

RECENT DEVELOPMENTS

GOOD HISTORY, GOOD LAW (AND BY COINCIDENCE GOOD POLICY TOO): *Granholm v. Heald*, 125 S. Ct. 1885 (2005)

With the rise of the Internet has come the lucrative practice of online wine selling. Although in nearly every state over-the-counter alcohol sales are, by law, channeled through elaborate multi-tiered distribution schemes, many states have enacted less restrictive laws for online sales, making possible direct sales to consumers.¹ In passing these laws, many states did more than liberalize a producer's ability to sell alcohol online; states placed out-of-state producers in less advantageous positions than in-state producers. Last Term, in *Granholm v. Heald*, the Court held that the dormant Commerce Clause's antidiscrimination principle prohibits a state from treating in-state wine merchants more favorably than out-of-state sellers, the Twenty-First Amendment notwithstanding.² Although the decision advanced domestic free trade, a sound policy outcome, there may be reasons to fear that the case was incorrectly decided as a matter of law. Such fears, however, are unnecessary, as there is no conflict between the correct constitutional interpretation and freer trade.

Prior to *Granholm*, the circuits split in addressing discriminatory regulations of alcohol sales, with some striking down the laws as violating the dormant Commerce Clause's antidiscrimination principle, and others exempting these laws under Section Two of the Twenty-First Amendment.³ The U.S. Su-

1. *Granholm v. Heald*, 125 S. Ct. 1885, 1892 (2005) (citing FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 5-7 (July 2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>).

2. *Id.*

3. Compare *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004) (upholding a New York statute that restricted the direct shipment of wine from out-of-state sellers to in-state buyers), and *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (upholding an Indiana statute that prohibited direct shipment of wine from out-of-state sellers to in-state buyers), with *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) (holding unconstitutional a North Carolina statute favoring in-state wine manufacturers over out-of-state manufacturers), *Dickerson v. Bailey*, 336 F.3d 388

preme Court consolidated two of these circuit decisions and granted certiorari. The question before the Supreme Court in *Granholm* was thus whether Section Two gives States the power to discriminate against out-of-state wine merchants. The first case came from Michigan, where “approximately 40 in-state wineries . . . [were] eligible for ‘wine maker’ licenses that allow[ed] direct shipment to in-state consumers” while “[o]ut-of-state wineries [could] apply for a \$300 ‘outside seller of wine’ license, but this license only allow[ed] them to sell to in-state wholesalers.”⁴ This meant, in effect, that out-of-state wineries were forbidden to ship directly to consumers in Michigan. The Sixth Circuit held that this regime was unconstitutional.⁵

The second case concerned New York’s licensing system. There, an out-of-state wine maker could ship directly to in-state consumers, but New York law imposed heavy burdens on doing so. “Wineries that produce[d] wine only from New York grapes [could] apply for a license that allow[ed] direct shipment to in-state consumers” but an “out-of-state winery [could] ship directly to New York consumers only if it bec[ame] a licensed New York winery, which require[d] the establishment of a ‘branch factory, office or storeroom within the state of New York.’”⁶ Moreover, even if an out-of-state winery were to avail itself of that expensive option—none had⁷—it still would not have had the same opportunities available to in-state wineries: such “[o]ut-of-state wineries . . . [were] ineligible for a ‘farm winery’ license, the license that provides the most direct means of shipping to New York consumers . . . [and could] apply only for a commercial winery license.”⁸ This was a less attractive license because “[u]nlike farm wineries . . . commercial wineries [had to] obtain a separate certificate from the state liquor

(5th Cir. 2003) (holding unconstitutional a Texas statute prohibiting direct shipment of wine from out-of-state sellers to in-state buyers), *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) (holding unconstitutional a Michigan statute that prohibited direct shipment of wine from out-of-state sellers to in-state consumers), and *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) (remanding to district court to determine whether Florida statute restricting direct shipment of wine was “necessary” to effectuate government’s core concerns).

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

5. *Heald*, 342 F.3d at 526.

6. *Granholm*, 125 S. Ct. at 1894.

7. *Id.* at 1896.

