Watering Down the Exceptionalism of the Twenty-first Amendment

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I. INTRODUCTION

October Term 2018 had a lot to say about alcohol. Even before the term began, a confirmation hearing featured the nominee's repeated endorsement, "I like beer," a representation never before made in a public hearing on a Supreme Court vacancy.[1] The topic of alcohol also made an appearance that fall at the University of Toronto, when Supreme Court of Canada Justice Rosalie Silberman Abella asked Justice Elena Kagan, "Do you like beer?"[2] Justice Kagan was reticent, responding with a smile, "What was your second question?"[3] Even Simon Tam—the free-speech advocate who prevailed in *Matal v. Tam*[4]—wrote a song reflecting on the Eighteenth Amendment and its repeal through the Twenty-first Amendment: "You were 18, now you're 21. Housed by rules now you're free to run."[5] In one case, the Court addressed whether drawing blood from an unconscious driver in order to determine his blood alcohol content violates the Fourth Amendment.[6] And, in the case most relevant to the burgeoning craft-beer industry, the Court

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[1] Stephanie K. Baer, *Here Are All The Times Brett Kavanaugh Said He Likes Beer At His Senate Hearing On Sexual Assault Allegations*, BUZZFEED NEWS (Sept. 27, 2018), https://www.buzzfeednews.com/article/skbaer/brett-kavanaugh-likes-beer.

[2] Victoria Kwan, *SCOTUS Map: November 2018*, SCOTUSBLOG (Nov. 30, 2018, 12:19 PM), https://www.scotusblog.com/2018/11/scotus-map-november-2018/.

[3] *Id.*

[4] 137 S. Ct. 1744, 1751 (2017) ("We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.").

[5] *Lyrics to 18th & 21st Amendments by The Slants*, WNYC STUDIOS (Sept. 18, 2018), https://www.wnycstudios.org/podcasts/radiolabmoreperfect/articles/lyrics-18th-21st-amendments-slants; *see also* U.S. CONST. amends. XVIII, XXI.

[6] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2530–31 (2019) ("In this case, we return to a topic that we have addressed twice in recent years: the circumstances under which a police officer may administer a warrantless blood alcohol concentration (BAC) test to a motorist who appears to have been driving under the influence of alcohol.").

decided whether the Twenty-first Amendment empowers states with the ability to pass laws designed to protect local retailers of alcohol.[7]

In *Tennessee Wine & Spirits Retailers Association v. Thomas*, the Supreme Court reviewed whether a durational-residency requirement imposed by Tennessee for liquor-store license applicants violated the dormant Commerce Clause, notwithstanding ratification of the Twenty-first Amendment.[8] Although the Supreme Court had been consistent in narrowing the aperture of perceived state power under the Twenty-first Amendment,[9] many scholars tended to view alcohol as an exception to the general rule against state protectionism, whereby a state's authority over the production, distribution, and sale of alcohol is "'virtually' limitless."[10] History indeed demonstrates that states have leveraged the Twenty-first Amendment to prohibit the intrastate sale of alcohol writ large, or at least severely restrict its sale and consumption.[11]

Although some states continued to prohibit the sale of alcohol after ratification of the Twenty-first Amendment, all had abandoned the cause of Prohibition by 1966.[12] Many states have since gravitated to a three-tier system of alcohol distribution, where producers sell to wholesalers, wholesalers sell to retailers, and retailers sell to consumers.[13] Within this system, states have often developed differing licensing schemes for producers, wholesalers, and retailers.[14] Before October 2018, it was clear

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[7] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2457 (2019) ("Because Tennessee's 2-year residency requirement for retail license applicants blatantly favors the State's residents and has little relationship to public health and safety, it is unconstitutional.").

[8] *See* Aurora Barnes, *Petitions of the week*, SCOTUSBLOG (Aug. 9, 2018, 1:42 PM), https://www.scotusblog.com/2018/08/petitions-of-the-week-4/.

[9] *Compare* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984) (explaining that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause"), *with* Granholm v. Heald, 544 U.S. 460, 489 (2005) ("State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, 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.").

[10] *See, e.g.*, Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d 608, 632–33 (6th Cir. 2018) (Sutton, J., dissenting) (citation omitted).

[11] *See Granholm*, 544 U.S. at 496 (Stevens, J., dissenting) ("In the years following the ratification of the Twenty-first Amendment, States adopted manifold laws regulating commerce in alcohol, and many of these laws were discriminatory. So-called 'dry states' entirely prohibited such commerce; others prohibited the sale of alcohol on Sundays; others permitted the sale of beer and wine but not hard liquor; most created either state monopolies or distribution systems that gave discriminatory preferences to local retailers and distributors.").

[12] Nina Totenberg & Domenico Montanaro, *Supreme Court Hands Total Wine, Other Out-Of-State Liquor Retailers A Big Win*, NPR (June 26, 2019), https://www.npr.org/2019/06/26/732524432/supreme-court-hands-total-wine-other-out-of-state-liquor-retailers-big-win.

[13] *See* North Dakota v. United States, 495 U.S. 423, 432 (1990); *Granholm*, 544 U.S. at 469.

[14] *See Granholm*, 544 U.S. at 469.

that states at least could not discriminate against out-of-state producers.[15] That some questions still remained about the status of laws favoring in-state wholesalers and retailers demonstrates the perceived exceptionalism of the Twenty-first Amendment.[16] *Tennessee Wine* tested that theory, seeking to distill the extent to which alcohol was an exception to constitutional norms that disfavor protectionist treatment in commerce.

Writing for a 7-2 majority, Justice Samuel A. Alito Jr. concluded in *Tennessee Wine* that differing treatment among producers, wholesalers, and retailers is of no moment when a state adopts a licensing requirement whose "predominant effect" is "simply to protect" in-state interests "from out-of-state competition."[17] The Court could not have been more plain that, "[a]s for the dormant Commerce Clause, the developments leading to the adoption of the Twenty-first Amendment have convinced us that the aim of [the amendment] was not to give States a free hand to restrict the importation of alcohol for purely protectionist purposes."[18] The "thrust" of the Twenty-first Amendment and its residual empowerment of state action, the Court continued, was to "'constitutionaliz[e]' the basic structure of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment."[19] So while the case addressed a rigid durational-residency requirement to sell alcohol as a retailer, it also provided a rule of decision for any alcohol-related law imposed at the state level. *Tennessee Wine* therefore makes clear that the Twenty-first Amendment does not excuse states from adhering to other constitutional prescriptions, not least because any burden imposed by an alcohol-related law must serve a valid state interest directed to health and safety, which cannot include bald "protectionism."[20] Perhaps alcohol is not so exceptional after all.

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[15] *See id.* at 486 ("Our more recent cases, furthermore, confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers.").

[16] *See* Sean O'Leary, *Tennessee Wine Case's Big Winner: Data Geeks*, IRISH LIQUOR LAWYER (June 28, 2019), https://irishliquorlawyer.com/tennessee-wine-cases-big-winner-data-geeks/ ("The debate on whether *Granholm* extended to retailers or was limited to producers was settled in this case."); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2462 (2019) ("Tennessee's 2-year durational-residency requirement plainly favors Tennesseans over nonresidents, and neither the Association nor the dissent below defends that requirement under the standard that would be triggered if the requirement applied to a person wishing to operate a retail store that sells a commodity other than alcohol.").

[17] *Tenn. Wine*, 139 S. Ct. at 2471 ("At issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers, but the durational-residency requirement that Tennessee has chosen to impose on new applicants for liquor store licenses."); *see id.* at 2473, 2476.

[18] *Id.* at 2469.

[19] *Id.* at 2463.

[20] *Id.* at 2469–70, 2473.

This Article argues that *Tennessee Wine* clarifies that once a state condones the sale of alcohol within its borders, the powers reserved to that state by the Twenty-first Amendment are watered down. Alcohol, then, starts to resemble other commodities in commerce, which a state cannot burden through protectionist or other unconstitutional actions. In three parts, the Article describes the advent of the Eighteenth Amendment and Prohibition, explains how courts have interpreted the first and only repeal of a constitutional amendment via ratification of the Twenty-first Amendment,[21] and concludes by addressing *Tennessee Wine* and what it augurs for existing state-law regimes. *Tennessee Wine*, in some ways, offers a reset in thinking about alcohol regulation: the greater power to open the marketplace for the sale of alcohol carries the more potent obligation to ensure that the market, once open, is offered to participants on fair terms that do not discriminate and do not offend other constitutional prescriptions. As industries like home brewing and craft beer continue to prosper,[22] states should examine and reckon with the import of *Tennessee Wine* on laws once thought enabled by the Twenty-first Amendment. It appears to be "last call" for exceptionalism, "so gather up your jackets, and move it to the exits," because a new judicial approach to alcohol-related laws is emerging.[23]

II. THE RISE AND FALL OF THE EIGHTEENTH AMENDMENT

Understanding how the Twenty-first Amendment came to be perceived as an exception to constitutional norms requires a review of the history and pressures to ratify the only amendment that repealed in full a previous amendment.[24] That necessarily requires studying the ratification of the Eighteenth Amendment and the ensuing era of Prohibition.

The Eighteenth Amendment was a mixed-motive product of "the greatest burst of constitutional activity since the Bill of Rights," which also included amendments establishing the federal income tax, direct election of senators, and women's suffrage.[25] Yet the work aborning Prohibition began roughly

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[21] *See* U.S. CONST. amends. XVIII, XXI.

[22] *National Beer Sales & Production Data*, BREWERS ASS'N, https://www.brewersassociation.org/statistics-and-data/national-beer-stats/ (last visited July 3, 2019).

[23] SEMISONIC, *Closing Time*, *on* FEELING STRANGELY FINE (MCA 1998).

[24] Robert P. George & David A. J. Richards, *The Twenty-First Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxi/interps/151 (last visited July 11, 2019).

[25] Robert P. George & David A. J. Richards, *The Eighteenth Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xviii/interps/169 (last visited July 5, 2019).

100 years before ratification of the Eighteenth Amendment. It remains debatable what was learned or achieved in prohibiting for just thirteen years "the manufacture, sale, or transportation of intoxicating liquors."[26]

A. The Antebellum Roots of the Temperance Movement

John James Marshall assumed the position of Fourth Chief Justice of the United States in 1801, and he quickly became, by some measures, "the greatest epicure of drink to sit as chief."[27] Historical accounts suggest that he "made the Court into a 'boozily social workplace,' with collegiality enhanced by frequent imbibing of his famous Quoit Club punch."[28] As early as 1827, in *Brown v. Maryland*, Chief Justice Marshall struck a blow to the federal government's power over interstate commerce by leading the Court in nullifying a Maryland law that would have required a state license to import, among other commodities, alcoholic beverages.[29]

Roger B. Taney—then-Attorney General of Maryland and eventual Chief Justice of the United States—had argued that "the law of Maryland did not lay a duty on imports, and was not repugnant to the constitution of the United States."[30] Taney argued that federal interference with a state's decision to tax imports was antithetical to constitutional norms:

> The *Federalist* must be considered as expressing the opinions of the friends of the federal constitution, both in and out of the Convention; and in No. 33, and near the conclusion of that number, the commentary on the subject of the taxing power is thus concluded: "The inference from the whole is, that the individual States would, under the proposed constitution, retain an independent and uncontrollable authority to raise revenue to any extent of

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[26] *See id.*

[27] Kenneth Jost, *Judging How America Drinks*, WASH. INDEP. REV. OF BOOKS (Jan. 4, 2019) (reviewing NANCY MAVEETY, GLASS AND GAVEL: THE U.S. SUPREME COURT AND ALCOHOL (2018)), http://www.washingtonindependentreviewofbooks.com/index.php/bookreview/glass-and-gavel-the-u.s.-supreme-court-and-alcohol.

[28] *See id.*

[29] *See* 25 U.S. (12 Wheat.) 419, 449 (1827) ("We think there is error in the judgment of the Court of Appeals of the State of Maryland, in affirming the judgment of the Baltimore City Court, because the act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the constitution of the United States, and, consequently, void.").

[30] *Id.* at 425.

> which they may stand in need, *by every kind of taxation*, except duties on imports and exports."[31]

Chief Justice Marshall rejected this contention, explaining that "[t]he constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory."[32] Until an imported product actually settles and mixes with other local commodities, it is still national in character:

> It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.[33]

Chief Justice Marshall's axiom became known as the "original-package doctrine."[34] Thus, the states' ability to control alcoholic imports remained relatively constrained. Yet for Taney, a moderate drinker due to ill health for most of his life, the decision was a mere setback.[35]

By the late 1820s, "a wave of religious revivalism" ignited what would become the temperance movement,[36] a social development that attracted many to its cause for reasons both benevolent and malevolent.[37] Massachusetts was an early pioneer in this movement, passing an 1838 law banning the sale of spirits in less than 15-gallon quantities.[38] In 1846, Maine

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[31] *Id.* at 430.
[32] *Id.* at 441.
[33] *Id.* at 441–42.
[34] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2464 (2019).
[35] Jost, *supra* note 27.
[36] *Prohibition*, HISTORY, https://www.history.com/topics/roaring-twenties/prohibition (last updated Jan. 27, 2020).
[37] *Cf.* Robert P. George, *Good and Bad Reasons For and Against Alcohol Prohibition*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xviii/interps/169#the-eighteenth-amendment-by-robert-george (last visited July 29, 2020).
[38] *Prohibition*, *supra* note 36.

became the first state to prohibit the sale of alcohol outright, with several states joining the cause by the start of the Civil War in 1861.[39]

As the Court's membership changed, its decisions also began to foment this movement.[40] Writing for a fractured Court in 1847 in the *License Cases*, Chief Justice Taney, Marshall's successor, declared:

> [I]f any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, 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.[41]

"[N]or can the court," Chief Justice Taney continued, "inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade."[42] Justice John McLean sought to explain in a separate dissenting opinion that, while a state's police-power prerogatives are cardinal, those powers drain away when states begin to "trench upon the power of Congress to regulate foreign commerce."[43] According to Justice McLean, it is too attenuated to strike down a law as interfering with commerce on the basis that, for example, "[a]n innkeeper is forbidden to allow drunkenness in his house, and if this prohibition be observed, a less quantity of rum is sold."[44] But that extreme example, Justice McLean explained, only proves the rule that "[i]n a system of government so complex as ours, it may be difficult, perhaps impracticable, to prescribe the exact limit, in particular cases, to federal and State powers."[45]

The Court's decisions during this period also reflect the belief that alcohol had become a hinderance to public safety and transportation. Just one year before the *License Cases*, in *Stockton v. Bishop*, the Supreme Court upheld a $6,500 jury award to a stagecoach passenger injured in a mishap

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[39] *Id.*
[40] *See* Jost, *supra* note 27.
[41] Thurlow v. Massachusetts (The License Cases), 46 U.S. (5 How.) 504, 577 (1847).
[42] *Id.* at 583.
[43] *Id.* at 589 (McLean, J., dissenting).
[44] *Id.* at 591.
[45] *Id.* at 588.

blamed on the driver's intoxication.[46] No blood draws or breathalyzers were needed back then. A few years later, in *Propeller Genesee Chief v. Fitzhugh*, Chief Justice Taney sanctioned jurisdiction in federal court over a lawsuit arising from the collision of two river-going vessels blamed on a wheelsman who may have been incapacitated by liquor.[47] Taney thereby concluded, "[i]t is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant look-out besides the helmsman."[48]

B. The Postbellum Temperance Movement: A Chorus of Conflicting Voices

The temperance movement gained further momentum after the Civil War as it avowed to fight "the perceived evils linked with alcoholic beverages."[49] In his important study of the Eighteenth Amendment and its repeal, Daniel Okrent described the jagged political coalition whose decades-long work led to the ratification of the Eighteenth Amendment:

> Five distinct, if occasionally overlapping, components made up this unspoken coalition: racists, progressives, suffragists, populists (whose ranks included a small socialist auxiliary), and nativists. Adherents of each group may have been opposed to alcohol for its own sake, but used the Prohibition impulse to advance ideologies and causes that had little to do with it.[50]

Robert George writes that, "[h]onorable supporters of alcohol prohibition hoped that a nationwide ban on the manufacture, sale, and transport of beverage alcohol would significantly reduce alcohol consumption, abuse, and addiction, resulting in fewer alcohol-related illnesses and accidents, and

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[46] *See* Stockton v. Bishop, 45 U.S. (4 How.) 155, 167 (1846) ("The allegation is, that the plaintiff, at the special instance and request of the defendants, became and was a passenger in a certain coach, to be carried safely, &c., for certain rewards to the defendants; and thereupon it was their duty to use due and proper care, that the plaintiff should be safely conveyed. The breach is well assigned, as it shows the neglect and consequent injury sustained.").

