# *Granholm v. Heald*: A Case of Wine and a Prohibition Hangover

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The national prohibition of what the Constitution calls ''intoxicating liquors'' ended in 1933 with the ratification of the Twenty-first Amendment. We're still feeling the effects of Prohibition today, however, because the Twenty-first Amendment didn't just repeal the Eighteenth. It also granted power to the states, in an unusual and facially ambiguous way, to regulate interstate shipments of alcohol. This part of the Twenty-first Amendment has generated a steady flow of litigation, the most recent installment of which reached the Supreme Court in the 2004 term in the form of two cases consolidated as *Granholm v. Heald*.[1] These cases raised the same question: May a state permit in-state wineries to ship directly to customers but forbid out-of-state wineries from doing so?

The source of all this litigation is Section 2 of the Twenty-first Amendment, which provides: ''The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.''[2] This sort of clause 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. But Section 2 has never been read literally. As we'll see below, there is a reason Section 2 was written in such a strange way. It was meant to supersede some specific turn-of-the-century Supreme Court cases interpreting the Commerce Clause, not to supersede the entire Constitution. The

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[1] 125 S. Ct. 1885 (2005). The other case was called *Swedenburg v. Kelly*, and there was also a second certiorari petition in *Granholm* called *Michigan Beer & Wine Wholesalers Association. v. Heald*, but I will refer to both cases and all three petitions as *Granholm*.

[2] U.S. Const. amend. XXI, § 2.

weird language of Section 2, however, is susceptible of a range of interpretations. Because states have been aggressive in regulating the liquor business over the past seventy years, and because lots of money has been at stake, courts, including the Supreme Court, have been wrestling with the Twenty-first Amendment ever since the end of Prohibition.

*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. The Constitution's grant to Congress of the power to regulate interstate commerce has been understood since the mid-nineteenth century to imply that states may not burden interstate commerce in certain ways, and the paradigmatic example of a state law barred by this so-called "dormant Commerce Clause" is a law discriminating against out-of-state products. The question in *Granholm* was whether the Twenty-first Amendment creates an exception allowing states to discriminate where the product involved is liquor. By a five to four vote, the Court concluded that such discrimination is not permitted by the Twenty-first Amendment and, accordingly, held that if a state wants to allow in-state wineries to ship directly to customers it must allow out-of-state wineries to do the same.[3]

## I

Since the end of Prohibition, most states have required alcoholic beverages to be sold through a three-tier distribution system: producers must sell to wholesalers, wholesalers must sell to retailers, and only retailers can sell to the consumer. Producers, wholesalers, and retailers are each licensed separately. The traditional justifications for the three-tier system include facilitating the collection of taxes, preventing sales to minors, promoting temperance, and keeping away organized crime. It is not obvious that the three-tier system actually accomplishes these goals any better than one-tier or two-tier distribution, except to the extent that the three-tier system promotes temperance indirectly, by raising prices.

Instead, the three-tier requirement has two primary effects. The first is to raise the price of alcohol to the consumer by placing two intermediaries between the consumer and the producer. One can

[3] 125 S. Ct. at 1907.

imagine circumstances under which a three-tier system would be the most efficient way to sell a product, but then this system would exist without any law requiring it. Where it exists only because of state law, wholesalers and retailers profit at consumers' expense. The second effect of the three-tier requirement is to reduce the consumer's range of choice. Wholesalers and retailers are prevented by cost and space constraints from offering every variety of every beverage produced. They focus on the well-known brands of the largest producers, at the expense of the smaller producers and lesser-known products.

The three-tier requirement has nevertheless persisted for decades, most likely because the wholesalers are a well-organized lobbying force while consumers and small producers are not. In recent years, however, this distribution system has come under pressure from two sources. One has been the phenomenal increase in the quantity and quality of American wine. As of 2001, the United States was the world's fourth largest wine producer (after France, Italy, and Spain) and the world's third largest wine consumer (after France and Italy).[4] The number of wineries in the country has roughly quadrupled in the past twenty-five years, to more than three thousand.[5] The large majority of these wineries produce in quantities so small that their wine is not widely carried by wholesalers.[6] Consumer demand for such wine has increased correspondingly. One measure of this growth is the paid circulation of the magazine *Wine Spectator*, which grew approximately from 150,000 to 375,000 between 1994 and 2003; eight of ten subscribers in the latter year owned a wine collection, the average size of which was 516 bottles.[7] Such consumers are interested in trying a large variety of wines from different

[4] World Wine Production by Country, http://www.wineinstitute.org/communications/statistics/keyfacts_worldwineproduction02.htm; World Wine Consumption in Listed Countries, http://www.wineinstitute.org/communications/statistics/keyfacts_worldwineconsumption2002.htm.

[5] Wine Facts, http://www.americanwineries.org/newsroom/winefacts04.htm.

[6] Alan E. Wiseman & Jerry Ellig, Market and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia (2004), available at http://www.bepress.com/bap/vol6/iss2/art4.

[7] 5 Very Good Reasons to Advertise in Wine Spectator, at 1, http://www.winespectator.com/Wine/Images/Graphics/ads/WS_NAT_EKIT.pdf.

producers. Like the small wineries, they have been increasingly frustrated by the constraints of the three-tier system.

The second source of pressure has been the explosion of commerce over the Internet. Small wineries have been able to sell on-site to tourists for some time under a common exception to the three-tier requirement in the wine-producing states, but before 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.

