That's Why I Hang My Hat in Tennessee: Alcohol and the Commerce Clause

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> *The Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.*
>
> Art. I, § 8 (a.k.a. the "Commerce Clause")
>
> *The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxication liquors, in violation of the laws thereof, is hereby prohibited.*
>
> Amend. XXI, § 2

Tennessee spirits have inspired many a song writer. George Jones got to number two with "Tennessee Whiskey." "Copperhead Road," Steve Earle's tale of three generations of East Tennessee bootleggers, is a classic. No doubt, Tennessee liquor has brought out the best in song writers. The Supreme Court got its turn this past term with the case of *Tennessee Wine and Spirits Retailers Association v. Thomas*, a major Supreme Court case involving the intersection of the Commerce Clause and the Twenty-first Amendment.

The respondents in this case—out-of-staters seeking retail liquor licenses—might argue that Tennessee liquor has not always brought out the best in the writers of Tennessee laws. Tennessee lawmakers went to great lengths to ensure that Tennesseans and only Tennesseans can sell alcohol in Tennessee by restricting retail liquor licenses to those who had resided in Tennessee for two years

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(what I'll call the "durational requirement").[1] This had the effect of denying two would-be retailers of alcohol—the Ketchum family, who recently relocated to Memphis and cashed in their savings to open a neighborhood store, and Total Wine & More, a wine and alcohol superstore—from operating in Tennessee.

Constitutional protection of the free flow of interstate commerce has been a frequent object of Supreme Court review since soon after the Founding, leaving behind a convoluted doctrine. Nothing makes the already-complicated Commerce Clause even more complicated than alcohol because of its unique constitutional status (constitutionally prohibited, then reinstated with states given special power over its regulation). So, can states constitutionally deny licenses to sell wine and liquor to parties who have not resided in the state for a specified period of time? Or are such durational residency requirements impermissible burdens on interstate commerce? These were the questions presented to the Supreme Court in *Tennessee Wine*.

Durational requirements seem at first blush to constitute obvious discrimination against out-of-state interests, thus violating the long-held doctrine against such interstate protectionism. So why was this case so difficult to get to the Supreme Court? As often is the case, alcohol is at the root of the problem. There are no two ways about it—if the licenses at issue had been to sell anything other than booze, then this case would never have been a case. States cannot burden interstate commerce by excluding out-of-staters from local markets.[2] Durational requirements on licenses to sell goods and articles like "cabbages and candlesticks" impermissibly burden interstate commerce and would be flagrantly and obviously unconstitutional.[3] Do the same rules apply to alcohol? Liquor does

[1] Two related durational restrictions were challenged as well. Tennessee also required that a person live in Tennessee for 10 years before they could renew the license. Tenn. Code Ann. § 57-3-204(b)(2)(A). The state also imposed additional residency requirements on officers and stockholders of any corporation wishing to acquire a retail license. Tenn. Code Ann. § 57-3-204(b). Only the two-year residency requirement was before the Supreme Court because, after the lower courts struck the others down, they were not appealed to the Supreme Court.

[2] Lewis v. BT Inv. Managers, Inc. 447 U.S. 27, 53 (1980) (excluding out-of-state banks); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391–92 (1994) (excluding out-of-state waste processors).

[3] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2484 (2019) (Gorsuch, J., dissenting).

tend to make easy things hard, but can it change the outcome in a Commerce Clause case?

Section 2 of the Twenty-first Amendment gives the states broad authority in the regulation of the sale and distribution of alcohol. Then again, the Supreme Court has already held that authority is not unlimited. In the Court's last foray into the Twenty-first Amendment, the 2005 case of *Granholm v. Heald*, it rejected the idea that the amendment was a total shield from the nondiscrimination principle. That case struck down a law discriminating against out-of-state alcohol products and producers.[4] But was that holding limited to producers, or would it extend to other tiers in the alcohol distribution scheme such as retailers?

Before *Tennessee Wine*, this was all about as clear as mud. Still, there were a couple of fixed points in the Twenty-first Amendment celestial sky. One, as mentioned above, is that, despite the Twenty-first Amendment, state alcohol regulations are not totally immune from Commerce Clause challenges. The second is that the three-tier system that many states use to regulate alcohol distribution is constitutional, however peculiarly unwieldy it may look.[5] The three-tier system originated during the Franklin Roosevelt administration, resulting from post-Prohibition efforts to subject alcohol to a demanding and exceptional regulatory scheme.[6] Alcohol is thus distributed through three distinct layers that may not overlap: producers, wholesalers, and retailers. "Manufacturers are limited to selling to wholesalers; wholesalers may sell to retailers, or in some cases to other wholesalers; consumers are required to buy only from retailers."[7] This brings us to a third fixed point. At the retail tier in particular, the state interest in local control reaches its highest level because of the undisputed need to control the "dispensation of alcoholic beverages within its borders."[8] As a result, one way of analyzing the question is to ask whether *Granholm* was limited to discrimination against out-of-state products and producers—a distinct part of the three-tier approach—but not out-of-state persons who wish to act as retailers, selling alcohol directly to the citizens of a particular state.

[4] Granholm v. Heald, 544 U.S. 460, 493 (2005).

[5] *Id.* at 488 (calling it "unquestionably legitimate").

[6] Jon Riches, It's Not Prohibition, so Ditch the Old Alcohol Laws, Ariz. Republic (Feb. 15, 2015).

[7] Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d 608, 612 (6th Cir. 2018).

[8] Craig v. Boren, 429 U.S. 190, 215 (1976) (Stewart, J., concurring).

In sum, are Tennessee's durational requirements the sort of economic protectionism that the Constitution stops in other contexts, or are they an appropriate way of maintaining local control of alcohol so as to address the problems involved with intoxicating spirits? Perhaps the more important question is whether the "dormant" Commerce Clause is even still a thing? As a doctrine, it has come under criticism.[9] In *Tennessee Wine*, the Supreme Court waded into these fraught waters.

Let's begin by examining the factual background and cast of characters. Then, let us take a brief look at the Commerce Clause, the Twenty-first Amendment, and how this case got to the Supreme Court. Then we can discuss what the justices did and what may still be lingering.

I. Factual Background

Doug and Mary Ketchum moved to Tennessee in 2016 from Utah.[10] They care for their disabled daughter, Stacy, who has cerebral palsy and quadriplegia requiring 24-hour care. Advised by her doctor to leave the area because the temperature inversion of Salt Lake Valley caused Stacy's lung to collapse, the Ketchums settled on a move to Memphis. They found a retail liquor shop that was up for sale and decided to buy it, enabling them to care for Stacy. In April 2016, they submitted a letter of intent to purchase the store.

At the time, they were aware of Tennessee's durational requirement, but they did not think it would matter. The Tennessee attorney general had issued two opinions on the durational requirement and determined that they were unconstitutional.[11] The Ketchums were advised by the Tennessee Alcoholic Beverage Commission (ABC) that it did not enforce the durational requirement. They were further told that the ABC had issued retail liquor licenses to other

[9] See, e.g., Garrick B. Pursley, Dormancy, 100 Geo. L.J. 497, 499 n.3 (2011) (collecting criticisms).

[10] The background facts are taken from the district court opinion. Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 259 F. Supp. 3d 785 (M.D. Tenn. 2017). See also, Joint Appendix, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019) (No. 18-96) (Nov. 13, 2018); The Tennessee Wine Case and the 21st Amendment, We the People Podcast, National Constitution Center (Feb. 14, 2019), https://constitutioncenter.org/podcast-the-tennessee-wine-case-and-the-21st-amendment.

[11] Tenn. Att'y Gen. Op. No. 12-59 (2012); Tenn. Att'y Gen. Op. No. 14-86 (2014).

nonresidents and would issue the Ketchums a retail liquor license. With this understanding, the Ketchums applied for a retail liquor license. The Ketchums submitted proof of their Utah residency along with the application. They were told the application was in order and would be placed on the commission's agenda in July 2016.

The Ketchums dove deeply into their retirement funds to pay for the purchase and secured financing. Doug quit his job in Utah, and the family moved to the Bluff City in July 2016, where they have resided ever since. Doug has been unable to find full-time employment since moving, so he lacks health benefits and has struggled to provide care for his daughter.

