HISTORY TURNED "SIDEWAYS": *GRANHOLM V. HEALD* AND THE TWENTY-FIRST AMENDMENT

In the past decade, there has been a tremendous spike in consumer interest in wine.[1] This growth in interest has corresponded with the rise of the Internet as an integral part of our everyday lives. Consumers have generally reaped the benefits of online shopping, enjoying the luxury of purchasing products from thousands of miles away and having them shipped directly to their front door. But to the dismay of oenophiles, the majority of states had laws prohibiting or severely restricting consumers' ability to purchase wine directly from out-of-state suppliers. Many of these states allowed direct wine shipments from in-state wineries. The out-of-state suppliers were limited to selling to in-state alcoholic beverage distributors, who in turn sold their wines to retailers, who in turn sold them to consumers. This meant that small wineries, with insufficient product to make it economically feasible for distributors to sell their products, had no way of reaching customers in such states. State bans on interstate direct shipping represented the single largest regulatory barrier to the expansion of e-commerce in wine.[2] However, with the Supreme Court's recent decision in *Granholm v. Heald*,[3] these regulatory practices were found to violate the Interstate Commerce Clause and therefore deemed unconstitutional.

Notwithstanding the positive effects the decision may have for wine lovers, the decision runs contrary to the meaning, spirit and history of the Twenty-first Amendment to the United States Constitution.

Despite contemporary attitudes, American law has not treated alcohol as an ordinary article of commerce. It remains unique, having necessitated not one, but two constitutional amendments. Written after the failure of the nation's "great experiment" with prohibition,[4] the Twenty-first Amendment secured for the states, once and for all, complete control over the regulation of alcohol.

Given the Court's history in interpreting laws governing alcohol, the *Granholm* decision is not entirely surprising. *Granholm* is just the latest in a history of decisions in which the Court

---

[1] *See* FTC—POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 3-5 (July2003), http://www.ftc.gov/os/2003/07/winereport2.pdf (last visited Oct. 16, 2005).

[2] *Id.*

[3] 125 S. Ct. 1885 (2005).

[4] U.S. CONST. amend. XVIII. The Eighteenth Amendment, which implemented federal prohibition, is commonly referred to as the nation's "Great Experiment."

misconstrued Congressional attempts to move the sale of alcoholic beverages outside the confines of the commerce clause of the Constitution and to delegate to each state the sole responsibility of regulating its sale within the state's borders.

Part I will trace how early Court decisions frustrated Congress' numerous attempts to empower state regulation of alcohol, leading up to Prohibition. Part II will discuss section 2 of the Twenty-first Amendment as well as the Court's subsequent recognition of the states' complete and plenary control over alcohol. Part III will examine the decision in *Granholm v. Heald*, and concludes that this latest departure from the Court's earlier Twenty-first Amendment jurisprudence reverts the law to earlier misinterpretations of federal law. Part IV will consider the possible implications of *Granholm*.

I. THE SUPREME COURT'S ALCOHOL DECISIONS BEFORE PROHIBITION

During the nineteenth century, Americans convinced of the addictive evils associated with alcohol began advocating temperance. In 1851 Maine introduced prohibition laws.[5] Before the end of the decade a dozen other states followed Maine's example.[6]

In 1869, in response to declining support due to the Civil War, advocates of liquor reform created the Prohibition Party, which presented prohibitionist candidates for political office.[7] Similar groups sprung up all over the country, including the Women's Christian Temperance Union in 1874. These groups convinced the legislatures in many states to adopt prohibitions or local-option laws, which gave individual communities within the state the option of banning alcohol.[8] The Supreme Court had upheld the constitutionality of a state's ban on the manufacture or sale of alcohol within its borders as a valid exercise of its police power as early as 1847.[9] The Court reaffirmed this right in 1887 with *Mugler v. Kansas*, although that decision was limited to a prohibition on the manufacture and sale of alcohol within the state for personal

---

5 *See generally* SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 899-900 (1965).

6 *Id.*

7 *See generally* DONALD BARR CHIDSEY, ON AND OFF THE WAGON 23-56 (1969).

8 *Id.*

9 Thurlow v. Massachusetts (The License Cases), 46 U.S. 504, 577 (1847) ("[I]f any State deems the retail and internal traffic in ardent spirits injurious to its citizens . . . I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.").

consumption (as opposed to commercial exports).[10]

These tactics proved to be of limited success, mainly because alcohol produced in non-prohibition states or areas were still being imported into dry jurisdictions. In response, some states expanded their laws to prohibit the importation into the state of liquor produced outside the state.