8. *Id.* at 1897.

authority”⁹ The Second Circuit held that though “the physical presence requirement could create substantial dormant Commerce Clause problems [for] a commodity other than alcohol,” the Twenty-First Amendment enabled New York to “ensure accountability through presence” for wineries involved in “the importation and transportation of alcohol for use in New York.”¹⁰

Justice Kennedy, joined by Justices Scalia, Souter, Ginsburg, and Breyer, first found that these state licensing approaches violated the antidiscrimination principle of the dormant Commerce Clause. Justice Kennedy observed that Michigan’s “complete ban on direct shipment” by out-of-state wineries made the “discriminatory character of the Michigan system . . . obvious.”¹¹ He then wrote that “New York’s in-state presence requirement 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,’”¹² and listed the additional burdens that a wine seller would face in establishing an in-state presence.¹³

The Court then addressed the larger question of whether the Twenty-First Amendment permitted such discrimination. Justice Kennedy offered an extended history lesson, beginning with the early state prohibition laws and the dormant Commerce Clause’s original-package doctrine. That doctrine stifled democratically enacted prohibition laws by permitting the States to ban the local production of liquor but forbidding them to prohibit importation of liquor from out-of-state producers, so long as such liquor remained in its original package.¹⁴ In response, Congress passed the Wilson Act,¹⁵ which by its text re-

9. *Id.* Also, in-state wineries without the requisite licenses could “distribute their wine through other wineries that have the applicable licenses. This is another privilege not afforded out-of-state wineries.” *Id.* (citation omitted).

10. *Swedenburg v. Kelly*, 358 F.3d 223, 238 (2d Cir. 2004).

11. *Granholm*, 125 S. Ct. at 1896.

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

13. *Id.* (describing the permitting, distribution, and presence requirements).

14. *See id.* at 1897–99 (citing, among others, *Bowman v. Chi. & Nw. R.R.*, 125 U.S. 465 (1888)).

15. 27 U.S.C. § 121 (2000) (“All . . . intoxicating liquors . . . transported into any State . . . for use, consumption, sale or storage therein, shall upon arrival in such State . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, to the same extent and in the same manner as

turned to the States the ability to use their police powers to regulate liquor without being undermined by out-of-state retailers, but did not permit the States to discriminate against out-of-state retailers. The Court held in *Scott v. Donald* that the Wilson Act, although enabling the States to regulate liquor effectively within their respective borders, “did not allow States to discriminate against out-of-state liquor”¹⁶ In cases following *Scott*, however, the Court construed the Wilson Act to permit importation for personal use, undermining a state’s ability to regulate liquor importation,¹⁷ to which Congress responded with the 1913 Webb-Kenyon Act.¹⁸

Though admitting that the language of Webb-Kenyon was broad, Justice Kennedy interpreted the Act as solely closing the judicially created loophole for personal importation, not as eliminating the antidiscrimination component of the Wilson Act that was recognized in *Scott*. The Court reached this narrow interpretation by invoking a clear statement requirement for federal laws that would permit state discrimination against out-of-state retailers and by noting the historical context preceding the passage of the Webb-Kenyon Act and the cases that later construed it narrowly.¹⁹ Justice Kennedy also emphasized that the Webb-Kenyon Act did not expressly repeal the Wilson Act and that repeals by implication are disfavored.²⁰ Thus when the Webb-Kenyon Act was passed, “States were required to regulate domestic and imported liquor on equal terms.”²¹

though such . . . liquors had been produced in such State . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.”).

16. *Granholm*, 125 S. Ct. at 1899 (citing *Scott v. Donald*, 165 U.S. 58 (1897)).

17. *Id.* at 1899–900 (citing *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898), and *Rhodes v. Iowa*, 170 U.S. 412 (1898)).

18. 27 U.S.C. § 122 (2000) (“The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State . . . into any [other] State . . . in violation of any law of such State . . . is prohibited.”).

19. *Granholm*, 125 S. Ct. at 1899–901 (noting that the Court, in its first case interpreting the Webb-Kenyon Act, stated that it “‘was enacted simply to extend that which was done by the Wilson Act’” and that “[t]he Act’s purpose ‘was 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’”) (quoting *Clark Distilling Co. v. W. Md. R.R.*, 242 U.S. 311, 324 (1917)).

20. *Id.* at 1901.

21. *Id.* at 1902.