The other party that sought a retail license was Total Wine & More, a company looking to become the Walmart of alcohol. Total Wine was created as a limited liability company under Tennessee law in 2016, with the objective of opening one or more retail stores in the state. None of its shareholders were, or are, Tennessee residents. Total Wine's representatives met with ABC authorities to discuss opening a store and got the go-ahead, having directly asked about the durational requirement. ABC staff had told Total Wine that the agency did not enforce the durational requirement because of the attorney general's opinions, and that it had issued licenses to other nonresidents. The ABC recommended conditional approval, subject to the deliverance of a certificate of occupancy and an inspection, along with other routine matters. The ABC was scheduled to vote on the application in August 2016.

Without notice, the ABC deferred action. A trade association, the Tennessee Wine and Spirits Retailers Association (the association), threatened to sue the state unless it enforced the durational requirement. Clayton Byrd,[12] then the executive director of the ABC, initiated the lawsuit by filing a declaratory action, essentially asking the federal courts to tell him whether the durational requirement was unconstitutional.[13]

Total Wine invoked the dormant Commerce Clause. The Ketchums agreed and also relied on the Privileges or Immunities Clause at the

[12] Careful observers may note the first named defendant changed in the case headings throughout the proceedings. It is not important because the executive director for Tennessee's alcohol board kept changing.

[13] As the litigation unfolded, the ABC turned to actively defending the durational requirement by adopting the position of the association and ceding its argument to the association.

Supreme Court.[14] Before delving into the lower court proceedings setting up the Supreme Court case, a brief discussion of the pertinent doctrines is in order.

II. A Primer on the Dormant Commerce Clause and the Privileges or Immunities Clause

The dormant Commerce Clause is an offshoot of the Commerce Clause, which provides that "Congress shall have the Power . . . to regulate commerce . . . among the several States."[15] The courts have interpreted the Commerce Clause to have a negative component that limits the states by prohibiting them from discriminating or placing excessive burdens on interstate commerce.[16] Not actually a clause, the dormant Commerce Clause is instead a doctrine that is essentially the obverse of the Commerce Clause.

The dormant Commerce Clause arises from the constitutional concern over states' burdening interstate commerce.[17] Generally speaking, the dormant Commerce Clause protects against state regulations that "erect barriers against interstate trade."[18] Preventing interstate trade wars was one of the original purposes for convening the Constitutional Convention. As the Supreme Court stated in *Hughes v. Oklahoma*, by granting Congress authority over interstate commerce, the Constitution aimed to "avoid tendencies toward the economic Balkanization that had plagued relations among the colonies and later among the states under the Articles of Confederation."[19] The other prominent justification for the dormant Commerce Clause is that it promotes economic efficiency that

[14] The Ketchums had two obstacles to presenting this claim. First, they proceeded under the name of their corporation, Affluere Investments, and the Privileges or Immunities Clause applies to citizens, not corporations. The Ketchums argued that the durational requirement depended on the residency of the Ketchums and thus the license was bound up in the rights of citizens. Brief for Respondent Affluere Investments at 28 n.8, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019) (No. 18-96). Second, the Sixth Circuit had not ruled on Privileges or Immunities Clause grounds, though the Ketchums asked the Supreme Court to review the issue. *Id*. at 29.

[15] U.S. Const. art. I, § 8.

[16] Fulton Corp. v. Faulkner, 516 U.S. 325, 330 (1996).

[17] *Id*. at 330 (quoting Associated Indus. of Mo. v. Lohman, 511 U.S. 641, 647 (1994)).

[18] Lewis v. BT Inv. Managers, Inc., 447 U.S. at 35.

[19] Hughes v. Oklahoma, 441 U.S. 322, 325 (1979); see also Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1794 (2015).

in-state protectionism would undermine.[20] And while the dormant Commerce Clause has its prominent detractors, it continues to be an important aspect of the Supreme Court's interpretation of the Commerce Clause and federalism principles.

Dormant Commerce Clause analysis falls under one of two categories. The first concerns a class of legislation that is virtually per se invalid.[21] The second considers "incidental burdens" on interstate commerce and engages in a balancing test.[22] It is not always easy to slot the legislation into one of the two. The Supreme Court has acknowledged that "there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach."[23] Under either analysis, however, "the critical consideration is the overall effect of the statute on both local and interstate activity."[24]

Two types of laws are considered per se violations of the dormant Commerce Clause: those that are facially discriminatory on out-of-state businesses, and laws that regulate extraterritorial conduct. State regulation of interstate commerce is facially discriminatory when it favors in-state interests over out-of-state ones. [25] A state law with the practical effect of regulating extraterritorial commerce—that is, commerce occurring wholly outside that state's borders, whether or not the commerce has effects within the state—is also a per se violation.[26] Courts will apply the same level of scrutiny to a law that is facially discriminatory as to one that wholly burdens out-of-state activity.[27] The defending state must overcome a presumption of unconstitutionality by demonstrating that the burden serves a legitimate local purpose that could not be adequately served by available nondiscriminatory alternatives.[28]

[20] Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99 (1994).

[21] See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 108 (2d Cir. 2001).

[22] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[23] Brown-Forman Distillers Corp., 476 U.S. at 579 (1986).

[24] *Id.*

[25] Maine v. Taylor, 477 U.S. 131, 148 (1986); Or. Waste Sys., Inc., 511 U.S. at 99.

[26] See, e.g., Healy v. Beer Inst., 491 U.S. 324, 332 (1989); Am. Bev. Ass'n v. Snyder, 735 F.3d 362, 373 (6th Cir. 2013).

[27] Healy, 491 U.S. at 337 n.14; Brown-Forman Distillers Corp., 476 U.S. at 582.

[28] Granholm, 544 U.S. at 489 (quoting New Energy Co. of Ind. v. Limbach, 489 U.S. 269, 278 (1988)).

Commerce Clause challenges have cropped up in subjects as varied as fish, trains, and trucks. True to our Tennessee roots, this may all sound like a country song. Turning to two examples of facially discriminatory laws, consider bait.

In *Maine v. Taylor*, the Court considered a regulation from Maine that prohibited the import of out-of-state bait fish. Finding the regulation facially discriminatory, the Court nonetheless ruled the measure constitutional. Because the regulation saved Maine bait fish from out-of-state parasites, the Court determined that the law served a legitimate local purpose that could not be achieved with a nondiscriminatory alternative. The Court fished around further in *Hughes v. Oklahoma*. *Hughes* concerned an Oklahoma law that banned out-of-state buyers from purchasing Oklahoma minnows. The local purpose was allegedly to address waning minnow stock. Since this goal could be achieved by a nondiscriminatory alternative, specifically, limiting the sale of live minnows to all, the Court found the measure unconstitutional. In both instances, the Court required a high level of justification to expressly burden interstate trade.

For the plaintiff who brings an extraterritorial challenge, the question is "whether the practical effect of the regulation is to control conduct beyond the boundaries of the state."[29] The Commerce Clause generally "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another."[30] A state cannot, for example, force "an out-of-state merchant to seek regulatory approval in one state before undertaking a transaction in another."[31] An extraterritoriality analysis requires a court to consider not only the consequences of the statute itself, but "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."[32]

[29] Healy, 491 U.S. at 336 (citing Brown-Forman Distillers Corp., 476 U.S. at 579).

[30] *Id.* at 337.

[31] Int'l Dairy Foods, Ass'n v. Boggs, 622 F.3d 628, 645 (6th Cir. 2010) (quoting Healy, 491 U.S. at 337)).

[32] Healy, 491 U.S. at 336.

Extraterritoriality cases make up a slender portion of the Commerce Clause jurisprudence, but they are on the rise in the internet age.[33] As states increasingly try to regulate perceived problems online, extraterritoriality challenges are apt to increase as well. Given the borderless nature of the internet, any effort to regulate is doomed to "project its regulation" into other states and "directly regulate commerce therein."[34] The Supreme Court may one day need to weigh in on this issue separately, but states that wish to regulate online businesses would do well to carefully tailor those laws to remain in-state.

