NOTE

"DORMANT" NO MORE: THE SUPREME COURT AWAKENS THE DORMANT COMMERCE CLAUSE IN *GRANHOLM v. HEALD*

I. INTRODUCTION

Supreme Court Justices possess and use a variety of analytical tools, devices of construction, or interpretational theories that assist them in analyzing a particular constitutional problem. They look at the constitutional or statutory text at issue, the intent of the Framers or the legislature, or perhaps the history of and context within which the legislation was passed. The Supreme Court has also frequently walks the line between the Court's authority and states' rights. But, perhaps for the first time, in *Granholm v. Heald*,[1] the Court has clearly elevated the "dormant" commerce clause, which is essentially a judicial construction, to the level of constitutional text.[2] The Court did so by holding that the dormant commerce clause serves as a limit on the ability of states to regulate the direct shipment of wine to in-state consumers from out-of-state wineries,[3] despite the plenary authority given to the states to regulate the importation of "intoxicating liquors" under the Twenty-first Amendment.[4]

Leading up to the *Granholm* decision, commentators recognized that reconciling the conflict between the dormant commerce clause and the Twenty-first Amendment would be difficult,[5] in light of the

1. 125 S. Ct. 1885 (2005).

2. Lloyd C. Anderson, *Direct Shipment of Wine, the Commerce Clause and the Twenty-First Amendment: A Call for Legislative Reform*, 37 AKRON L. REV. 1, 7 (2004) (stating that the Court has relied upon a negative construction of the Commerce Clause whereby it has been interpreted that the states have no authority to regulate interstate commerce without the express approval of Congress because Congress has express power to regulate interstate commerce).

3. *Granholm*, 125 S. Ct. at 1892.

4. U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

5. *See, e.g.*, Stuart Banner, Granholm v. Heald: *A Case of Wine and a Prohibition Hangover*, 2005 CATO SUP. CT. REV. 263, 269, *available at*

historical support for the view that states were unrestrained in their regulation of importation and transportation of alcohol within their borders,[6] and the more recent support for the notion that the Commerce Clause would serve as a limit on this authority.[7] In the end, the seemingly clear textual command of the Twenty-first Amendment did not provide the tiebreaker. The Supreme Court instead reinforced the central tenet of the dormant commerce clause that states may not enact laws that favor local economic interests simply to create a competitive advantage, notwithstanding a seeming constitutional grant to do so.[8]

II. THE CASE

In *Granholm*, the Court considered challenges to Michigan and New York laws that limited the direct shipment of wine from out-of-state wineries to in-state buyers.[9] Immediately, the Court set the tone for its discussion by essentially rejecting any justification for Michigan and New York's different treatment of out-of-state wineries. "It is evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the States' borders."[10]

Both Michigan and New York regulated the sale and importation of alcohol through the so-called three-tiered system. Such a system is not unusual and has been utilized by most states since the end of Prohibition.[11] In a three-tiered system, producers, wholesalers, and retailers each make up one tier. Each is licensed separately and must distribute the product through each other. Thus, "producers must sell to wholesalers, wholesalers must sell to retailers, and only retailers can sell to the consumer."[12] The Court has held that this system, in and of itself, is a valid exercise of state authority under the Twenty-first Amendment.[13]

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http://www.cato.org/pubs/scr/2005/index.html ("If Section 2 [of the Twenty-first Amendment] could be read literally, the case would have been an easy one. . . . But the story behind the language of Section 2 is long and complex, beginning several decades before national Prohibition.").

6. *See, e.g.*, Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

7. *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

8. *Granholm*, 125 S. Ct. at 1907.

9. *Id.* at 1891-92.

10. *Id.* at 1892.

11. *See* Banner, *supra* note 5, at 264.

12. *Id.*

13. *Granholm*, 125 S. Ct. at 1892; *see also* North Dakota v. United States, 495 U.S. 423, 432 (1990).