Then came Prohibition with the Eighteenth Amendment, and the end of Prohibition with Section One of the Twenty-First Amendment, Section Two²² of which would become the source of controversy in *Granholm*. The Supreme Court held in *Craig v. Boren* that Section Two incorporated into the Constitution the Wilson and Webb-Kenyon Acts, including their antidiscrimination principle.²³ Therefore, as with the Webb-Kenyon Act, under Section Two a state may choose to ban all online wine sales, but “[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.”²⁴ The majority, while acknowledging that some (but not all) of the early case law took a much more expansive view of Section Two, explained that this holding was in line with modern case law, and insofar as that early case law was contrary, it was abrogated.²⁵

After establishing that the laws in question were discriminatory, and that Section Two provided no license for such discrimination, the Court addressed whether there were “reasonable nondiscriminatory alternatives” to advance the states’ policy goals of protecting minors from alcohol and enabling easier collection of taxes.²⁶ The Court noted that there is little evidence that online alcohol sales pose a real threat to minors, and the paucity of evidence was insufficient to meet the requirement of “clearest showing,” which is applied when a state seeks to defend a discriminatory law.²⁷ Furthermore, even if underage drinking from online wine sales did pose a threat, the states’ laws did not eliminate this threat because in-state wineries could still ship directly.²⁸ Regarding taxation, the Court observed that there are ample ways for a state to ensure that taxes are collected that are far less burdensome on commerce.²⁹

Justice Stevens, joined by Justice O’Connor, dissented. He recognized that but for the Twenty-First Amendment, these

22. U.S. CONST. amend. XXI, § 2 (“The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”).

23. *Id.* (citing *Craig v. Boren*, 429 U.S. 190 (1976)).

24. *Id.* at 1907.

25. *Id.* at 1902–05.

26. *Id.* at 1905 (citations omitted).

27. *Id.* (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994)).

28. *Id.* at 1905–06.

29. *Id.* at 1906–07.

state laws would unquestionably be unconstitutional, but stressed that alcohol, because of the Twenty-First Amendment, is different, and that “those members of the younger generations who make policy decisions” fail to understand the significance of Section Two. Therefore, “[t]he views of judges who lived through the debates that led to the ratification of those [alcohol] Amendments are entitled to special deference.”³⁰ Justice Stevens then cited cases that took a very expansive view of Section Two and listed state laws passed soon after the ratification of the Twenty-First Amendment that would be considered discriminatory but were still permitted, such as laws mandating that a state be “dry” or forbidding Sunday alcohol sales.³¹

Justice Thomas also issued a dissent, joined by Chief Justice Rehnquist and Justices Stevens and O’Connor, offering a novel and powerfully comprehensive take on the history of the alcohol statutes and Section Two. Justice Thomas first stated that the Webb-Kenyon Act permitted the state laws in question because it exempted alcohol entirely from the dormant Commerce Clause, so there was no need for the Court to consider Section Two of the Twenty-First Amendment or the dormant Commerce Clause.³² Justice Thomas’s argument relied on the text of the Webb-Kenyon Act and on the few early cases interpreting the Wilson and Webb-Kenyon Acts. In contrast to the majority, he read those cases to mean that the Webb-Kenyon Act extended the Wilson Act by removing both the judicially created loophole and also the antidiscrimination requirement.³³

30. *Id.* at 1908 (Stevens, J., dissenting).

31. *Id.* at 1909.

32. *Id.* at 1910 (Thomas, J., dissenting).

33. *Id.* at 1912–13. Specifically, Justice Thomas understood the Court’s decision in *Scott* to mean that the state law at issue was discriminatory because it “allow[ed] consumers] to purchase liquor from in-state stores, but not directly from out-of-state interests.” *Id.* at 1918. Justice Thomas interprets the majority’s opinion as asserting that *Scott* had two holdings: first, that the law was discriminatory because the state monopoly discriminated against out-of-state producers, and second, implicit here but more obvious in subsequent cases, that consumers had the right to import alcohol for personal use. *Id.* at 1917–18, 1899–900. Justice Thomas believed his position correct because if there were two holdings, the Court could have remedied the state law, as the dissent in *Scott* suggested, simply by striking down the portions of the law that discriminated against out-of-state producers, instead of permitting consumers to receive direct imports. It was this right to personal importation—which Justice Thomas stated the Court derived from the non-discrimination principle of the dormant Commerce Clause—that undermined the States, and hence *Scott*, as well as *Vance* and *Rhodes*, was a target of Webb-Kenyon.