[47] 53 U.S. (12 How.) 443, 446, 463 (1852).

[48] *Id.*

[49] Autumn R. Veatch, Comment, *Where Does the Commerce Clause End and the Twenty-first Amendment Begin Under* Bainbridge v. Turner*?*, 39 NEW ENG. L. REV. 111, 116 (2004).

[50] George & Richards, *supra* note 25.

a reduction of alcohol-fueled violence and other social evils."[51] But the ignoble arguments in support of alcohol prohibition included a purported association between excessive drinking and particular social groups, among them African Americans, Catholics, immigrants from southern and eastern Europe, and—in the wake of World War I—Germans.[52] Some proponents of temperance denounced alcohol as "the Negro's center of power," because "[b]etter whiskey and more of it is the rallying cry of dark faced mobs."[53] Others viewed temperance as a means to stem the tide of immigration and the so-called "'hyphenated Americanism' against which President Theodore Roosevelt inveighed."[54]

As support for temperance galvanized, in 1880, Kansas became the first state to pass a constitutional provision that prohibited intrastate production and sale of alcohol.[55] Seven years later, the Supreme Court—now led by Chief Justice Morrison Remick "Mott" Waite—reviewed several challenges to that provision and its enabling legislation, all of which the plaintiff's attorney, George G. Vest, argued were in violation of various clauses of the Fourteenth Amendment:

> The right to manufacture for his own use either food or drink is certainly an absolute or natural right, reserved to every citizen—one guarante[ed] by the Fourteenth Amendment, and when, under the laws of Kansas he is punished for manufacturing beer, it "abridges his privileges as a citizen of the United States," it "deprives him of liberty and property without due process of law," and it denies him "the equal protection of the laws."[56]

Writing for the Court in an 8-1 decision, Justice John Marshall Harlan concluded that the laws did not violate the Constitution and were an appropriate exercise of the state's police powers:

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[51] Robert P. George, *Good and Bad Reasons For and Against Alcohol Prohibition*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xviii/interps/169#the-eighteenth-amendment-by-robert-george (last visited June 23, 2020).

[52] *See id.*

[53] David A. J. Richards, *The Dark Side of the Noble Experiment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xviii/interps/169#the-eighteenth-amendment-by-david-richards (last visited July 9, 2019).

[54] *See id.*

[55] *See* Russ Miller, Note, *The Wine Is in the Mail: The Twenty-first Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND. L. REV. 2495, 2503–04 (2001).

[56] Brief for the Petitioner at 653, Mugler v. Kansas, 123 U.S. 623 (1887).

> But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.[57]

Yet "mere pretenses," the Court continued, could not sustain a law regulating alcohol; rather, if "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."[58]

Justice Stephen J. Field argued in dissent that, although the majority was correct in upholding certain sections of the law prohibiting the sale of alcohol, the result would be different if Congress had authorized the importation of alcohol through its powers under the Commerce Clause:

> If one state can forbid the sale within its limits of an imported article, so may all the states, each selecting a different article. There would then be little uniformity of regulations with respect to articles of foreign commerce imported into different States, and the same may be also said of regulations with respect to articles of interstate commerce. And we know it was one of the objects of the formation of the federal constitution to secure uniformity of commercial regulations against discriminating state legislation.[59]

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[57] *Mugler*, 123 U.S. at 660–61.
[58] *Id.* at 661.
[59] *Id.* at 676 (Field, J., dissenting).

Justice Field also questioned the constitutionality of a provision under Kansas law authorizing the confiscation of property associated with producing alcohol and the possible imprisonment of scofflaws:

> These clauses appear to me to deprive one who owns a brewery and manufactures beer for sale, like the defendants, of property without due process of law. The destruction to be ordered is not as a forfeiture upon conviction of any offence, but merely because the legislature has so commanded.[60]

A few years after recognizing that states could prohibit the intrastate sale of alcohol, the Supreme Court heard a pair of cases from Iowa, one in which the state required importers to obtain special certificates,[61] and another in which the state banned the importation of liquor with limited exceptions.[62] In striking down both laws, the Court adopted the position that "the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce."[63] At the time of those decisions, the "original-package doctrine" defined the outer limits of Congress's authority to regulate interstate commerce,[64] where "goods shipped in interstate commerce were immune from state regulation while in their original package" because at that point they had not yet comingled with the mass of domestic property subject to the state's jurisdiction.[65] The original-package doctrine felled both laws under the reasoning that states could not regulate alcohol unless and until transportation of the alcohol terminated in the regulating state and became comingled with other property.[66]

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[60] *Id.* at 678.

[61] *See* Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465, 474 (1888).

[62] *See* Leisy v. Hardin, 135 U.S. 100, 123–24 (1890).

[63] Granholm v. Heald, 544 U.S. 460, 477 (2005) (citation omitted).

[64] *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 421–22 (1827) ("It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.").

[65] *Granholm*, 544 U.S. at 477.

[66] *See Leisy*, 135 U.S. at 123–24; *Bowman*, 125 U.S. at 485.

C. The Wilson Act and Webb-Kenyon Act as Frameworks for Regulating Alcohol Sales

The Supreme Court's decisions through 1890 left advocates for temperance "in a bind."[67] They could persuade states to pass laws banning the production and sale of alcohol within their borders, but those bans "were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package."[68] Put differently, "the Court's interpretation of the dormant Commerce Clause conferred favored status on out-of-state alcohol, and that hamstrung the dry States' efforts to enforce local prohibition laws."[69]

Congress responded that same year by passing the Wilson Act—named for Senator James F. Wilson of Iowa, whose home state's laws had been stymied by the Supreme Court's decisions—which gave states the power to regulate the importation of liquor to the same degree as they regulated in-state liquor:

> 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.[70]

The law sought to enable "each State to decide whether to admit alcohol," while "mandat[ing] equal treatment for alcohol produced within and outside a State, not favorable treatment for local products."[71] Eight years later, however, the Supreme Court again scuttled Congress's efforts, concluding

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[67] *Granholm*, 544 U.S. at 478.
[68] *Id.*
[69] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2465 (2019).
[70] Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2020)).
[71] *Tenn. Wine*, 139 S. Ct. at 2465–66.

that the Wilson Act did not cover mail-order alcohol,[72] thereby freeing residents of dry states to continue ordering and receiving imported alcohol. As a result, "[m]ail order booze, of course, flourished."[73] Perhaps by historical accident, the Wilson Act remains codified positive law.[74]

Temperance advocates, undeterred, persuaded Congress in 1913 to pass the Webb-Kenyon Act, which prohibited the importation of liquor into any state with intent to violate the laws of that state.[75] The Webb-Kenyon Act struck similar tones with what became Section 2 of the Twenty-first Amendment:

> 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 . . . or from any foreign country into any State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State . . . is hereby prohibited.[76]

Because of congressional consensus that a federal law according states with the authority to regulate all manner of importing alcohol "would amount to an unconstitutional delegation of Congress's legislative power over interstate commerce," the Webb-Kenyon Act "was framed not as a measure conferring power on the States but as one prohibiting conduct that violated state law."[77]

The Court upheld the constitutionality of the Webb-Kenyon Act in 1917, two years before the beginning of national prohibition.[78] In a 7-2 decision,

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[72] *See* Vance v. W. A. Vandercook Co., 170 U.S. 438, 444–45 (1898) ("It is also certain that the settled doctrine is that the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by Interstate Commerce remain under the shelter of the Interstate Commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the State."); Jason E. Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment*, 79 NOTRE DAME L. REV. 1563, 1575 (2004).

[73] Sidney J. Spaeth, Comment, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL L. REV. 161, 173 (1991).

[74] 27 U.S.C. § 121 (2020).

[75] Webb-Kenyon Act, Pub. L. No. 68-398, 37 Stat. 699 (1913).

[76] *Compare id.*, *with* U.S. CONST. amend. XVIII, § 2.

[77] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2466 (2019).

[78] James S. Clark Distilling Co. v. W. Md. Ry., 242 U.S. 311 (1917).

Chief Justice Edward White Jr. explained that West Virginia could permissibly "forbid all shipments, whether for personal use or otherwise, and whether from within or without" the borders of the state;[79] that "if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce, and therefore had prevented all movement between the several States, such action would have been lawful, because within the power to regulate which the Constitution conferred";[80] and that from Congress's broader powers necessarily intoned the lesser power to enact laws like the Webb-Kenyon Act, which "ma[de] it impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce."[81] As a Louisiana Democrat and "connoisseur of good drink," Chief Justice White did not let his predilections impede the nation's momentum plunging it into Prohibition.[82] Justice James C. McReynolds concurred in the judgment without a published opinion,[83] and Justice Oliver Wendell Holmes Jr. (joined by Justice Willis Van Devanter) dissented without a published opinion.[84] By that point, World War I had exacerbated xenophobia against the German brewing industry, leading one temperance politician to exclaim, "[a]nd the worst of all our German enemies, the most treacherous, the most menacing, are Pabst, Schlitz, Blatz and Miller."[85]

D. Prohibition as a Bridge Connecting Reconstruction and the Dawn of the Twentieth Century

With Nebraska's ratification on January 16, 1919, the Eighteenth Amendment became law, setting the nation on a path towards prohibition of the making, transporting, and selling of alcoholic beverages.[86] Proponents of the movement exhorted that temperance would reduce crime and corruption, decrease the need for welfare and prisons, and improve the health and welfare of Americans.[87] In contrast to earlier amendments to the Constitution, the Eighteenth Amendment set a one-year delay before it

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[79] *Id.* at 318.
[80] *Id.* at 325–26.
[81] *Id.* at 331.
[82] *See* Jost, *supra* note 27.
[83] *James S. Clark Distilling Co.*, 242 U.S. at 332 (McReynolds, J., concurring in judgment).
[84] *Id.* (Holmes, J., dissenting).
[85] Evan Andrews, *10 Things You Should Know About Prohibition*, HISTORY (Jan. 16, 2015), http://www.history.com/news/10-things-you-should-know-about-prohibition.
[86] *See Happy Birthday to the 18th Amendment!*, NAT'L CONST. CTR. (Jan. 16, 2020), https://constitutioncenter.org/blog/happy-birthday-kind-of-to-the-18th-amendment; U.S. CONST. amend. XVIII.
[87] *See id.*

would become operative.[88] That the government hesitated for one year is telling, and foreshadowed the fate of the "noble experiment,"[89] which served as an interregnum between an inward focus on Reconstruction and an outward focus on increasing globalism.[90]

To define the prohibitory terms of the Eighteenth Amendment, Congress passed the National Prohibition Act, better known as the Volstead Act, on October 28, 1919.[91] The Volstead Act clarified that certain "intoxicating liquors" were exempted from Prohibition (notably those used for medial and religious purposes) and charged the U.S. Treasury Department with enforcement of the new restrictions.[92] President Woodrow Wilson vetoed the bill, but was overridden by Congress.[93] Wilson's veto was largely grounded in what he considered a procedural deficiency in the bill's enforcement during wartime (which he considered unnecessary because Americans considered World War I over), stating that when dealing with matters affecting the "personal habits and customs of large numbers of our people," it is cardinal to alleviate any perceived procedural flaws.[94] Thus, the Volstead Act directed that nationwide Prohibition would start on January 17, 1920, the earliest date authorized by the Eighteenth Amendment.[95] Prohibition was the law of the land for the following thirteen years.[96]

The Supreme Court heard several cases touching on Prohibition. Although the Court first observed that "[t]he Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book,"[97] the justices' views (or at least treatment of) alcohol shifted over the thirteen years in which Prohibition was in effect.

In 1920, the Supreme Court decided seven cases from Rhode Island, New Jersey, Massachusetts, Kentucky, Wisconsin, and Missouri.[98] Known as the *National Prohibition Cases*, the Court upheld challenges to the ratification

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[88] George & Richards, *supra* note 25.

[89] Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INST. (July 17, 1991), https://www.cato.org/policy-analysis/alcohol-prohibition-was-failure (last visited July 29, 2020).

[90] *See generally* George & Richards, *supra* note 25.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] The Woodrow Wilson Presidential Library & Museum, *Prohibition: The Volstead Act*, THE WOODROW WILSON BLOG (Nov. 21, 2018), https://www.woodrowwilson.org/blog/2018/11/21/prohibition-the-volstead-act.

[95] George & Richards, *supra* note 25.

[96] *Id.*

[97] Grogan v. Hiram Walker & Sons, Ltd., 259 U.S. 80, 89 (1922).

[98] Nat'l Prohibition Cases, 253 U.S. 350, 387 (1920).

of the Eighteenth Amendment and enactment of the Volstead Act.[99] Writing for the Court in a 7-2 decision, Justice Van Devanter explained that while the text of the Eighteenth Amendment gave Congress and the States "concurrent power" to enforce prohibition, exercise of that authority could not "defeat or thwart the prohibition."[100] Justice McReynolds penned a cautionary concurrence: "It is impossible now to say with fair certainty what construction should be given to the Eighteenth Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here."[101] Justice Joseph McKenna argued in dissent that "united action between the States and Congress" was necessary to decide what was intoxicating and that "[t]he conviction of the evils of intemperance—the eager and ardent sentiment that impelled the Amendment,—will impel its execution through Congress and the States."[102] Justice John Hessin Clarke similarly argued in dissent that any enabling legislation would be "effective within the boundaries of any State only when concurred in by action of Congress and of such State."[103]

Two years later, in *Corneli v. Moore*, the Court—while acknowledging that the Constitution and the Volstead Act permitted consuming alcohol within a person's home—explained the freedom to consume alcohol did not extend to a government-bonded warehouse.[104] Nor did it deprive the owner of due process, the Court explained, when the Volstead Act precluded transportation of previously lawful alcohol to the owner's home.[105] Only Justice McReynolds dissented:

> Corneli entrusted his supply to a government warehouse as permitted by the statute, and is denied the privilege of taking it home because that warehouse is not contributory to his dwelling, nor an adjunct thereto, nor an outbuilding connected therewith . . . He stored where the statute said he might. Now he is told that no analogy exists between his lonely barrel there and the many "bottles, barrels, casks and cases" which, within more favored walls, await the pleasure of their owner.[106]

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[99] *Id.*
[100] *Id.*
[101] *Id.* at 392 (McReynolds, J., concurring).
[102] *Id.* at 405–06 (McKenna, J., dissenting).
[103] *Id.* at 408 (Clarke, J., dissenting).
[104] 257 U.S. 491, 496 (1922).
[105] *Id.* at 498.
[106] *Id.* at 500–01 (McReynolds, J., dissenting).