Michigan and New York laws, however, did not provide for a straightforward, three-tiered distribution system, but instead permitted in-state wineries special accommodations. In Michigan, in-state wineries could obtain "wine maker" licenses that allowed them to directly ship to in-state consumers.[14] In New York, although out-of-state wineries were not directly banned from shipping to in-state consumers, in order to obtain the necessary licensing they had to maintain a physical presence in New York. This requirement obviously placed the most significant burdens on small operations that would most benefit from direct shipping.[15]

In order to understand why these two systems resulted in disparate treatment of out-of-state wineries, it is helpful to know a little about the justifications of the three-tiered system and the modern-day impact of the Internet on sales possibilities for smaller ventures. Three-tiered distribution systems were initially adopted following the repeal of Prohibition, primarily to address the concerns of preventing organized crime and streamlining tax revenue to the states.[16] Two inevitable effects of this system were higher prices to consumers due to the interjection of intermediate parties between the producer and the consumer, and reduction of the consumer's overall choices because wholesalers and retailers are prevented from accommodating smaller producers due to cost and space restrictions. Despite these effects, the system has persevered.[17]

Recently, however, the three-tiered system has been criticized, primarily because of the overall increase in production and quality of American wines and the new market opportunities for small producers via the Internet.[18] Also undercutting the system is the overall decline in the number of wholesalers. "In stark contrast to the growth of the first and third tiers (the producers and

14. *Granholm*, 125 S. Ct. at 1893.

15. *Id.* at 1896-97.

16. *See* Lisa Lucas, Note, *A New Approach to the Wine Wars: Reconciling the Twenty-first Amendment with the Commerce Clause*, 52 UCLA L. REV. 899, 902 (2005). Michigan and New York offered similar justifications for their liquor laws. *See Granholm*, 125 S. Ct. at 1905-06 ("The States offer two primary justifications for restricting direct shipments from out-of-state wineries: keeping alcohol out of the hands of minors and facilitating tax collection."). Both were ultimately rejected based on lack of evidentiary support for their assertions and the existence of less restrictive alternatives to accomplish the same objectives. *Id.* at 1905-07.

17. *See* Banner, *supra* note 5, at 265 (positing that the three-tiered system has persisted mainly due to the lobbying force of the wholesalers).

18. *See id.* at 265-66 ("[B]efore the Internet there was not much of a market for shipping wine directly to consumers in other states. As in other industries, however, from books to collectibles, the Internet has allowed small sellers and small buyers of wine to find one another despite being physically far apart.").

consumers), the number of wholesalers that comprise the middle tier has shrunk by 90 percent, from approximately 6000 in 1950 to 600 in 2002."[19] Such a decline further limits the availability of the ever-increasing quantity of quality products.

It was within this context that the plaintiffs, three small wineries and several potential consumers in New York and Michigan,[20] brought suit to challenge Michigan and New York state law.[21]

III. BACKGROUND

A. Heald v. Engler[22] *and* Swedenburg v. Kelly[23]

Michigan residents first brought suit against several state officials in the United States District Court for the Eastern District of Michigan.[24] The plaintiffs, who included "wine connoisseurs, wine journalists, and one small California winery that ship[ped] its wines to customers in other states," claimed that Michigan's alcohol distribution system "[was] unconstitutional under the dormant commerce clause because it interfere[d] with the free flow of interstate commerce by discriminating against out-of-state wineries."[25] The District Court granted the defendants' motion for summary judgment,[26] but the Sixth Circuit reversed,[27] finding that "the regulations in question are discriminatory in their application

19. *See* Lucas, *supra* note 16, at 907.

20. *See* Banner, *supra* note 5, at 268. Banner also offered this additional information about the plaintiffs:

> The winery in the Michigan case was Domaine Alfred . . . which produces only three thousand cases per year. Terry Speizer, the winery's owner and operator, received requests for Domaine Alfred from Michigan customers, but he could not find a Michigan wholesaler willing to list it. . . . Among the plaintiffs in the New York case was Juanita Swendenburg, the owner/operator of a Virginia winery producing only two thousand cases per year. More than 90% of Swedenburg's sales were to tourists visiting the winery, about half of whom lived outside Virginia. When they returned home, some to New York, these out-of-state customers were disappointed to find that there was no way to obtain more of Swedenburg's wine unless they returned to Virginia.

Id.

21. *Granholm*, 125 S. Ct. at 1891-92.

22. 342 F.3d 517 (6th Cir. 2003).

23. 358 F.3d 223 (2d Cir. 2004).

24. *Heald*, 342 F.3d at 519-20.

25. *Id.* at 519.