He also noted that, as the majority conceded that the Webb-Kenyon Act and Section Two permit unequal treatment for out-of-state wholesalers, the notion that they included an antidiscrimination principle was not a logical construction.³⁴ Further, as the text was so plain, the majority's speculation about Congress's intent to remedy the Court's narrow construction of the Wilson Act was inappropriate. Even if such intent was properly considered, the majority still erred because language in the legislative histories of "early versions" of the Webb-Kenyon Act suggests that its drafters also objected to *Scott*, the case that upheld the Wilson Act's antidiscrimination principle.³⁵

Though considering it unnecessary to the outcome of the case, Justice Thomas then addressed the Twenty-First Amendment and found that the same outcome should result. First, he stated that the language of Section Two is broader than the Webb-Kenyon Act, so it is clear that the dormant Commerce Clause is not an obstacle to the States.³⁶ Second, in the early cases concerning Section Two, the Court had held that the expansive view was correct.³⁷ Third, contrary to the majority's assertion, Justice Thomas stated that the early post-ratification practice of the States supported his view.³⁸ Based on this historical argument, Justice Thomas discounted the Court's more modern precedents. In addition, he wrote, those modern cases do not require the majority's holding, especially since the "core concerns" test set forth in *Bacchus Imports, Ltd. v. Dias*, the leading case in which the Twenty-First Amendment was held not to sanction a protectionist state law, was not even employed in the majority's decision.³⁹ Justice Thomas then explained that the cases holding that Section Two does not permit the States to violate other constitutional provisions, such as the Equal Protection Clause or the First Amendment, are "inapposite" be-

Id. at 1918–19. As support for this assertion, Justice Thomas noted that the Court in *Clark Distilling Co.* said Webb-Kenyon "'extend[ed] that which was done by the Wilson Act' in that 'its purpose was 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.'" *Id.* at 1912 (citations omitted).

34. *See id.* at 1911–12.

35. *See id.* at 1914–17.

36. *See id.* at 1919–20.

37. *See id.* at 1920–21.

38. *See id.* at 1921–24.

39. *Id.* at 1924–27 (citing *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984)).

cause Section Two's text is a "term[] of art" that relates only to the repeal of the dormant Commerce Clause.⁴⁰

It is plain that those who favor free markets have reason to celebrate the Court's holding, which obliterated laws that appear to be motivated by rent seeking.⁴¹ For many, however, the celebration is tempered by a nagging feeling that, while the majority got the policy right, it may have gotten the law wrong.⁴² The decision, which otherwise would be happily welcomed, seems tainted.⁴³

The majority opinion does provide cause for concern. For instance, the decision seems to trample upon the Twenty-First Amendment's text, and it rests on an application of the dormant Commerce Clause—a "clause" that is not in the Constitution. Additionally, it may be at odds with the original understanding of Section Two. Notwithstanding these concerns, however, the Court's decision was correct.

The first objection to *Granholm* is its apparent disregard for the Constitution's text. The expansive text of Section Two reads, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use

40. *Id.* at 1926–27.

41. See, e.g., Gina M. Riekhof & Michael E. Sykuta, *Regulating Wine by Mail*, REGULATION, 31–36 (Fall 2004), available at <http://www.cato.org/pubs/regulation/regv27n3/v27n3-3.pdf>.

42. See, e.g., Instapundit.com, <http://instapundit.com/achives/023016.php> (May 16, 2005, 13:13 EST) ("I actually think that the defenders [of the state laws] may be right here, but that won't stop me from enjoying a better market for wine than Tennessee's rather protectionist setup has heretofore permitted. . . . UPDATE: Bainbridge says that the ruling may not affect Tennessee [as the States retain the power to simply not permit online wine sales at all]. Dang. An arguably-wrong decision that also won't benefit me personally. No upside there.").

43. Statements by the dissenters that the majority was putting policy concerns over sound construction contribute to this unease. See *Granholm*, 125 S. Ct. at 1909 (Stevens, J., dissenting) ("Today's decision may represent sound economic policy and may be consistent with the policy choices of the contemporaries of Adam Smith who drafted our original Constitution; it is not, however, consistent with the policy choices made by those who amended our Constitution in 1919 and 1933."); *id.* at 1927 (Thomas, J., dissenting) ("The Court's focus on these [pro-consumer] effects suggests that it believes that its decision serves this Nation well. I am sure that the judges who repeatedly invalidated state liquor legislation, even in the face of clear congressional direction to the contrary, thought the same. The Twenty-First Amendment and the Webb-Kenyon Act took those policy choices away from judges and returned them to the States. Whatever the wisdom of that choice, the Court does this Nation no service by ignoring the textual commands of the Constitution and Acts of Congress.").

therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."⁴⁴ By the text alone one should conclude, as Justice Brandeis did in *State Board of Equalization v. Young's Market*, that it supersedes even the Fourteenth Amendment.⁴⁵ No one on the Court today is willing to go that far, though Justice Stevens's position—that great weight should be afforded those early opinions by Brandeis and others—if accepted in full, would require it. Justice Thomas took special care to indicate that Section Two only “displaces liquor’s negative Commerce Clause immunity, not other constitutional provisions.”⁴⁶ The text does not seem to include that limitation; rather, the limitation exists because, as Justice Thomas noted, the text of Section Two is a “term[] of art.”⁴⁷ As the Court stated in *Craig v. Boren*, and as all nine justices accepted in *Granholm*, one cannot read Section Two’s text apart from the Webb-Kenyon Act and the meaning it was understood to have when Section Two was ratified.⁴⁸ Thus, if the Court’s analysis of the early understanding of Webb-Kenyon is correct, the charge that *Granholm* ignores Section Two’s text is not. Although this construction of Section Two does not comport with Webster’s Dictionary, that does not necessarily indicate that anything is amiss.⁴⁹

44. U.S. CONST. amend. XXI, § 2.

45. See, e.g., *State Bd. of Equalization v. Young's Mkt.*, 299 U.S. 59, 64 (1936) (“The claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth.”); see also *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938) (“[T]he equal protection clause is not applicable to imported intoxicating liquor.”).

46. *Granholm*, 125 S. Ct. at 1927 (Thomas, J., dissenting).

47. *Id.* at 1926; see also *id.* at 1919.

48. See *Craig v. Boren*, 429 U.S. 190, 205–06 (1976) (“The wording of § 2 . . . closely follows the Webb-Kenyon and Wilson Acts, expressing the framers’ clear intention of constitutionalizing the Commerce Clause framework established under those statutes.”).

49. This unanimous acceptance of a “term of art,” however, poses difficult interpretative questions that no Justice adequately explored: namely, was it clear at all ratification levels that such a term of art existed? Although there is ample evidence that those in the United States Senate were aware of the term-of-art status of Section Two, it is more difficult to find evidence that those voting in the United States House of Representatives or the state conventions were operating under such an understanding. See Aaron Nielson, Note, *No More “Cherry-Picking”: The Real History of the 21st Amendment’s § 2*, 28 HARV. J.L. & PUB. POL’Y 281, 285–90 (2004). Further, as “the Twenty-first Amendment was the only Amendment in our history to have been ratified by the people in state conventions rather by state legislatures,” it is not inconceivable that those voting at the state conventions did not know of the term-of-art status of Section Two. See *Granholm*, 125 S. Ct. at 1909

The second objection some may have to *Granholm* is that it relies heavily on the dormant Commerce Clause. Support for this concern is found in the words of Judge Easterbrook's insightful opening in an opinion on this topic: "This case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not."⁵⁰ Though the dissents in *Granholm* did not argue the point, it deserves a response. First, it should be noted that Judge Easterbrook found that the Illinois law at issue was not discriminatory, so with the exception of the Second Circuit, no circuit has held that Section Two permitted discrimination against out-of-state wineries' online sales.⁵¹ Second, and more important, although one needs a decoder ring to find the dormant Commerce Clause, no member of the Court—Justices Scalia and Thomas included—fails to recognize the legitimacy of the antidiscrimination principle, although Justice Thomas has written that it is not found in the Commerce Clause but instead in the Import-Export Clause.⁵² However, for the sake of argument, even if the antidiscrimination principle does not deserve the constitutional respect it is afforded, that would not necessarily mean that *Granholm* was incorrectly decided. If the pre-Prohibition scheme was such that discrimination was impermissible, then it stands

(Stevens, J., dissenting). But neither is there clear evidence that those House and state voters believed that they were adopting the plenary power understanding of the early Court, though there was limited discussion—but not explicitly about protectionism—at the House and state levels suggesting that at least some thought the plenary view was correct. See Nielson, *supra*, at 285–90. Thus a textualist might argue, applying Justice Scalia's "absurdity doctrine," that the plenary view—based on the text—should prevail over the "term of art" approach. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) ("I think it entirely appropriate to consult all public materials, including . . . the legislative history . . . to verify that what seems to us an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning . . ."). No one on the Court, however, took such a position in *Granholm*. Whether it is appropriate to have a constitutional clause that does not mean what it says was not addressed by the Court, and if there is anything conceptually worrisome about *Granholm*, it is this aspect. As it relates to the Webb-Kenyon Act, however, Justice Scalia's absurdity doctrine suggests that laws like the one at issue in *Granholm* should not be permitted, as Webb-Kenyon's legislative history in no way indicates that such discrimination was contemplated. See Todd Zywicki & Asheesh Agarwal, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J.L. & LIBERTY 609, 620 (2005).

50. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000).

51. *Id.* at 853.