States accordingly began allowing wineries to ship directly to customers, but they did so in a few different ways. By 2003 the Federal Trade Commission counted thirty states that permitted direct intrastate shipments, of which twenty-four also allowed some form of direct interstate shipping.[8] Thirteen of these twenty-four were ''reciprocity'' states, which only allowed customers to receive wine directly from producers in other reciprocity states, while several others placed restrictions on interstate shipments that were not placed on intrastate shipments.[9] Around half the states allowed no direct interstate shipments at all.[10]

Michigan and New York were the two states whose regulatory schemes were challenged in *Granholm*. Michigan allowed in-state wineries to ship directly to in-state customers but required out-of-state wineries to sell to in-state wholesalers.[11] New York in principle permitted wineries located anywhere to ship directly to in-state customers but required them first to establish a factory, office, or storeroom in New York.[12] This requirement was of course a much greater burden on out-of-state wineries than in-state wineries, and too great a burden for the smaller wineries.

The justifications for these differential requirements were the same as those traditionally said to justify the three-tier system as a whole, but here they are even more dubious. Even if a complete ban on direct

[8] Federal Trade Comm'n, Possible Anticompetitive Barriers to E-Commerce: Wine (July 2003), at 7, available at http://www.ftc.gov/us/2003/07/winereport2.pdf.

[9] *Id.* at 7–8.

[10] *Id.* at 8.

[11] Granholm v. Heald, 125 S. Ct. 1885, 1893 (2005).

[12] *Id.* at 1894.

shipping could be said to limit underage drinking, for instance—a questionable proposition, as it is no harder for a delivery company to verify the age of a customer than it is for a liquor store—a ban only on *interstate* direct shipping can hardly do so, because the determined underage drinker need only order from an in-state producer. Instead, discrimination against out-of-state wineries is far more likely to be a result of simple protectionism.[13] The states that discriminate do not appear to be trying to protect their own wineries, despite the fact that some have wine industries that face competition for in-state customers from more well-regarded California wineries. Small wineries in New York, for example, have been trying for years to end the state's ban on direct interstate shipping, on the theory that they have more to gain from out-of-state customers than to lose from out-of-state competitors.[14] States instead seem to be primarily protecting their wholesalers and retailers, who stand to lose revenue if out-of-state wineries can bypass them and sell directly to in-state customers. Indeed, one of the most commonly proffered reasons for barring direct interstate shipments is to facilitate ''orderly market conditions.'' As Judge Easterbrook has pointed out, this is nothing but a euphemism for reducing competition.[15]

Reducing competition, as might be expected, raises the price of wine and reduces the variety of wine available to the consumer. The Federal Trade Commission recently examined the wine market in McLean, Virginia (a state that banned interstate direct shipment), and found that 15% of a sample of popular wines available on the Internet were not stocked by any retail wine store within ten miles.[16] If they had been allowed to purchase on the Internet, consumers would have paid 8%–13% less than the store price for wine costing more than $20 per bottle, and 20%–21% less than the store price for wine costing more than $40 per bottle.[17] Had the sample included less popular wines from smaller non-Virginia wineries, the percentage

[13]Gina M. Riekhof & Michael E. Sykuta, Regulating Wine by Mail, Regulation, Fall 2004, at 30–36.

[14]Al Baker, Mixed Reaction to Web Wine Plan, N.Y. Times, May 30, 2005, at B3.

[15]Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000).

[16]Federal Trade Comm'n, *supra* note 8, at 3.

[17]*Id.*

unavailable to consumers in Virginia would no doubt have been much higher.

The plaintiffs in *Granholm* were three small wineries, two located in California and one in Virginia, and several potential customers residing in Michigan and New York. The winery in the Michigan case was Domaine Alfred, in San Luis Obispo, California, which produces only three thousand cases per year.[18] 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.[19] Even if he could have found a wholesaler, selling Domaine Alfred through Michigan's three-tier system would most likely not have been profitable, because the markups charged by the wholesaler and the retailer would have made the consumer price too high or the price Speizer charged to the wholesaler too low. Among the plaintiffs in the New York case was Juanita Swedenburg, the owner/operator of a Virginia winery producing only two thousand cases per year.[20] More than 90% of Swedenburg's sales were to tourists visiting the winery, about half of whom lived outside Virginia.[21] 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.

By the time the cases reached the Supreme Court, so many other interested parties had filed amicus briefs that *Granholm* engaged virtually every Washington law firm with a significant appellate practice. On the side of the plaintiffs were a variety of trade organizations representing the wine industry; a handful of the big wine-producing states (including California, Oregon, and Washington); several members of Congress (most representing the wine-producing districts of California and New York); a few ideological organizations interested in free trade; some companies and trade associations involved in Internet commerce (including eBay); the trade association that represents interstate shippers like United Parcel Service and Federal Express; and a group of distinguished economists. On the side of Michigan and New York were thirty-three

[18]Granholm, 125 S. Ct. at 1893.

[19]*Id.*

[20]Petitioner's Brief on the Merits at 2, Swedenburg v. Kelly, No. 03-1274 (U.S. Oct. 7, 2004).

[21]*Id.*

other states with similar differential shipment laws; the wine and spirits wholesalers; a collection of groups concerned with temperance and underage drinking; two organizations of state liquor administrators; the National Beer Wholesalers Association; and the trade association representing the country's largest breweries.[22] Temperance organizations and liquor wholesalers would be strange bedfellows in most contexts, but they are not so strange here if one purpose of the three-tier distribution system is to insulate the wholesalers from competition, and if the resulting higher consumer prices reduce liquor consumption.[23] The participation of so many groups in the case suggests the economic importance of the Supreme Court's decision.