26. Heald v. Engler, No. 00-CV-71438-DT, 2001 U.S. Dist. LEXIS 24826 (E.D. Mich. Sept. 28, 2001).

27. *Heald*, 342 F.3d at 520.

to out-of-state wineries, in violation of the dormant commerce clause, and cannot be justified as advancing the traditional 'core concerns' of the Twenty-first Amendment."[28]

The plaintiffs in *Swedenburg* brought suit in the United States District Court for the Southern District of New York against the officials who administered New York's Alcoholic Beverage Control Law.[29] In a procedural converse to *Heald*, the district court granted summary judgment for the plaintiffs, but the Second Circuit reversed.[30] Although it recognized that the regulations "could create substantial dormant [c]ommerce [c]lause problems if [the] licensing scheme regulated a commodity other than alcohol,"[31] the court nevertheless found that the regulatory scheme was "directly tied to the importation and transportation of alcohol for use in New York,"[32] and was thus "within the ambit of the powers granted to states by the Twenty-first Amendment."[33] In other words, although New York's distribution system violated the dormant commerce clause as a facially discriminatory regulation, the Twenty-first Amendment provided express authority to the states to pass laws of this kind, and thus overrode any dormant commerce clause implications.

B. The Dormant Commerce Clause

Article I, section 8 of the United States Constitution grants the federal legislature the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[34] Beyond serving as an explicit source of congressional authority in regulating interstate commerce, one of its most controversial functions is the implicit limitation it places on state legislative power. In other words, the negative implication of the Commerce Clause is that states may not exercise similar power in an explicit area of federal congressional authority. The dormant commerce clause thus limits the ability of states to regulate their own commerce in a way that could impact interstate commerce.[35]

Because the dormant commerce clause is not an explicit textual authority stated in the United States Constitution, and is only derived from the negative implications of the Commerce Clause, Congress can explicitly grant the states the authority to interfere

28. *Id.*
29. N.Y. Alco. Bev. Cont. Law § 1-164 (McKinney 2000).
30. *Swedenburg*, 358 F.3d at 227.
31. *Id.* at 238.
32. *Id.*
33. *Id.* at 239.
34. U.S. CONST. art. I, § 8, cl. 3.
35. 15 C.J.S. *Commerce* § 4 (2005).

with commerce in a particular field.[36] Conversely, Congress may also explicitly restrict state action by passing legislation to preempt an entire field, or a statute that conflicts with that of the state regulation.[37]

While there is no simple test for determining if a state action has violated the dormant commerce clause, the key determination in the modern analysis is whether the state action unduly discriminates against interstate commerce.[38] When examining a state action that impacts interstate commerce, a court typically engages in a three-part balancing test. The court considers: first, whether the regulation pursues a legitimate state end; second, whether the regulation is rationally related to the legitimate end; and third, whether the burden imposed, including any discrimination against interstate commerce, is outweighed by the state's interest in enforcing the regulation.[39]

The Court does not view economic protectionism—the desire to strengthen the local economy at the expense of out-of-state competition—as a legitimate state end.[40] States must offer other rationales, such as the pursuit of health and safety objectives, to support any regulation that affects interstate commerce.[41]

C. The Twenty-first Amendment.

The Twenty-first Amendment was passed to repeal the Eighteenth Amendment[42] and thus end Prohibition. Although it ended the outright national ban on alcohol sales and transportation, the Twenty-first Amendment granted considerable discretion to the states in their regulation of alcohol within their own borders.[43] Section 2 provides that: "The transportation or importation into any State, Territory, or possession of the United States for delivery or

36. *Id.* § 11.

37. *Id.*

38. *Id.*; *see also* Norman R. Williams, *The Dormant Commerce Clause: Why* Gibbons v. Ogden *Should be Restored to the Canon*, 49 ST. LOUIS U. L.J. 817, 817 (2005) ("The Supreme Court has applied a virtually fatal form of strict scrutiny to state laws that discriminate against interstate commerce and a more forgiving balancing test that practically rubber-stamps other laws that only incidentally affect interstate commerce.").

39. 15 C.J.S. *Commerce* § 11 (2005).

40. *Id.* § 9.

41. *Id.*

42. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

43. *See* Lucas, *supra* note 16, at 901 ("Enacted in 1993, the Twenty-first Amendment served two primary purposes: It repealed the constitutional prohibition of the manufacture, sale, or transportation of intoxicating liquor, and it placed power to control the transportation or importation of intoxicating liquor into the hands of the states.").

use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[44] Thus, the states were given "not only the right to enact laws to regulate the commerce of intoxicating liquors within their borders, but also to prohibit completely the importation of some or all intoxicating liquors destined for distribution, use, or consumption within their borders."[45]

The difficult question was how the Twenty-first Amendment should be interpreted to interact with the dormant commerce clause. As discussed previously, the dormant commerce clause essentially prohibits states from discriminating against out-of-state products.[46] Thus, the question in *Granholm* became whether the Twenty-first Amendment operated as an exception to the dormant commerce clause, permitting states to discriminate where the commercial product at issue was liquor.[47]

D. Other Limits on the Twenty-first Amendment

The conflict between the Twenty-first Amendment and the dormant commerce clause is not the first conflict with the Twenty-first Amendment that the United States Supreme Court has addressed. In the past, the Court has held that "state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment."[48] The one undeniable difference between these decisions and *Granholm*, however, is that the Court's previous decisions had all addressed conflicts between two textual Constitutional provisions. The dormant commerce clause, in contrast, is a judicial construct.