52. See Zywicki & Agarwal, *supra* note 49, at 644–45.

to reason that the antidiscrimination principle was incorporated in Section Two's term-of-art text.

Finally, the third objection to the Court's opinion is that it is not supported by the history of Section Two. This is where Justice Thomas attacked; however, there are a number of reasons why Justice Thomas's take on the history is unpersuasive, and why the majority had the better historical argument.⁵³

First, both Justice Stevens's and Justice Thomas's reliance on the early Twenty-First Amendment cases is fundamentally misplaced. Relying on those early cases is not logically consistent with the invocation of a term-of-art meaning—the existence of which all members of the Court accepted—because those early cases interpreted Section Two as if there were no term of art involved. Thus, though the dissents reached an outcome somewhat similar to those early cases,⁵⁴ their conceptual approach is as different from the Court's approach in those cases as is the majority's in *Granholm*. The Court in the 1930s refused to consider the history of Section Two,⁵⁵ and without considering that history it is impossible to arrive at either the *Granholm* majority's or dissents' positions, which all require Section Two to mean something other than what its text suggests.

Second, before the ratification of the Twenty-First Amendment's Section Two, Webb-Kenyon was construed narrowly. If Section Two's term-of-art status is accepted, the judicial interpretations during the period after Webb-Kenyon's enactment but prior to Section Two's ratification are relevant to interpreting Section Two, and here the evidence strongly supports the majority's view. For instance, the Court in *Clark Distilling Co.* read Webb-Kenyon narrowly:

Reading . . . Webb-Kenyon . . . in the light . . . thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity

53. For a full discussion of the history, see *id.* at 612–45.

54. They are, however, by no means identical. As has been noted, those early decisions explicitly stated that even the Fourteenth Amendment does not apply because of Section Two.

55. See *State Bd. of Equalization v. Young's Mkt.*, 299 U.S. 59, 63–64 (1936) (“As we think the language of the Amendment is clear, we do not discuss [the history].”).

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.⁵⁶

Justice Thomas's interpretation of this language—that the dormant Commerce Clause absolutely does not apply to alcohol—would have stopped the undermining of state laws and would have been technically an extension of the Wilson Act. Such an interpretation, however, is not the natural use of the phrase “simply to extend that which was done.” Instead, if that meaning had been intended, it would have been more appropriate to have used the term “replace” rather than “extend” to explain that which was done to the Wilson Act.⁵⁷ This is the more reasonable reading given that the “laws [being set at] naught” by “subterfuge and indirection” were not laws that traditionally had been considered discriminatory and, as such, were permitted under the Wilson Act's police-power protecting scheme but could not be enforced because of the post-Wilson personal importation exception. Justice Thomas's construction would do more than merely “extend” the Wilson Act; it would destroy the principle of balanced federalism that both the Act's text and history indicate it was enacted to protect.

Even if one is unconvinced by *Clark Distilling Co.*, there is additional support for the proposition that early courts construed the Webb-Kenyon Act narrowly. For example, at least one court held expressly that the Act contained an implied anti-discrimination clause. The South Carolina Supreme Court ruled in *Brennan v. Southern Express Co.* that Webb-Kenyon “was not intended to confer and did not confer . . . the power to make injurious discriminations against the products of other states which are recognized as subjects of lawful commerce by the law of the state making such discriminations” and noted that the Act's very title—“An Act Divesting intoxicating liquors of their interstate character in certain cases”—suggests that it was not intended to apply in all cases.⁵⁸ Also, Justice Kennedy noted that after Section Two's ratification, several lower courts held this reading to be correct, but the early Court, refusing to con-

56. *Clark Distilling Co. v. W. Md. R.R.*, 242 U.S. 311, 323–24 (1917).

57. See *Walling v. Michigan*, 116 U.S. 446, 460 (1886).

58. See 90 S.E. 402, 404 (S.C. 1916) (noting that Webb-Kenyon “evidently contemplated the violation of only valid State laws”).

sider the Act's history, was not persuaded.⁵⁹ Justice Thomas cited the reading of Webb-Kenyon in *McCormick & Co. v. Brown* to support his position, but he conceded that the case did not involve discrimination.⁶⁰ Justice Thomas did not offer any pre-ratification case that explicitly endorsed his view.