The constitutionality of such laws was quickly challenged, and in *Bowman v. Chicago N.W. Railway Co.* the Court found that such statutes violated the Commerce Clause.[11] Distinguishing *Bowman* from earlier decisions, the Court declared that while states have the right to ban the sale of liquor after it had been brought into its jurisdiction, citizens have an antecedent right to import the alcohol.[12] While recognizing the dilemma this created for dry states in their attempt to prevent the flow of alcoholic beverages into its borders, the Court reiterated its established Commerce Clause doctrine: "[States] cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of other States of the Union in order to effect its end, however desirable such regulation might be."[13] Moreover, the Court invoked the dormant Commerce Clause, first articulated in *Willson v. Blackbird Creek Marsh Co.*,[14] asserting that Congress' silence on the regulation of alcohol indicated its intention for commerce in that area to be unimpeded by the states.[15]

A state's power to control the use and sale of alcohol was further limited by the Court's decision in *Leisy v. Hardin*, where it was held that prohibition states could not ban the sale of imported liquor in its original packaging.[16] Relying again on dormant Commerce Clause principles, the Court rationalized that imported alcohol retained its character as an article of interstate commerce as long as it remained in its original packaging, and therefore any regulation was solely within the plenary power of Congress.[17] If states wanted to prohibit the sale of imported alcohol they needed

---

[10] Mugler v. Kansas, 123 U.S. 653, 655 (1887). Although the Kansas statute did in fact ban the sale and manufacture of alcohol for export, rather than use it as an opportunity to address the constitutionality of such a ban, the Court specifically chose to limit its decision to its facts. ("We need only say . . . that there is no intimation in the record that the beer . . . defendants manufactured was intended to be carried out of the State . . . And, without expressing an opinion . . . we observe that it will be time enough to decide a case of that character when it shall come before us.") *Id.* at 674.

[11] Bowman v. Chicago & N.W. Railway Co., 125 U.S. 465, 492-93 (1888).

[12] *Id.* at 479.

[13] *Id.* at 493.

[14] Willson v. Blackbird Creek Marsh Co., 27 U.S. 245 (1829).

[15] *Bowman*, 125 U.S. at 495.

[16] Leisy v. Hardin, 135 U.S. 100, 124-25 (1890).

[17] *Id.* at 126.

"congressional permission."[18] As a result of *Leisy*, not only were dry states unable to prevent the importation of alcohol, as was decided in *Bowman*, but they also were powerless to stop sales of the imported alcohol. Within a month of the *Leisy* decision, alcohol purveyors had opened "original package houses" and "supreme court saloons" in every dry state.[19] Consequently, the earlier victories of the prohibition movement were rendered all but moot.

Congressional response was swift. Within six months it passed the Wilson Act, so named for Senator Wilson of Iowa, whose state law had been declared unconstitutional by *Leisy*.[20] Congress described it as "an act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases."[21] Essentially, Congress intended the Act to give states legislative authority over all intoxicating liquors brought into its jurisdiction. The statute was intended to be the explicit "congressional permission" the Court said in *Bowman* and *Leisy* was necessary to strip imported alcohol of its interstate commerce clause protection and subject it to local law.

Indeed, the Court recognized the constitutionality of the Wilson Act in *In re Rahrer*[22], affirming a Kansas man's conviction for selling imported liquor in violation of state law. The Court conceded that "[C]ongress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature."[23] Thus it appeared the loopholes that earlier Court decisions had exposed and that alcohol purveyors had exploited were finally closed by act of Congress.

However, subsequent decisions reduced the Wilson Act to a nullity and returned prohibition states to the position of impotence they occupied prior to the Act's enactment. In the first

---

18 *Id.* at 124.

19 *See* RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT 56 (1995) ("The Supreme Court's interstate commerce decisions created an 'original package business' that threatened all liquor controls and created a crisis in alcohol policy . . . "). *Id.* at 57.

20 *Leisy* at 125.

21 26 Stat. 313 (1890) (now codified as 27 U.S.C. § 121 (2005)):

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

22 *In re* Rahrer, 140 U.S. 545, 561 (1891).

23 *Id.* at 560.

of these decisions, *Scott v. Donald*[24], the Court struck down a South Carolina law forbidding the importation of alcohol by anyone except certain state officers. South Carolina permitted the sale and consumption of alcohol, but it attempted to create a monopoly on distribution controlled by the state. Therefore, both in and out-of-state manufacturers were prohibited from selling alcohol directly to consumers, and instead were required to sell to the state which acted as the exclusive dispensary.[25] The Court considered certain provisions of the statute requiring state officials to purchase supplies from the brewers and distillers in-state and giving discriminatory tax-breaks to domestic wineries.[26] Rather than strike down these specific provisions, the Court made its decision in large part on South Carolina's ban on the direct shipment of out-of-state liquor for personal use.[27] The Court found that because South Carolina did not allow consumers to directly purchase liquor from outside the state on the same terms they could purchase from the state dispensaries, the system was unconstitutionally discriminatory.[28] Furthermore, the Court reasoned that because the sale and manufacture of alcohol was legal in South Carolina (albeit restricted), the statute could not be reasonably seen as an attempt to protect its citizens from adulterated goods.[29] The Court found that in passing the Wilson Act, Congress did not intend to permit a state to pass laws that were discriminatory.[30] As a result, because South Carolina's dispensary law was not within the scope of the Wilson Act, it was an invalid exercise of police power.[31]