The Court dealt with the relationship between the Twenty-first Amendment and the First Amendment in *44 Liquormart, Inc. v. Rhode Island*.[49] Writing for the majority, Justice Stevens concluded that Rhode Island's prohibition of liquor price advertising abridged speech in violation of the First Amendment,[50] a violation that was not saved by the Twenty-first Amendment.[51]

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44. U.S. CONST. amend. XXI, § 2.

45. Elizabeth D. Lauzon, Annotation, *Interplay Between Twenty-first Amendment and Commerce Clause Concerning State Regulation of Intoxicating Liquors*, 116 A.L.R. 5th 149, 164 (2005).

46. *See supra* notes 33-35 and accompanying text.

47. *See* Banner, *supra* note 5, at 264 ("*Granholm* posed a classic Twenty-first Amendment question. Everyone agreed that the statutes at issue would have been unconstitutional if the regulated commodity were anything other than alcohol.").

48. Granholm v. Heald, 125 S. Ct. 1885, 1903 (2005).

49. 517 U.S. 484 (1996).

50. *Id.* at 516.

51. *Id.*

The Court also addressed the relationship between the Twenty-first Amendment and the Establishment Clause in *Larkin v. Grendel's Den, Inc*.[52] In *Larkin*, a Massachusetts statute conferred on the governing bodies of churches and schools the power to effectively veto applications for liquor licenses within five hundred feet of the church or school by providing that such licenses would not be granted if a church or school objected.[53] Although it recognized "the power of a state to regulate the environment in the vicinity of schools, churches, hospitals, and the like by exercise of reasonable zoning laws,"[54] the Court found that the Massachusetts statute was not simply a zoning law, but an impermissible delegation of "important, discretionary governmental powers" to a religious institution.[55] The statute was thus in violation of the Establishment Clause, irrespective of any power granted to the states under the Twenty-first Amendment.[56]

The Court struck down an Oklahoma statute that discriminated based on gender classifications in *Craig v. Boren*.[57] The state claimed that it had based its differential treatment of males and females in sales of low-alcohol beer on important governmental objectives[58] and that it was explicitly given broad regulatory authority under the Twenty-first Amendment.[59] However, the Court declared "the unconstitutionality of gender lines that restrain the activities of customers of state-regulated liquor establishments irrespective of the operation of the Twenty-first Amendment."[60] In spite of the Court's recognition of the limiting effect of other constitutional provisions on the Twenty-first Amendment, the Court's argument still centered on the importance of protecting individual rights.[61] The Court contrasted this importance with issues that "[touch] upon purely economic matters."[62] Essentially accepting that the Twenty-first Amendment is not limited by the Commerce Clause, the Court focused on the greater constitutional

52. 459 U.S. 116 (1982).
53. *Id.* at 117.
54. *Id.* at 121.
55. *Id.* at 127.
56. *Id.* at 122 n.5 ("The Twenty-first Amendment reserves power to states, yet here the State has delegated to churches a power relating to liquor sales. The State may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment.").
57. 429 U.S. 190 (1976).
58. *Id.* at 199.
59. *Id.* at 204.
60. *Id.* at 208.
61. *Id.* at 206-07.
62. *Id.* at 207.

importance of measures that limit individual rights.[63]

In *Wisconsin v. Constantineau*,[64] the Court struck down a Wisconsin statute under which the plaintiff's name was posted in retail liquor stores as a means of identifying those to whom liquor should not be sold. Although it again recognized "the power of a State to deal with the evils described in the Act,"[65] the Court analyzed the issue as if the Due Process Clause coexisted with the Twenty-first Amendment, noting that "the private interest is such that those requirements of procedural due process must be met."[66]