Prohibition also affected foreign commerce. In 1922, in a 7-3 decision by Justice Holmes, the Court concluded that the Constitution and the Volstead Act prohibited the transportation of intoxicating liquors from a foreign port through the United States to another foreign port.[107] One year later, Justice Van Devanter explained that the Volstead Act enabled the seizure of alcohol carried on both foreign and American ships at sea because

> [i]t now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.[108]

Stated differently, Prohibition reigned both on the land and at sea. Justice McReynolds again dissented (this time without a published opinion),[109] while Justice George Sutherland explained in a separate dissent that "I am unable to accept the view that the Eighteenth Amendment applies to foreign ships coming into our ports under the circumstances here disclosed."[110]

While impingement of economic liberties seemed to stir some justices at the outset, challenges to criminal convictions related to Prohibition were initially met with skepticism before an eventual softening of views on the Court. Writing for the Court in a unanimous decision, even Justice McReynolds refused to grant a writ of habeas corpus to a pharmacist convicted of prescribing eight ounces or more of alcohol because "certainly nothing in [the Volstead Act] lends color to the suggestion that it endows a pharmacist with the right to dispense liquors for which he may claim the protection of the Fourteenth Amendment."[111] Enforcement of the Volstead Act also gave rise to what would become the automobile exception to the warrant requirement under the Fourth Amendment. In *Carroll v. United States*, Chief Justice William Howard Taft explained that a warrantless search did not violate the Fourth Amendment when "the facts and circumstances within [the police officers'] knowledge and of which they had

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[107] Grogan v. Hiram Walker & Sons, Ltd., 259 U.S. 80, 85, 90 (1922).
[108] Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923).
[109] *Id.* at 132 (McReynolds, J., dissenting).
[110] *Id.* (Sutherland, J., dissenting).
[111] Hixson v. Oakes, 265 U.S. 254, 256 (1924).

reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched."[112] Although Chief Justice Taft decried off the bench that he "did not believe that liquor control could be sustained," his personal doubt did not impede enforcement of Prohibition.[113] In *Carroll*, Justice McReynolds, joined by Justice Sutherland, returned to their remonstrations against overzealous enforcement of the Volstead Act: "The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods."[114] All told, despite skepticism among some members of the Court, Prohibition steadily creeped beyond interstate commerce to effect law more generally, including shaping criminal law in its short tenure.

E. Field Observations of the Noble Experiment

Fissures in the Court's thinking about Prohibition began to emerge as the roaring 1920s continued. In a unanimous decision in 1925, Chief Justice Taft explained—without citing the Eighteenth Amendment—that Article II permitted the president to pardon a contempt offense in which the defendant had been found to have "sold to several persons liquor to be drunk on his premises" in violation of a temporary order.[115] One year later, writing for a five-justice majority in *Lambert v. Yellowley*, Justice Louis D. Brandeis concluded that Congress had the power to establish the "amount of liquor which may be prescribed for medicinal purposes" because it would be "strange if Congress lacked the power to determine that the necessities of the liquor problem require a limitation of permissible prescriptions, as by keeping the quantity that may be prescribed within limits which will minimize the temptation to resort to prescriptions as pretexts for obtaining liquor for beverage uses."[116] Put more simply, Congress had the power to regulate the medicinal use of alcohol.

Although the decision appeared a logical extension of precedent, Justice Sutherland and three other justices argued in dissent that "Congress in submitting the Amendment, and the several states in ratifying it, meant to leave the question of the prohibition of intoxicating liquors for other than

[112] 267 U.S. 132, 162 (1925).
[113] Jost, *supra* note 27.
[114] *Carroll*, 267 U.S. at 163 (McReynolds, J., dissenting).
[115] *Ex parte* Grossman, 267 U.S. 87, 107 (1925).
[116] 272 U.S. 581, 589, 597 (1926).

beverage purposes to the determination of the states, where it had always been."[117] He explained that the Court

> must begin this inquiry with the assumption that vinous and spirituous liquors are in fact valuable medicines; and it necessarily follows that, at least as an end as distinguished from a means to an end, the prescription of such liquors in good faith for medicinal use cannot be prohibited by Congress, since that body lawfully cannot legislate beyond the grants of the Constitution.[118]

For the four dissenters, "[a] grant of power to prohibit for specified purposes does not include the power to prohibit for other and different purposes."[119] The tension between federal power and more localized solutions thus surfaced in greater relief as the noble experiment wore on.

One year later, in *Gambino v. United States*, Justice Brandeis, explained that the pre-incorporated exclusionary rule for federal agents could apply when state actors, although not agents of the United States, act in "relation to the federal prosecution" under the Volstead Act[120]:

> We are of opinion that the admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the Fourth and Fifth Amendments. The wrongful arrest, search and seizure were made solely on behalf of the United States. The evidence so secured was the foundation for the prosecution and supplied the only evidence of guilt. It is true that the troopers were not shown to have acted under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such cooperation, as by the state officers acting under direction of the federal officials.[121]

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[117] *Id.* at 597 (Sutherland, J., dissenting).
[118] *Id.* at 601.
[119] *Id.* at 603.
[120] 275 U.S. 310, 314 (1927).
[121] *Id.* at 316.

The result marked, as the Court acknowledged, its first application of the exclusionary rule to state actors not under federal direction or control.[122] And the decision was unanimous in favor of the bootleggers.

One year later, in another 5-4 decision, Chief Justice Taft explained in *Olmstead v. United States* that "the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping" without a warrant could be used without violating the Fourth and Fifth Amendment to prove "conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors."[123] The decision produced four separate dissents,[124] including a memorably prescient opinion by Justice Brandeis:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.[125]

After serving a few years in prison, Olmstead was pardoned.[126] The Supreme Court overturned the wiretap exception to the Fourth Amendment in 1967.[127]

Although a majority of the Supreme Court seemed committed to Prohibition as a nationalized solution at the outset, as its decisions telegraphed, agitation for repeal sparked "almost from the time [the Eighteenth Amendment] was adopted."[128] Accounts suggest the passage of the Eighteenth Amendment drove the lucrative alcohol business

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[122] *Id.* at 314.

[123] 277 U.S. 438, 455 (1928).

[124] *Id.* at 469 (Holmes, J., dissenting); *id.* at 471 (Brandeis, J., dissenting); *id.* at 485 (Butler, J., dissenting); *id.* at 488 (Stone, J., dissenting).

[125] *Id.* at 474 (Brandeis, J., dissenting).

[126] *Olmstead Case Was a Watershed for Supreme Court*, NAT'L CONST. CTR. (June 4, 2020), https://constitutioncenter.org/blog/olmstead-case-was-a-watershed-for-supreme-court.

[127] *See* Katz v. United States, 389 U.S. 347, 353 (1967).

[128] Rutkin v. Reinfeld, 229 F.2d 248, 255 (2d Cir. 1956).

underground, creating a pervasive black market.[129] According to some reports, "[i]t was only slightly more difficult to buy liquor under Prohibition than it had been prior to its passage."[130] Evidence shows that Prohibition encouraged disrespect for the law and strengthened organized crime.[131] Several states refused to enforce the Eighteenth Amendment.[132] New York City boasted more than thirty thousand speakeasies, and Detroit's alcohol trade was second only to the auto industry in contribution to its economy.[133] Chicago gangster Al Capone earned $60 million annually from bootleg operations and speakeasies.[134] Illegal operations fueled a corresponding rise in gang violence, including the 1929 St. Valentine's Day Massacre in Chicago, in which several men, dressed as police officers, killed a group from a rival gang.[135]

In the face of gangsters bootlegging and politicians succumbing to corruption, President Warren G. Harding declared that Prohibition had metastasized into a "nationwide scandal."[136] To be sure, Prohibition succeeded in curbing drinking, most effectively among the nation's working class and poor, as the high price of bootleg liquor margined out all but middle- and upper-class consumers.[137] What is more, the "costs of law enforcement, jails and prisons spiraled upward" for what enforcement did occur.[138] And estimates suggest that more than ten thousand people died of tainted booze during Prohibition.[139] As the roaring 1920s gave way to the Great Depression, consensus emerged that a change of course was necessary for the "failed, if noble, experiment."[140]

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[129] *Happy Birthday to the 18th Amendment!*, *supra* note 86.

[130] Marc Aaron Melzer, Comment, *A Vintage Conflict Uncorked: The 21st Amendment, the Commerce Clause, and the Fully-Ripened Fight over Interstate Wine and Liquor Sales*, 7 U. PA. J. CONST. L. 279, 283–84 (2004).

[131] *Happy Birthday to the 18th Amendment!*, *supra* note 86.

[132] Andrews, *supra* note 85.

[133] *Id.*

[134] *Prohibition*, *supra* note 36.

[135] *Id.*

[136] LAURENCE F. SCHMECKEBIER, THE BUREAU OF PROHIBITION 46 (1929).

[137] *Prohibition*, *supra* note 36.

[138] *Id.*

[139] Andrews, *supra* note 85.

[140] George & Richards, *supra* note 24.

III. THE TWENTY-FIRST AMENDMENT'S DESCENT FROM MOST-FAVORED AMENDMENT

As the nation came to understand that the virtues of temperance could not counterpoise the consequences of removing a liberty widely enjoyed,[141] the constitutional solution carried with it the baggage of Prohibition and left courts to consider whether the Twenty-first Amendment was a simple repeal and return to the status quo or instead an amplification of state power in the area of alcohol regulation.[142] Alongside the contributing foreground of Prohibition, the idea that the Twenty-first Amendment supplanted certain constitutional protections that do not directly relate to alcohol is a product of the amendment's ratification, text, and application, all of which merged into a mystique of exceptionalism that has only recently been subject to the gravitational pulls of larger constitutional norms.

A. Ratification of the Twenty-first Amendment: Rejoicing with Guarded Optimism

The election of President Franklin Delano Roosevelt in November 1932 dealt a fatal blow to Prohibition.[143] The new Congress made it a priority to repeal anti-alcohol statutes, passing a proposed amendment styled as "Repeal of Prohibition" on February 20, 1933.[144] Yet with the understanding that, even at a fast pace, it would take months for the states to consider a constitutional amendment covering all intoxicating liquors, Congress passed an interim solution.[145] "[F]aced [with] a thirsty American public that also dealt with a crippling Depression," President Roosevelt signed the Cullen-Harrison Act on March 22, 1933, which amended the Volstead Act's definition of "intoxicating" to permit people to buy and drink in public low-alcohol beer and wine.[146]

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[141] *See generally* Jesse D.H. Snyder, *What Prohibition Teaches About Guns and Abortion: How Alcohol Can Save Individual Rights*, 28 HASTINGS WOMEN'S L.J. 143 (2017).

[142] *See* Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d 608, 632–33 (6th Cir. 2018) (Sutton, J., dissenting).

[143] *The Constitutional Origins of National Beer Day*, NAT'L CONST. CTR.: CONST. DAILY (Apr. 7, 2019), https://constitutioncenter.org/blog/the-constitutional-origins-of-national-beer-day.

[144] George & Richards, *supra* note 24.

[145] *The Constitutional origins of National Beer Day*, *supra* note 143.

[146] *Id.*

When the Cullen-Harrison Act took effect on April 7, 1933, which is now considered "National Beer Day," newspapers ran headlines that beer was back on taps in nineteen states.[147]

> In St. Louis, the Budweiser Clydesdales made their first public appearance as they pulled a beer wagon through the city. In Washington, D.C., the owner of the Abner-Drury Brewery ordered a guarded truck to depart at 12:01 a.m. for the White House, with two cases of beer for President Roosevelt. The shipment arrived along with a local press contingent, only to discover that Roosevelt was asleep. The Marine who was guarding the beer opened the first symbolic beer bottle and drank it so the press could get photographs. Later, the president sent the beer cases to the National Press Club. In Chicago, an estimated $5 million in beer sales occurred on that single day. There were few reports of arrests. In Hollywood, actress Jean Harlow christened a beer delivery truck.[148]

Amid the revelry of lawful consumption of low-alcohol beer and wine, the proposed amendment sent to the states for ratification contained three sections.[149] The first section repealed the Eighteenth Amendment.[150] The second section contained the substance of the new Amendment: "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."[151] The third section was unique in that it dictated how the states must ratify the Amendment and by when they must do so: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."[152]

The Twenty-first Amendment ultimately became the only amendment ever approved by state ratifying conventions, which occurred roughly ten months after submission to the states.[153] Professors Robert George and

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[147] *Id.*
[148] *Id.*
[149] George & Richards, *supra* note 24.
[150] U.S. CONST. amend. XXI, § 1.
[151] U.S. CONST. amend. XXI, § 2.
[152] U.S. CONST. amend. XXI, § 3.
[153] George & Richards, *supra* note 24.

David Richards suggest that a mandate of ratification through state conventions, rather than state legislatures, was calculated to provide cover for elected officials still beholden to temperance lobbyists:

> The answer seems to be that though prohibition of alcohol had lost a great deal of popular support by the early 1930s, the political power of the temperance lobby remained intact in a great many states. Many state legislators and legislative leaders were likely to be unwilling to risk the lobby's wrath. So political prudence pointed in the direction of ratifying conventions as a way of leaving gun-shy legislators with their eyes on re-election out of the process and "off the hook."[154]

Prohibition officially ended with the ratification of the Twenty-first Amendment on December 5, 1933.[155] On that day, conventions in Ohio, Pennsylvania, and Utah approved the Amendment, making it official.[156] In New Orleans, as the story goes, the occasion was honored with twenty minutes of celebratory cannon fire.[157] According to another apocryphal tale, President Roosevelt marked the occasion by downing a dirty martini.[158] Although a few states continued to prohibit alcohol after Prohibition, all had abandoned the movement by 1966.[159] Mississippi was the last dry state in the country, finally allowing the sale of liquor that year.[160] The "noble experiment" had failed.[161]

Around the time of ratification, American financier and philanthropist John D. Rockefeller Jr. commissioned a study on the effects of alcohol regulation, seeking to support the return to legal alcohol sales.[162] Under Rockefeller's commission, Raymond Fosdick and Albert Scott produced *Toward Liquor Control*, which outlined how policymakers might create regulatory systems for alcohol.[163] Some commentators have likened *Toward*

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[154] *Id.*
[155] *See* U.S. CONST. amend. XXI; Simpkins v. United States, 78 F.2d 594, 595 (4th Cir. 1935).
[156] *Happy Birthday to the 18th Amendment!*, *supra* note 86.
[157] Andrews, *supra* note 85.
[158] *Id.*
[159] *Prohibition*, *supra* note 38.
[160] Totenberg & Montanaro, *supra* note 12.
[161] Matthew B. Mills, Note, *Let History Be Our Guide: Using Historical Analogies to Analyze State Response to a Post*-Granholm *Era*, 81 IND. L.J. 1097, 1102 (2006).
[162] *Toward Liquor Control*, CTR. FOR ALCOHOL POL'Y, https://www.centerforalcoholpolicy.org/toward-liquor-control/ (last visited Aug. 16, 2019).
[163] *See id.*

Liquor Control to *The Federalist Papers*, suggesting that the book is a "leading intellectual treatise" on the Twenty-first Amendment.[164] Fosdick and Scott argue that Prohibition was destined to fail; instead, the states should both legalize alcohol and heavily regulate the "menace."[165] Fosdick and Scott estimated that "it was a mistake to regard the United States as a single community in which a uniform policy of liquor control could be enforced."[166] "When the citizens of the Unites States wrote prohibition into the Federal constitution," they explained, those citizens "forgot that this nation is not a social unit with uniform ideas and habits."[167]

As soon as 1934, Chief Justice Taft's successor, Charles Evans Hughes, led the Court in backing away from viewing the drinker as a "lowly bootlegger" and nudged toward rhapsodizing the drinker as a "civil libertarian patriot."[168] In *United States v. Chambers*, Chief Justice Hughes's six-page opinion for a unanimous court held that continued prosecutions under the preexisting regime of Prohibition could no longer stand:

> The continuance of the prosecution of the defendants after the repeal of the Eighteenth Amendment, for a violation of the National Prohibition Act alleged to have been committed in North Carolina, would involve an attempt to continue the application of the statutory provisions after they had been deprived of force.[169]

The Court further explained that, "The principle involved is thus not archaic, but rather is continuing and vital that the people are free to withdraw the authority they have conferred and, when withdrawn, neither the Congress nor the courts can assume the right to continue to exercise it."[170] Chief Justice Hughes thus made manifest that "any still pending Volstead

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[164] *Tennessee Retailers' Supreme Court Case Has A New Respondent*, ALCOHOL L. REV. (Feb. 27, 2019), https://www.alcohollawreview.com/supreme-court-briefing-completed-by-parties-for-tennessee-retailers-appeal-from-6th-circuit/.