This decision ran contrary not only to the plain meaning of the Wilson Act but also to its legislative intent. As the dissent accurately pointed out:

> [I]f as [sic] state cannot prohibit her own citizens from importing liquors, as well as buying them at home, the 'Wilson bill' is set at naught, and the prohibitory laws of the several

---

24 Scott v. Donald, 165 U.S. 58 (1897).

25 *Id.* at 91-93.

26 *Id.* at 92-93.

27 *Id.* at 99-100 ("The prohibition of the importation of . . . [alcohols] of other States by citizens . . . for their own use is made absolute, and does not depend on the purity or impurity of the articles . . . and thus those citizens . . . are deprived of the exercise of their own judgment and taste in the selection of commodities.").

28 *Id.* at 100.

29 *Id.*

30 *Id.* (The Wilson Act "was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce."). *Id.*

31 *Id.* at 101.

> States rendered inoperative in a vital particular. The fact that these liquors were imported for complainant's own use and consumption, instead of for sale, raises no question under the Federal Constitution. Both are under the ban of the statute.[32]

Scott did not go unnoticed by Congress. Soon after the decision, Senator Tillman of South Carolina proposed an amendment to the Wilson Act granting States "absolute control of . . . liquors or liquids within their borders by whomever produced and for whatever use imported."[33] While it passed the Senate, the House Judiciary Committee amended the bill to include a ban on discriminatory practices towards goods of other states. The proposed amendment would have kept *Scott* intact.[34] Consequently, the amendment failed to pass the House.[35]

Subsequent decisions further undermined the Wilson Act. In *Rhodes v. Iowa*, the Court found unconstitutional an Iowa law prohibiting the knowing delivery of alcohol within the state's borders.[36] Although the Court concurred that the Wilson Act allowed states to prohibit the sale of imported liquor upon arrival, it concluded that "arrival" meant only after the alcohol was delivered to the consignee.[37] Thus the *Rhodes* decision sweep was even broader than *Scott*. It protected interstate liquor shipments regardless of whether they were for personal use. Then, in *Vance v. Vandercook Co.*, the Court held that the "arrival" language in the Wilson Act proscribes the state's ability to place regulatory conditions on the importation of alcohol.[38] These interpretations confounded the plain language and intent of the Wilson Act, which makes no mention of arrival as being to a specific destination or place within the state.[39]

Paradoxically, by finding that a citizen had a constitutional

---

32 *Id.* at 107 (Brown, J., dissenting).

33 30 CONG. REC. 2612 (1897).

34 H.R. REP. No. 667, 55th Cong., (2d Sess.1898).

35 *Id.*

36 Rhodes v. Iowa, 170 U.S. 412, 426 (1898). The Iowa law at issue made it illegal for carriers who knew they were delivering alcohol to a consignee in Iowa, as opposed to carriers merely passing through Iowa as part of a delivery to another state. *Id.* at 417-419.

37 *Id.* at 421-23.

38 Vance v. Vandercook Co., 170 U.S. 438 (1898). In *Vance*, the state of South Carolina enacted a law similar to the one found unconstitutional in *Scott v. Gardner*. However, the new law removed the discriminatory clauses and allowed citizens to import out-of-state alcohol for personal use after receiving approval from a state chemist as to its purity. The Court found this importation regulation to be "wholly incompatible with and repugnant to the existence" of one's "constitutional right" to import alcohol for personal use. *Id.* at 455.

39 26 Stat. 313 (1890) (now codified as 27 U.S.C. § 121 (2005)). "All . . . intoxicating liquors . . . transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State . . . " *Id.*

right to import alcohol for personal use, the Court created a perverse form of discrimination in favor of interstate commerce. While state law prohibited in-state manufacturers from selling alcohol directly to consumers, out-of-state manufactures faced no such bar. Prohibition states were deluged with liquor sent by people from other States under the shelter of the Commerce Clause. The Court's decisions allowed bootleggers to order large quantities of alcohol, creating "a flourishing interstate commerce in alcohol between wet and dry states . . . [as] express freight offices in prohibition territory often became little more than interstate commerce liquor package stores."[40]