The Court further examined the Twenty-first Amendment, in relation to the Export-Import Clause, in *Department. of Revenue v. James B. Beam Distilling Co.*[67] The Kentucky Department of Revenue required an importer of whiskey to pay a ten cent tax on each proof gallon of whiskey it imported from Scotland, under the authority of a Kentucky statute providing for such tax on any importer of "distilled spirits."[68] Despite arguments that the tax was valid based on Kentucky's authority to regulate the importation of liquor under the Twenty-first Amendment, the Court held that the Export-Import Clause still limited this authority.[69]

Notwithstanding the case's obvious applicability to *Granholm* in terms of the Court's broader recognition of other Constitutional limits on the Twenty-first Amendment, the Court's specific discussion may have provided ammunition for the dissenters in *Granholm*. The Court seemed to base its holding not on the general notion that the Twenty-first Amendment is limited by other constitutional provisions, but on the motion that it is limited specifically by the more precise command of the Export-Import Clause.[70] The Court contrasted this precision with "the generalized authority given to Congress by the Commerce Clause."[71] The Court further indicated its adherence to the notion that "'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.'"[72] Thus, the

63. *Id.* at 206 ("Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful.").

64. 400 U.S. 433 (1971).

65. *Id.* at 436.

66. *Id.*

67. 377 U.S. 341 (1964).

68. *Id.* at 342.

69. *Id.* at 343-46.

70. *Id.* at 344.

71. *Id.*

72. *Id.* (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S.

implication of the Court's discussion seemed to be that unless the Twenty-first Amendment was limited by a specific constitutional command, the states essentially had plenary authority under the Twenty-first Amendment.[73] However, the Court did not address laws that discriminated against interstate commerce, so its application is limited.

Thus, despite a history of reining in states' authority under the Twenty-first Amendment, it still was not clear that the Court come to the same conclusion when considering a constitutional provision that dealt not only with purely economic authority (and not individual rights) but was also not an explicit textual command under the Constitution. It was not clear that the Court would restrict a textual right given to the states with a non-textual, negative implication of an economic provision. Yet that is what the Court ultimately did in *Granholm*.[74]

III. ANALYSIS

A. The Opinion

Essentially, the decision in *Granholm* hinged upon whether the dormant commerce clause operated as a limit on the authority of the state legislatures to regulate the importation of wine into their states, or whether the Twenty-first Amendment served as an "exception" to the dormant commerce clause. Two propositions were relatively clear before the Court granted certiorari in *Granholm*: first, if the Michigan and New York regulations applied to any item of commerce other than alcohol, then they would not have been upheld;[75] and second, if only the text of the Twenty-first Amendment itself was considered, then states would have clear plenary authority to regulate the transportation and importation of

324, 330 (1964)).

73. However, the Court also discussed the "extraordinary conclusion" that the Twenty-first Amendment somehow operated to repeal the Export-Import Clause as applied to the regulation of alcohol. *Id.* at 345-46.

74. 125 S. Ct. at 1892 ("We hold that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, Art I, § 8, cl. 3, and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment.").

75. *See Swedenburg*, 358 F.3d at 238 ("[T]he physical presence requirement could create substantial dormant commerce clause problems if this licensing scheme regulated a commodity other than alcohol."); *see also* Banner, *supra* note 5, at 264 ("Everyone agreed that the statutes at issue would have been unconstitutional if the regulated commodity were anything other than alcohol.").

intoxicating beverages within their borders.[76] These two divergent perceptions came to a head in *Granholm*, which is what made it such an interesting case.[77]

From the first page of the opinion, the Court focused its analysis on the clear discriminatory intent of the Michigan and New York statutes, noting that "[i]t is evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the States' borders."[78] While Michigan regulated most alcoholic beverages through the traditional three-tier system, meaning that wine producers would generally be required to distribute their wine through wholesalers,[79] it also provided for "wine maker" licenses for in-state wineries.[80] These licenses allowed in-state wineries to directly ship their products to consumers, but did not grant the same privilege to out-of-state wineries.[81] New York, while technically permitting out-of-state wineries to ship directly to New York consumers, only granted licenses for direct shipment to those wineries that established a physical presence in New York, through a branch factory, office, or storeroom.[82] Both the Michigan and New York laws thus posed economic hurdles for out-of-state wineries, and these burdens were not imposed on their in-state counterparts.

The Court summarized its dormant commerce clause

76. *See* Banner, *supra* note 5, at 263 ("[Section 2 of the Twenty-first Amendment] is unique in the Constitution. Read literally, it would forbid, as a constitutional matter, whatever acts pertaining to liquor importation the states already forbid, even acts protected by federal statutes or other parts of the Constitution.").