Laws that fall under the first slot of dormant Commerce Clause challenges (facially discriminatory and extraterritorial) are, as pointed out above, virtually per se invalid. It should be noted, however, that *taxation* and *regulation* of interstate commerce are two different things.[35] The compensatory tax doctrine allows even facially discriminatory laws to survive in the realm of taxation, so long as they are designed only to make interstate commerce bear a burden already born by intrastate commerce.[36] This is, however, different from the *regulation* of interstate commerce. Under a recognized line of cases, states may not require an out-of-state party engaging in

[33] See, e.g., Am. Booksellers Found. v. Dean, 342 F.3d 96, 104 (2d Cir. 2003); ACLU v. Johnson, 194 F.3d 1149, 1158 (10th Cir. 1999); Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 958 (N.D. Cal. 2006); Publius v. Boyer-Vine, 237 F. Supp. 3d 997 (E.D. Cal. 2017); Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 183–84 (S.D.N.Y. 1997); Cyberspace Communs., Inc. v. Engler, 55 F. Supp. 2d 737, 748 (E.D. Mich. 1999); Backpage.com, LLC. v. Cooper, 939 F. Supp. 2d 805, 836–37 (M.D. Tenn. 2013); Backpage.com, LLC. v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

[34] It is an open question whether state regulations of the internet would always violate the Commerce Clause, given its fundamentally interstate character. The lower courts are all over the map on this question. Compare the cases above with Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493 (5th Cir. 2001); Am. Booksellers Found. for Free Expression v. Strickland, 601 F.3d 622, 628 (6th Cir. 2010); Beyond Sys. v. Keynetics, Inc., 422 F. Supp. 2d 523 (D. Md. 2006); Washington v. Heckel, 24 P.3d 404 (Wash. 2001) (upholding state anti-spam law limited to computers located in Washington or to an email address held by a Washington resident).

[35] See, e.g., Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1324 (9th Cir. 2015) (recognizing the distinction).

[36] Henneford v. Silas Mason Co., 300 U.S. 577, 584 (1937); Fulton Corp. v. Faulkner, 516 U.S. 325, 331–32 (1996); Evco v. Jones, 409 U.S. 91, 93 (1972); Dep't of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252, 254 (1941).

national transactions to qualify to do business in the state absent evidence that the party has sufficiently localized.[37]

Returning to subjects for country songs, the prominent Supreme Court cases in this area examine state efforts to regulate trains and trucks. In *Southern Pacific Co. v. Arizona*, the Court held that an Arizona law that limited the length of train cars was unconstitutional. It placed too high a burden on interstate commerce.[38] There was no evidence that it would actually lead to increased safety. With that ratio of burden-to-benefit, the Court had no problem striking the law as unconstitutional. In *Bibb v. Navajo Freight Lines*, the Court held that an Illinois law requiring trucks and trailers on state highways to have a specific type of mud flap would unduly and unreasonably burden interstate commerce.[39] The Court ruled that the asserted safety benefit of the mud flap was "inconclusive," while the burden was "clear" and "heavy." The constitutional concern overrode the Court's stated great deference to the state in providing safety regulation for vehicles.

Finally, when a facially neutral law has the effect of actually discriminating against out-of-state business, the Court reverts back to the level of scrutiny it applies to facially discriminatory measures. The burden falls back on the state to justify the local benefits of the law and the unavailability of other alternatives. In *Hunt v. Washington State Apple Advertising Co.*, the Court considered a North Carolina law that required all apples shipped into the state to display only the USDA apple grade.[40] While facially neutral, the law discriminated

[37] See, e.g., Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 292 (1921); Shafer v. Farmers' Grain Co., 268 U.S. 189, 198–99 (1925); Hood & Sons v. Du Mond, 336 U.S. 525, 539 (1949) (license); Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 31–32 (1974); Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888 (1988); Johnson Creative Arts v. Wool Masters, 743 F. 2d 947, 954 (1st Cir. 1984); Ford Motor Co. v. Chroma Graphics, Inc., 678 F. Supp. 169 (E.D. Mich. 1987). If the firm localizes (say, by installing an office with staff), they can require a qualification to do business. Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944). But when an out-of-state business "enters the State to contribute to or to conclude a unitary interstate transaction," the state may not regulate without violating the Commerce Clause. Allenberg Cotton Co., 419 U.S. at 32–33 (quoting Union Brokerage Co., 322 U.S. at 211). Complicating this already-complicated doctrine even further, some lower courts have wondered aloud whether *Allenberg Cotton Co.* is a third form of a per se dormant Commerce Clause violation, or how it can be reconciled with *Pike*. See, e.g., BlueHippo Funding, LLC v. McGraw, 609 F. Supp. 2d 576, 591 (S.D. W. Va. 2009).

[38] S. Pacific Co. v. Arizona, 249 U.S. 472, 476–78 (1919).

[39] Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

[40] Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977).

against out-of-state interests because it had the effect of burdening Washington state apple companies. And because the law could achieve the goal of protecting citizens from confusion over the quality of apples through other means, the Court ultimately ruled the measure unconstitutional.

For less obviously discriminatory laws that incidentally burden interstate commerce, the Court uses the *Pike* balancing test. But this test is more deferential and would not be used on something that facially discriminates, such as Tennessee's durational requirement.

The dormant Commerce Clause has its critics who fault it for being constitutionally atextual. At least one active justice—Justice Clarence Thomas—numbers among them. Could other constitutional provisions serve as an alternative way to invalidate the durational requirement? Justice Thomas has suggested the Import-Export Clause[41] or the Privileges or Immunities Clause of the Fourteenth Amendment.[42] How new justice Brett Kavanaugh felt about the dormant Commerce Clause, or whether Justice Neil Gorsuch was receptive to one of the other alternatives, was anyone's guess.

For his part, Justice Gorsuch has demonstrated a willingness to accept a Privileges or Immunities claim as an alternate basis for incorporating constitutional rights against the states.[43] No doubt with an eye to at least Justices Thomas and Gorsuch, who are otherwise receptive to limited-government claims, the Ketchums thus also contended that the durational requirement violated the Privileges or Immunities Clause.

That clause provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In contrast to the Privileges *and* Immunities Clause found in Article IV (and which was raised by Total Wine at the district court level) which protects the privileges and immunities of state citizenship from interference by other states, the Privileges *or* Immunities Clause protects privileges and immunities of national citizenship from interference by other states. Simply stated, Article IV

[41] Camps New Found/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 624–36 (1997) (Thomas, J., dissenting).

[42] Saenz v. Roe, 526 U.S. 489, 521–28 (1999) (Thomas, J., dissenting).

[43] Timbs v. Indiana, 139 S. Ct. 682, 691–92 (2019) (Gorsuch, J., concurring) (regarding the Eighth Amendment's Excessive Fines Clause, see Brianne J. Gorod & Brian R. Frazelle, "*Timbs v. Indiana*: Mere Constitutional Housekeeping or the Timely Revival of a Critical Safeguard," in this volume).

(Privileges and Immunities) protects citizens of other states from the actions of a state in which they do not reside, and the Fourteenth Amendment (Privileges or Immunities) protects citizens from their own state. What precisely those privileges or immunities consist of has been a frequent topic of controversy.

Not long after the enactment of the Fourteenth Amendment, the Court largely put the Privileges or Immunities Clause out to pasture in its seminal decision in the *Slaughter-House Cases*.[44] Yet perhaps the durational requirement could crack the doctrine open. Within the majority and dissent in the *Slaughter-House Cases,* the justices signaled agreement that one of the rights protected by the clause is the right of newly arrived residents of one state to be treated equally to longer-term residents. The decision squarely held that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State."[45] And in *Saenz v. Roe*, the Court struck down a one-year durational residency requirement enacted by California for the receipt of full welfare benefits on Privileges or Immunities grounds. The right of a newly arrived resident to be treated equally in a new state, according to the Court "is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States."[46]

III. A Primer on the Twenty-first Amendment

The durational requirement takes the most basic dormant Commerce Clause principle—that courts will closely and with deep skepticism examine state laws that overtly favor in-state interests over out-of-state interests—and crashes it straight into Section 2 of the Twenty-first Amendment, which expressly recognizes state authority to regulate alcohol.

[44] The Court held that the Privileges or Immunities Clause prohibits states from inhibiting the privileges or immunities possessed by virtue of national citizenship, which does not include a generalized right to economic liberty. Slaughter-House Cases, 83 U.S 36, 79–80 (1872) (listing privileges or immunities: the right to come to the seat of government to conduct business, seek its protection, share its officers, free access to the seaports, peaceably assemble and petition for redress, habeas corpus, the rights secured by treaties with foreign nations, etc.).

[45] *Id*. at 80.

[46] Saenz, 526 U.S at 508.