[165] *See id.*; RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 6–8, 10, 28–32 (Center for Alcohol Policy 2011) (1933).

[166] *Guest Column: 100 Years After the Failure of Prohibition, the Supreme Court Has Opportunity to Prevent Another Federalization of Alcohol Policy*, ALCOHOL L. REV. (Jan. 15, 2019), https://www.alcohollawreview.com/guest-column-100-years-after-the-failure-of-prohibition-the-supreme-court-has-opportunity-to-prevent-another-federalization-of-alcohol-policy/.

[167] *See id.*

[168] Jost, *supra* note 27.

[169] 291 U.S. 217, 222–23 (1934).

[170] *Id.* at 226.

Act prosecutions cannot be continued."[171] Enforcement of nationalized Prohibition had vaporized.

B. Pause and Reflection Following Ratification of the Twenty-first Amendment

The aftermath of ratification was a time for reflection and, for some, vindication. Some opponents accurately predicted the criminal boom for those that worked within the black market during Prohibition.[172] Others foresaw that "lax or selective enforcement" of the Eighteenth Amendment, coupled with rampant corruption and bribing of judges, officers and other public officials, would negate law and order, "erod[ing] respect for the authority of law generally."[173] "The Anti-Saloon League (founded in 1893) and its allies had shut down the saloon," Professors George and Richards explained, "only to have it replaced by the 'speakeasy.'"[174] Despite the benefit of hindsight, it should not be forgotten that "many well-intentioned and honorable people—progressives, activists for women's rights, religious groups—were motivated by an honest (and accurate) sense that drunkenness and alcohol addiction were significant contributing factors to major social ills."[175] So a "democratic society may decide that recreational drinking is worth the price in tragic fatalities and other consequences."[176]

That "after fourteen years with nothing to drink the American people got thirsty" simplifies the impetus behind the repeal of Prohibition, not least because of a "feeling that the widespread flouting of Prohibition laws was undermining respect for law in general and encouraging an attitude of contempt for rightful authority."[177] To some, the "noble experiment" was "worth a try," validating a willingness to experiment with freedom and restraint.[178] But to the extent that Prohibition achieved a reduction in alcohol consumption and alcoholism generally, it did so at a societal cost.[179]

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[171] Jost, *supra* note 27 (internal quotes omitted).

[172] George, *supra* note 37.

[173] *See id.*

[174] *See id.*; George & Richards, *supra* note 24.

[175] Robert P. George, *Public Morality, Prudence, and the "Noble Experiment" that Failed*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxi/interps/151#the-twenty-first-amendment-by-robert-george (last visited July 12, 2019).

[176] David A. J. Richards, *What We Should Have Learned (But Did Not) From the Failure of the Noble Experiment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxi/interps/151#the-twenty-first-amendment-by-david-richards (last visited July 12, 2019).

[177] George & Richards, *supra* note 24.

[178] George, *supra* note 37.

[179] *See id.*

Although not quite instantiated by 1933, more contemporary positions have surfaced with

> the doctrinaire libertarian belief that people have a right to drink, and even to get drunk, and that law therefore has no legitimate authority to forbid the production and sale of alcoholic beverages or other intoxicants, even for the sake of ameliorating the social ills resulting from its widespread abuse.[180]

For these libertarians, Prohibition represented "the control of consciousness that [is] at the heart of the values of freedom of thought and experience of the First Amendment," and "for this reason violated human rights, and should further be condemned because its political motives were, on examination, racist, condemning the ways of life not only of people of color but of racialized recent immigrants."[181] "The violent criminality associated with alcohol use was," Professor Richards explained, "largely the product of its unjust criminalization (its criminogenesis)."[182]

Prohibition marks the only time that the states ratified a constitutional amendment only to repeal it after experience.[183] This unsuccessful foray that once had the approval of three-fourths of the states illustrates, among other things, what happens when rights assumed to be retained by the people cease to exist.[184] Instead of referring to the epoch as an effective execution of the constitutional-amendment process, history labels the period as a failure.[185]

Prohibition teaches many things, not least of them including the idea that when purged of an individual right, people carry on as if they still retain the right despite state action to the contrary. Confidence in governmental institutions erodes, and respect for the rule of law falls to a nadir. And, as history demonstrates, the unresolved issues of Reconstruction remained just that—unresolved during a time when the nation's focus turned to sobriety and became increasingly blind to emerging globalism.[186] In the view of Professor Richards, Prohibition anticipated what President Richard Nixon's advisor John Ehrlichman later acknowledged was the basis for the administration's War on Crime: "We knew we couldn't make it illegal to be

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[180] *See id.*
[181] Richards, *supra* note 177.
[182] *See id.*
[183] *Compare* U.S. CONST. amend. XVIII, *with* U.S. CONST. amend. XXI.
[184] U.S. CONST. art. V.
[185] Mills, *supra* note 161, at 1100 (citations omitted).
[186] Richards, *supra* note 53.

either against the war or black . . . but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt these communities."[187] From that perspective, Prohibition was born of "some of our worst, most ignoble political impulses," which later perpetuated "racialized mass incarceration" for "the drug habits of lower-class people of color."[188]

Whatever lessons can be gleaned from Prohibition, the residual effects of those thirteen years carry some measure of purchase over interpreting the Twenty-first Amendment because of its peculiar history and wording. Had the Twenty-first Amendment ended at its first section, litigation over its meaning would have been uninteresting because it would have been clear that the amendment process "restore[d] the status quo ante."[189] It did not. And as a result, courts are still interpreting the second section of the Twenty-first Amendment, seeking to glean just how exceptional the repeal of Prohibition should be in furthering a state's regulatory aims over alcohol.

C. State Power Enabled by the Language of the Twenty-first Amendment

The perceived exceptionalism of the Twenty-first Amendment can be traced, in part, to its second and only substantively operative section after ratification.[190] Section 2 of the Twenty-first Amendment provides as follows: "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."[191] Although Prohibition has received ample attention among scholars, actual documentation of the ratification history of the Twenty-first Amendment is "famously sparse."[192]

The underpinnings of Twenty-first Amendment exceptionalism are found in this second section. Read literally, any state—for any reason—could prohibit the transportation, importation, or possession for delivery of intoxicating liquors. The upshot would permit, for example, a "state law

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[187] *See id.*

[188] Richards, *supra* note 177.

[189] George & Richards, *supra* note 24.

[190] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2462 (2019) ("Although the interpretation of any provision of the Constitution must begin with a consideration of the literal meaning of that particular provision, reading §2 to prohibit the transportation or importation of alcoholic beverages in violation of any state law would lead to absurd results that the provision cannot have been meant to produce.").

[191] U.S. CONST. amend. XXI, § 2.

[192] *Tenn. Wine*, 139 S. Ct. at 2480 (Gorsuch, J., dissenting).

prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex," which for any other commodity would violate the Equal Protection Clause.[193] A similarly capacious understanding of the Twenty-first Amendment could permit a state to proscribe the importation of alcohol for sale to Democrats or, on the seller's side of the transaction, bar Republicans from importing alcohol.[194] Although the Supreme Court has described the Twenty-first Amendment as a "shield" from other constitutional protections,[195] an energetic reading of the amendment is better understood as a sword of overriding power against an individual's liberty interests no longer shielded by the Constitution. Put more simply, shields protect rights while swords project power to limit rights. And states, of course, have powers—not rights. Yet language inviting states to enact "any law" entices the question of whether the Twenty-first Amendment is truly an exception to constitutional norms.

Since its enactment, states have taken the position that the Amendment granted them broad authority over the regulation of alcoholic beverages and limited the power of the federal government to intercede into local beverage-control policies.[196] Some states have exercised this perceived authority by delegating it to counties and localities.[197] As a result, the availability of alcoholic beverages, their prices, and the terms and conditions under which they can be obtained (for example, whether a county is "dry," or whether a state itself exercises a monopoly on the sale of wines and spirits) have varied substantially across the country and even within the states.[198] Even so, amid the influx of state action following ratification of the Twenty-first Amendment, interpretations of the limits (if any) on state power were slow to percolate. The Twenty-first Amendment thus attained most-favored-constitutional-provision status based on untested assumptions and practices.

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[193] *See Tenn. Wine*, 139 S. Ct. at 2462–63 (majority opinion)
[194] *See id.*
[195] *See id.* at 2457, 2466, 2469, 2471, 2474.
[196] George & Richards, *supra* note 24.
[197] *See id.*
[198] *See id.*

D. The Supreme Court's Views on the Twenty-first Amendment Through Three Chiefs

Although it appears settled that a state or local entity can ban all alcohol sales within its jurisdiction, it was less clear what a state could do beyond that.[199] This is largely because of the capacious language of the Twenty-first Amendment, but also because the repeal of Prohibition came after the ratification of some of the Constitution's most litigated amendments.[200] So questions remained about whether this later amendment displaced its predecessors.

i. The Warren Court Energizes Federal Power to Regulate Alcohol

Although the Warren Court had few opportunities to interpret the Twenty-first Amendment, those few decisions laid the groundwork for understanding that Congress's commerce power is not subordinate to the Twenty-first Amendment. Near the end of the Warren Court, in 1964, the Supreme Court addressed whether the Twenty-first Amendment enabled Kentucky to enact a law regulating alcohol in a manner that would otherwise violate the Export-Import Clause.[201] Writing for the Court in a 6-2 decision (with Justice William J. Brennan Jr. not participating in the disposition of the case) in *Department of Revenue v. James B. Beam Distilling*, Justice Potter Stewart explained that "[t]his Court has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids."[202] The law at issue required Jim Beam to obtain a permit from Kentucky and "pay a tax of 10 cents on each proof gallon of whisky which it thus imported from Scotland."[203] "To sustain the tax which Kentucky has imposed in this case," Justice Stewart observed, "would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned."[204] The majority made clear that "[n]othing in the language of the Amendment nor in its history leads to such an extraordinary conclusion."[205]

In doing so, Justice Stewart also explicated where the Twenty-first Amendment steps in to amplify state power:

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[199] *See id.*
[200] *See* Granholm v. Heald, 544 U.S. 460, 496 (2005) (Stevens, J., dissenting).
[201] Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 342 (1964).
[202] *Id.* at 344.
[203] *Id.* at 342.
[204] *Id.* at 345.
[205] *Id.* at 345–46.

> We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported.[206]

Justice Hugo Black argued in dissent that states have "plenary power to decide which liquors shall be admitted into the State for storage, sale, or distribution within the State."[207] Writing just for himself, and not for Justice Arthur Goldberg who otherwise joined the dissent in full, Justice Black mused that "[a]lthough I was brought up to believe that Scotch whisky would need a tax preference to survive in competition with Kentucky bourbon, I never understood the Constitution to require a State to give such preference."[208]

In the same year, along the same lineup of votes, in *Hostetter v. Idlewild Bon Voyage Liquor*, Justice Stewart explained that, while a state "is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders," it would be an "oversimplification" to suggest that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned."[209] There, the Court concluded that New York could not pass a law requiring state licensure before selling bottled alcohol in John F. Kennedy Airport to departing travelers bound for foreign countries because the U.S. Bureau of Customs had already sanctioned that activity under the Tariff Act of 1930.[210] In the majority's view, "the State has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations."[211] Justice Black relied on the Amendment's ratification history to

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[206] *Id.* at 346.
[207] *Id.* at 348 (Black, J., dissenting).
[208] *Id.* at 348–49.
[209] 377 U.S. 324, 330–32 (1964).
[210] *Id.* at 325–26.
[211] *Id.* at 334.

argue in dissent that the majority's analysis proved correct the fear among senators during the ratification debates that "any grant of power to the Federal Government, even a seemingly narrow one, could be used to whittle away the exclusive control over liquor traffic given the States by Section 2."[212]

ii. The Burger Court Clarifies the Constitutional Order

The Burger Court accelerated momentum toward normalizing the Twenty-first Amendment by addressing challenges to state laws under various constitutional provisions. In 1971, in *Wisconsin v. Constantineau*, the Supreme Court addressed whether the Twenty-first Amendment circumscribes the right to procedural due process when engaging in the sale or gifting of alcohol.[213] The Court reviewed a state law empowering designated officials without notice to post signs forbidding the sale or gift of alcohol by anyone "who 'by excessive drinking' produces described conditions or exhibits specified traits, such as exposing himself or family 'to want' or becoming 'dangerous to the peace' of the community."[214] As framed by Justice William O. Douglas, "[t]he only issue present here is whether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard."[215] In a 6-3 decision, Justice Douglas concluded that:

> [T]he private interest is such that those requirements of procedural due process must be met. . . . Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the Court explained, "notice and an opportunity to be heard are essential.[216]

The dissenters, although acknowledging that due-process problems may exist with the state law as applied, would have waited for a definitive interpretation from the Wisconsin courts before intervening in the case.[217]

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[212] *Id.* at 337 (Black, J., dissenting).
[213] 400 U.S. 433, 436 (1971).
[214] *Id.* at 434 (quoting WIS. STAT. § 176.26 (1967)).
[215] *Id.* at 436.
[216] *Id.* at 436–37.
[217] *See, e.g.*, *id.* at 441–43 (Burger, C.J., dissenting).

In 1976, in *Craig v. Boren*, the Supreme Court further expounded that the "the Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment."[218] There, the Court considered separate sections of an Oklahoma statute, which prohibited the sale of a certain state-defined category of alcohol—"nonintoxicating" 3.2% beer—to males under 21 and females under 18.[219] Women could drink 3.2% beer at 18, while men had to wait until they were 21. In a 7-2 decision, Justice Brennan observed at the outset that a female vendor of 3.2% beer had standing to sue "to assert those concomitant rights of third parties" because "[s]he is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or to disobey the statutory command and suffer, in the words of Oklahoma's Assistant Attorney General, 'sanctions and perhaps loss of license.'"[220]

On the merits, the Court concluded that "Oklahoma's 3.2% beer statute invidiously discriminates against males 18–20 years of age" not least because "the relationship between gender and traffic safety becomes far too tenuous to satisfy [the] requirement that the gender-based difference be substantially related to achievement of the statutory objective."[221] Justice Brennan closed by observing that, while the Twenty-first Amendment "primarily created an exception to the normal operation of the Commerce Clause, . . . the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful."[222] That is because, Justice Brennan explained, "the wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of *constitutionalizing* the Commerce Clause framework established under those statutes."[223] Recognition of this constitutional moment in time would become "pathmarking" as a rule of decision.[224]

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[218] 429 U.S. 190, 204–05 (1976).
[219] *Id.* at 191–92.
[220] *Id.* at 194–95.
[221] *Id.* at 204.
[222] *Id.* at 206 (citations omitted).
[223] *Id.* at 205–06 (emphasis added).
[224] Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1785 (2017) (Sotomayor, J., dissenting) (explaining the concept of a "pathmarking" decision as one that provides "the touchstone of the . . . analysis" for a particular issue).

The concurring justices agreed that the Twenty-first Amendment did not displace the Fourteenth Amendment's guarantees.[225] Justice John Paul Stevens's concurrence was especially dubious of the state's traffic-safety justification "to make an otherwise offensive classification acceptable":

> The legislation imposes a restraint on 100% of the males in the class allegedly because about 2% of them have probably violated one or more laws relating to the consumption of alcoholic beverages. It is unlikely that this law will have a significant deterrent effect either on that 2% or on the law-abiding 98%. But even assuming some such slight benefit, it does not seem to me that an insult to all of the young men of the State can be justified by visiting the sins of the 2% on the 98%.[226]

Justice Stewart added that "[t]he disparate statutory treatment of the sexes here, without even a colorably valid justification or explanation, thus amounts to invidious discrimination."[227]

Chief Justice William E. Burger and Justice William H. Rehnquist focused their arguments in dissent on the efficacy of analyzing gender-based discrimination under any standard above rational-basis review.[228] The pairing was odd in that Chief Justice Burger was "rumored to have kept a well-stocked wine cellar in the basement of the Supreme Court building," while Rehnquist appeared partial to only Miller Lite.[229] Although the dissenters dedicated substantial attention to why gender should not be a suspect class under the Fourteenth Amendment, they did not argue that the Twenty-first Amendment displaced the protections found in the Fourteenth Amendment.