77. *See* Asheesh Agarwal & Todd Zywicki, *The Original Meaning of the 21st Amendment*, 8 GREEN BAG 2d 137 (2005). This article provided one of the more interesting quotes pertaining to the conflict:

> The consolidated cases . . . have become a sort of judicial Super Bowl. On the field are wineries and consumers versus wholesalers and States. In the stands are free-market conservatives and Netizens, rooting against social conservatives and federalists. The "skill players" include Kenneth Starr, Carter Phillips, and Clint Bolick versus Robert Bork, C. Boyden Gray, and Miguel Estrada. The regular season, which stretches back into the 19th century, ended with a cryptic opinion from Judge Frank Easterbrook, who explained the cases as pitting "the twenty-first amendment, which appears in the Constitution, against 'the dormant commerce clause,' which does not." The favorite? Too close to call.

Id. at 137.

78. Granholm v. Heald, 125 S. Ct. 1885, 1892 (2005).

79. *Id.* at 1893.

80. *Id.*

81. *Id.*

82. *Id.* at 1894.

jurisprudence: "Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"[83] The Court heralded the principal rationale of the negative implications of the Commerce Clause, proclaiming that "[t]his rule is essential to the foundations of the Union,"[84] and that permitting discrimination against out-of-state wineries would only foster "a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."[85] Prohibiting discrimination would help "avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"[86] and would ensure that states would not have to negotiate with each other about rights for their own citizens.[87]

The Court's focus was on the primary purpose of the Commerce Clause: to provide a uniform system of commercial laws so that individual states could still operate under a national system of government[88]. This focus led to the inevitable conclusion that the New York and Michigan direct shipment laws were invalid under the Constitution.[89]

The Court's examination of the history of the Twenty-first Amendment did nothing to sway its conclusion. Three eras of Twenty-first Amendment jurisprudence can be delineated: the period before Prohibition, the period immediately after Prohibition, and the more recent cases.[90]

During the pre-Prohibition, pre-Eighteenth Amendment era, states could regulate alcohol production within their borders but were generally not permitted to discriminate against products made in another state.[91] In several cases, the Court held that the

83. *Id.* at 1895 (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)).

84. *Id.*

85. *Id.* at 1896 (quoting Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951)).

86. *Id.* at 1895 (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)).

87. *Id.* The Court went so far as to say that "[t]he current patchwork of laws—with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war." *Id.* at 1896.

88. *Id.* at 1907.

89. *Id.*

90. *See* Agarwal & Zywicki, *supra* note 77, at 138-43.

91. *Id.* at 138 ("In the 19th century, States could regulate alcohol production within their own borders. . . . Because of the Commerce Clause, however, States could not use their police power to discriminate against alcohol

Commerce Clause prohibited discrimination against imported alcohol.[92] In *Walling v. Michigan*,[93] for example, the Court invalidated a Michigan law that taxed liquor imports but exempted local sales. Certain cases also prohibited states from instituting "facially neutral laws that placed an impermissible burden on interstate commerce."[94] The Court's adherence to the Commerce Clause may have gone a step too far, however, when the Court extended the Commerce Clause to prevent states from regulating liquor imports until such liquor was first sold within the state or until its original package was removed.[95] "This 'original package doctrine' created an anomaly, in that States could forbid domestic production of alcohol, but not importation."[96]

Congress passed the Wilson Act[97] to remedy this inconsistency. Even though the Act provided that states could regulate liquor imports "to the same extent and in the same manner as though liquids or liquors had been produced in such State or Territory,"[98] courts still held that states could not ban interstate shipment of alcohol directly to consumers if the product was still in its original package and was intended for personal use.[99] Thus, in 1913, Congress enacted the Webb-Kenyon Act in an attempt to effectuate its purpose of giving states the power to regulate liquor within state borders, regardless of its source.[100] "States were now empowered to forbid shipments of alcohol to consumers for personal use, provided that the States treated in-state and out-of-state liquor on the same terms."[101]

Most commentators agree that these acts were not passed to encourage or permit states in any way to discriminate against out-of-state liquor producers. "When the Webb-Kenyon Act was enacted, the idea of authorizing states to discriminate against out-of-state liquor producers was the farthest thing from anyone's mind. The point of the Act was exactly the opposite: to end the discrimination *in favor* of out-of-state producers . . . ."[102] Thus, in the time before

made in another State.").