Alcohol regulation is just different. From a constitutional perspective, we only have the liberty to consume alcohol because of the Twenty-first Amendment, which erased the Eighteenth.[47] The Eighteenth Amendment was enacted in 1919, just after World War I, amid a wave of Progressive fervor that animated a series of constitutional amendments. Prohibitionists were a diverse ideological coalition made up of "racists, progressives, suffragists, populists (whose ranks included a small socialist auxiliary), and nativists."[48] Each of these unlikely allies had a different reason for supporting Prohibition, but "used the Prohibition impulse to advance ideologies and causes that had little to do with it."[49]

The speed with which Prohibition blazed through Congress is staggering (sobering?), but it was in a prime spot to succeed. Prohibition tickled many of the funny bones of the time. For progressive adherents to the rising fashionable science of eugenics, the way forward for improvement of the race lay with Prohibition.[50] They found common cause with moralists who hoped to forever rinse away the stain of alcohol. When the day of Prohibition finally arrived, evangelist Billy Sunday told a congregation of 10,000 that "the reign of tears is over." Historian Andrew Sinclair perfectly describes their eschatological vision: "With hope and sincerity, the prohibitionists looked forward to a world free from alcohol, and by the magic panacea, free also from want and crime and sin, a sort of millennial Kansas afloat on a nirvana of pure water."[51]

The suffragists had reasons of their own to believe that Prohibition would lead to the betterment of American women:

> A drunken husband and father was sufficient cause for pain, but many rural and small-town women also had to endure the associated ravages born of the early saloon: the wallet emptied into a bottle; the job lost or the farmwork left undone; and, most pitilessly, a scourge that would later

[47] See generally, John Kobler, Ardent Spirits: The Rise and Fall of Prohibition (1993 ed.); Andrew Sinclair, Prohibition: The Era of Excess (1962); Daniel Okrent, Last Call: The Rise and Fall of Prohibition (2010); Edward Behr, Prohibition: Thirteen Years that Changed America (1996).

[48] Okrent, *supra* note 47, at 42.

[49] *Id.*

[50] Sinclair, *supra* note 47, at 4.

[51] *Id.*

> in the century be identified by physicians as "syphilis of the innocent"—venereal disease contracted by the wives of drink-sodden husbands who had found something more than liquor lurking in saloons.[52]

Prohibition also spoke to rural anxieties over packed urban areas, brimming with vertically packed tenements and full of beer-swilling immigrants gathering in saloons.[53]

American entry into World War I proved to be the rocket fuel that propelled Prohibition forward. Amid the emotion attending the buildup to war, it was easy to bill prohibition as a wartime food-preservation measure. The prohibitionists were aided by the fact that many of these immigrants were Germans at a time when anti-German sentiments were cresting, and German-American associations and breweries were also actively involved in counter-lobbying. The war supplied a convenient villain for the prohibitionists in the form of the legions of German-Americans with supposedly conflicted loyalties "whose names were wreathed in the scent of malt and hops: Schmidt, Ruper, Pabst, and of course, Busch," who ran well-known breweries. [54] The attitude of the British prime minster embodied the sentiment of the time: "We have three foes—Germany, Austria and drink—and the greatest of these is drink!" A politician named John Strange felt comfortable telling the paper—in Milwaukee, no less—that out of all Germans, "the worst . . . the most treacherous, the most menacing, are Pabst, Schlitz, Blatz, and Miller."[55]

Prohibition had more than just war fever in its favor. The cause had been advancing for decades at the grassroots level. It had everything a cause needs to enact a profound change: organization, money, and purpose. Perhaps most of all, its supporters had the smell of recent success in their nostrils. Some form of prohibition had already been achieved in many states, but especially in rural areas.[56] By 1917, the champions of Prohibition were primed for success while everyone else was focused on the war.

[52] Okrent, *supra* note 47, at 16.

[53] Behr, *supra* note 47, at 47–49, 51, 63, 64; Okrent, *supra* note 47, at 26, 85, 102–03; Kobler, *supra* note 47, at 206.

[54] Okrent, *supra* note 47, at 85, 87.

[55] Kobler, *supra* note 47, at 211; see also Okrent, *supra* note 47, at 100, 170.

[56] Sinclair, *supra* note 47, at 4; Kobler, *supra* note 47, at 206, 217.

But whatever consensus existed at the time, it did not resemble what resulted under Prohibition, and the rapidly expanding urban areas never shared in it in the first place. Section 2 of the Eighteenth Amendment provided that the states and the federal government had "concurrent power" to enforce the amendment, but that quickly proved illusory. In 1919, the Volstead Act overrode all previous dry legislation in the states and declared an intoxicant anything with an alcohol content of .05 or higher.[57] This swept far too broadly. The sort of prohibition enactments that existed before the Eighteenth Amendment took a great variety of forms and did not address individual consumption. Twenty-three states had some type of prohibition, but "very few were as 'bone dry' as the Eighteenth Amendment."[58] Indeed, the prohibitionists had aimed to stop the liquor trade but not to outlaw drinking entirely. "We do not say that a man shall not drink," said Rep. Richmond Hobson, who introduced what became the Eighteenth Amendment in the House. Then, in 1920, in the *National Prohibition Cases*, the Supreme Court ruled that the Supremacy Clause rendered any state legislation that conflicted with federal law, including the constraints of the Volstead Act, preempted.[59] The states which had preceded the federal government in enacting Prohibition ceded enforcement to a woefully inadequate federal government.[60] Prohibition quickly reached a point at which it no longer represented the national will and became unenforceable.

As a consequence of Prohibition's failures, the Twenty-first Amendment, which repealed Prohibition, was particularly solicitous of state-enforcement authority. The Twenty-first Amendment repealed the Eighteenth Amendment in Section 1 and ended nationwide Prohibition, but, in Section 2, it gave control back to the states to regulate alcohol. It provides, "transportation or importation of alcohol into any State . . . for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, shall be prohibited" (emphasis added).

What exactly does that mean? One reading would have it mean that states can enact *any* law and claim it is constitutionally sanctioned, but that reading would produce unacceptable outcomes.

[57] Behr, *supra* note 47, at 78; Kobler, *supra* note 47, at 217.

[58] Okrent, *supra* note 47, at 53, 92, 94.

[59] National Prohibition Cases, 253 U.S. 350, 387 (1920).

[60] Behr, *supra* note 47, at 166.

No one would accept that a race-based liquor law would be constitutional. Clearly the states have constitutional authority to control the transportation and importation of alcohol. But how does this constitutional provision interact with other constitutional limits placed on the state, including the prohibition on state-protectionist measures?

The absolutist reading of Section 2 predominated immediately following the ratification of the Twenty-first Amendment.[61] Across the board, the courts largely viewed alcohol as the constitutional exception, enabling states to do all sorts of things that would otherwise be unconstitutional. This notion would not endure. In *Craig v. Boren*, the Court rejected the notion that the Twenty-first Amendment authorized the states to do something in the realm of alcohol it could not do anywhere else.[62] *Craig* was a challenge to an Oklahoma law that established different drinking ages for men and women—men had to be 21 to drink 3.2 percent beer, but women could drink it at 18. It was argued that Section 2 of the Twenty-first Amendment could save the law, which, while seeming absurd today, was actually an open question. The Court definitively held that there is not "sufficient 'strength' in the [Twenty-first] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause."[63] But discriminatory drinking ages do not concern importation of alcohol into a state, which the Court said was a "regulatory area where the State's authority under the Twenty-first Amendment is transparently clear."[64] That raises the obvious question: what about the Commerce Clause?

This basic question has been before the Court several times. It is clear that states do not have unlimited power over importation and transportation, but they do have powers over alcohol that they would not have for any other product. Where the line is drawn is anything but well-established.

[61] Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d at 614 (quoting Granholm, 544 U.S. at 522).

[62] Craig, 429 U.S. at 209 ("We thus hold that the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case.").

[63] *Id.* at 207.

[64] *Id.*

The Court's first pass on the Twenty-first Amendment gave the states a near-total exemption from the Commerce Clause.[65] Starting in the 1960s, the Court began to beat back that notion.[66] The Court outright held that liquor was not exempt from the Commerce Clause in the 1964 case, *Hostetter v. Idlewild Bon Voyage Liquor Corp.* Yet it was not until the 1984 case of *Capital Cities Cable Inc. v. Crisp* that the Court began to put real parameters on the principle.[67] There, the Court laid out a balancing test: are the state's interests in regulations so "closely related to the powers reserved by the Amendment that the regulation may prevail, even though its requirements directly conflict with express federal policy"?[68] In *Bacchus Imports, Ltd. v. Dias*, decided the same year as *Crisp*, the Court laid out the seminal principle that protectionism tested the Court's indulgence of a state's regulation of alcohol.[69] The Court struck down a preferential tax for certain local Hawaiian liquors, finding, "State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."[70] At that time, this was the Court's clearest articulation of the interplay between the Commerce Clause and the Twenty-first Amendment, and it hinted at a broader lesson.