## II

The outcome of *Granholm* hinged on whether Section 2 of the Twenty-first Amendment allows states to discriminate against out-of-state liquor producers. If Section 2 could be read literally, the case would have been an easy one. The direct shipment of wine from out-of-state wineries to New York or Michigan customers is an obvious instance of the "importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof,"[24] and, under a literal reading, would be exactly what Section 2 prohibits. But the story behind the language of Section 2 is long and complex, beginning several decades before national Prohibition. When Section 2 is placed in its historical context, it is clear that Section 2 was not intended to authorize states to discriminate against out-of-state producers.

Prohibition began, state by state, many years before the Eighteenth Amendment. In dry states, statutes normally prohibited the manufacture and sale of liquor, but not the consumption or simple possession of liquor. Such laws were enforced against manufacturers and shippers, because they could not be enforced against consumers.

States faced no constitutional obstacle to prosecuting in-state producers, particularly after the Supreme Court held in 1887 that a ban

[22]See, e.g., Granholm v. Heald, No. 03-1116, http://www.supremecourtus.gov/docket/03-1116.htm.

[23]Cf. Bruce Yandle, Bootleggers and Baptists—The Education of a Regulatory Economist, Regulation, May/June 1983, at 13.

[24]U.S. Const. amend. XXI, § 2.

on the manufacture and sale of liquor did not deprive producers of property without due process.[25] Many of the dry states, however, were adjacent to wet states, where liquor producers were happy to supply a neighboring market lacking manufacturers of its own. To combat the sale of liquor effectively, dry states accordingly needed to restrict the importation of liquor from wet states. That, however, invited constitutional challenge under the dormant Commerce Clause, which was then understood to impose two very different kinds of limits on the regulatory power of a state.

First, state laws discriminating against out-of-state liquor producers were unconstitutional, just like state laws discriminating against out-of-state producers of any commodity. In *Tiernan v. Rinker*,[26] for example, the Supreme Court considered a Texas tax on sellers of beer and wine that exempted beer and wine manufactured in Texas. The Court held that ''the statute of Texas is inoperative, in so far as it makes a discrimination against wines and beer imported from other States. . . . A tax cannot be exacted for the sale of beer and wines when of foreign manufacture, if not exacted from their sale when of home manufacture.''[27] A few years later, the Court considered a similar Michigan tax on businesses selling liquor imported from other states and reached the same result. ''A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States,'' the Court held, ''and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.''[28] This anti-discrimination doctrine was not troubling to prohibitionists. They wanted to restrict the manufacture and sale of both in-state *and* out-of-state liquor.

The second limit imposed on state power by the dormant Commerce Clause, by contrast, was disturbing to prohibitionists. In *Bowman v. Chicago and Northwestern Railway Company*,[29] the Court addressed for the first time the Commerce Clause implications of a

[25] Mugler v. Kansas, 123 U.S. 623 (1887).

[26] 102 U.S. 123 (1880).

[27] *Id.* at 127.

[28] Walling v. Michigan, 116 U.S. 446, 455 (1886).

[29] 125 U.S. 465 (1888).

dry state's efforts to bar liquor imports from wet states. Iowa had recently prohibited the sale of liquor, with certain exceptions, including for medicinal or sacramental purposes. Iowans falling within one of these exceptions were required to obtain a license. In aid of this ban, Iowa prohibited any common carrier from bringing liquor into the state without first having received a certificate stating that the person to whom the liquor was being delivered possessed the required license.[30] This latter rule was the one challenged under the Commerce Clause. The Court observed that the Iowa law was backed by the best of intentions—it was not adopted for the purpose of discriminating against interstate commerce.[31] The Court nevertheless found the law inconsistent with the Commerce Clause, on the ground that the state lacked any regulatory power over imports in transit. ''[T]he right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated,'' the Court reasoned. ''The right of importation from abroad, and of transportation from one State to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates.''[32] This was, as applied to liquor, the then-current ''original package'' doctrine—the view that Congress' power over goods shipped between states was exclusive so long as those goods remained in their original packages.

*Bowman* alarmed prohibitionists, who recognized that dry states would be powerless to enforce their liquor laws if they could not prevent importers from selling liquor to state residents. The leading prohibition organizations reacted by increasing pressure on Congress to enact a national prohibition law. Liquor producers in wet states, meanwhile, began taking advantage of *Bowman*, by opening retail outlets in dry states, where they sold liquor in the original packages.[33]

Prohibitionists became even more alarmed two years later, when *Leisy v. Hardin*[34] spelled out the implications of *Bowman*. The Leisy

[30]For a complete recitation of the statutory provisions at issue in *Bowman*, see *id.* at 474-75.

[31]*Id.* at 475–76.

[32]*Id.* at 499.

[33]Richard Hamm, Shaping the Eighteenth Amendment 65–66 (1995).

[34]135 U.S. 100 (1890).