92. *Granholm*, 125 S. Ct. at 1898.

93. 116 U.S. 446, 461 (1886).

94. *Granholm*, 125 S. Ct. at 1898.

95. *See* Agarwal & Zywicki, *supra* note 78, at 138.

96. *Id.*

97. Ch. 728, 26 Stat. 313 (1890) (codified as amended at 27 U.S.C. § 121 (2005)) (also known as Original Packages Act).

98. *Id.*

99. *Granholm*, 125 S. Ct. at 1899.

100. 27 U.S.C. § 122 (2000).

101. *Granholm*, 125 S. Ct. at 1900.

102. *See* Banner, *supra* note 5, at 277.

the Eighteenth Amendment and Prohibition, Congress had developed a regulatory framework in which states could restrict out-of-state liquor in virtually any manner, as long as the method was consistent with its regulation of in-state liquor.[103]

Even after the Eighteenth Amendment was repealed by the Twenty-first Amendment in 1933, Congress wanted to protect those states that wished to remain dry. "With public sentiment shifting away from Prohibition . . . there was a possibility that the Webb-Kenyon Act might one day be repealed . . . ."[104] Thus, while Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment, Section 2 "restored to the states the powers they had under the Wilson and Webb-Kenyon Acts."[105]

Although Michigan and New York argued that the provision granted them the discretion to discriminate against liquor imports, the majority held that this position was inconsistent with the history of the Wilson and Webb-Kenyon Acts.[106] The view was also inconsistent with the purpose of the Amendment, which was to "allow States to maintain an effective and uniform system for controlling liquor," and "did not give States the authority to pass non-uniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time."[107] Although certain cases decided shortly after ratification of the Twenty-first Amendment seemingly permitted this type of discrimination,[108] the

103. *Id.* at 278 ("On the eve of Prohibition, then, Congress had created a unique regulatory framework for liquor. States had the power, unimpeded by the dormant commerce clause, to restrict out-of-state liquor the same way they restricted in-state liquor. But states could not discriminate against out-of-state liquor. Such discrimination still violated the Commerce Clause."). Justice Thomas, dissenting, viewed the effect of the Webb-Kenyon Act differently, finding that the "Act's language displaces any negative Commerce Clause barrier to state regulation of liquor sales to in-state consumers." *Granholm*, 125 S. Ct. at 1910 (Thomas, J., dissenting). In Justice Thomas's view, the clear textual language permits states to discriminate against out-of-state products, as long as the regulated party "in violation of those state-law restrictions is a 'person interested therein' 'intend[ing]' to 's[ell]' wine 'in violation of' Michigan and New York law." *Id.*

104. *See* Banner, *supra* note 5, at 278 ("To protect the dry states, Congress included, as Section 2 of the proposed Twenty-first Amendment, a near-identical copy of the language of the Webb-Kenyon Act.").

105. *Granholm*, 125 S. Ct. at 1902.

106. *Id.* at 1889.

107. *Id.* at 1902.

108. *Id.* ("The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time. Some of the cases decided soon after ratification of the Twenty-first Amendment did not take account of this history and were inconsistent with this view.").

Court noted that these cases neglected to address the history underlying the Twenty-first Amendment, despite "ample opinion"[109] that this history was relevant and supportive of "the principle that the Amendment did not authorize discrimination against out-of-state liquors."[110]

The majority was also not swayed by the argument of dissenting Justices Stevens, O'Connor, Thomas, and Rehnquist.[111] Writing for himself in an opinion joined by Justice O'Connor, Justice Stevens essentially argued that the regulation of alcohol transportation and distribution is exempt from the Commerce Clause, noting that "Congress' power to regulate commerce among the States includes the power to authorize the States to place burdens on interstate commerce."[112]

In a separate dissenting opinion, Justice Thomas disagreed with the majority's interpretation of history—of the cases, the statutes, and of the Twenty-first Amendment.[113] Although in his view the Court did not even need to reach the Twenty-first Amendment to find in favor of Michigan and New York, since the Webb-Kenyon Act grants the states the plenary authority to regulate liquor imports within its borders, an analysis of the Twenty-first Amendment led to the same conclusion.[114] His dissent reflected the belief that the majority insisted on making policy decisions that were ultimately better left to the states.[115]