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[225] *See, e.g.*, *Craig*, 429 U.S. at 214 (Blackmun, J., concurring in part) ("I agree, however, that the Twenty-first Amendment does not save the challenged Oklahoma statute.").

[226] *Id.* at 213–14 (Stevens, J., concurring) (footnote omitted).

[227] *Id.* at 215 (Stewart, J., concurring in judgment).

[228] *See id.* at 217 (Burger, C.J., dissenting) ("The means employed by the Oklahoma Legislature to achieve the objectives sought may not be agreeable to some judges, but since eight Members of the Court think the means not irrational, I see no basis for striking down the statute as violative of the Constitution simply because we find it unwise, unneeded, or possibly even a bit foolish."); *id.* at 217–18 (Rehnquist, J., dissenting) ("I think the Oklahoma statute challenged here need pass only the 'rational basis' equal protection analysis expounded in cases such as *McGowan v. Maryland*, 366 U.S. 420 (1961), and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), and I believe that it is constitutional under that analysis.").

[229] Jost, *supra* note 27.

Four years later, the Court concluded that the Twenty-first Amendment did not provide states with the capacity to override federal antitrust laws through establishing price-maintenance laws for the wholesale wine trade.[230] The state law at issue precluded wine producers and wholesalers from selling to retailers unless they submitted a pricing schedule to the state or posted a resale schedule for the brand of wine.[231] A California appellate court enjoined the law as an unlawful restraint on trade from which the state could not claim immunity due to the passive part it played in pricing.[232] The Court agreed in a unanimous opinion authored by Justice Lewis F. Powell Jr., noting in an often-quoted passage that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."[233] Even so, the Court explained, "those controls may be subject to the federal commerce power in appropriate situations,"[234] which is not undermined by "unsubstantiated state concerns" about "temperance and the protection of small retailers" in view of "the undoubted federal interest in a competitive economy."[235]

In 1982, the Court returned to the Twenty-first Amendment when, in *Larkin v. Grendel's Den*, it considered

> whether a Massachusetts statute, which vests in the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a 500-foot radius of the church or school, violates the Establishment Clause of the First Amendment or the Due Process Clause of the Fourteenth Amendment.[236]

In striking down the statute, Chief Justice Burger, writing for an 8-1 majority, made several points clear. First, "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."[237] Second, "[g]iven the broad powers of states under the Twenty-first

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[230] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 114 (1980).
[231] *Id.* at 100.
[232] *Id.* at 100–01.
[233] *Id.* at 110; *see also* Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d 608, 632–33 (6th Cir. 2018) (Sutton, J., concurring in part and dissenting in part).
[234] *Midcal Aluminum*, 445 U.S. at 110.
[235] *Id.* at 113–14.
[236] 459 U.S. 116, 117 (1982).
[237] *Id.* at 127.

Amendment, judicial deference to the legislative exercise of zoning powers by a city council or other legislative zoning body is especially appropriate in the area of liquor regulation."[238] Yet "the deference normally due a legislative zoning judgment is not merited" when "the legislature has delegated this important decisionmaking power" to religious organizations.[239] Justice Rehnquist lodged a solo dissent, arguing that "[t]he State does not, in my opinion, 'advance' religion by making provision for those who wish to engage in religious activities, as well as those who wish to engage in educational activities, to be unmolested by activities at a neighboring bar or tavern that have historically been thought incompatible."[240]

Two years later, in *Capital Cities Cable v. Crisp*, the Supreme Court summed up its jurisprudence on the Twenty-first Amendment by remarking that "our prior cases have made clear that the [Twenty-first] Amendment does not license the States to ignore their obligations under other provisions of the Constitution."[241] *Crisp* reviewed a law from Oklahoma requiring cable-television operators in that state to delete all advertisements for alcoholic beverages originating from out-of-state signals.[242] The cable companies and Federal Communications Commission argued that "the federal regulatory scheme for cable television systems administered by the Commission is intended to pre-empt any state regulation of the signals carried by cable system operators."[243] The Court agreed in a 9-0 decision.[244] Justice Brennan explained that "[n]otwithstanding the Amendment's broad grant of power to the States, therefore, the Federal Government plainly retains authority under the Commerce Clause to regulate even interstate commerce in liquor."[245] That is so because, as he observed, "when a State has not attempted directly to regulate the sale or use of liquor within its borders—the core § 2 power—a conflicting exercise of federal authority may prevail."[246] Justice Brennan made manifest that

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[238] *Id.* at 121–22.
[239] *Id.* at 122.
[240] *Id.* at 130 (Rehnquist, J., dissenting).
[241] 467 U.S. 691, 712 (1984).
[242] *See id.* at 694.
[243] *Id.* at 698.
[244] *See id.* at 716 ("We conclude that the application of Oklahoma's alcoholic beverage advertising ban to out-of-state signals carried by cable operators in that State is pre-empted by federal law and that the Twenty-first Amendment does not save the regulation from pre-emption.").
[245] *Id.* at 713.
[246] *Id.*

> when, as here, a state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law, and the State's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred by the Supremacy Clause.[247]

That same year, in *Bacchus Imports v. Dias*, Justice Byron Raymond "Whizzer" White wrote for a 5-3 majority (with Justice Brennan not participating) that Hawaii could not impose a 20% excise tax on wholesaler sales of liquor with exemptions from the tax for certain locally produced alcoholic beverages.[248] The carved-out exemptions involved okolehao brandy, which is distilled from the root of the ti plant as an indigenous shrub of Hawaii, and pineapple wine.[249] Exploring the ratification history of the Twenty-first Amendment, the Court noted that "[n]o clear consensus concerning the meaning of the provision is apparent," with sponsoring Senator John J. Blaine expressing on the one hand that states should have "absolute control in effect over interstate commerce affecting intoxicating liquors," while on the other hand adopting a narrower view that ratification would only "assure the so-called dry States against the importation of intoxicating liquor into those States."[250]

Justice White acknowledged "the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers," yet he nonetheless concluded that such desire "had both the purpose and effect of discriminating in favor of local products."[251] The Court's rejection of the idea that the Twenty-first Amendment facilitated state power in that manner was emphatic: "The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization."[252] "State laws that constitute mere economic protectionism," the Court observed, "are therefore

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[247] *Id.* at 716.
[248] 468 U.S. 263, 265 (1984).
[249] *Id.* at 265.
[250] *Id.* at 274–75.
[251] *Id.* at 273.
[252] *Id.*

not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."[253]

Justice Stevens, joined by Justices Rehnquist and Sandra Day O'Connor, argued in dissent that the power to ban all liquor sales left room for some measure of local protectionism:

> If the State has the constitutional power to create a total local monopoly—thereby imposing the most severe form of discrimination on competing products originating elsewhere—I believe it may also engage in a less extreme form of discrimination that merely provides a special benefit, perhaps in the form of a subsidy or a tax exemption, for locally produced alcoholic beverages.[254]

The views of Justice Stevens, as later cases would confirm, were shaped by his personal experiences living through Prohibition.[255]

iii. The Rehnquist Court and the Three-Tier System

Unlike the Warren and Burger Courts, the Rehnquist Court's jurisprudence in the area of the Twenty-first Amendment was largely defined by a lack of consensus that went beyond recognition of the three-tier model of regulating alcohol sales that many states had come to adopt.[256] Ten years after its last case on the Twenty-first Amendment, in 1996, a new composition of justices heard *44 Liquormart v. Rhode Island*,[257] concluding in a unanimous yet fractured decision that "Rhode Island's statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is" unconstitutional because "such an advertising ban is an abridgment of speech protected by the First Amendment and that it is not shielded from constitutional scrutiny by the Twenty-first Amendment."[258]

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[253] *Id.* at 276.

[254] *Id.* at 286.

[255] Gregory Garre, *Remembering Justice Stevens: A Lost Link to Our Past*, SCOTUSBLOG (July 22, 2019, 11:03 AM), https://www.scotusblog.com/2019/07/remembering-justice-stevens-a-lost-link-to-our-past/.

[256] Granholm v. Heald, 544 U.S. 460, 468–69 (2005).

[257] *See* Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html ("The court's membership turned over completely and moved indisputably to the right during Justice Stevens's long tenure on the bench.").

[258] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996).

Although different justices joined different parts of the majority opinion, Justice Stevens explained for himself and five other justices that "the text of the Twenty-first Amendment supports the view that, while it grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limit whatsoever on other constitutional provisions."[259] Put more simply, "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."[260] Among the concurrences, only Justice O'Connor's concurrence in judgment, joined by Chief Justice Rehnquist and Justices David H. Souter and Stephen G. Breyer, addressed the implications of the Twenty-first Amendment on regulations over disclosures of alcohol-retail pricing.[261] Justice O'Connor was perhaps even more direct than Justice Stevens: "The Twenty-first Amendment does not trump First Amendment rights or add a presumption of validity to a regulation that cannot otherwise satisfy First Amendment requirements."[262]

Nine years later, in *Granholm v. Heald*, the Court heard cases from Michigan and New York involving similar laws that allowed "in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint."[263] In a 5-4 decision, Justice Anthony M. Kennedy concluded "that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause . . . and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment."[264] In so doing, the Court described what had become known in many states as the "three-tier distribution system" of alcohol: (1) producers, distillers, and brewers sell to wholesalers, (2) wholesalers sell to retailers, and (3) retailers sell to consumers.[265] It further observed how laws—state and federal—can offer varying treatment on how to facilitate alcohol sales to consumers through these tiers.[266] Justice Kennedy observed that the Twenty-first Amendment "did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a

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[259] *Id.* at 515.
[260] *Id.* at 516.
[261] *Id.* at 532 (O'Connor, J., concurring in judgment) ("Respondents argue that an additional factor, the Twenty-first Amendment, tips the First Amendment analysis in Rhode Island's favor.").
[262] *See id.* at 533.
[263] 544 U.S. 460, 466 (2005).
[264] *Id.*
[265] *Id.* at 468–69.
[266] *Id.* at 469–71.

privilege they had not enjoyed at any earlier time."[267] Citing Justice Brennan's rule of decision from *Craig v. Boren*, the Court's analysis anchored the interpretive meaning of the Twenty-first Amendment to the state of affairs during the reign of the Wilson Act and Webb-Kenyon Act, the former of which operationally remains good law.[268]

Justice Kennedy summed up the precedents on the Twenty-first Amendment as embodying three succinct precepts: (1) "state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment"; (2) the Twenty-first Amendment "does not abrogate Congress['s] Commerce Clause powers with regard to liquor"; and (3) "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."[269] So while a state may "treat liquor produced out of state the same as its domestic equivalent," it cannot "involve straightforward attempts to discriminate in favor of local producers."[270] Under its analysis of the dormant Commerce Clause, the Court also reviewed and rejected the states' interests in curbing the purchase of alcohol online by minors,[271] alleviating tax-evasion,[272] "facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability."[273]

In a dissent joined by Justice O'Connor, Justice Stevens argued that a "state law may violate the unwritten rules described as the dormant Commerce Clause either by imposing an undue burden on both out-of-state and local producers engaged in interstate activities or by treating out-of-state producers less favorably than their local competitors."[274] Yet his preferred outcome was a reflection of experience, which to him suggested a greater role for states in alcohol regulation:

> Today many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products. That was definitely not the view of the

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[267] *Id.* at 484–85.

[268] *Id.* at 483 (citation omitted).

[269] *Id.* at 486–87.

[270] *Id.* at 489.

[271] *Id.* at 490 ("The States provide little evidence that the purchase of wine over the Internet by minors is a problem.").

[272] *Id.* at 491 ("The States' tax-collection justification is also insufficient. Increased direct shipping, whether originating in state or out of state, brings with it the potential for tax evasion.").

[273] *Id.* at 492.

[274] *Id.* at 493 (Stevens, J., dissenting) (internal quotations omitted).

> generations that made policy in 1919 when the Eighteenth Amendment was ratified or in 1933 when it was repealed by the Twenty-first Amendment. On the contrary, the moral condemnation of the use of alcohol as a beverage represented not merely the convictions of our religious leaders, but the views of a sufficiently large majority of the population to warrant the rare exercise of the power to amend the Constitution on two occasions.[275]

Justice Stevens concluded by observing that, while "[t]oday'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," the decision "is not, however, consistent with the policy choices made by those who amended our Constitution in 1919 and 1933."[276]

Justice Clarence Thomas penned a separate dissent, also joined by Justices Stevens and O'Connor, in which he argued that "[t]he Webb-Kenyon Act immunizes from negative Commerce Clause review the state liquor laws that the Court holds are unconstitutional."[277] Reviewing the text of the Webb-Kenyon Act, Justice Thomas explained that the phrase "'[a]ny law of such State' means any law, including a 'discriminatory' one."[278] He also observed for the dissenters that the provisions of the Twenty-first Amendment "more naturally encompasses discriminatory state laws," which permit a state to "ban imports entirely while leaving in-state liquor unregulated, for they do not condition the State's ability to prohibit imports on the manner in which state law treats domestic products."[279] Justice Thomas closed by noting that "[t]he Twenty-first Amendment and the Webb-Kenyon Act took those policy choices away from judges and returned them to the States," thereby "displac[ing] the negative Commerce Clause as applied to regulation of liquor imports into a State."[280]

All modern cases passing on the Twenty-first Amendment took the unalloyed view that it provided no special power to immunize state laws that regulate alcohol in a manner favoring local interests over interstate interests. Still, the myth of exceptionalism left some to wonder if carveouts to state power remained in areas not explicitly addressed by previous decisions—

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[275] *Id.* at 494–95 (footnote omitted).
[276] *Id.* at 496.
[277] *Id.* at 498 (Thomas, J., dissenting).
[278] *Id.* at 500.
[279] *Id.* at 514.
[280] *Id.* at 527.

such as retail sales of alcohol.[281] It would take almost fifteen years before the Supreme Court would hear another case involving the Twenty-first Amendment.[282] By that point, a light drinker of "just a glass of wine from time to time" had become the leader of the federal judiciary: Chief Justice John G. Roberts Jr.[283]

IV. THE TWENTY-FIRST AMENDMENT IS NOT SO EXCEPTIONAL OVERALL

Norms are difficult to break. In the context of alcohol sales, "[t]his is really one of the last industries still dominated by family-owned businesses," stated Michael D. Madigan, a Minneapolis lawyer who has practiced alcohol-related law for more than 30 years.[284] The Supreme Court's decision in *Tennessee Wine*, and what it presages for the future of alcohol regulation, is a product of pushing on those norms and challenging conventional wisdom.

A. Along Came a Couple from Utah and a Big Boozy Retail Chain

Every now and again, alcohol restores hope and brings people together.[285] That appears to be what happened in Tennessee around 2016. Doug and Mary Ketchum moved to Tennessee from Utah to escape air-quality problems in the Salt Lake Valley, which endangered their 32-year-old daughter, Stacie, who has cerebral palsy.[286] They used their retirement savings to purchase a liquor store in Memphis, which was named Kimbrough Wine and Spirits and once frequented by Johnny Cash.[287] They thought the store would support the family while "giving them the flexibility they needed to care for their daughter."[288]

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[281] *See, e.g.*, O'Leary, *supra* note 16 ("The debate on whether *Granholm* extended to retailers or was limited to producers was settled in this case.").

[282] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2462 (2019).

[283] Jost, *supra* note 27.

[284] Mark Walsh, *Liquor Store War: Should a Giant Wine and Spirits Retailer Be Subject to State Residency Requirements?*, A.B.A. J. (Jan. 1, 2019), http://www.abajournal.com/magazine/article/liquor_retailer_state_residency_requirement.

[285] *See* Jost, *supra* note 27.

[286] Jacob Sullum, *Does a State Law That Bars Newcomers From Selling Liquor Violate Their 'Privileges or Immunities'?*, REASON FOUND. (Dec. 19, 2018), https://reason.com/2018/12/19/do-liquor-store-regulations-that-discrim/.