Third, the majority is correct that at the time of enactment, a "clear statement" was required before a federal law such as the Webb-Kenyon Act would be interpreted to permit discrimination by the States. The early courts' construal of the Webb-Kenyon Act more narrowly than its text suggests is evidence that those courts were operating with a clear statement rule in mind. The Court sometimes requires clear statements because they ensure that Congress contemplated changing "critical matters" "affecting the federal balance."⁶¹ Federal law enabling an interstate "low-level trade war"⁶² is surely such a "critical matter." Also, though the propriety of using legislative history is debated, an invocation of a clear statement rule in the context of Webb-Kenyon is supported by its history. No comment made in that history indicated that discrimination was to be permitted.⁶³ If the Act was understood to be broad enough to allow what had long been considered discrimination and not just to close the loophole created by the personal importation holdings, protectionism would not have gone unmentioned.⁶⁴

59. *Granholm v. Heald*, 125 S. Ct. 1885, 1903 (2005) (citations omitted).

60. *Id.* at 1910–11 (citing 286 U.S. 131, 139–40 (1932)).

61. *E.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (citation omitted). Even Justice Thomas has recognized that in some circumstances clear statement rules are appropriate. *See, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 99–100 (2000) (Thomas, J., concurring in part and dissenting in part) (recognizing a clear statement rule in the Eleventh Amendment sovereign immunity context).

62. *Granholm*, 125 S. Ct. at 1896.

63. *See Zywicki & Agarwal*, *supra* note 48, at 620.

64. Justice Thomas attempted to dispute the appropriateness of a clear statement rule by noting that Webb-Kenyon obviously was, even for the majority, a clear enough statement for purposes of removing the personal importation right from protected commerce and that "[t]here is no reason to require another clear statement for each sort of law to which [Webb-Kenyon, by its plain text,] might apply." *Granholm*, 125 S. Ct. at 1912 n.3 (Thomas, J., dissenting). However, there is a reason to require another clear statement (or at least the repeal of the Wilson Act): the history of prohibition movements. Prior to the creation of the original-package doctrine, although discriminatory laws analogous to those in New York and Michigan were not permitted, the police power of the States was quite broad.

Fourth, aside from the majority's observation that the Webb-Kenyon Act does not expressly repeal the Wilson Act and that repeals by implication are disfavored, there are many statements in the legislative history—again, which arguably is not of interpretative value but to which Justice Thomas referred—that affirmatively suggest that the Webb-Kenyon Act was not intended to have the broad meaning assigned to it by Justice Thomas. For example, Senator Kenyon stated that the Act's "purpose, and its only purpose, is to remove the impediment existing as to the States in the exercise of their police powers"⁶⁵ In *Walling v. Michigan*, the Court held that a state's police powers, while expansive, were constrained by the anti-discrimination principle.⁶⁶

Fifth, Justice Thomas offered little support for his assertion that because both the Webb-Kenyon Act and Section Two of the Twenty-First Amendment permit States to forbid out-of-state wholesalers from competing with in-state wholesalers, it is illogical to conclude that they contain an implied antidiscrimination clause. To show that unequal treatment against out-of-state wholesalers was considered "discrimination" for dormant Commerce Clause purposes in 1913 or 1933, Justice Thomas cited *Lewis v. BT Investment Managers, Inc.*⁶⁷ and *Memphis Steam Laundry Cleaner, Inc. v. Stone*,⁶⁸ decided in 1980 and

See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887) (holding that the police power was sufficient to forbid production of liquor); *Walling v. Michigan*, 116 U.S. 446 (1886) (holding that the police power was not broad enough to impose a discriminatory tax against out-of-state producers). The original-package doctrine upset this equilibrium. The congressional response was the Wilson Act, which, by its text, attempted to restore the law to where it was before the original-package doctrine. Then came the personal-importation loophole, such that when the Webb-Kenyon Act was passed, there were two separate and distinct ways in which a law could be viewed as discriminatory: by denying the personal importation right or by being a law, such as that in *Walling*, that historically had been considered discriminatory. If Webb-Kenyon is read as Justice Thomas suggested, the law would permit not only the first type of discrimination—the "discrimination" that was invented after the passage of the Wilson Act—but also the second type, which never had been permitted before and which the Wilson Act expressly attempted to not permit. Given this context, a clear statement requirement for the second type of discrimination is reasonable.

65. 49 CONG. REC. 707 (1912) (daily ed. Dec. 16, 1912) (statement of Sen. Kenyon). *See also* Zywicki & Agarwal, *supra* note 49, at 617–20 (noting many similar statements).

66. 116 U.S. at 460.

67. 447 U.S. 27 (1980).

68. 342 U.S. 389 (1952).