Company was a family-owned brewery in Peoria, Illinois (a wet state), that shipped beer across the Mississippi River to Keokuk, Iowa (a dry state), where John Leisy offered the beer for sale in its original kegs and cases.[35] When Iowa seized the beer, on the ground that Leisy was violating the Iowa statute prohibiting the sale of liquor, Leisy brought suit seeking return of his merchandise. The Court held that the Commerce Clause rendered Iowa powerless to interfere with Leisy's sales. ''Under our decision in *Bowman*,'' the Court explained, ''[Leisy] had the right to import this beer into [Iowa], and in the view which we have expressed they had the right to sell it.''[36] Only *after* a sale in the original package would the state's regulatory power commence. ''Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation or sale by the foreign or non-resident importer.''[37]

*Leisy* triggered a crisis. As Richard Hamm, the leading historian of these events, tells it:

> Overnight the *Leisy* ruling created a new liquor business: the original package house. As this trade grew, panic over the control of liquor began to sweep the country. The prohibition states' original package business, which in May was ''budding like a bloom,'' had in June and July spread like a pernicious weed. . . . In Kansas City, Kansas [a dry state], during the summer of 1890 it was impossible to get cool water but ''everywhere may be found iced beer.'' Soon every major town in the prohibition states had its own package house.[38]

Residents of dry states strengthened their call for a federal statute that would override the holdings of *Bowman* and *Leisy* and authorize the states to regulate the sale of liquor in its original package.[39]

Congress responded quickly, with a statute signed by President Harrison less than four months after the decision in *Leisy*. The Wilson

[35] *Id.* at 100, 101.

[36] *Id.* at 124.

[37] *Id.* at 124–25.

[38] Hamm, *supra* note 33, at 70–71.

[39] *Id.* at 70–71, 85.

Act of 1890,[40] named for the prohibitionist Iowa Senator James Falconer Wilson, provided: ''All . . . intoxicating liquors or liquids transported into any State . . . shall upon arrival in such State . . . be subject to the operation and effect of the laws of such State . . . to the same extent and in the same manner as though such liquids or liquors had been produced in such State . . . and shall not be exempt therefrom by reason of being introduced therein in original packages.''[41] The Wilson Act was a straightforward response to *Bowman* and *Leisy*. Congress, using its affirmative Commerce Clause power to regulate interstate commerce, authorized the states to treat imported liquor exactly as they treated domestic liquor.

The Wilson Act thus did not remove *all* Commerce Clause limits on state authority to regulate interstate liquor shipments. It removed only the limit imposed by the original package doctrine, the limit that had previously forced dry states to tolerate out-of-state liquor. The other Commerce Clause limit, the ban on discrimination against out-of-state producers, remained in force, untouched by the Wilson Act.

The Court removed any possible doubt on this score a few years later, in *Scott v. Donald*.[42] In South Carolina, a state commissioner was statutorily responsible for purchasing all the liquor to be sold in the state. The commissioner furnished the liquor to designated dispensaries, where it could be sold to the public.[43] The statute required the commissioner to purchase from in-state producers so long as their prices were no higher than those of out-of-state producers.[44] The statute also limited the mark-up that could be charged by the dispensaries on the sale of wine to ten percent, but the limit applied only to in-state wine; there was no limit on the price the dispensaries could charge for out-of-state wine.[45] One of South Carolina's theories in defense of the scheme's constitutionality was that the Wilson Act had removed all Commerce Clause limits on a state's

[40] 26 Stat. 313 (1890) (currently codified at 27 U.S.C. § 121).

[41] *Id.*

[42] 165 U.S. 58 (1897).

[43] *Id.* at 92.

[44] *Id.*

[45] *Id.* at 93.

authority to regulate the liquor trade. The Court rejected the argument. The Wilson Act ''was not intended to confer upon any State the power to discriminate injuriously against the products of other States,'' the Court held.[46] Under the Wilson Act, a state could entirely forbid the sale of liquor, or it could regulate domestic and imported liquor identically. ''But the state cannot . . . establish a system which, in effect, discriminates between interstate and domestic commerce.''[47]

Over the next fifteen years, as dry states tried to stem the flow of liquor from wet states, the Court had several occasions to interpret the Wilson Act. In a few of these cases, the Court construed the Act very narrowly, and found state statutes unconstitutional under the Commerce Clause. These decisions reopened the door Congress had meant to close in the Wilson Act. It was not long before there was once again a flourishing wet-to-dry interstate liquor trade.

The most important of these cases were *Rhodes v. Iowa*[48] and *Vance v. W.A. Vandercook Co.*,[49] decided on the same day in 1898. *Rhodes* asked whether Iowa's liquor transportation statute—the same one at issue in *Bowman*—could be enforced against a common carrier before the liquor had been delivered to its consignee. That is, did the Wilson Act authorize Iowa to intercept the liquor at the state line, or was Iowa required to wait until the liquor had been delivered before seizing it? The Act subjected liquor to state regulatory power ''upon arrival in such State.''[50] In *Rhodes*, the Court held that ''arrival'' meant arrival in the hands of the consignee, not arrival within the borders of the state. The state was powerless while the liquor was in transit.[51]

In *Vance*, the Court held that the Wilson Act did not authorize a state to interfere with the ability of a state resident to receive a shipment of out-of-state liquor for his own personal use. The Wilson Act allowed states to forbid the sale of out-of-state liquor in its original package, the Court reasoned, but nothing more. All other

[46] *Id.* at 100.

[47] *Id.* at 92–93.

[48] 170 U.S. 412 (1898).

[49] 170 U.S. 438 (1898).

[50] 27 U.S.C. § 121.

[51] Rhodes, 170 U.S. at 421–23.

regulation unconstitutional before the Wilson Act remained unconstitutional after.[52]

Liquor producers in wet states immediately opened up mail-order businesses, shipping directly to consumers in dry states. The dry states fought back with different methods of enforcement, but the Court repeatedly found these state restrictions unauthorized by the Wilson Act. In four cases decided between 1905 and 1912, the Court held that: (1) a state could not interfere with a C.O.D. liquor shipment from out-of-state while the liquor was still in the hands of the delivery company; (2) a state could not interfere with an interstate liquor shipment while the liquor was in the carrier's warehouse awaiting delivery to the consignee; (3) a state could not ban C.O.D. shipments of liquor; and (4) a state could not simply ban the interstate shipment of liquor to dry localities within the state.[53] There was nothing the dry states could do to keep liquor out.