Officially, the Twenty-first Amendment was no longer a trump card. The Court observed that it was "by now clear" that alcoholic beverages were not "entirely removed from the ambit of the Commerce Clause" because of the Twenty-first Amendment.[71] The notion that the end of Prohibition "somehow operated to 'repeal' the Commerce Clause" when it came to alcohol was described by the Court as "an absurd simplification."[72] Both the Commerce Clause and the Twenty-first Amendment were constituent parts of the Constitution

[65] State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939).

[66] See, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) (Commerce Clause); Dep't of Revenue v. James B. Beam Co., 377 U.S. 341 (1964) (Import-Export Clause); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (Due Process Clause).

[67] Capital Cities Cable Inc. v. Crisp, 467 U.S. 691 (1984).

[68] *Id.* at 714.

[69] Bacchus Imps., LTD v. Dias, 468 U.S. 263, 275–76 (1984).

[70] *Id.* at 276.

[71] *Id.* at 275.

[72] *Id.* (quoting Hostetter, 377 U.S. at 331–32).

and "must be considered in light of the other and in the context of the issues and interests at stake in any concrete case."[73]

The Court instead introduced a balancing test. For state laws that are "mere economic protectionism," the courts must evaluate "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[74] Because in *Bacchus*, the challenged regulation was not designed to promote temperance or any other purpose of the Twenty-first Amendment, but was instead designed to promote a local industry (pineapple wine and okolehao), the Court ruled that the measure unconstitutionally burdened interstate commerce.

In *Granholm v. Heald*, the Court reiterated the core principle that the Twenty-first Amendment provides no exemption from the Commerce Clause.[75] In *Granholm*, the Court struck down a Michigan law that banned the direct sale of out-of-state wine to consumers while allowing in-state sales. The Supreme Court stated that "state policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."[76]

This latter statement comes to full boil in *Tennessee Wine*. Tennessee's durational requirement satisfies a literal read of this statement. Liquor produced out-of-state is treated identically as liquor produced in-state. The durational requirement affects only who can sell wine and liquor at the retail level. Even if it patently discriminates in favor of Tennesseans, it does so only in the realm of *retailers*; it does not discriminate in favor of Tennessee *producers* or a Tennessee *product*. The Ketchums and Total Wine brought a whole other tier of the three-tier system before the Court. But the blatant discrimination in favor of Tennesseans was sure to make the law suspicious.

Larger issues about the regulation of alcohol, in particular the three-tier system, cast a large shadow over the issues here. And as the courts were to engage with the Tennessee durational requirement, they were apt to peer down the road, concerned about the larger implications of their rulings.

[73] *Id.* at 275.

[74] *Id.* at 275–76.

[75] Granholm, 544 U.S at 489.

[76] *Id.* at 463.

The core lesson to be learned from Section 2 of the Twenty-first Amendment seems to be that the regulation of alcohol is constitutionally different because Section 2 makes it constitutionally different. How far does that extend? All that could be said with certainty going into *Tennessee Wine* is that the Twenty-first Amendment is not a total pass on the Commerce Clause, but that states have special authority over alcohol under Section 2, which makes the regulation of alcohol different from the regulation of apples—especially at the retail level inside a state's borders. So how does Tennessee's durational requirement square with those principles?

IV. Procedural Background

The Ketchums and Total Wine carried the day in the lower courts. In the Middle District of Tennessee, District Judge Kevin Sharp held that the durational requirements were unconstitutional under the dormant Commerce Clause, and the Sixth Circuit affirmed.[77] After all, the Sixth Circuit, which includes the Middle District of Tennessee, had already struck a two-year residency requirement for a license to operate a winery.[78]

The Tennessee Wine and Spirits Retailers Association claimed the same logic did not extend past producers because Section 2 afforded states wide latitude to regulate the distribution of alcoholic beverages within their borders. The association also pointed out that several districts had agreed with its interpretation, limiting the reach to out-of-state products.[79] But Judge Sharp found the durational requirement facially discriminatory in violation of the dormant Commerce Clause. Relying on a Fifth Circuit case, *Cooper v. Texas Alcoholic Beverage Commission*, he ruled that the Commerce Clause limits state alcohol regulations differently for each tier in the three-tier system.[80] For producers, the Commerce Clause exerts greater limitations. For retailers and wholesalers, the limitations are less, but even those tiers are not immunized from Commerce

[77] Tenn. Wine & Spirits Retailers Ass'n, 259 F. Supp. 3d at 796–98; Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d at 623–26.

[78] Jelovsek v. Bredesen, 545 F.3d 431 (6th Cir. 2008).

[79] Arnold's Wines, Inc. v. Boyle, 571 F.3d 185 (2d Cir. 2009); S. Wine & Spirits of America, Inc., v. Division of Alcohol & Tobacco Control, 731 F.3d 799 (8th Cir. 2013).

[80] Cooper v. Tex. Alcoholic Beverage Comm'n, 820 F.3d 730 (5th Cir. 2016).

Clause scrutiny. *Granholm* affirmed that Commerce Clause principles apply to the treatment of people and things and not just liquor producers and products. Only in the narrowest of circumstances would state laws mandating "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," be valid under the Commerce Clause.[81]

Judge Sharp was at a loss to come up with a reason why a durational requirement served a state's interest in regulating alcohol. Unlike a requirement that a retailer or wholesaler of alcohol products be physically present, an essential feature in a three-tier system, durational requirements "are not inherent to a legitimate three-tier system."[82] In the absence of a showing that no reasonable, nondiscriminatory alternative existed, the district court struck down the law.

The Sixth Circuit affirmed that ruling in a 2-1 opinion. It agreed that the Twenty-first Amendment did not immunize Tennessee's durational requirement. A flagrantly protectionist state law is not given the same deference that the courts ordinarily accord to combat "the perceived evils of an unrestricted traffic in liquor."[83] The Sixth Circuit asked if the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policy. Agreeing with the Fifth Circuit, the court determined that state alcohol laws are not immune from Commerce Clause analysis simply because they are part of the three-tier system. The Sixth Circuit agreed that a physical presence requirement might be essential to a three-tier system, but it determined that three-tier system could operate perfectly well without durational requirements: "Tennessee's durational-residency requirements do not relate to the flow of alcoholic beverages within the state. Instead, they regulate the flow of individuals who can and cannot engage in economic activities."[84] The court analyzed and rejected the stated rationales for the durational requirement because it

[81] Granholm, 544 U.S. at 472.

[82] Tenn. Wine & Spirits Retailers Ass'n, 259 F. Supp. 3d at 794.

[83] Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d at 615 (quoting Hostetter, 377 U.S. at 276).

[84] *Id.* at 623.

was comfortable that these goals could be pursued in a nondiscriminatory alternative manner.

Judge Jeffrey Sutton dissented.[85] He thought that the Twenty-first Amendment gave states the authority to regulate the sale of alcohol within their borders in all manner of ways. A durational requirement, like "these modest requirements," fits within a state's broad authority. Judge Sutton provided an insightful history of the Twenty-first Amendment, arguing that it was intended to give states authority to do things to alcohol it could not with other articles of commerce. Judge Sutton understood the durational requirement as the natural extension of the accepted rule that the states can require an in-state presence for retailers or wholesalers. If they can do that, they can "define the requisite degree of 'in-state' presence." Retailers are the ones closest to the interests involved in the tight regulation of alcohol, such as drunk driving, domestic abuse, and underage drinking. The durational requirement, therefore, "make[s] sense," by ensuring that retailers "will be knowledgeable about the community's needs and committed to its welfare."[86]

In presenting their case to the Supreme Court, the Ketchums and Total Wine argued that Tennessee's durational requirements were an unconstitutional burden on interstate commerce. The primary issue involved the dormant Commerce Clause. They argued that the Twenty-first Amendment may give the states a high degree of regulatory autonomy, allowing even a total prohibition on importation altogether for teetotaling states that wish to remain dry. But Section 2 does not allow states to so baldly discriminate in favor of its citizens. This, they maintained, is the very sort of economic protectionism that the Constitution was purposed to end when it turned a confederation of states into a nation. Under a straightforward application of *Granholm*, the durational residency requirements violate the dormant Commerce Clause.