1952, respectively, many years after the enactment of Webb-Kenyon and the ratification of Section Two. In addition, neither of his descriptions of their holdings seems directly on point.⁶⁹ Although a wholesaler can add value to consumers by creating economies of scale, and thus is more than an intermediary, it is unclear whether this economic insight was sufficiently understood at the time of the Twenty-First Amendment's ratification such that a prohibition solely on wholesaler competition was understood to amount to constitutionally prohibited discrimination. In fact, though Justice Thomas wrote that this was because the Court in *Vance v. W.A. Vandercook Co.*⁷⁰ had recognized a right to personal importation, the Court in *Vance* also held separately that wholesaler monopoly laws were not discriminatory.⁷¹

When the question before the Court is as difficult as the one in *Granholm*,⁷² it is reasonable that unless an extremely strong

69. Justice Thomas described *BT Investment* as “invalidating [a] law that discriminated against banks, bank holding companies, and trust companies with out-of-state business operations” and *Memphis Steam* as “invalidating [a] tax that discriminated against solicitors for out-of-state-licensed businesses.” *Granholm*, 125 S. Ct. at 1923–24 (Thomas, J., dissenting). Neither of these cases involved multi-tiered distribution laws like those regulating alcohol.

70. 170 U.S. 438 (1898).

71. *Id.* at 1915. Justice Thomas's view that *Vance*'s first holding—that there was a constitutional right to personal importation—influenced the second holding has support in *Vance*. *Id.* at 1915 n.5. *Vance* demonstrates, however, that the question of whether non-competition wholesale laws were discriminatory was not settled when Section Two of the Twenty-First Amendment was ratified.

72. Justice Thomas's reading of *Scott*, *Vance*, and *Rhodes* presents a close question. The law in *Scott*, however, plainly discriminated beyond forbidding the personal importation of out-of-state alcohol, which may or may not have been considered discrimination on its own. *Granholm*, 125 S. Ct. at 1913–19 (Thomas, J., dissenting); *id.* at 1899–901 (majority opinion). Thus, the majority's conclusion that “*Scott* . . . held two things” and that the Webb-Kenyon Act only “overruled *Scott*'s second holding” that there was a personal right to import alcohol is plausible. *Id.* at 1917–18 (Thomas, J., dissenting). It is true, as Justice Thomas noted, that the court in *Brennan v. Southern Express Co.* seems to have read *Scott* to mean that it was discriminatory to require state wholesaler monopolies. *Id.* at 1918–19. *Scott*, *Vance*, and *Rhodes* may be read to have this meaning, though there was plain discrimination in *Scott*. However, accepting for the sake of argument that the Webb-Kenyon Act was intended to overrule *Scott*, as well as *Vance* and *Rhodes*, Justice Thomas's position does not necessarily follow, as the Webb-Kenyon Act did not expressly repeal the Wilson Act, which should be read as prohibiting discrimination against out-of-state producers. So even if Congress disagreed with how the Wilson Act's antidiscrimination principle was applied in *Scott*, it did not wish to eliminate the principle itself. Rather, it simply intended to extend what was done in the Wilson Act by closing the loophole for laws the Court labeled as discrimina-

case is presented, the presumption should be against a substantial alteration of the constitutional structure. Justice Thomas did not rebut this presumption. By accepting Section Two as a term of art—which explains why the Fourteenth Amendment still applies to imported alcohol—the resolution of *Granholm* becomes significantly easier as the pre- and post-enactment histories of the Webb-Kenyon Act—the source of the term of art—do not support interstate discrimination.

Those who oppose rent seeking as a policy matter, but also want the Court to get the law right, might be troubled by *Granholm*. This need not be so: Though the ultimate outcome is not unquestionable, particularly given the disagreement among the Justices about the early state practices, as highlighted in Justice Thomas's opinion, the weight of the evidence shows that the majority was correct. Thus, as Paul wrote to the Christians in Rome, "Happy is he that condemneth not himself in that thing which he alloweth."⁷³ Believing in the importance of rule of law and taking pleasure in *Granholm's* potential opening of freer markets, are, thankfully, not in conflict.

Aaron Nielson

tion contrary to Congress's intention. Like Justice Thomas's assertion that the Webb-Kenyon Act itself permitted discrimination, it can be argued that Webb-Kenyon should be interpreted narrowly as it did not expressly repeal the Wilson Act; thus, Wilson *still* does not permit discrimination. As Justice Thomas concedes that Congress still has affirmative Commerce Clause authority notwithstanding Section Two, the Wilson Act itself prohibited the Michigan and New York laws.

73. *Romans* 14:22 (King James).