One colorful example of the lively interstate liquor trade during this period can be found in another of the Court's cases, *Kirmeyer v. Kansas*.[54] For many years, Kirmeyer ran an illegal beer-selling business out of a warehouse in Leavenworth, Kansas, a dry state. Leavenworth was on the west bank of the Mississippi River. Just across the river, in wet Missouri, was the village of Stillings, a place with one store, a few residences, and no post office—but with a roundhouse, a freight depot, and eight or ten beer warehouses. In 1907, fearing apprehension by Kansas officials, Kirmeyer moved his office across the river to Stillings. He continued living in Leavenworth, and he continued using the same Leavenworth warehouse to store beer awaiting shipment to his Kansas customers. The only change was that now he received his orders by telephone or mail in Missouri rather than in Kansas.[55] Nevertheless, the Court held, the Commerce Clause protected Kirmeyer's right to ship beer to Kansans, and the Wilson Act did not authorize Kansas to interfere.[56]

[52] Vance, 170 U.S. at 451–52.

[53] These were: (1) American Express Co. v. Iowa, 196 U.S. 133, 143–44 (1905); (2) Heyman v. Southern Ry. Co., 203 U.S. 270, 275–76 (1906); (3) Adams Express Co. v. Kentucky, 206 U.S. 129, 136–37 (1907); and (4) Louisville & Nashville R.R. Co. v. F.W. Cook Brewing Co., 223 U.S. 70, 82 (1912).

[54] 236 U.S. 568 (1915).

[55] For a complete recitation of the facts in *Kirmeyer*, see *id.* at 570–71.

[56] *Id.* at 572.

These Wilson Act cases exasperated prohibitionists, who returned to Congress seeking a stronger declaration of dry states' power to keep liquor out. After several years of fruitless lobbying, the leading prohibition organizations gathered in Washington in December 1911 for a bill-drafting conference organized by the Anti-Saloon League. That conference produced a bill introduced in Congress, with the League's assistance, by two prohibitionist members, Representative E. Yates Webb of North Carolina and Senator William Kenyon of Iowa.[57] After some modification, the bill was enacted as the Webb-Kenyon Act of 1913.[58]

The purpose of the Webb-Kenyon Act, contemporaries recognized, was to strengthen the Wilson Act—or more precisely, to authorize dry states to restrict liquor imports in the ways the Court had found unauthorized by the Wilson Act.[59] The Webb-Kenyon Act was accordingly worded more broadly than the Wilson Act. It prohibited the shipment of intoxicating liquor into a state, ''to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of such State.''[60] Once again, Congress used its Commerce Clause power to allow states to regulate out-of-state liquor just as they regulated in-state liquor. Like the Wilson Act, the Webb-Kenyon Act did not remove *all* Commerce Clause limits on state authority to regulate interstate liquor shipments; it removed only the limit that was troubling to prohibitionists, the one that had prevented dry states from stamping out liquor imports. The other Commerce Clause limit, the ban on discriminating against out-of-state producers, was untouched by the Webb-Kenyon Act, just as it had been untouched by the Wilson Act. The ban on discrimination was a hardship only to those who wished to promote in-state liquor producers at the expense of out-of-state producers, but such people were not the political force behind the Webb-Kenyon Act. As all historians of the subject agree, the supporters of the Webb-Kenyon Act were prohibitionists.[61]

[57] Hamm, *supra* note 33, at 212–13.

[58] 37 Stat. 699 (1913) (currently codified at 27 U.S.C. § 122).

[59] Allen H. Kerr, The Webb Act, 22 Yale L.J. 567, 567 (1913); Winfred T. Denison, States' Rights and the Webb-Kenyon Liquor Law, 14 Colum. L. Rev. 321, 321 (1914).

[60] 27 U.S.C. § 122.

[61] See, e.g., Ann-Marie E. Szymanski, Pathways to Prohibition: Radicals, Moderates, and Social Movement Outcomes 196 (2003); David E. Kyvig, Repealing National Prohibition 7 (2d ed. 2000); Thomas R. Pegram, Battling Demon Rum: The Struggle

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 that had existed ever since the Court decided *Bowman* in 1888. During the congressional debate over the Webb-Kenyon Act, the Act's proponents made clear their desire to override the line of cases that began with *Bowman*, but they expressed no interest in overriding *Scott v. Donald*, the case in which the Court held that the Wilson Act did not authorize state discrimination against out-of-state liquor.[62] If the goal of the Webb-Kenyon Act had been to overturn the result of *Scott*, surely someone would have said so.

Because the Eighteenth Amendment was ratified in January 1919, the Webb-Kenyon Act generated only a short period of litigation. (In principle the Webb-Kenyon Act remained in effect throughout national Prohibition, and it still exists today, but it was largely superseded in practice, first by the Eighteenth Amendment and then by the Twenty-first.) During that period there appear to have been only two published lower court opinions addressing whether the Webb-Kenyon Act authorized states to discriminate against out-of-state liquor. Read literally, without any attention to context, the Act did indeed authorize such discrimination: liquor imported into a state, contrary to the state's protectionist legislation, would literally have been imported ''in violation of the law of such State.''[63] But both courts recognized that such was not the purpose of the Webb-Kenyon Act. The Act ''was not intended to confer and did not confer upon any State the power to make injurious discriminations against the products of other States,'' the South Carolina Supreme Court held in 1916.[64] ''Substantially the same thing was said in *Scott v. Donald* of the Wilson Act.''[65] A year earlier, a federal district court in Alabama had reached the same conclusion.[66]

for a Dry America, 1800–1933, at 134 (1998); Kenneth D. Rose, American Women and the Repeal of Prohibition 29–30 (1996); James H. Timberlake, Prohibition and the Progressive Movement 1900–1920, at 162 (1966); Joseph R. Gusfield, Symbolic Crusade: Status Politics and the American Temperance Movement 120 (1963).