But the Ketchums were also interested in raising the Privileges or Immunities Clause issue. They further argued, no doubt with an eye toward the justices skeptical of the dormant Commerce Clause as a theory, that the durational requirement violates the Privileges or Immunities Clause of the Fourteenth Amendment. That provision was

[85] *Id.* at 628–36 (Sutton, J., concurring in part and dissenting in part).

[86] *Id.* at 633.

intended to give people the right to be treated the same as any other citizen when moving to a new state. That includes the right to make a living by obtaining a license for which they were eligible but for the fact that they had not resided in Tennessee for a sufficient length of time.

V. Decision

By a 7-2 vote, the Supreme Court affirmed the Sixth Circuit, striking down the residency requirement as violating the dormant Commerce Clause, notwithstanding the Twenty-first Amendment.[87] In a nutshell, the Court ruled that Section 2 only allowed states to enact measures that were legitimate exercises of their inherent police powers. In-state protectionism was not a legitimate exercise because it did not have a real or substantial tendency to promote the public's health, safety, or welfare. Thus, Section 2 provided no basis to treat retailers of alcohol differently from any other product, and the durational requirement was an impermissible burden on interstate commerce without an adequate justification.

Aside from the core holding, the Court issued its most conclusive renunciation of a broad reading of Section 2 that would generally shield state regulation of alcohol from other constitutional considerations, including the Commerce Clause.[88] The Court also tore down the idea that *Granholm* was limited to producers and products, making its analysis applicable across the three tiers and using reasoning that may have broader implications for laws under the umbrella of the three-tier system.[89] The Court did not seem hesitant to reaffirm the dormant Commerce Clause doctrine in general.[90] And despite a skeptical note about the dormant Commerce Clause, the dissent differed over the meaning of the text of Section 2, leaving the Privileges or Immunities debate for another day.[91]

The breakdown in the two opinions came down to fundamental disagreement over the history of Congress's view of interstate regulation of alcohol before the Twenty-first Amendment and what was

[87] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2474–76.

[88] *Id.* at 2462.

[89] *Id.* at 2471.

[90] *Id.* at 2461 ("In light of this history and our established case law, we reiterate that the Commerce Clause by its own force restricts state protectionism.").

[91] *Id.* at 2477 (Gorsuch, J., dissenting, calling the doctrine "a peculiar one").

intended with Section 2. The majority, authored by Justice Samuel Alito, regarded Section 2 as a restoration of the rights enjoyed by the states to regulate alcohol before the Eighteenth Amendment. After a rigorous historical treatment, the Court concluded that states were only allowed to enact and enforce regulations that promoted public health and safety—applying those rules equally to all alcohol businesses (or would-be businesses)—not in-state protectionism.

The Court began by reaffirming that the regulation of alcohol is not immunized from the other portions of the Constitution.[92] Section 2 restored state authority to regulate alcohol to its pre-Eighteenth Amendment status. So what was that status? The Court looked to history, which "has taught us that the thrust of § 2 is to 'constitutionaliz[e]' the basic structure of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment."[93]

Without question, alcohol had endured "waves of state regulation."[94] The first wave occurred in response to the country's early years, a "time of notoriously hard drinking."[95] Sunday closing laws and licensing requirements followed. The Court accepted these laws, but no particular theory carried the day and "the general status of dormant Commerce Clause claims was left uncertain."[96]

Next came the period following the Civil War. A wave of saloons and attendant social problems prompted fresh alcohol regulations, including total prohibition enacted at the state level. The three-tier system emerged during this period to counter what came to be known as the "tied-house" system, in which an alcohol producer would set up saloon keepers in exchange for exclusively selling that producer's wares. This incentivized saloon keepers to encourage "irresponsible drinking."[97] The three-tier system was a way of creating inefficiencies in the consumption of alcohol by disrupting the incentives created under an integrated "tied-house" system.

[92] *Id.* at 2462 ("we have held that § 2 must be viewed as one part of a unified constitutional scheme").

[93] *Id.* at 2463 (quoting Craig, 429 U.S. at 206).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at n.7.

During this period, the Court heard and rejected several constitutional challenges to state enactments and began to defer to states in the regulation of alcohol. In an observation that was later to prove determinative in this case, the Court emphasized that, under this line of cases, the Court had always insisted the law in question have a "real and substantial relation" to the promotion of public health and safety, and that "mere pretences [sic]" would not suffice.[98]

Furthermore, the Court's dormant Commerce Clause cases during this period needed to be contextualized because Congress was to fashion its legislation in response. An understanding of this dynamic proved to be critical to the Court's understanding of Section 2's limitations.

By the late 19th century, the Court's Commerce Clause jurisprudence had matured to a point at which the consensus view was that states could not discriminate against the citizens and products of other states, including alcohol.[99] States retained the authority to regulate alcohol under their police powers, but the Court continued to impose meaningful limits on a state's exercise of its police powers. In *Mugler v. Kansas*, the Court stressed that any regulation, even an alcohol regulation, needed to have a "bona fide" relation to protecting the public.[100] Nor was the Court content to ignore facially neutral laws when they placed an impermissible burden on interstate commerce.

Where the boozy dance between Congress and the Court started to become awkward relates to what became known as the "original package doctrine."[101] For the Court, the original package doctrine set the "outer limits" of Congress's ability to regulate interstate commerce. Under the original package doctrine, states were prohibited from regulating goods shipped in interstate commerce while they were still in their original package because they had yet to be "comingled with the mass of domestic property subject to state jurisdiction."[102]

[98] *Id.* at 2464 (quoting Mugler v. Kansas, 123 U.S. 623, 661 (1887)).

[99] *Id.* (citing Walling v. Michigan, 116 U.S. 446, 460 (1886)).

[100] *Id.* (quoting Mugler, 123 U.S. at 661).

[101] *Id.* (quoting Granholm, 544 U.S. at 477).

[102] *Id.* at 2465.

This created a real difficulty for dry states because it essentially established an end run around Prohibition. States that made a democratic choice to be alcohol-free saw that decision hampered if they could not inhibit the importation of out-of-state alcohol. The perverse effect, the Court recognized, was to "confer[] favored status on out-of-state alcohol, and that hamstrung the dry States' efforts to enforce local prohibition laws."[103]

Congress passed two laws to address this anomaly: the Wilson Act and the Webb-Kenyon Act. Both the majority and dissent in *Tennessee Wine* agreed that Section 2's language was modeled on Webb-Kenyon, but they fundamentally differed on what that language meant. First was the Wilson Act of 1890. To address the dormant Commerce Clause, Congress proposed to directly involve itself in the interstate commerce of alcohol. The Wilson Act left it to each state to determine whether to admit alcohol. The critical provision specified that alcohol "transported into any State or Territory" was subject "upon arrival" to the same restrictions imposed by the state "in the exercise of its police powers" on alcohol produced in the state. The Wilson Act, therefore, attempted to equalize the favoritism shown toward out-of-state alcohol under the original package doctrine.

The Wilson Act failed to alleviate the problem faced by dry states. In two cases, *Rhodes v. Iowa* and *Vance v. W.A. Vandercook Co.*, the Court construed the Wilson Act's reference to the "arrival" of alcohol to mean delivery to the *consignee*, not arrival within the state's borders.[104] Thus, the dry states continued to be plagued by the problem that the Wilson Act was supposed to fix. With states still helpless to stem the influx of out-of-state alcohol, Congress enacted the Webb-Kenyon Act.

Passed in 1913, Webb-Kenyon aimed to give the states more control to regulate the importation of alcohol. The law provided that the shipment of alcohol into a state, in the original package or otherwise, "in violation of such State," was prohibited. The Court observed the odd way in which Webb-Kenyon went about this enactment. Instead of directly conferring a power on the states—feared by some

[103] *Id.*

[104] Rhodes v. Iowa, 170 U.S. 412 (1898); Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898).

at the time as a potential unconstitutional delegation of Congress's legislative power over interstate commerce—Webb-Kenyon instead adopted a negative: prohibiting conduct that violated state law. However odd the approach was, Webb-Kenyon's language was the model for Section 2.