[287] *See id.*; Amy Howe, *Argument Preview: Justices to Consider Constitutionality of Residency Requirements for Liquor Licenses*, SCOTUSBLOG (Jan. 9, 2019, 4:23 PM), https://www.scotusblog.com/2019/01/argument-preview-justices-to-consider-constitutionality-of-residency-requirements-for-liquor-licenses/.

[288] Sullum, *supra* note 287.

> The Ketchums knew of a Tennessee law which limits liquor store licenses to people who have lived in the state for at least two years immediately before applying and limits annual renewals to people who at some point have lived in the state for at least ten consecutive years . . . But they also knew that the Tennessee Alcoholic Beverage Commission had not enforced the law for years because the state's attorney general had deemed it unconstitutional.[289]

Indeed, the Tennessee Attorney General's Office had issued two opinions, each concluding that the state's residency requirements for liquor licenses likely violated the dormant Commerce Clause.[290]

Around the time the Ketchums opened their store, just east along I-40, a new superstore—Total Wine Spirits Beer & More—opened in Knoxville, offering some eight thousand wines, three thousand spirits, and more than two thousand beers, "as well as a wine-tasting bar, a classroom, and a walk-in cigar humidor."[291] "I think we're unlike any other retail liquor store in Tennessee," said Edward Cooper of Total Wine.[292] "I think that customers will be happy with our interest and desire in giving them what they deserve, and that's price, service, selection and a great customer experience."[293] But with nearly two-hundred stores nationwide and roughly $3 billion in revenue, the prospect of Total Wine's entry into Tennessee raised the specter of aggressive competition with the settled expectations of extant liquor stores.[294]

When Total Wine and the Ketchums each sought licensure to sell alcohol in 2016, Tennessee's Alcoholic Beverage Commission recommended

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[289] *Id.*

[290] Walsh, *supra* note 285.

[291] *Id.*; *see also Total Wine & More*, TURKEY CREEK, http://turkeycreek.com/directory/total-wine-more/ (last visited Aug. 4, 2020) ("We're passionate about wine, and know many of our customers feel the same way. So we are committed to offering the nation's best wine selection, with an emphasis on fine wines. Our typical store carries more than 8,000 different wines from every wine-producing region in the world. The typical Total Wine & More also carries more than 2,500 beers, from America's most popular brands to hard-to-find microbrews and imports, and more than 3,000 different spirits in every style and price range.").

[292] Walsh, *supra* note 285 (internal quotations omitted).

[293] *Id.* (internal quotations omitted).

[294] Nick Sibilla, *Supreme Court Hears Liquor Store's Fight Against 'Good Old Boys System' That Bans Competition*, FORBES (Jan. 14, 2019), https://www.forbes.com/sites/nicksibilla/2019/01/14/supreme-court-hears-liquor-stores-fight-against-good-old-boys-system-that-bans-competition/#1f30fda7e4b4.

approving the applications.[295] But the Tennessee Wine and Spirits Retailers Association—a Nashville-based association representing more than five hundred liquor-store owners across Tennessee—informed the commission that if the agency granted the licenses, the retailers association "would immediately file suit . . . asking a court to make a Tennessee agency follow current Tennessee law passed by the Tennessee legislature elected by Tennessee citizens."[296] Doug Ketchum later commented that "the Retailers Association is renting out the government's power to block anyone from competing with them," which is "like a good old boys system: economic protectionism at its worst."[297] "If you want to understand how powerful the liquor retailers lobby is here in Tennessee," Ketchum lamented, "consider this: I can run for Governor in Tennessee after residing here for only seven years, but I can't legally renew my liquor license until I've lived here for ten years."[298]

The commission's director decided to file his own lawsuit, seeking a declaration on the legality of Tennessee's requirements. The retailers association then removed the case to federal court.[299] The district court examined Tennessee's two-year requirement to obtain a retailer-alcohol license and ten-year requirement to renew the license, ultimately granting summary judgment to Total Wine and the Ketchums that these durational-residency requirements violated the dormant Commerce Clause.[300] The district court also ruled a separate provision, which precluded corporations from obtaining a license "unless all of [their] stockholders are residents[,]" to be unconstitutional.[301] During litigation, the state and retailers association only attempted to defend the two-year requirement.[302]

The retailers association appealed to the U.S. Court of Appeals for the Sixth Circuit. Though it filed a brief supporting the two-year requirement,

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[295] Howe, *supra* note 288; *see also* Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 259 F. Supp. 3d 785, 788 (M.D. Tenn. 2017) ("The Commission's staff advised Plaintiff Tennessee Fine Wines that, in light of two opinions by the Tennessee Attorney General that the residency requirements are unconstitutional, the Commission has not enforced the residency requirements and has licensed nonresidents in the past. The Commission's staff recommended that the Commission approve Plaintiff Tennessee Fine Wines' application, subject to certain conditions.").

[296] Walsh, *supra* note 285; *see also* Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d 608, 613 (6th Cir. 2018) ("When the Association, which represents Tennessee's business owners, discovered that Fine Wines and Affluere had pending applications, it informed the TABC that litigation was likely.").

[297] Sibilla, *supra* note 295.

[298] *See id.*

[299] *Id.*

[300] *See Byrd*, 883 F.3d at 612.

[301] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, at 2457 (2019).

[302] Howe, *supra* note 288.

the state neither appealed nor participated in oral argument.[303] Meanwhile, the Ketchums received a liquor license and bought a store in Memphis, while Total Wine opened a large store in Knoxville.[304]

In February 2018, Judge Karen Nelson Moore wrote for a 2-1 panel that the residency requirements violated the dormant Commerce Clause.[305] Judge Moore concluded that "the Twenty-first Amendment does not immunize Tennessee's durational-residency requirements from scrutiny under the dormant Commerce Clause,"[306] and that the requirements are unconstitutional because they "are facially discriminatory and there is no evidence that Tennessee cannot achieve its goals through nondiscriminatory means."[307] Judge Jeffery Sutton concurred as to the ten-year and corporate-stockholder residency requirements, but he dissented as to the two-year requirement.[308] He argued in defense of the two-year requirement that the language of the Twenty-first Amendment "prohibiting the 'delivery or use' of alcohol 'in violation of the laws' of each State . . . empowers States to regulate sales of alcohol within their borders."[309] The case is especially complicated because, "in a post-1930s world, in which the National Government and States largely have *overlapping* power over most sectors of commerce, the implementation of an implied restriction on state authority is much more difficult to articulate and police."[310] He closed by stating, "Until the Supreme Court says so, we may not assume that the Twenty-first Amendment no longer 'create[s] an exception to the normal operation of the Commerce Clause.'"[311]

The retailers association petitioned the Supreme Court for review, with the state declining to file a brief at the certiorari stage, raising this question: "Whether the [Twenty-first] Amendment empowers states, consistent with the dormant commerce clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or [entities] that have resided in-state

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[303] *Id.*; *see also* Brief of Clayton Byrd in His Official Capacity as Executive Director of the Tennessee Alcoholic Beverage Commission, Byrd v. Tenn. Wine & Spirits Retailers Ass'n, No. 17-5552, 2017 U.S. 6th Cir. Briefs LEXIS 23, at *3–4 (6th Cir. July 19, 2018) ("Director Byrd files this brief for the limited purpose of renewing his argument below that Tennessee's residency requirement for retail liquor licenses is constitutional.").

[304] Howe, *supra* note 288.

[305] *Byrd*, 883 F.3d at 612.

[306] *Id.* at 623.

[307] *Id.* at 624.

[308] *Id.* at 628–29 (Sutton, J., concurring in part and dissenting in part).

[309] *Id.* at 629.

[310] *Id.* at 631 (emphasis in original).

[311] *Id.* at 636 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984)).

for a specified time."[312] The Supreme Court granted certiorari at the first conference during which the justices discussed the case.[313] The immediate grant was a departure from the Roberts Court's practice of discussing a case at multiple conferences before granting certiorari.[314]

B. Views on Tennessee's Durational-Residency Requirements Before the Roberts Court

Despite a distinct trajectory of Supreme Court decisions in one direction, the litigation in *Tennessee Wine* demonstrated that Twenty-first Amendment exceptionalism remained an open question within the constitutional hierarchy of order.[315] Whether exceptionalism is a feature or bug in that order depends, as the briefing showed, on the vantage point of who is seeking protection and who is seeking to influence power.

The merits briefing offered disparate views on what the Twenty-first Amendment accomplished in its repeal of Prohibition.[316] The retailers association emphasized that the Twenty-first Amendment gave states "broad latitude" to regulate retail sales of alcohol.[317] It further asserted that the Amendment was intended to give back the powers that states had before Prohibition, including to allow the "states to pursue policies that best fit local values and conditions, and to experiment with different approaches to the difficult problems inherent in regulating the distribution and use of alcohol."[318]

The retailers association explained that "the Supreme Court has distinguished between 'core' state powers, which are protected by the [Twenty-first] Amendment against suggestions that they violate the dormant

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[312] Aurora Barnes, *Petitions of the Week*, SCOTUSBLOG (Aug. 9, 2018, 1:42 PM), https://www.scotusblog.com/2018/08/petitions-of-the-week-4/; *see also* Petition for Writ of Certiorari, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, 2018 U.S. S. Ct. Briefs LEXIS 2649, at *7 (U.S. July 20, 2018).

[313] Tennessee Wine & Spirits Retailers Association v. Thomas, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/tennessee-wine-spirits-retailers-association-v-blair/ (last visited Aug. 20, 2019); *see also* Tenn. Wine & Spirits Retailers Ass'n v. Byrd, 139 S. Ct. 52 (2018) ("Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted.").

[314] *See, e.g.*, John Elwood, *Relist Watch*, SCOTUSBLOG (May 30, 2019, 11:11 AM), https://www.scotusblog.com/2019/05/relist-watch-145/.

[315] *See* Walsh, *supra* note 285.

[316] Howe, *supra* note 288.

[317] *See* Brief of Petitioner Tennessee Wine and Spirits Retailers Association, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, 2018 U.S. S. Ct. Briefs LEXIS 4127, at *29–30 (U.S. Nov. 13, 2018).

[318] *See id.* at *31.

Commerce Clause, and 'non-core' powers, which are not protected."[319] Core powers, the association observed, include the power to directly regulate sale or use of liquor within the state, while non-core powers involve the regulation of activity outside the state, such as a ban on alcohol-related TV advertisements that are broadcast into the state from another state. or laws that regulate prices in the state by comparison to prices at which alcohol is sold in other states.[320] The retailers association also argued that the law is palliative in that it forces retailers to "become true members of a community":

> The long-time resident who attends football games on Fridays is less likely to be duped by the drum major's fake ID on Saturdays. She is also less likely to do business with the town drunk if she knows he will drive around on the same streets that her family and friends use.[321]

And more broadly, the retailers association added, rules that make it more difficult to open a liquor store are generally good, because less liquor may help to reduce alcohol abuse.[322] The state filed a letter with the Supreme Court in conjunction with the retailers association, representing that the Tennessee Alcoholic Beverage Commission believed its residency requirements do not violate the dormant Commerce Clause, but the commission would not file its own merits brief.[323]

Total Wine and the Ketchums saw Tennessee's durational-residency laws through a different lens.[324] To the respondents, that the state had not enforced the laws for six years and had only filed a letter in the Supreme Court agreeing with the retailers association demonstrated why the laws were "so manifestly protectionist."[325] They stressed that "the sole party" that is actively defending the residency requirement in the Supreme Court is

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[319] *Id.* at *32–33.
[320] *Id.* at *34.
[321] *Id.* at *77.
[322] *Id.* at *79.
[323] Walsh, *supra* note 285; *see also* Letter of Office of Attorney General, State of Tennessee, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, at 1 (U.S. Nov. 13, 2018), https://www.supremecourt.gov/DocketPDF/18/18-96/71867/20181113165621822_TennWine Letter.pdf.
[324] Howe, *supra* note 288.
[325] Brief of Respondent Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, 2018 U.S. S. Ct. Briefs LEXIS 4772, at *6 (U.S. Dec. 13, 2018).

the retailers themselves, who acknowledge that their right to sue comes from their interest in not having to compete with Total Wine and the Ketchums.[326]

What is more, Total Wine and the Ketchums observed that the laws do not require a retailer "to reside in the community in which it owns a store, either before or after it obtains a license; the retailer need only reside somewhere in Tennessee."[327] They argued that "[t]he notion that someone living in Memphis is more in touch with Knoxville than someone living in Asheville, North Carolina, which is 250 miles closer, is silly."[328] That Tennessee does not have a similar residency requirement for bars, hotels, and restaurants, they continued, "forecloses any argument that Tennessee is genuinely concerned about nonresidents' suitability to own retail alcohol businesses."[329]

A primary goal of the dormant Commerce Clause, Total Wine and the Ketchums asserted, is to prevent the states from protecting their own citizens and businesses at the expense of others, and the Supreme Court "has made clear that the Twenty-first Amendment was not intended to save laws that have no purpose other than protecting in-state businesses."[330]

In a separate brief filed by the Institute for Justice, the Ketchums argued that Tennessee's durational-residency requirements also "discriminate[ ] against newly-arrived residents of Tennessee itself"—in conflict with the original understanding of the Privileges or Immunities Clause, which was ratified to allow newly freed slaves to travel to find work and "be treated equally in their new states of residence."[331] The durational-residency requirements violated the Privileges or Immunities Clause, the Ketchums explained, because "the original public understanding of the clause was that it would protect the right of the freedmen (and their white Northern supporters) to migrate in connection with a livelihood and be treated equally in their new states of residence."[332] The brief even brought forth flashes of Chief Justice Taney and *Dred Scott*.[333]

The case received twenty-two amicus briefs.[334] The Cato Institute took the binary position of arguing that state power to regulate alcohol is like a

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[326] *Id.*

[327] *Id.* at *40.

[328] *Id.*

[329] *Id.* at *43.

[330] *Id.* at *28–29.

[331] Brief of Respondent Affluere Investments, Inc., Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, 2018 U.S. S. Ct. Briefs LEXIS 4801, at *21–22 (U.S. Dec. 13, 2018).

[332] *Id.*

[333] *See id.* at *50; see also *Tennessee Retailers' Supreme Court Case Has A New Respondent*, *supra* note 164.

[334] *Tennessee Retailers' Supreme Court Case Has A New Respondent*, *supra* note 164.

light switch, not a dimmer, in which things are either prohibited or everything must be allowed.[335] The Center for Alcohol Policy filed a brief in support of Tennessee's durational-residency requirements, citing the venerable *Toward Liquor Control* and arguing for the need for wide latitude in localized regulations.[336] The National Beer Wholesalers Association argued in support of the retailers association that, without the three-tier system, which includes resident wholesalers and retailers, "small suppliers would be unable to compete with multinational suppliers," and consumers would not "enjoy the unprecedented choice and variety offered by the current regulatory system."[337] The American Beverage Licensees, a national association of package liquor stores, bars, and taverns also backed Tennessee's residency rules: "In all events, *Granholm* should not be expanded to invalidate laws requiring in-state alcohol retailers, as this would eviscerate the three-tier system that has existed for decades."[338]

Several parties attempted to enter the fray of oral argument, with the Court granting Illinois—a state that does not even have a durational-residency requirement—ten minutes of the retailers association's time, while rejecting efforts to split time between the Ketchums and Total Wine as well as for the Institute for Justice to receive argument time on their behalf.[339] And the Court heard the case exactly one hundred years after ratification of the Eighteenth Amendment.[340]

The case was argued before eight justices, with Chief Justice Roberts announcing that Justice Ruth Bader Ginsburg, who was convalescing from recent surgery, would participate in the case through study of the transcript and briefs.[341] Amy Howe observed that oral argument centered on the

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[335] *See id.*; *see also* Brief of Amicus Curiae The Cato Institute, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, 2018 U.S. S. Ct. Briefs LEXIS 4946, at *5 (U.S. Dec. 20, 2018) ("Indeed, this Court has time and again struck down state laws that deprive citizens of their right to access the markets of other states on equal terms.").