[62] 49 Cong. Rec. 699–707, 2687–91, 2788–868, 2898–924 (1913).

[63] 28 U.S.C. § 122.

[64] Brennan v. Southern Express Co., 90 S.E. 402, 404 (1916).

[65] *Id.*

[66] Evansville Brewing Ass'n v. Excise Comm'n, 225 F. 204, 209 (N.D. Ala. 1915).

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.

Prohibition temporarily removed the need to worry about such issues. However, as the end of Prohibition drew near and Congress debated the text of what would become the Twenty-first Amendment, the scope of state power over interstate liquor shipments became an important question once again, as national Prohibition's end promised to restore the state-by-state prohibition of the decades before 1919. The Webb-Kenyon Act was still on the books, but its constitutionality was not entirely assured. Two justices, including Oliver Wendell Holmes, had dissented from the 1917 decision upholding the statute.[67] President Taft had vetoed the Webb-Kenyon bill (Congress overrode his veto) because he and his attorney general, George Wickersham, also thought it unconstitutional.[68] With public sentiment shifting away from Prohibition, meanwhile, there was a possibility that the Webb-Kenyon Act might one day be repealed, and the dry states reopened to liquor shipments from wet states. 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, a ban on shipping liquor into a state ''in violation of the laws thereof.''[69] The Twenty-first Amendment thus in effect constitutionalized the Webb-Kenyon Act.[70] Even after the repeal of national Prohibition, dry states would have the power, enshrined in the Constitution, to keep liquor out.

Nowhere in the debates over the Twenty-first Amendment is there any suggestion that Section 2 was meant to go beyond the Webb-Kenyon Act and allow states to discriminate against out-of-state

[67] Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311, 332 (1917) (Holmes, J., dissenting).

[68] Todd Zywicki & Asheesh Agarwal, Wine, Commerce, and the Constitution, NYU J.L. & Liberty, forthcoming, at 19, available at http://www.law.nyu.edu/journals/liberty/Images/Zywicki-FAAP.doc.

[69] See note 2, *supra*, and accompanying text.

[70] Craig v. Boren, 429 U.S. 190, 205–06 (1976).

liquor. States had never possessed that power before national Prohibition, and no one in Congress appears to have suggested that they ought to have it after. In context, the original meaning of Section 2 is clear enough: states can regulate out-of-state liquor just as restrictively as they regulate in-state liquor without worrying about the Commerce Clause. But they cannot regulate out-of-state liquor more restrictively.

## III

If the history of the Twenty-first Amendment ended in 1933, *Granholm v. Heald* would have been an easy case. It would have been clear that New York and Michigan lacked the power to discriminate against out-of-state wineries. What made *Granholm* difficult was the rest of the story.

Shortly after the Twenty-first Amendment was ratified, California enacted a statute imposing a license fee of $500 for importing beer into the state. A group of California beer wholesalers challenged the statute on the ground that it violated the Commerce Clause by discriminating against out-of-state beer. The Court rejected the challenge in a short, puzzling opinion by Justice Brandeis.[71] Brandeis began by denying that any discrimination was taking place.[72] It is not entirely clear what he meant, but he may have been taking account of the fact that in-state breweries also had to pay a license fee, one greater than $500; as a result, Brandeis may have assumed the out-of-state breweries and the wholesalers selling their beer were not actually operating at any disadvantage.[73] Brandeis went on, however, to make a broad and incorrect claim about the brand new Twenty-first Amendment that implicitly presumed California *was* discriminating against out-of-state beer. He said that a state need not ''let imported liquors compete with the domestic on equal terms.''[74] Such a requirement of equality, Brandeis concluded, ''would involve not a construction of the Amendment, but a rewriting of it.''[75]

[71] State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

[72] *Id.* at 61.

[73] See, e.g., *id.* at 64.

[74] *Id.* at 62.

[75] *Id.*

Given the long pre-Prohibition history of challenges to state liquor regulation, it is hard to understand why the Court interpreted Section 2 in this way. Brandeis and his colleagues were old enough to remember the legal battles leading up to Prohibition, and they could hardly have avoided knowing about them, because liquor regulation was one of the major domestic political issues of the era. One is tempted to look for clues in Brandeis's personal jurisprudence, particularly his reluctance to find commercial regulation unconstitutional and his general preference for local diversity over national uniformity, but this sort of investigation would not explain the absence of dissenting justices. It is possible (although I do not know of any evidence of it) that during and shortly after Prohibition contemporaries had forgotten the purpose of the Webb-Kenyon Act; and that when the Act's language was constitutionalized in the Twenty-first Amendment, contemporaries believed they were completely freeing the states from Commerce Clause restrictions rather than merely freeing the states from one such restriction while keeping another in place. Whatever the reason, Brandeis repeated the holding in three more cases over the next three years. Under the Twenty-first Amendment, he explained in 1938, ''discrimination against imported liquor is permissible.''[76] This was so, he twice wrote the following year, because ever since the Twenty-first Amendment, ''the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.''[77] Again, no one dissented. Only a few years after the end of Prohibition, a view of the Twenty-first Amendment had crystallized that was very different from the one that had been intended by the drafters of identical language in the Webb-Kenyon Act.