Most importantly for this discussion, Justice Thomas noted that "[t]he Twenty-first Amendment and the Webb-Kenyon Act took . . . policy choices away from judges and returned them to the States. Whatever the wisdom of that choice, the Court does this Nation no service by ignoring the *textual* commands of the Constitution and the Acts of Congress."[116] The dissent argued that the majority's recitation of cases concerning state laws that violate other Constitutional or statutory provisions was irrelevant: "Cases involving the relation between the Twenty-first Amendment and Congress' *affirmative* Commerce Clause power are irrelevant to whether the Twenty-first Amendment protects state power against the *negative* implications of the Commerce Clause."[117] In other words, Justice Thomas recognized that the Twenty-first Amendment

109. *Id.* at 1903.
110. *Id.*
111. *Id.* at 1907, 1909.
112. *Id.* at 1907 (Stevens, J., dissenting).
113. *Id.* at 1909-27 (Thomas, J., dissenting).
114. *Id.* at 1910, 1919.
115. *Id.* at 1889 (majority opinion).
116. *Id.* at 1927 (Thomas, J., dissenting) (emphasis added).
117. *Id.* at 1926 (emphasis added).

was obviously limited by other textual sources like the First Amendment and the Equal Protection Clause, but could not conclude that it would be so limited by what was essentially a judicial construction. Justice Thomas preferred to respect "the language of both the statute that Congress enacted and the Amendment that the Nation ratified, rather than the Court's questionable reading of history and the 'negative implications' of the Commerce Clause."[118]

Despite the tight disagreement among the Justices, the Court held that the Michigan and New York laws were discriminatory and in violation of the Commerce Clause—discrimination that was not overcome by any authority granted under the Twenty-first Amendment.[119] Further, the justifications offered by New York and Michigan, such as protection of minors and tax collection, did not meet the test of advancing "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[120]

B. The Implications

The dormant commerce clause has been controversial almost since its inception.[121] According to Justice Thomas, "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."[122] Justice Thomas has not been shy about his disdain for the doctrine, not only for its non-textual roots, but also the extent to which he has perceived the Court to be active in this area. "Although the terms 'dormant' and 'negative' have often been used interchangeably to describe our jurisprudence in this area, I believe 'negative' is the more appropriate term."[123] "There is, quite frankly,

118. *Id.* at 1910.

119. *Id.* at 1905 (majority opinion).

120. *Id.* (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988)).

121. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 96 (2001) ("Nor has the difficulty of formulating workable rules deterred the federal courts from enforcing the side of federalism doctrine that limits *state* power, despite the fact that the incoherence of dormant commerce clause doctrine has been an open scandal for generations.").

122. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

123. *Id.* at 609 n.1. Justice Thomas also quoted Justice Scalia's concurrence from another opinion, stating that "the 'negative Commerce Clause' . . . is 'negative' not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution." *Id.* (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (Scalia, J., joined by Thomas, J., concurring in the judgment).

nothing 'dormant' about our jurisprudence in this area."[124]

As is often the case, Justice Scalia agreed with Justice Thomas and forcefully offered scathing criticism of the dormant commerce clause:

> [T]o the extent that we have gone beyond guarding against rank discrimination against citizens of other States—which is regulated not by the Commerce Clause but by the Privileges and Immunities Clause . . . the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.[125]

Academic commentators have also criticized the doctrine, and have made frequent calls for the Court to abandon it altogether.[126] Most criticism lies in the Court's seeming "activism" in applying the doctrine despite its nontextual origins, and in the Court's inconsistent application and use of imprecise criteria when it does apply the doctrine. Some commentators have based their criticism not on the activity prevented in dormant commerce clause opinions, but on the source of the Court's opinions, calling for the Privileges and Immunities Clause to serve the function that the dormant commerce clause now performs.[127]

IV. CONCLUSION

Despite a troubled history and continued calls for its rejection, the Supreme Court reinvigorated the dormant commerce clause by approving its terms over that of a Constitutional Amendment. In

124. *Okla. Tax. Comm'n*, 514 U.S. at 200.

125. Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting).

126. *See* Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1460 (1995) ("Originating in the nineteenth century dual federalism cases suggesting that states were precluded form regulating at least some of the areas enumerated for national regulation, the twentieth century dormant commerce clause cases suffer under a debatable link to either the constitutional text or the Framers' intent.").

127. *See, e.g.,* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446-55 (1982); Martin H. Redish & Shane v. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 606-12 (1987).

doing so, the Court has perhaps answered any lingering questions over the future of the doctrine. Only time will tell how this will affect other intersecting areas of commerce and state regulation, especially in view of the ever-expanding global Internet market.

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