Because the Court in *Scott, Rhodes* and *Vance* failed to interpret the Wilson Act as it intended, Congress enacted the Webb-Kenyon Act of 1913.[41] Entitled "An Act divesting intoxicating liquors of their interstate character in certain cases," it provides:

> The shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited."[42]

As Senator William Kenyon of Iowa, co-sponsor of the Act, remarked, "[i]ts purpose, and its only purpose, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their own borders."[43] The Act's other co-sponsor, Representative Edwin Y. Webb of North Carolina, emphasized that the Act was meant not only to protect "dry" states from imported alcohol, but also the distribution regulations of "wet" states.[44] Also noteworthy is that unlike earlier drafts, Webb-Kenyon as enacted did not limit the States' right to regulate imports to nondiscriminatory measures; the bill was purposely amended to

---

40 *See* HAMM, *supra* note 19, at 179.

41 37 Stat. 699 (now codified at 27 U.S.C.S. § 122 (2005)).

42 *Id.*

43 49 CONG. REC. 760 (1913).

44 "[Webb-Kenyon] applies to all States, 'wet' and 'dry' alike, because every State in the Union has laws against the unrestricted sale of liquor, and this bill would protect the 'wet' States whose laws are to be violated in the use or sale of liquor as well it would protect the 'dry' States . . . . This bill might well be styled a local option act to give the various States power to control the liquor traffic as to them might seem best." 49 CONG. REC. 2, 812 (1913).

eliminate any reference to discrimination.[45]

A closely divided Court subsequently upheld the constitutionality of Webb-Kenyon in *Clark Distilling Co. v. Western Maryland Railway. Co.*, declaring its effect as "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught."[46] Thus it seemed that the Court had finally applied federal law in harmony with its congressional intent, creating an exception for alcohol to the Commerce Clause and giving the States power to regulate its physical importation.

II. The Twenty-First Amendment And Subsequent Court Decisions

With the enactment of the Eighteenth Amendment in 1919, a period of national prohibition began. During that time the Webb-Kenyon Act remained in effect and the right of the state to exercise its police power over liquor shipped in interstate commerce was recognized.[47]

With the repeal of prohibition in 1933, however, there was fear that the protections of Webb-Kenyon could be damaged either by a majority vote in Congress or by the Supreme Court (by overturning *Clarke*). To ensure its protection, the text of Section 2 of the Twenty-first Amendment closely parallels Webb-Kenyon. It provides: "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[48]

Tellingly, proponents of state control successfully contested a proposed Section 3 to the Amendment that would have given the federal government concurrent powers with the states to regulate saloons.[49] Section 3 was vigorously opposed for negating the

---

[45] *See* 49 Cong. Rec. 2, 687;919-920;924 (1913).

[46] Clark Distilling Co v. Western Maryland Ry. Co., 242 U.S. 311, 323-24 (1917). *See also id.* at 325 (stating Webb-Kenyon "took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.").

[47] *See* McCormick v. Brown, 286 U.S. 131 (1932).

[48] U.S. Const. amend. XXI, § 2. Section 1 of the Amendment merely repeals the Eighteenth Amendment.

[49] The text of the deleted section stated: "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4, 4141 (1933). For a detailed discussion of the proposed Section 3, *see* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 352-60 (1987) (O'Connor, J., dissenting); *but see* Aaron Nielson, *No More Cherry Picking: The Real History of the Twenty-first Amendment's § 2*, 28 Harv. J.L. & Pub. Pol'y 281 (2004).

States' regulatory prerogatives secured in Section 2. As Senator Blaine said, the purpose of Section 2 was "to restore to the States by constitutional amendment by absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States."[50] As state control advocates understood, anything short of an amendment guaranteeing their plenary power to regulate alcohol risked an eventual seizure by the federal government under the guise of the dormant Commerce Clause.

Furthermore, the Twenty-first Amendment was not adopted by Congress or by state legislatures but by the people in state conventions. It remains the only constitutional amendment so adopted. Thus the policy choice embedded in the language of the Amendment, and sanctioned by Congress and the people who ratified it, seems clear: alcohol was not to be regarded as just another ordinary article of commerce. Rather, the failure of the federal government and the Court to deal with its regulation in a satisfactory manner led to its unique place in constitutional law, where the States alone would control it.