That new view remained orthodoxy until the 1980s, when the Court once again reversed course, and returned to Section 2's original meaning. The first hint of this return came in 1980, in a case involving a related but different question: whether the Twenty-first Amendment immunized state liquor regulation from the Sherman Antitrust Act. Justice Powell's opinion noted that in interpreting Section 2,

[76] Mahoney v. Joseph Triner Corp., 304 U.S. 401, 403 (1938).

[77] Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 398 (1939) (the quoted language appears in both cases). The Court reached the same conclusion in another case in late 1939, after Brandeis had retired. Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939).

''the Court has focused primarily on the language of the provision rather than the history behind it,'' and implied in a footnote that an examination of the history might yield a different view.[78] The break came a few years later. *Bacchus Imports v. Dias*[79] involved a Commerce Clause challenge to a Hawaii liquor excise tax that exempted some locally produced drinks. The tax would have been clearly within Hawaii's power under the view of the Twenty-first Amendment in effect from the mid-1930s onward. For the first time, however, the Court returned to the Amendment's original meaning and held that Section 2 did not authorize a state to favor local interests by erecting trade barriers. ''State laws that constitute mere economic protectionism,'' the Court concluded, are ''not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.''[80] The three dissenters—Justices Stevens, Rehnquist, and O'Connor, the only members of the *Bacchus* Court who would remain on the bench for *Granholm*—rightly pointed out that this view was impossible to reconcile with the interpretation that had reigned for nearly fifty years.[81] The Court nevertheless stuck to its new (or, rather, the old) anti-protectionist view of the Twenty-first Amendment in two subsequent cases.[82]

Why, after fifty years of literally but inaccurately construing Section 2, did the Court switch back to the non-literal but historically faithful interpretation? In one sense, the switch came at an unlikely time, just as legal interpretive style was shifting in the opposite direction, toward textualism and away from historically contextual methods. In another sense, though, the switch came at the expected time, as originalism was gaining ground at the expense of more instrumentalist modes of interpretation. Textualism and originalism were in conflict when it came to Section 2, and it was a sign that originalism was winning when Justice Scalia, the Court's most thorough textualist, agreed in 1989 that a law's ''discriminatory character

[78] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106–07 & n.10 (1980).

[79] 468 U.S. 263 (1984).

[80] *Id.* at 276.

[81] *Id.* at 282–85 (Stevens, J., dissenting).

[82] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); Healy v. Beer Inst., 491 U.S. 324 (1989).

eliminates the immunity afforded by the Twenty-first Amendment.''[83] Maybe, by the 1980s, the self-evident evils of protectionism were beginning to overshadow the dimly remembered evils of drink.

It was this double reverse by the Court that made the outcome of *Granholm* hard to predict. The differential treatment of in-state and out-of-state companies had been a common feature of state liquor control virtually since the end of Prohibition in 1933. That differential treatment was clearly constitutional under the view of the Twenty-first Amendment in effect until 1984, a view unanimously held by the near-contemporaneous members of the Court, a view still favored by three current justices, and a view well supported by a literal reading of Section 2. On the other side of the scale were the more recent Twenty-first Amendment cases and the historical background of Section 2. *Granholm* thus pitted a literal, textualist reading of the Twenty-first Amendment against a contextual, originalist reading, and one group of Supreme Court cases against another.

## IV

Justice Kennedy's majority opinion in *Granholm* recites much of the pre-Prohibition history of liquor regulation, in order to demonstrate that the Twenty-first Amendment, like the Wilson and Webb-Kenyon Acts, was intended to level the playing field between in-state and out-of-state liquor, not to authorize states to discriminate against out-of-state liquor producers.[84] Kennedy rejects the Court's late-1930s opinions construing Section 2 for their failure to take this history into account, and relies instead on the newer line of cases beginning with *Bacchus*.[85] There is nothing surprising here: these were precisely the arguments made in the briefs of the wineries and their amici.

The surprising thing about *Granholm* is Justice Thomas's dissenting opinion, which also relies on a history of the Webb-Kenyon Act, but which narrates that history very differently.[86] This revisionist account

[83] Healy, 491 U.S. at 344 (Scalia, J., concurring in part and concurring in the judgment).

[84] Granholm v. Heald, 125 S. Ct. 1885, 1898–1902 (2005).

[85] *Id.* at 1902–04.

[86] *Id.* at 1909–19 (Thomas, J., dissenting)

of the pre-Prohibition history seems to have been developed within Thomas's chambers, as it does not appear (except in very sketchy form) in any of the briefs in the case or in any of the secondary literature. Thomas argues that the Webb-Kenyon Act was intended to overrule not just cases like *Bowman* and *Leisy* but *Scott v. Donald*, the case in which the Court had not allowed states to discriminate against out-of-state producers, as well. The evidence Thomas provides for this proposition is, I think, too weak to support it. The only explicit piece of evidence is that a very early and unsuccessful precursor of the Webb-Kenyon Act—a bill that members of Congress considered sixteen years earlier but did not pass—was accompanied by a Senate report that included *Scott* as one of the decisions this bill would have overruled.[87] The rest of the evidence adduced by Thomas consists of legislative documents either repeating or paraphrasing the language of the Webb-Kenyon Act itself.[88] Even after this additional piece of legislative history is taken into account, the conventional view of the Webb-Kenyon Act remains supported by the overwhelming bulk of contextual evidence and therefore is more persuasive.