But Webb-Kenyon fell short as well. Unlike the Wilson Act, which directly mandated equality between in-state and out-of-state alcohol, Webb-Kenyon contained no explicit mandate for the reason explained above. And unlike the Wilson Act's reference to laws "enacted in the exercise of its police powers," Webb-Kenyon applied to "any law of such state." Such a sweeping statement was bound to attract the argument that Section 2 functioned to mean that literally "any" state law, no matter how much it might burden interstate commerce, had congressional imprimatur. But that argument was put away in *Granholm* when the Court rejected the notion that Webb-Kenyon acted to authorize even protectionist laws.

The *Tennessee Wine* decision built on *Granholm*'s foundation.[105] Before Webb-Kenyon, the Court had already limited the validity of state alcohol regulations. Laws that were pure protectionism would not avoid scrutiny merely because they were "disguised as exercises of the police powers."[106] Webb-Kenyon, by regulating interstate commerce in alcohol, could address any dormant Commerce Clause problems, but did not and could not override either (1) the Constitution, or (2) "the traditional understanding regarding the bounds of the States' inherent police powers."[107] Turning to the Wilson Act and Webb-Kenyon's references to state laws, the Court determined that the Wilson Act "merely restated" that state laws must be valid under the state's police powers, and that "consequently, there was no need to include such language in Webb-Kenyon."[108]

This took the Court to the repeal of Prohibition and the decision's core reasoning: Section 2 only "constitutionalized the basic understanding of the extent of the States' power to regulate alcohol that prevailed before Prohibition,"[109] and the Commerce Clause "did

[105] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2464–65.

[106] *Id.* at 2467.

[107] *Id.*

[108] *Id.*

[109] *Id.* (citations omitted).

not permit the States to impose protectionist measures clothed as police-power regulations."[110] The Court's decision boiled down to this statement: "the aim of Section 2 was not to give States a free hand to restrict the importation of alcohol for purely protectionist purposes."[111] This would prove fatal for Tennessee's durational requirement.

The Court did not credit the argument that *Granholm* only limited the state's ability to discriminate against one tier of the three-tier system: producers and products. If Section 2 was to give the states exceptional authority to institute protectionist laws over alcohol, then out-of-state production and producers would have been the ones most likely targeted for exceptional regulation. They are, after all, the ones responsible for that which Section 2 directly addresses: the importation of alcohol. Section 2 does not mention retail sales at all, unlike importation, so it would be counterintuitive if states had authority under Section 2 to engage in protectionism at the retail level when they lacked such authority for producers. *Granholm* should be understood as prohibiting state discrimination against out-of-state economic interests, not just producers.

The Court also rejected the justification of the durational requirement as a fair reading of its approval of the three-tiered system. *Granholm* may have "spoke approvingly" of the model, but it would be too much to understand it as blessing "every discriminatory feature that a State may embed into its three-tiered scheme." The Court observed that some of its cases immediately following the Twenty-first Amendment may have been "overly expansive" in construing Section 2's authority, and that some state laws "can no longer be defended."[112]

The Court returned to *Mugler* as well to emphasize that states did not historically enjoy "absolute authority to police alcohol within their borders."[113] "[T]he Court's police power precedents required an examination of the actual purpose and effect of a challenged law."[114] This meant that, despite Section 2 giving regulatory authority to

[110] *Id.* at 2468.

[111] *Id.* at 2469.

[112] *Id.* at 2472.

[113] *Id.* at 2473.

[114] *Id.*

Tennessee which it would not otherwise enjoy, Tennessee could not rely on "mere speculation" or "unsupported assertions" to sustain its residency requirement. The effort to justify the residency requirement, was "implausible on its face" because the stated objectives (such as ensuring retailers are available for process in state courts, or ensuring fitness), could be achieved by other, nondiscriminatory means. The measure failed because the "predominant effect" was protectionism, not the protection of health and safety.[115]

The dissenting justices, Gorsuch and Thomas, took a different view. They saw the dormant Commerce Clause as allowing Congress to "authorize[] States to adopt laws favoring in-state residents," which is precisely what it did with Webb-Kenyon.[116] Under the Wilson Act, Congress had authorized states to regulate the importation of alcohol, which ought to have alleviated the Commerce Clause problem, but the Court "did not seem to get the message." Webb-Kenyon was an even more sweeping law intended to remove alcohol from the purview of interstate commerce considerations. The dissenters agreed that Section 2 was modeled on the Webb-Kenyon Act. They regarded the same language and history as the majority but came to an opposite conclusion. To the dissent, those who ratified the amendment wanted the states to regulate the sale of alcohol "free of judicial meddling under the dormant Commerce Clause—and there is no evidence they wanted judges to have the power to decide that state laws restricted competition 'too much.'"[117] Competition and lower prices might actually have been perceived to be vices, not virtues, when it came to alcohol. Under this interpretation, the point of Section 2 was to allow states to decide how much free trade they wanted when it came to alcohol.

The dissent signaled that it did not intend to follow the association all the way down into an absolutist reading of Section 2. In response to the hypothetical question challenged by the majority—whether a state might pass a law restricting licenses to people whose ancestors resided in the state for 200 years—the dissent agreed that the law would be unconstitutional under the Fourteenth Amendment for lacking a rational basis (interestingly, the same reasoning by

[115] *Id.* at 2474.

[116] *Id.* at 2477 (Gorsuch, J., dissenting).

[117] *Id.* at 2481.

the Court in the *Mugler* opinion favored by the majority).[118] As long as the law had a "rational relationship to a legitimate state interest," then it should stand. But no special concerns over interstate commerce should attend when the people had spoken through Section 2 of the Twenty-first Amendment and Webb-Kenyon before that.

The durational requirement could pass "easily" under the dissent's test.[119] A residency requirement was a reasonable way to achieve oversight, even if it might not have been the only way. The dissent thought there was a good reason to treat producers differently under *Granholm*. The dissent further wondered how the lower courts were supposed to determine when protectionism "predominates" and whether discouraging competition did not count as a public-health benefit. In the end, the dissent criticized the majority for imposing its own "free-trade rules for all goods and services in interstate commerce," undoing the compromise of the Twenty-first Amendment.[120]

VI. What's Left?

The obvious question resulting from the *Tennessee Wine* decision surrounds the inevitable line-drawing involved in determining "[w]here the predominant effect of a law is protectionism, not the protection of public health or safety."[121] It is safe to say that in many states the liquor lobby enjoys a high degree of influence. Until this case, all parties may have operated under the assumption that they more-or-less had a constitutional free pass, which was certainly advantageous to the liquor lobby. Undoubtedly, all too many states have alcohol laws on the books with dubious health-and-safety rationales.

But the three-tier system is now no longer the "full stop" end of the constitutional conversation. All nine justices appear to accept the conventional wisdom that the three-tier system is itself perfectly fine, but the majority expressly recognized that laws are not shielded from judicial scrutiny merely because they fall under the umbrella of the three-tier system. As long as a law is not an "essential feature of a three-tier scheme," it can face substantial judicial engagement that would require a claim made under the police

[118] *Id*. at n.7.

[119] *Id*. at 2482.

[120] *Id*. at 2484.

[121] *Id*. at 2474.

powers to be linked to an articulable and evidence-based public health and safety justification.[122] And the explicit requirement that a justification be supported by something other than "mere speculation" or "unsupported assertions"[123] will obligate states to muster evidence that a challenged regulation achieves a public health and safety objective. For many alcohol-related laws, a state may find this impossible. Factoring in that the courts are no longer confined to the products and producers tier, there may be many liquor law challenges in the offing.

Given that every stated justification failed in *Tennessee Wine*, one wonders under what scenario a protectionist alcohol law would ever prevail. Justice Gorsuch was certainly right that reducing competition in the liquor market and thereby raising prices and reducing demand now appears to be an insufficient justification under the majority's rationale. So what does Section 2 allow a state to do to alcohol that it could not do to apples? It will be an active question how much protection of in-state liquor interests states may engage in before the courts intervene.

Behind the subject matter of liquor and protectionism, the larger, abstract debate about the dormant Commerce Clause remains. Whether the Privileges or Immunities Clause of the Fourteenth Amendment prohibits protectionist laws like the durational requirement was never addressed. The dissent never mentioned it. Somewhat surprisingly, the dissent showed no real interest in discussing the dormant Commerce Clause at all. Justice Gorsuch's dissenting opinion was mostly grounded in a disagreement over the meaning of Section 2, more or less accepting the majority's premise about the limitations on state authority under the dormant Commerce Clause, then diverging from the majority's understanding of the constitutional history behind Section 2.