[336] *See* Brief of Amicus Curiae The Center for Alcohol Policy, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, 2018 U.S. S. Ct. Briefs LEXIS 4368, at *7–9 (U.S. Nov. 20, 2018).

[337] Walsh, *supra* note 285 (internal quotations omitted); *see* Brief of Amicus Curiae The National Beer Wholesalers Association, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, 2018 U.S. S. Ct. Briefs LEXIS 4352, at *6–7 (U.S. Nov. 20, 2018) ("Over about 100 pages, Toward Liquor Control--also known as the Rockefeller Report--made critical observations about why prohibition and repeal had occurred and what regulatory options would be appropriate for States moving forward.").

[338] Brief of Amicus Curiae The American Beverage Licensees, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, 2018 U.S. S. Ct. Briefs LEXIS 4266, at *5–6 (U.S. Nov. 20, 2018).

[339] *Tennessee Retailers' Supreme Court Case Has A New Respondent*, *supra* note 164.

[340] *See id.*

[341] Amy Howe, *Argument Analysis: Justices Weigh Text and History of 21st Amendment in Challenge to State Residency Requirement for Liquor Licenses*, SCOTUSBLOG (Jan. 16, 2019, 3:45 PM), https://www.scotusblog.com/2019/01/argument-analysis-justices-weigh-text-and-history-of-21st-amendment-in-challenge-to-state-residency-requirement-for-liquor-licenses/.

"general agreement that, if Total Wine and the Ketchums wanted to sell something else—for example, milk or paint—Tennessee's residency requirement would be unconstitutional, because it violates the dormant commerce clause by discriminating against out-of-state residents."[342] So the question "was whether the [Twenty-first] Amendment 'save[d]' laws like Tennessee's."[343]

Representing the retailers association, Shay Dvoretzky argued that the Twenty-first Amendment was intended to give back the powers that the states had had before Prohibition under two federal laws—the Wilson Act and the Webb-Kenyon Act—that gave them "virtually complete control over how" to regulate the distribution of liquor.[344] As long as states treat in-state and out-of-state products the same, which Dvoretzky stressed at least the two-year requirement does, states can do almost anything.[345] In response to Justice Alito's question about whether the state could impose a requirement that liquor-license applicants must have grandparents who have lived in Tennessee as a precondition in order to obtain a license, Dvoretzky responded that such a requirement "would not create a dormant Commerce Clause problem."[346] Adding to an earlier question posed by Justice Sonia Sotomayor, Justice Alito pressed further, asking "what is the—the basis for thinking that the purpose of or a purpose of Section 2 of the Twenty-First Amendment was to authorize the states in this one area, dealing with alcohol, to engage in protectionist activities that wouldn't be permitted with respect to any other commodity?"[347]

Justice Kavanaugh seemed similarly nonplused at the concept that "the sky is the limit"[348] for discrimination because, in his view, nothing in the text of the Twenty-first Amendment—which bars the "transportation or importation" of liquor into a state in violation of that state's laws—gives the states complete authority over the distribution of liquor.[349] To Justice Kavanaugh, and perhaps echoing the Cato Institute's amicus brief, all that

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[342] *Id.*

[343] *Id.*

[344] Oral Argument at 5:11–23, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, (U.S. Jan. 16, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-96_09m1.pdf.

[345] *Id.* at 8:11–17.

[346] *Id.* at 8:24–25.

[347] *Id.* at 19:21–20:3; *see also* Tonja Jacobi & Matthew Sag, *Prohibition, Pragmatism, and Protectionism*, SCOTUS OA (Jan. 28, 2019), https://scotusoa.com/tennessee-wine-spirits/.

[348] Oral Argument at 26:4–5, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, (U.S. Jan. 16, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-96_09m1.pdf.

[349] *Id.* at 20:18–25.

the Twenty-first Amendment was intended to do was let states remain "dry" if they chose to do so.[350]

Also arguing in support of the retailers association, Illinois Solicitor General David Franklin told the justices that the twin questions of who can sell alcohol and on what terms have always been "at the heartland of what the Twenty-First Amendment was meant to protect."[351] "Is there anything in your argument," Justice Elena Kagan asked Solicitor General Franklin, "that would give us a way to say" that these kinds of extreme examples are "clearly protectionist and not be allowed to occur," even if more reasonable residency requirements might survive?"[352] Solicitor General Franklin resisted the opportunity to propose a limiting principle, suggesting that such an approach would "still embroil the courts in the kind of line drawing that the [Twenty-first] Amendment was designed to relieve them of" and "would be at odds with the broad regulatory discretion" that the Amendment gives the state for alcoholic non-commodities.[353]

Appearing on behalf of Total Wine and the Ketchums, Carter Phillips iterated that the Twenty-first Amendment does not give states broad authority to regulate alcohol but instead was intended to allow states that had decided to remain dry to stop the importation of alcohol from other states.[354] Justice Breyer countered that the Supreme Court's earlier cases had already recognized that the Twenty-first Amendment gives states "virtually complete control" over how they want to structure their alcohol-distribution systems, which suggests that "[t]he history favors the other side," even if that history did not necessarily make sense.[355] Justice Neil M. Gorsuch mused whether a decision in favor of Total Wine and the Ketchums would invite new cases challenging current systems as discriminating against out-of-state residents by requiring retailers to have a "physical presence in the state."[356] Is not the next business model, Justice Gorsuch voiced, "the Amazon of" liquor sales?[357]

Coming out of oral argument, Amy Howe suggested that the case was hard to "handicap" because of the absence or silence of certain justices as well as "that Tennessee has made only a half-hearted attempt to defend the

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[350] *Id.* at 21:6–10.
[351] *Id.* at 29:15–21.
[352] *Id.* at 25:2–12.
[353] *Id.* at 30:7–16.
[354] *Id.* at 35:1–36:16.
[355] *Id.* at 38:10, 38:13–39:3.
[356] *Id.* at 49:19–50:2.
[357] *Id.* at 50:20.

residency requirements."[358] That one of Total Wine's owners is David Trone, a Democratic House member from Maryland's Sixth Congressional District, caused one commentator to exclaim after oral argument that Representative Trone was "trying to use a conservative judiciary to deregulate an industry so that his wine shops can pop up on every street corner in America."[359] (Representative Trone's congressional district, incidentally, was also the subject of a partisan-gerrymandering dispute in which the Supreme Court that same term determined was a nonjusticiable controversy.[360]) Tonja Jacobi and Matthew Sag used statistical analysis to parse the transcript from oral argument, along with prior writings by the justices, and predicted a 7-2 decision in favor of Total Wine and the Ketchums with Justices Thomas and Gorsuch in dissent.[361] Alcohol-law commentator Sean O'Leary predicted "[a]n Alito opinion [that] would widely condemn economic protectionism and economic discrimination and could be the [groundbreaking] opinion that opens up the retailer shipping market."[362]

C. The Roberts Court's First Decision on the Twenty-first Amendment

During the last week of October Term 2018, the Supreme Court handed down a 7-2 decision, affirming the judgment that Tennessee's durational-residency requirements amounted to unconstitutional protectionism in violation of the dormant Commerce Clause.[363] In announcing the decision as the author of the majority opinion, Justice Alito explained to the courtroom that "[d]uring the 19th Century, Americans did a lot of very heavy drinking," but that condition along with the incidence of Prohibition did not excuse that "[t]he provision at issue here expressly discriminates against

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[358] Howe, *supra* note 344.

[359] David Dayen, *The Monopolist in the House: David Trone's Wine Company Seeks to Overturn a Constitutional Amendment*, THE INTERCEPT (Jan. 23, 2019), https://theintercept.com/2019/01/23/total-wine-david-trone-congress/. Representative Trone's congressional district, incidentally, was also the subject of a partisan-gerrymandering dispute which the Supreme Court that same term determined was a nonjusticiable controversy. Amy Howe, *Opinion Analysis: No Role for Courts in Partisan Gerrymandering (Updated)*, SCOTUSBLOG (June 27, 2019, 8:50 PM), https://www.scotusblog.com/2019/06/opinion-analysis-no-role-for-courts-in-partisan-gerrymandering/.

[360] Howe, *supra* note 362.

[361] Jacobi & Sag, *supra* note 350.

[362] Sean O'Leary, *Who Will Write the Opinion in the Tennessee Wine Case and How Will it Influence the Outcome?*, IRISH LIQUOR LAWYER (June 15, 2019), https://irishliquorlawyer.com/who-will-write-the-opinion-in-the-tennessee-wine-case-and-how-will-it-influence-the-outcome/.

[363] Mark Walsh, *A "View" from the Courtroom: What the Constitution Means to Me*, SCOTUSBLOG (June 26, 2019, 5:29 PM), https://www.scotusblog.com/2019/06/a-view-from-the-courtroom-what-the-constitution-means-to-me/.

nonresidents and has at best a highly attenuated relationship to public health or safety."[364] Justice Alito's written opinion made plain that, while the Twenty-first Amendment gives states "leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable," the amendment "is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages."[365] The Court observed that "vigorous and thoughtful critiques" have surfaced about the efficacy of the dormant Commerce Clause, but "without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising."[366] That is "because removing state trade barriers was a principal reason for the adoption of the Constitution."[367]

The seven-justice majority then announced that approbating "the literal meaning" of the second section of the Twenty-first Amendment "would lead to absurd results that the provision cannot have been meant to produce."[368] For "such a reading of § 2 would mean that the provision would trump any irreconcilable provision of the original Constitution, the Bill of Rights, the Fourteenth Amendment, and every other constitutional provision predating ratification of the Twenty-first Amendment in 1933."[369] By Justice Alito's non-exhaustive count, a contrary view would permit state laws "prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex," proscribing "the importation of alcohol for sale by proprietors who had expressed an unpopular point of view on an important public issue," and enabling retroactive enforcement of "a crime to have bought or sold imported alcohol under specified conditions."[370] The Court, reviewing these possibilities and citing Justice Brennan's opinion in *Craig v. Boren*, edified that the "thrust" of Twenty-first Amendment interpretations should be "to 'constitutionaliz[e]' the basic structure of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment."[371]

The Court next considered the state of affairs before enactment of the Wilson Act and Webb-Kenyon Act.[372] Before Congress passed those laws,

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[364] *Id.*
[365] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2457 (2019).
[366] *Id.* at 2460.
[367] *Id.*
[368] *Id.* at 2462.
[369] *Id.*
[370] *Id.*
[371] *Id.* at 2463 (citation omitted).
[372] *Id.* at 2465.

Justice Alito explained that judicial interpretations permitted states to ban the sale of alcohol within their borders, but they could not regulate liquor originating out-of-state so long as it remained in its original packaging and did not mix with local goods.[373] The upshot was that "the dormant Commerce Clause conferred favored status on out-of-state alcohol, and that hamstrung the dry States' efforts to enforce local prohibition laws."[374]

With the passage of the Wilson Act, Justice Alito continued, Congress "did not attempt to ban all interstate shipment of alcohol," but rather sought "to leave it up to each State to decide whether to admit alcohol."[375] While "the Wilson Act mandated equal treatment for alcohol produced within and outside a State," interpretations of the law "failed to relieve the dry States' predicament" because "residents of dry States could continue to order and receive imported alcohol."[376] The reasoning at the time was that the point of reference for arrival of alcohol transmitted in interstate commerce was at the consignee's physical location—not at a state's borders.[377] A loophole hence remained for dedicated drinkers.

"The Webb-Kenyon Act," the Court observed, "attempted to fix the hole in the Wilson Act and thus to 'eliminate the regulatory advantage . . . afforded imported liquor.'"[378] Yet, through Congress's exercise of this commerce power, the "Webb-Kenyon Act did not purport to authorize States to enact protectionist measures."[379] And "the shelter given by the Webb-Kenyon Act" to close off the borders to alcohol when in violation of state law "applied only where 'the States treated in-state and out-of-state liquor on the same terms.'"[380] To hold otherwise, he continued, the Webb-Kenyon Act would have violated the dormant Commerce Clause.[381]

From there, the Court explained that, in proper context, the Twenty-first Amendment "cannot be given an interpretation that overrides all previously adopted constitutional provisions."[382] And although constitutionalizing the Wilson Act and Webb-Kenyon Act period just before Prohibition, the Court also makes clear that the Twenty-first Amendment "does not entirely supersede Congress's power to regulate commerce."[383] The question, then,

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[373] *Id.* at 2464-65 (citation and internal quotations omitted).
[374] *Id.* at 2465.
[375] *Id.*
[376] *Id.* at 2465-66.
[377] *Id.*
[378] *Id.* at 2466 (citations omitted).
[379] *Id.* at 2466-67.
[380] *Id.* at 2467 (citations omitted).
[381] *Id.*
[382] *Id.* at 2468.
[383] *Id.* at 2469.

is "whether state alcohol laws that burden interstate commerce serve" legitimate state interests.[384] And one interest that can never be legitimate, according to Justice Alito, is bare state protectionism.[385]

After concluding that the Twenty-first Amendment does not absolve states from complying with the dormant Commerce Clause, and reaffirming that states cannot pass protectionist laws inconsistent with the dormant Commerce Clause, the Court made short work of Tennessee's durational-residency requirements.[386] The Court's treatment of the ultimate result was succinct: "If we viewed Tennessee's durational-residency requirements as a package, it would be hard to avoid the conclusion that their overall purpose and effect is protectionist."[387] Stated differently, "the predominant effect of the 2-year residency requirement is simply to protect the Association's members from out-of-state competition," which the Court concluded "violates the Commerce Clause and is not saved by the Twenty-first Amendment."[388]

Justice Gorsuch dissented in an opinion joined by Justice Thomas, referencing the same historical record to argue that the Twenty-first Amendment "'constitutionaliz[ed]' the similarly worded Webb-Kenyon Act" to permit durational-residency requirements.[389] "Ours is a vast and diverse Nation," the dissenters asserted, "and those who adopted the Amendment believed that what works for one State may not work for another."[390] Justice Gorsuch also noted some special considerations, which militate in favor of solicitude to states in this area:

> But even there plenty of evidence can be found that those who ratified the Amendment wanted the States to be able to regulate the sale of liquor 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." After all, both before Prohibition and after repeal, robust competition in the liquor industry was far from universally considered an

[384] *Id.*
[385] *Id.*
[386] *Id.* at 2474.
[387] *Id.*
[388] *Id.* at 2476.
[389] *Id.* at 2480 (Gorsuch, J., dissenting).
[390] *Id.*

> unalloyed good; lower prices enabled higher consumption and invited social problems along the way.[391]

Justice Gorsuch then made clear that his disagreement with the majority goes beyond the Twenty-first Amendment: "Bending to the same impulses that moved it at the beginning of the 20th century, this Court has lately begun flexing its dormant Commerce Clause muscles once more to strike down state laws even in core areas of state authority."[392] He concluded by observing that the ratification of the Twenty-first Amendment came with "clear instructions that the free-trade rules this Court has devised for 'cabbages and candlesticks' should not be applied to alcohol."[393]

The 7-2 decision was not without rhetorical flare. The decision, all the same, was a doubtless blow to state power in the area of alcohol regulation. But understanding where states can lawfully proceed from here requires parsing the decision to determine the precise implications of constitutionalizing the system of federal-state alcohol regulation that existed before the ratification of the Eighteenth Amendment.

D. How Tennessee Wine *Debunked Twenty-first Amendment Exceptionalism*

While most commentators viewed *Tennessee Wine* as harbinger of a new way of thinking, just what that new way of thinking entails has eluded consensus. Amy Howe suggested that the decision "will make it easier for mega-chains like Total Wine, whose application for a license helped to give rise to this case, to expand into states like Tennessee."[394] Brent Kendall and Jess Bravin of *The Wall Street Journal* seemed to agree, noting that "Tennessee's requirements were some of the toughest in the nation, but the decision could affect a group of other states with residency rules for alcohol retail permits."[395] NPR's Nina Totenberg and Domenico Montanaro saw two possible consequences: "more big-box competitors are likely to move into the state, forcing some local stores out of business," and "there will be

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[391] *Id.* at 2480–81.