Immediately after the Amendment's adoption, most States enacted three-tier distribution systems for alcohol. The three-tier model restricted manufacturers to selling only to licensed wholesalers, who in turn could sell only to licensed retailers. This system developed in response to alcohol distribution prior to Prohibition, when many manufacturers owned or had strong ties to liquor retailers.[51] This led to cutthroat competition by manufacturers to control retail outlets, with many manufacturers pushing for increased sales without regard for the social costs. Consequently, the system fostered alcohol abuse, organized crime, and monopolistic sales practices.[52] Proponents of the three-tier system thus saw wholesalers as an important buffer, allowing for "checks and balances" within distribution. They also believed it allowed for more efficient tax collection as well as limit sales to minors.[53]

The constitutionality of distribution systems facially distinguishing between in-state and out-of-state alcohol were quickly questioned. In *State Board of Equalization of California v. Young's Market Co.*, a California law requiring a $500 import license fee for domestic wholesalers selling imported beer was challenged

---

50 76 CONG. REC. 4, 4143 (1933).

51 *See generally* VIJAY SHANKER, ALCOHOL DIRECT SHIPMENT LAWS, THE COMMERCE CLAUSE, AND THE TWENTY-FIRST AMENDMENT, 85 Va. L. Rev. 353, 355-56 (1999).

52 *Id.*

53 *Id.*

as being discriminatory and thus violating the Commerce Clause.[54] Specifically, the plaintiff argued that the Twenty-first Amendment did not authorize state regulations favoring the manufacture and sale of domestic alcohols over those that are imported. That is, their terms must be equal.[55] Writing for the Court, Justice Brandeis explicitly rejected this argument, stating that to hold otherwise "would involve not a construction of the Amendment, but a rewriting of it."[56] Further emphasizing this point, he continued: "[c]an it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?"[57] The Court reaffirmed this decision in *Mahoney v. Joseph Triner Corp.*, upholding a Minnesota statute prohibiting the importation of liquor above a certain alcohol percentage while allowing its sale when produced in-state.[58] It is noteworthy that Justices who personally lived through the debates leading to the Twenty-first Amendment rendered these decisions—and without dissent.

Although the power given to the States was unquestionably broad, it did not involve a strained interpretation of the Amendment. In essence, the Court's position during this era was that the language of the Twenty-first Amendment was to be interpreted literally, conferring full authority to the States to control liquor within its borders without regard to other constitutional limits.[59] The Court did not concern itself with the purpose of these laws, as long as the regulations applied strictly to alcohol for "delivery or use therein." In fact, the only area in which the Court did limit the scope of the Amendment was when

---

54 299 U.S. 59 (1936).

55 *Id.* at 62.

56 *Id.*

57 *Id.* at 63.

58 304 U.S. 401 (1938); *see also* Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939).

59 *See* State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59, 62 (1936) (emphasis added):

> The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. *The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes.*

See also Indianapolis Brewing, 305 U.S. at 394 ("Since the Twenty-first Amendment, as held in the *Young* case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause; and . . . discrimination between domestic and imported intoxicating liquors . . . is not prohibited by the equal protection clause.").

regulations extended to a federal jurisdiction, such as a national park.[60]

Relying on these decisions, many states created distribution regulations that burdened out-of-state sellers. For example, nearly every state limited retail and wholesaler licenses to in-state residents or domestic corporations.[61] Furthermore, utilizing state-controlled price structures and excise taxes, several states enacted laws giving favorable treatment to domestic wines.[62] When a Washington law of this type was challenged in 1958 as discriminatory, the Court, relying on its decisions from 1936 to 1939, upheld the Washington law's constitutionality in a *per curiam* order.[63]

As the era of Prohibition faded, the Court slowly began to curtail the powers granted to the states by the Twenty-first Amendment. After nearly three decades of consistent interpretation, the Court invalidated a state alcohol regulation in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*[64] That suit arose when New York attempted to prohibit a duty-free liquor store in John F. Kennedy International Airport from selling alcoholic beverages without a New York State license. Pursuant to the U.S. Customs regulation, the store purchased its liquor from a warehouse outside the state and took delivery to its in-state premises, where sales were limited to customers on international flights. Finding the airport store to be operating within a federal enclave as well as holding the ultimate "delivery" of any alcohol to be international in nature, the Court found the state regulation unprotected by the Twenty-first Amendment and thus unconstitutional under the Commerce Clause.[65] While the decision turned on these specific factual findings and fit within the federal jurisdiction exception laid out in *Collins v. Yosemite Park & Curry Co,* the dicta suggested a shift in its jurisprudence. Referring to its post-Prohibition cases, Justice Stewart stated:

> To draw a conclusion from this line of decisions that the Twenty-First Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is

---

60 Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 538 (1938) ("As territorial jurisdiction over . . . [Yosemite] Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment.").

61 *See* Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment,* 72 HARV. L. REV. 1145, 1148 (1959).

62 *Id.* at 1151-52.

63 California v. Washington, 358 U.S. 64 (1958).

64 377 U.S. 324 (1964).

65 *Id.* at 329, 333-34.

> concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.[66]

However, this reasoning distorted the issue; the Twenty-first Amendment does not "repeal" the Commerce Clause with respect to alcohol, but rather carves an exception for its "use or delivery" within the states. Allowing States to freely regulate alcohol imports free of the dormant Commerce Clause does not mean Congress is forever precluded from enacting its own regulation. In fact, in 1935 Congress passed the Federal Alcohol Administration Act governing the importation, manufacture or wholesaling of alcoholic beverages in interstate of foreign commerce.[67] Rather, the federal government's power to regulate alcohol is restricted by the Twenty-first Amendment in the same respect any law enacted under its Commerce Clause powers is restricted by the First Amendment. Yet this slight reframing of the constitutional issue in *Hostetter* marked a dramatic shift in the Court's approach, creating the first real crack in the States' power to regulate imported liquors.

As Justice Black (who as a Senator actually participated in the passage of the Twenty-first Amendment)[68] wrote in his dissenting opinion, the decision made "inroads upon the powers given the States by the Twenty-first Amendment. Ironically, it was against just this kind of judicial encroachment that Senators were complaining when they agreed to [Senate Joint Resolution] 211 and paved the way for the Amendment's adoption."[69]

If *Hostetter* marked the first crack in the States' regulation powers, *Bacchus Imports, Ltd. v. Dias* represented a rupture.[70] At issue in *Bacchus* was not the power of States to structure their liquor importation systems, but rather to offer special tax exemptions for locally produced wine. Specifically, Hawaii enacted a law exempting domestic wineries from a 20 percent excise tax. In fact, Hawaii conceded that the only purpose of the tax emption was to

---

66 *Id.* at 331-32.

67 27 U.S.C.S. § 201 (2005). The Federal Alcohol Administration Act (FAA) requires anyone who produces, processes, or warehouses alcohol beverage products (distilled spirits, wine, beer, malt beverages) to obtain a permit.

68 Before being nominated to the Supreme Court by President Franklin D. Roosevelt, Justice Black served as Alabama's Senator from 1926 to 1937. *See generally* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1997).

69 *Id.* at 340 (Black, J., dissenting).

70 468 U.S. 263 (1984).

promote local product.[71]

While the Court recognized its earlier post-Prohibition decisions, it tacitly dismissed them by noting that they relied upon its language rather than the more recent recognition of the "obscurity of the legislative history of § 2," of the Twenty-first Amendment.[72] Citing *Hostetter*, the Court concluded that it was by then "clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause."[73] Therefore, the Court reasoned the substantive issue was whether Twenty-first Amendment principles were sufficiently implicated by Hawaii's tax exemption to outweigh any Commerce Clause principles that would otherwise be violated.[74] Concluding "the central purpose of [Section 2] was not to empower States to favor local liquor industries by erecting barriers to competition," the Court struck down the law as unconstitutional.[75] However, because *Bacchus* was limited to the issue of a discriminatory tax structure, the case did not address the question of whether physical importation regulations were similarly restricted by the dormant Commerce Clause. Even so, the Court's interpretation of the Twenty-first Amendment suggested a continuing shift away from both the clear language of Section 2 and its history.

III. *GRANHOLM V. HEALD*

Any question of whether *Hostetter* and *Bacchus* were merely anomalies was to put to rest in the Court's decision in *Granholm v. Heald*.[76] At issue were the laws of Michigan and New York, each of which enacted a state regulated three-tier system consisting of manufacturers, wholesalers and retailers. While these systems prevented manufacturers from selling directly to consumers, they each contained an exception for in-state wineries, which were able to act as their own retailers.[77] The statutes contained no such exception for out-of-state wineries, who could only sell to in-state wholesalers.[78] The Court had "no difficulty" finding that these laws discriminated against goods in interstate commerce.[79] The Court

---

71 *Id.* at 276 (quoting brief of Hawaii).
72 *Bacchus*, 468 U.S. at 274.
73 *Id.* at 275.
74 *Id.*
75 *Id.* at 276.
76 125 S. Ct. 1885 (2005).
77 New York's regulations varied slightly from Michigan's by allowing out-of-state wineries to ship directly to consumers only if they established a licensed branch office and warehouse in the state. *Id.* at 1894.
78 *Id.* at 1893-96.
79 *Id.* at 1897.

then underwent an extensive analysis of the Twenty-first Amendment's "history."[80] However, the Court focused its analysis on the history of Court's own interpretations of the legislation rather than on congressional intent.[81]