The looming conservative argument over alternative constitutional theories will have to wait. For its part, the dormant Commerce Clause appears alive and well, with the majority's vigorous utilization of the doctrine gaining seven votes, including Justice Kavanaugh. The Ketchums probably did not care how they won, but to the cheerleaders of a Privileges or Immunities revival, the

[122] *Id*. at 2471.

[123] *Id*. at 2473.

victory probably tasted like Texas beef barbecue: better than nothing, but not as satisfying as the real deal.[124]

The real impact of the *Tennessee Wine* decision may prove to be the portion of the decision addressing the limitations on the police powers. Once the Court concluded that Section 2 did "not confer limitless authority," the Court turned to an inquiry wherein it asked "whether the challenged requirements can be justified as a public health or safety measure or on some other legitimate non-protectionist ground."[125] The Court ruled that Section 2 only authorized the state to enact measures that were legitimate exercises of the police powers. The Court then provided strong guidance, both on what constituted a legitimate exercise of the police powers and how courts were to evaluate those claims.

According to the Court:

- The police powers were "not understood to authorize purely protectionist measures with no bona fide relation to the public health or safety."[126]
- An exercise of the police powers "must have a *'bona fide'* relation" to the public's health, morals, or safety.[127]
- "Mere pretences [sic]" could not sustain a law. Neither could "speculation," or "unsupported assertions."[128]
- A statute "purporting" to protect the public health, safety, or morals must have a "real or substantial relation to those objects."[129]
- "The Court's police-power precedents required an examination of the actual purpose and effect of a challenged law."[130]

[124] Everyone knows that real barbecue is made with pork.

[125] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2474.

[126] *Id*. at 2462 n.5.

[127] *Id*. at 2464 (emphasis original).

[128] *Id*. at 2474 (quoting Mugler, 123 U.S. at 661) (cleaned up).

[129] *Id*. at 2464.

[130] *Id*. at 2473 (quoting Mugler, 123 U.S. at 661) (cleaned up) ("It does not at all follow that every statute enacted ostensibly for the promotion of 'the public health, the public morals, or the public safety' is 'to be accepted as a legitimate exertion of the police powers of the State.'").

- The Wilson Act only shielded laws enacted under its police powers "which, as we have seen, applied only to *bona fide* health and safety measures."[131]
- States cannot adopt laws "with no demonstrable connection" to those interests.[132]

The revitalization of *Mugler* authorizes courts to meaningfully scrutinize any exercise of the police powers to ascertain whether it has an actual public health and safety rationale, as well as whether it has any real or substantial tendency to promote those goals. Relying on *Mugler*, the Court took a view of judicial scrutiny that requires an examination of the "actual purpose and effect of a challenged law."[133] The Court did exactly that in *Tennessee Wine*. They analyzed the purported justifications for the residency requirement, even ones that were facially plausible, putting them up to the light of logic and facts and disregarding them, either because they were disproven or because the Court thought Tennessee could achieve its goals by alternative means. The Court's adoption of the rational basis test as envisioned in *Mugler* is thus significant on this basis alone and has application to future rational basis cases.

As a discussion of the limits of the police powers, this analysis exists independently of Commerce Clause doctrine. The Court relied upon *Mugler*, a Fourteenth Amendment case,[134] to rule that Section 2 could not mean that states had authority to enact discriminatory regulatory requirements because states never had that authority under their police powers in the first place.[135] Instead, the Court assessed the proffered justifications, rejecting them one by one. And if the state's police powers were so limited even in the

[131] *Id*. at 2466 (emphasis added).

[132] *Id*. at 2474.

[133] *Id*. at 2473. One commentator has promoted *Mugler* as a vehicle to fix the "broken" substantive due process doctrine. Jeffrey D. Jackson, Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment, 45 U. Rich. L. Rev. 491 (2011).

[134] Mugler, 123 U.S. at 653, 665 ("[T]he legislature, under the guise of that power, cannot strike down innocent occupations and destroy private property, the destruction of which is not reasonably necessary to accomplish the needed reform.").

[135] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2473 (citing Mugler, 123 U.S. at 661) ("the Court's police-power precedents required an examination of the actual purpose and effect of a challenged law").

field of alcohol, where the states enjoy special authority to regulate the distribution of alcohol in their borders, then they are certainly at least as circumscribed when it comes to other police-powers enactments.

Tennessee Wine thus refines the analysis for what a court is supposed to do when offered a police-powers justification. It reaffirms that a state's police powers are limited to those which actually protect the public, something the courts are competent to judge. Protectionism of in-state interests alone failed to protect the public in this case. Moreover, the courts do not uncritically accept the government's proffered justifications. Instead, the courts examine those justifications to determine whether they are bona fide and whether the challenged regulation has a real or substantial tendency to promote the public health, safety, or moral well-being. The Court's logic would obtain when a law is challenged under the rational basis test; any law with no real tendency to promote public health or safety would be a law that is constitutionally irrational.[136]

The related question would be how to evaluate any kind of protectionism, even those that exist not to protect in-state residents, but a discrete industry? As it stands, a circuit split exists over this very question.[137] *Tennessee Wine* bodes ill for the pro-protectionism circuits. About the only thing on which the two dissenting justices appeared to agree was that all state laws must bear a rational

[136] The courts of Tennessee frequently conflate the question of whether a regulation has a rational basis with whether it is a legitimate exercise of the police powers. See, e.g., Estrin v. Moss, 430 S.W.2d 345, 348 (Tenn. 1968) ("If the legislation is for the beneficial interest of the public health, then it constitutes a reasonable exercise of police power. . . . The sole test of the constitutionality of any particular classification is that it must be reasonable; that is, made up on a reasonable basis.") (citing Tenn. Bd. of Dispensing Opticians v. Eyear Corp., 400 S.W.2d 734, 741 (Tenn. 1966)); see also, State Personnel Recruiting Services Bd. v. Horne, 732 S.W.2d 289, 291 (Tenn. Ct. App. 1977).

[137] Compare Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) (protectionism of a discrete interest group is not a legitimate governmental purpose), Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate government interest."), and St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) (mere economic protectionism of a particular industry is not a legitimate governmental purpose), with Sensational Smiles LLC, v. Mullen, 793 F.3d 281, 287 (2d Cir. 2015) ("Much of what states do is to favor certain groups over others on economic grounds. We call this politics."), and Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004).

relationship to a legitimate state interest.[138] And the dissent gave no reason to think that the durational requirement would have been constitutional for anything other than alcohol.

That line of thinking, in turn, bears on the application of the rational basis test. In evaluating whether the law was a legitimate exercise of the police powers, "justified as a public health or safety measure or on some other legitimate non-protectionist ground," the Court appeared to utilize the rational basis test or something indistinguishable from it.[139] Commentators, fairly or not, commonly characterize rational basis scrutiny as having two forms: rational basis and rational basis "with bite."[140] Under rational basis with bite, the courts consider whether the actual legislative purpose is a proper one and whether the law has any meaningful tendency to promote those objectives.[141] Under the more deferential form, the courts merely ask if there is a rational justification for a purported law. It is not necessary that the government prove that the law is rational if it is supported by rational speculation.[142] Under *Tennessee Wine*, a law must have a "real and substantial" relation to an actual public health or safety goal. That looks a lot like the rational basis with bite used by the Supreme Court in *Cleburne*. And given that Section 2 is supposed to give states more regulatory authority than they ordinarily have, it is illogical to suppose that a less exacting form of judicial scrutiny would attend an evaluation of state power outside the realm of alcohol regulation.

Tennessee Wine refines the standard for evaluating the limits on the government's police powers and permissible scope of judicial scrutiny. That's a very important issue and it's currently undergoing a revitalization[143]—a pretty interesting result for a little case about good ol' Tennessee spirits.

[138] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2477–84 (Gorsuch, J., dissenting).

[139] *Id.* at 2474.

[140] See Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 98–99 (Tex. 2015) (Willett, J., concurring); Timothy Sandefur, Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity," 25 Geo. Mason U. C.R. L.J. 43, 45 (2013).

[141] See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985).

[142] See, e.g., FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

[143] See generally, Clark M. Neily III, Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government (2013).