[392] *Id. at* 2482.

[393] *Id.* at 2484 (citation omitted).

[394] Amy Howe, *Opinion Analysis: A Total Victory for Total Wine in 21st Amendment Dispute*, SCOTUSBLOG (June 26, 2019, 5:24 PM), https://www.scotusblog.com/2019/06/opinion-analysis-a-total-victory-for-total-wine-in-21st-amendment-dispute/.

[395] Brent Kendall & Jess Bravin, *Supreme Court Strikes Down Tennessee Alcohol-License Regulations*, WALL ST. J. (June 26, 2019), https://www.wsj.com/articles/supreme-court-strikes-down-tennessee-alcohol-license-regulations-11561560497.

more product choices for consumers."[396] Lisa Sorenson of the Council of State Governments recommended that states should review their durational-residency laws "to determine their constitutionality following the Court's decision in this case."[397] Ilya Shapiro, a lawyer with the Cato Institute, was both concise and nondescript: "a win for wine-drinkers and freedom-lovers alike."[398] The Editorial Board of *The Wall Street Journal* also agreed with the outcome, merely noting that "[t]here are better cases where the current Court can put limits on the Commerce Clause, and we look forward to supporting Justice Gorsuch on those."[399] Sean O'Leary declared that "temperance was dead because it would be hard to prove" a valid state interest in limiting alcohol consumption through "concrete evidence."[400] Dean Alan B. Morrison similarly suggested that the decision could jettison any state law "claimed to be needed to assure connection with the mores of the locality."[401] As this commentary demonstrates, *Tennessee Wine* reboots predominate views on alcohol regulation.

At an axiomatic level, *Tennessee Wine* will require states to reassess their durational-residency laws, which at least twenty-one states had imposed on retailers and wholesalers at the time the Supreme Court handed down the decision.[402] Whether for as little as thirty days as in South Carolina,[403] or

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[396] Totenberg & Montanaro, *supra* note 12.

[397] Lisa Soronen, *SCOTUS Strikes Down Durational-Residency Requirement for Alcohol Sellers*, COUNCIL OF ST. GOV'TS (June 26, 2019, 3:54 PM), https://knowledgecenter.csg.org/kc/content/scotus-strikes-down-durational-residency-requirement-alcohol-sellers.

[398] Ilya Shapiro, *Supreme Court Toasts Economic Liberty in Tennessee Wine Case –Cheers!*, CATO AT LIBERTY (June 26, 2019, 1:14 PM), https://www.cato.org/blog/supreme-court-toasts-economic-liberty-tennessee-wine-case-cheers.

[399] Editorial, *Sobriety About the Commerce Clause*, WALL ST. J. (June 26, 2019), https://www.wsj.com/articles/sobriety-about-the-commerce-clause-11561590094.

[400] O'Leary, *supra* note 16.

[401] Alan B. Morrison, Response, Tennessee Wine & Spirits Retailers Ass'n v. Thomas: *Local Protectionism Loses Out*, GEO. WASH. L. REV. ON THE DOCKET (July 2, 2019), https://www.gwlr.org/tennessee-wine-spirits-retailers-assn-v-thomas-local-protectionism-loses-out/.

[402] *See* ARK. CODE ANN. § 3-4-606(a)(1)–(3) (West 2019); GA. CODE ANN. § 3-4-23(a)–(b) (West 2006); IND. CODE ANN. § 7.1-3-21-5(5)(a)–(b) (West 2016); KAN. STAT. ANN. § 41-311(b) (West 2016); KY. REV. STAT. ANN. § 243.100(1)(f) (West 2017); LA. STAT. ANN. § 26:80(A)(2) (2016); ME. REV. STAT. ANN. tit. 28-A, § 1401(5)(A)–(B) (2016); MD. CODE ANN., ALCOHOLIC BEVERAGES, § 3-102 (West 2020); MICH. COMP. LAWS ANN. § 436.1601 (West 2019); MISS. CODE. ANN. § 67-3-21 (West 2020); MO. REV. STAT. § 311.060.2(3) (2016); N.H. REV. STAT. ANN. § 178:1 (2019); OKLA. STAT. ANN. tit. 37, § 527 (West 2020) (repealed 2016); 47 PA. STAT. AND CONS. STAT. ANN. §§ 4-403, 4-410, 4-431, 4-432 (West 2016); S.C. CODE ANN. § 61-6-110(2) (2020); TENN. CODE ANN. § 57-3-203 (West 2017); TEX. ALCO. BEV. CODE ANN. § 6.03(a) (West 2019); VA. CODE ANN. § 4.1-222 (West 2020); WASH. REV. CODE ANN. § 66.24.010(2)(a) (West 2020); W. VA. CODE ANN. § 11-16-8(a)(1) (West 2020); WIS. STAT. ANN. § 125.04(5) (West 2018); *see also* IDAHO CODE ANN. § 23-304 (West 2020) (durational-residency requirement for "special distributors"). The Oklahoma statute was repealed in 2016, effective October 2018.

[403] S.C. CODE ANN. § 61-6-110(2) (2020) (30-day residency requirement).

for long as ten years of residency in Oklahoma,[404] taking the Court at its word in *Tennessee Wine* requires taking seriously that a bare protectionist interest—no matter how it might materialize—has no place in the constitutional order. And that should apply whether the retailer, wholesaler, or producer is an individual, corporation, or a by-chance resident of a particular county or municipality.[405]

Favoring in-state retailer and wholesaler shipments of wine and beer, while proscribing shipments from out-of-state retailers and wholesalers will now be suspect state action as well.[406] The constitutionality of these laws, too, turns on the interplay between the Twenty-first Amendment and the dormant Commerce Clause when a state decides to admit alcohol and regulate retailers and wholesalers. And should states elect to place different licensing burdens on third-party shipment services dependent on the location of the retailer, wholesaler, or third party, those actions likewise will face difficulty in court after *Tennessee Wine*. Laws whose effects intend to imbue local interests with a competitive advantage over out-of-staters, moreover, will attract more scrutiny than previously under the three-tier system. For example, if a state passes a law demonstrating preferential treatment of a local hop variety for craft beer sales, it is not implausible for out-of-state hop growers and craft beer sellers to argue that their inability to grow or brew with that local hop constitutes a burden on interstate commerce. Before *Tennessee Wine*, such an argument would have been quixotic.

But beyond the obvious portents, understanding what *Tennessee Wine* achieved in the area of alcohol regulation requires returning to Justice Alito's constitutional-moment reference point: the legal terrain just before passage of the Eighteenth Amendment.[407] The still-codified Wilson Act had

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[404] OKLA. STAT. ANN. tit. 37, § 527 (West 2020) (repealed 2016) (ten-year residency requirement).

[405] *Compare, e.g.*, KY. REV. STAT. ANN. § 243.100(1)(f) (West 2017) (requirement applicable to individuals only), *with* IND. CODE ANN. § 7.1- 3-21-5 (West 2016) (requirement applicable to both individuals and corporations); *see also, e.g.*, GA. CODE ANN. § 3-4-23(a) (West 2006) (requirement specific to the county or municipality).

[406] *See, e.g.*, 235 ILL. COMP. STAT. ANN. 5/6-29.1(b) (West 2017) (prohibiting out-of-state retailers, but not in-state retailers, from shipping wine directly to Illinois consumers); N.Y. ALCO. BEV. CONT. LAW §§ 100(1), 102(1)(a)–(b) (McKinney 2020) (prohibiting out-of-state retailers, but not in-state retailers, from shipping wine directly to New York consumers); VA. CODE ANN. § 4.1–310(E) (West 2007) (creating an exception to personal-import ban that favors in-state retailers); CAL. BUS. & PROF. CODE § 23366.2 (West 2020) (prohibiting out-of-state wholesalers, but not in-state wholesalers, from selling liquor directly to in-state retailers).

[407] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2463 (2019) ("In attempting to understand how § 2 and other constitutional provisions work together, we have looked to history for guidance, and history 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") (citation omitted).

the "modest" goal of "leav[ing] it up to each State to decide whether to admit alcohol."[408] And even though the Webb-Kenyon Act allowed states to refuse importation of alcohol in violation of its laws, it did so without "overrid[ing] the limitations imposed by these other constitutional provisions and the traditional understanding regarding the bounds of the States' inherent police powers."[409] When viewed in the broader constitutional framework of substantive and procedural protections, Tennessee could have, in line with its explicit authority under the Twenty-first Amendment, enacted a ban of all in-state alcohol. The state instead chose to use the three-tier system and license its liquor retailers. In doing so, Tennessee subjected its regulatory scheme to scrutiny under other constitutional provisions, which makes sense because the Twenty-First Amendment was not designed to "save" state laws from constitutional scrutiny.[410]

Tennessee Wine therefore suggests that, beyond choosing to become a dry state, a state might not be able to go much further. Courts should now see alcohol regulation as a binary choice: ban it or admit it subject to the typical protections afforded to other commodities. For example, if a notional state decided to impose an upper limit on the percentage of alcohol by volume for alcoholic beverages sold in the state, require additional warning labels and other notices, or mandate certain ownership structures, those laws would have dubious legality, not least because they interfere with interstate commerce. Admitting only 3.2% beer, or dictating where purchases of beer with higher alcohol percentages can take place, at a minimum runs afoul of the dormant Commerce Clause based on undisputed evidence supporting the burdens outlier laws impose on the industry.

The Alcohol and Tobacco Tax and Trade Bureau, a division of the U.S. Department of Treasury, is charged with approving new packaging and labels for beer shipped in interstate commerce.[411] In 2018, the bureau processed 34,166 label applications for malt beverages, a daily average of 93.6 new labels.[412] Consumers' drive for innovation and something new powers a $111.4 billion market of which craft beer accounts for roughly 23% of sales.[413] Tinkering with labeling or forcing new recipes in order to sell in outlier states amount to burdens on at least the producer end of the three-tier

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[408] *Id.* at 2465; *see also* 27 U.S.C. § 121 (2020).

[409] *Tenn. Wine*, 139 S. Ct. at 2467.

[410] *See* Healy v. Beer Inst., 491 U.S. 324, 344 (1989) (Scalia, J., concurring).

[411] Ethan Sacks, *Government Shutdown is Brewing Trouble for America's Craft Beer Makers*, NBC (Jan. 11, 2019), https://www.nbcnews.com/news/us-news/government-shutdown-brewing-trouble-america-s-craft-beer-makers-n957751.

[412] *See id.*

[413] *See id.*

distribution of alcohol in interstate commerce. Wholesalers and retailers, too, might have similarly situated arguments if, for example, those entities specialize in non-local sales that are not subject to particularized labeling requirements.

As a backstop, a matured understanding of the Twenty-first Amendment underscores that, if a state permits alcohol to be sold within its borders, a law may burden its sale and purchase if within the reach of permissible police powers "to promote the public health or safety."[414] But the Supreme Court has held that "[r]egulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause."[415] And where a "safety interest has been found to be illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation," *Tennessee Wine* is problematic for those states admitting and yet disfavoring alcohol.[416] Returning to Justice McLean's dissent in *Thurlow*, a state can protect third parties from injury because "[i]ndividuals in the enjoyment of their own rights must be careful not to injure the rights of others."[417] But aside from the direct protection of third parties "limited to the existing exigency" and a blanket ban on alcohol sales,[418] that could be all a state can achieve in this space under a careful reading of *Tennessee Wine*. Alcohol, then, should become much more like other commodities. After all, the original targets of the Eighteenth Amendment—sellers and drinkers of alcohol—would have their constitutional rights restored, at least to the extent permitted by the Twenty-first Amendment in view of other constitutional provisions. Increased choice and possibly decreased prices will redound at all economic levels, all of which hold fidelity to *Tennessee Wine*.[419] *Tennessee Wine*, at bottom, was a case about economic freedom and a rejection of a governmental "free hand to restrict the importation of alcohol for purely protectionist purposes."[420]

As a final thought, *Tennessee Wine* destabilizes extant laws on alcohol when evidence demonstrates that the state is endorsing religion, suppressing speech, or displaying animus. Laws that proscribe alcohol sales on Sundays or otherwise circumscribe those sales in ways dissimilar to other drugs could be vulnerable to challenges under the Court's rule of decision, which traces

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[414] Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670 (1981).
[415] *Id.*
[416] *Id.* at 671.
[417] Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 589 (1847) (McLean, J., dissenting).
[418] *Id.* at 592.
[419] *See* Totenberg & Montanaro, *supra* note 12.
[420] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2469 (2019).

back to the gender-based discrimination case of *Craig v. Boren*.[421] After all, when alcohol is singled out over other drugs for liminal purchase periods historically aligned with religious precepts, a state should have to justify those laws while disarmed of invoking the Twenty-first Amendment as a sword to advance local interests. Moreover, if evidence bears out that alcohol-related laws were enacted to target disfavored groups associated with alcohol consumption, the Constitution similarly provides a pathway to protect the seller and buyer from the zeal of animus.[422] Alcohol built coalitions in the days of Chief Justice Marshall,[423] and it at least should not be weaponized to wedge people apart today. Yet even if courts eventually settle on a solicitous view of a state's prerogative to dictate "the times, places, and manner" of alcohol sales in more stringent ways than more socially destructive or illicit drugs,[424] retailers, wholesalers, and producers could still have free-speech, due-process, or even privileges-or-immunities claims that the state is interfering with their ability to earn a living through the sale of lawful products on equal terms and in a manner that violates no third-party rights. Put more simply, *Tennessee Wine* calls into question the disfavored treatment of sellers of a legal product entitled to basic constitutional protections.

There can be no doubt that the Court's decisions have helped construct America's culture of alcohol either "by creating legal space for a culture of its enjoyment or by endorsing a culture and legal regime of its regulation."[425] *Tennessee Wine* is a firm step toward the former, removing the sheen of exceptionalism that has dominated views and treatment of alcohol-related laws. It has been said that "[w]hat the justices say and do with respect to alcohol . . . tells us something important about their times, our times, and our 'constitutional cocktail' of limited governmental powers and individual rights."[426] That cocktail right now seems heavy on rights with less governmental power watering it down.

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[421] *See id.* at 2463 (citation omitted).

[422] Richards, *supra* note 53.

[423] Jost, *supra* note 27.

[424] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 716 (1984); *see also* Kenneth Jost, *Courts Taking a Bite Out of Establishment Clause*, JOST ON JUSTICE (Aug. 26, 2019, 4:58 PM), http://www.jostonjustice.com/2019/08/courts-taking-bite-out-of-establishment.html.

[425] Jost, *supra* note 27.

[426] *See id.*

V. CONCLUSION

Fans of music from the 1990s will no doubt recall a song by Semisonic in which the band asserts that "[c]losing time" means "[o]ne last call for alcohol so finish your whiskey or beer."[427] Closing time for state protectionism is certainly upon us, and so is Twenty-first Amendment exceptionalism after *Tennessee Wine*. The second section of that amendment is not a dead letter, but the perceived potency of a state's power to regulate alcohol has been diminished. And for those states asserting a robust right to protect certain local interests, any law passed on the basis of protectionism will be immediately suspect. Unable to use the Twenty-first Amendment as a sword to defeat other provisions in the Constitution that impose limits on state regulatory actions, alcohol might slowly descend to a status similar to other lawful commodities. And the upshot could be increased choices and decreased pricing for craft beer and other alcohol beverages. Although some local interests may suffer, the drinker—acting as an individual whose behavior was the original target of the Eighteenth Amendment—seems likely to be a restored to the status quo ante of liberties enjoyed before Prohibition. If Semisonic is correct that "[e]very new beginning comes from some other beginning's end,"[428] *Tennessee Wine* might just represent the end of one way of thinking about the Twenty-first Amendment and the dawn of a new way of conceptualizing alcohol regulation through reference to a bygone era, which at least in this context seemed to provide greater liberties to drinkers.

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[427] SEMISONIC, *supra* note 23.
[428] *Id.*