Thomas was joined by the three *Bacchus* dissenters, who in *Bacchus* had relied primarily on other arguments, and the *Granholm* dissent is on firmer ground when Thomas turns to these arguments.[89] We have two good sources for contemporaries' understanding of the Twenty-first Amendment—the immediate post-Prohibition output of state legislatures and the late-1930s decisions of the Supreme Court—and both suggest that contemporaries believed the Amendment had authorized states to discriminate against out-of-state liquor. We can perhaps discount the relevance of the state liquor regulation of the period, on the ground that it is hardly unknown for state governments to exceed their authority in an attempt to advance the interests of in-state voters at the expense of others. The Court decisions of the late 1930s, however, are not so easily dismissed. The *Granholm* majority cites some contemporary law review commentary critical of these decisions, but the dissent

[87] *Id.* at 1914.

[88] *Id.* at 1916.

[89] *Id.* at 1920–24.

responds with more contemporary commentary that was not critical,[90] so there was clearly some doubt on this score at the time.

But this only restates why *Granholm* was a hard case. In the end, the Court had to choose between the old cases and the new cases, between the literal reading of Section 2 and the historically contextual reading. Either choice would have been defensible, and either would have been subject to attack.

After *Granholm*, states can no longer discriminate against out-of-state liquor. Whether they will permit out-of-state wineries to ship directly to customers, however, is another question. The states' only obligation is to treat in-state and out-of-state wineries equally. Some states may allow all wineries to ship directly to customers; others may forbid all wineries from doing so; still others may allow direct shipment but impose restrictions equally on all wineries. How it all sorts out will depend on political battles among winemakers, wine drinkers, and wholesalers, and the relative influence of the three groups differs dramatically from state to state. The most likely overall outcome, however, will be more direct interstate shipment than we had before.

There is nothing in the Twenty-first Amendment that distinguishes wine from other ''intoxicating liquors,'' so similar state-by-state political battles may take place with respect to beer and spirits as well. The small wineries have their counterparts in these markets—microbreweries producing beer in quantities too small to be carried by the beer wholesalers, tiny producers of flavored vodka, and so on—who will also have an interest in selling to customers in other states. As with wine, states can still forbid direct shipment of such products to customers, but only at the possible political cost of including in-state producers within that prohibition.

There is likewise nothing in the Twenty-first Amendment that distinguishes one link in the three-tier system from the others. If states lack the power to discriminate against out-of-state liquor *producers*, they presumably lack the power to discriminate against out-of-state liquor *wholesalers* or *retailers* as well. The majority opinion in *Granholm* is careful to say that the decision does not invalidate the three-tier system as a whole, but, as Justice Thomas points out, the system is normally predicated on forcing alcohol to flow through

[90] *Id.* at 1903, 1923.

in-state wholesalers and in-state retailers, which is another form of protectionism.[91] In *North Dakota v. United States*,[92] the Court (in dicta) called this system ''unquestionably legitimate,'' but that conclusion relied in part on the late-1930s cases repudiated in *Granholm*,[93] and even if *North Dakota* had not relied on them, its logic would require reconsideration now. We should thus in the short run expect to see challenges brought by out-of-state wholesalers seeking to sell to in-state retailers and consumers, by out-of-state retailers seeking to sell to in-state consumers, by in-state retailers seeking to buy directly from out-of-state producers, and from consumers seeking to buy from anyone, anywhere. These cases will embody a clash of logic and experience: the rationale of *Granholm* suggests the challengers should win, but the long history of entrenched practice under the three-tier system suggests they will not. In the long run, if logic prevails, perhaps we will see a restructuring of the entire industry.

Indeed, the first of these challenges was already underway before the Supreme Court decided *Granholm*. The companies with the most to gain from dismantling the three-tier system are the large supermarket chains, which are the biggest retailers. They could save a bundle if they could cut out the wholesalers and buy directly from producers. In February 2004, the supermarket chain Costco brought suit against the Washington State Liquor Control Board, seeking, among other things, to have Washington's three-tier system declared inconsistent with the Commerce Clause.[94] The case was still in the pretrial stage when *Granholm* was decided. The outcome of *Granholm* makes the legal environment more attractive for similar lawsuits in the future.

If these suits do eventually dismantle the three-tier system, that would be good news indeed for consumers, who would almost certainly see lower prices and greater variety. It would be bad news for those wholesalers and retailers who owe their place in the distribution chain to state regulation rather than to their performance of

[91] *Id.* at 1905, 1923–24.

[92] 495 U.S. 423, 432 (1990).

[93] *Id.* at 432 (citing *Young's Market Co.*). Compare Granholm, 125 S. Ct. at 1902–03 (discussing *Young's Market* and progeny).

[94] Washington Beer & Wine Wholesalers Association, The Costco Lawsuit: An Attempt to Dismantle Washington's Three-Tier System, http://www.wbwwa.org/legal/legalissues.html.

any useful function. It would not necessarily be a loss for advocates of temperance or those concerned with underage drinking. States would not lose any ability to moderate the effect of alcohol. They would still be free to limit drinking any way they like, so long as the limit is applied evenhandedly to in-state and out-of-state businesses. Drinking might go up as prices go down, but if that is a source of concern, it can easily be addressed by a non-discriminatory alcohol tax.

*Granholm* is thus unlikely to be the Supreme Court's last Twenty-first Amendment case. In resolving one question it opened up others that may prove to be even more important. The odd wording of Section 2, a hangover of Prohibition and the decades of state liquor regulation that came before, will loom over the liquor industry for some time to come.