Reviewing its earlier decisions regarding the Wilson Act, the Court held that that statute did not allow States to discriminate against out-of-state liquor.[82] It then concluded that the purpose of Webb-Kenyon was not to repeal, but "simply to extend that which was done by the Wilson Act."[83] While this "extension" was enacted precisely to prevent the Commerce Clause from continuing to undermine the States' power to regulate alcohol (as it had with the Wilson Act), the Court stated Webb-Kenyon "expresses no clear congressional intent to department from the principle, unexceptional at the time the Act was passed and still applicable today, that discrimination against out-of-state goods is disfavored."[84] Consequently, the Court reasoned that Webb-Kenyon did not permit discriminatory regulations while the Wilson Act remains in effect today.[85] Moreover, because Section 2 of the Twenty-first Amendment was intended merely to restore to the States the powers they possessed under the Wilson and Webb-Kenyon Acts, the Court found that Section 2 does not permit discriminatory regulations either.[86]

The Court admitted that this interpretation directly conflicted with earlier holdings granting "the States broad powers under Section 2," such as *Young's Market*.[87] Rather than giving these decisions deference (as they were made by justices who lived

---

80 *Id.* at 1897-1905.

81 *Id.*

82 *Id.* at 1899 (quoting Scott v. Donald, 165 U.S. 58, 100-01(1897)):

> [T]he Wilson Act was 'not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce.' To the contrary . . . the Wilson Act mandated 'equality or uniformity of treatment under state laws,' and did not allow [a State] to provide 'an unjust preference' to its products 'as against similar products of the other States.'

However, as Justice Thomas accurately reasons in his dissent, the unconstitutional discrimination at issue in *Scott* was a state ban on the direct importation of alcohol, a right eventually prohibited by the Webb-Kenyon Act. *See Granholm* at 1917-19 (Thomas, J., dissenting).

83 *Id.* at 1901 (quoting Clark Distilling Co. v. Western Maryland R. Co., 242 U.S. 311, 324 (1917)).

84 *Id.*

85 *Id.* at 1901-02 ("The Wilson Act reaffirmed and the Webb-Kenyon Act did not displace, the Court's line of Commerce Clause cases striking down state laws that discriminated.").

86 *Id.*

87 *Id.* at 1902. For a discussion of these earlier Section 2 decisions *see supra* text accompanying notes 54-58.

through the underlying history of the Twenty-first Amendment), the Court instead tacitly overruled the *Young's Market* line of decisions[88] in favor of the historical interpretations of more recent cases such as *Bacchus*.[89] Based on these modern interpretations, the Court concluded that Section 2 only protects "nondiscriminatory" state regulations because "discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment."[90]

After reaching this conclusion, the Court applied its dormant Commerce Clause balancing test.[91] Recognizing that the regulations in question directly discriminate in favor of in-state economic interests,[92] the Court turned its attention to whether they "advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[93] The Court swiftly rejected both of the States' primary justifications: restricting under-age drinking and facilitating tax collections.[94] With regard to underage drinking, the Court found a lack of State evidence that wine-sales over the Internet are problematic. It noted that minors are just as likely to purchase alcohol online from in-state wineries as out and that out-of-state wineries that sell to minors risk losing their state and federal licenses and thus already have an incentive to enforce age restrictions.[95]

The Court also dismissed the State's tax-collection justifications because, according to the Court, less restrictive options are available. "If licensing and self-reporting provide adequate safeguards for wine distributed through the three-tier system, there is no reason to believe they will not suffice for direct

---

88 *Id.* ("Some of the cases decided soon after ratification of the Twenty-first Amendment did not take account of *this* history and were inconsistent with this view.") (emphasis added).

89 *Id.* at 1902-04.

90 *Id.* at 1905.

91 Challenged statutes are typically subjected to a two-part analysis. The Court first considers whether the state statute "directly regulates or discriminates against interstate commerce, or . . . [if] its effect is to favor in-state economic interests over out-of-state interests." Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986). Statutes that fit this description are presumed invalid. However, the Court must still determine whether the challenged statute serves a "legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977). If it does, the statute will be upheld. *Id.*

92 *Granholm*, 125 S. Ct. at 1905 ("The instant cases . . . involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.").

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

94 *Id.* at 1905-07.

95 *Id.* at 1906.

shipments."[96] Moreover, provisions of federal law already offer out-of-state wineries incentives to comply with state regulations.[97] By finding that the federal regulatory scheme in conjunction with state licenses sufficiently satisfies any local interests regulating under age drinking and tax-collection,[98] the Court effectively moved discriminatory statutes from presumptively valid to presumptively unconstitutional. This result is particularly ironic when one considers that the origins of the Wilson and Webb-Kenyon Acts (and the Twenty-first Amendment) was so States *did not* have to rely on the federal government to protect its interests in regulating alcohol.

The opinion concludes with an apt summary of the Court's newly articulated jurisprudence:

> States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on even-handed terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.[99]

IV. THE IMPLICATIONS OF *GRANHOLM*

Just as its decisions once undermined the intentions of the Wilson Act, the Court in *Granholm* confirmed that it would now subject state alcohol regulation to the very dormant Commerce Clause analysis the Twenty-first Amendment was meant to prevent. The driving force behind the enactment of the Webb-Kenyon Act and Twenty-first Amendment was to prohibit Court interference and give the States plenary power to regulate imports into their jurisdiction. The Court ignored the plain meaning of these texts and revised the history that inspired them.

While the decision may represent "sound economic policy . . . . it is not, however, consistent with the policy choices

---

96 *Id.* ("Indeed, various States use this approach for taxing direct interstate wine shipments, *e.g.*, [New Hampshire], and report no problems with tax collection.").

97 *Id.* (citing The Tax and Trade Bureau's authority to revoke federal licenses for violating state laws as well the Twenty-first Amendment Enforcement Act which allows state attorneys general power to sue wineries in federal court to enjoin violations of state law.).

98 *Granholm*, 125 S. Ct. at 1905-07.

99 *Id.* at 1907.

made by those who amended our Constitution in 1919 and 1933."[100]

When the States enacted their regulatory schemes following Prohibition, the Court made it clear that it would not concern itself with their purpose so long as they were limited to the "delivery or use" of alcohol within their jurisdiction. The Court would therefore purposely avoid distinguishing between measures appropriate to a policy of regulation and measures going beyond them for strictly economic purposes.[101] In reliance, the States adopted regulations without engaging in any dormant Commerce Clause analysis for potential discrimination. However, in the wake of *Granholm,* the States now must review each regulation for potential discriminatory effects on out-of-state interests. If discriminatory, the state must establish a legitimate local purpose and demonstrate that that purpose cannot be accomplished through less discriminatory measures.

The potential impact is much greater than the Court implies, particularly on those states whose laws are structured upon the three-tier systems. As Justice Stevens expressed in his dissent, while *Granholm* suggests its effects are limited to highly sought-after wines, the Court's reasoning is equally applicable to *all* restrictions on direct alcohol shipments. Accordingly, there would appear to be no reason why States that permit in-state retailers to sell beer and liquor online should be able to prevent out-of-state retailers from doing the same. Similarly, can States require wholesalers to have an in-state presence in order to sell to retailers without discriminating against out-of-state wholesalers? The answer is not clear, but the Court's reasoning implies that these regulations are now unconstitutional without a showing of a compelling state interest.

The Court paid lip service to the three-tier system as "unquestionably legitimate,"[102] and gave its assurance that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."[103] Yet any assurance that *stare decisis* will protect the three-tier system is belied by the Court's casual dismissal of its cases decided immediately after the repeal of Prohibition.

Moreover, in another section of the opinion, the Court found

---

100 *Id.* at 1909.

101 *See* State Board of Equalization of California v. Young's Market Co. 299 U.S. 59, 62-63 (1936).

102 *Id.* at 1905 (quoting North Dakota v. United States, 495 U.S. 423, 432 (1986)).

103 *Id.*

that "New York's in-state presence requirement [for wineries] runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'"[104] It is unclear from the Court's reasoning why manufactures should be treated differently than wholesalers and retailers, who are also required to have an in-state presence.

In fact, a case may already be pending that will confront this problem directly. Costco Wholesale Corp., the nation's largest wine retailer, has challenged the constitutionality of Washington's three-tier system, which allows only in-state manufactures to sell directly to retailers.[105] Essentially, Costco would like to cut out the "middleman" (wholesalers). Costco claims that if it is permitted to bypass the wholesale tier, it will be able to sell wines to its consumers more cheaply. While permitting an out of state supplier to sell directly to a retailer may make for "sound economic policy," and please the likes of Adam Smith, the logic is certainly is not within the plain-meaning, spirit or history of the Twenty-first Amendment.

However, as implicitly suggested in *Granholm*, modern *laissez-faire* policies may be more important than quaint notions such as a need to adhere to the plain language of the Constitution or the intent of its framers.

*Harris Danow**

104 *Id.* at 1897 (quoting Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 72 (1963)).

105 Costco v. Maleng, et. al., No. 04-360 (W.D.W.A. filed Feb. 20, 2004). *See* R. Corbin Houchins, What the Direct Shipment Ruling Means for Retailers, Wine Business Online, available at http://www.winebusiness.com/html/MonthlyArticle.cfm?dataid= 38950 (last visited Nov. 2, 2005).

** Staffer, Recent Developments, Cardozo Arts & Entertainment Law Journal; J.D. candidate, 2007, Benjamin N. Cardozo School of Law; B.A., 2001, Wesleyan University. Thank you to Keven Danow, Peter Nurnberg, Joe Baranello and all AELJ staff members for their help and insights.