THE SUPREME COURT SPEAKS:

Tennessee Wine & Spirits Retailers Assn. v. Thomas

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PETITIONERS WIN: Justice Samuel Alito wrote the 7-2 majority decision, joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, Elena Kagan and Brett Kavanaugh. As Justice Alito wrote: [*T*]*he Commerce Clause by its own force restricts state protectionism, ... 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. . . §2* [*of the 21st Amendment*] was *meant to "constitutionaliz[e]" the basic understanding of the extent of the States' power to regulate alcohol that prevailed before Prohibition. And as recognized during that period, the Commerce Clause did not permit the States to impose protectionist measures clothed as police-power regulations. . . We have examined whether state alcohol laws that burden interstate commerce serve a State's legitimate §2 interests. And protectionism, we have stressed, is not such an interest. . . the predominant effect of the* [*Tennessee*] *2-year residency requirement is simply to protect the Association's members from out-of-state competition.*"

DISSENTERS LAMENT: Justice Neil Gorsuch, joined by Justice Clarence Thomas, argued that states have enacted residency requirements for at least 150 years to ensure that retailers would be amenable to state oversight and increase the odds "that retailers will have a stake in the communities they serve." As Justice Gorsuch wrote: *Like it or not, those who adopted the Twenty-first Amendment took the view that reasonable people can disagree about the costs and benefits of free trade in alcohol. They left us with clear instructions that the free-trade rules this Court has devised for "cabbages and candlesticks" should not be applied to alcohol. . . . If the people wish to alter this arrangement, that is their sovereign right. But until then, I would enforce the Twenty-first Amendment as they wrote and originally understood it."*

INTERSTATE RETAILERS CELEBRATE: The National Wine Retailers Association and alcohol beverage retailers who sell direct to consumers across state lines likely will be celebrating. The majority's decision makes clear that *Granholm*'s application of the dormant Commerce Clause doctrine to alcohol laws was never intended to stop at discrimination affecting only producers and products: *"Although Granholm spoke approvingly of that basic [three-tier system] model, it did not suggest that §2 [of the Twenty-first Amendment] sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme."* Such language is likely to fuel additional litigation challenging state laws that allow local in-state retailers to sell and deliver products to consumers, but prohibit out of state retailers from doing the same.

SUMMARY ANALYSIS

Tennessee Wine & Spirits Retailers Association v. Thomas[1] required the Court to interpret and construe its original holding in *Granholm v Heald*[2] relative to Tennessee's durational residency requirements for alcohol licensure, and in doing so balance the seemingly disparate elements of the Constitution embodied by the dormant Commerce Clause doctrine and the 21st Amendment.

On June 26, 2019, the Court rendered its decision. In a 7 to 2 split, the majority of justices ruled in favor of the petitioners and the dormant Commerce Clause doctrine, finding that Tennessee's two-year residency requirements for new alcohol beverage licensees constituted protectionist legislation designed to favor in-state retailers to the detriment of out-of-state competitors. That discrimination contravenes the dormant Commerce Clause doctrine, according to the Court.

Perhaps most importantly, the majority of justices further concluded that while the Twenty-first Amendment was relevant to the case, its strength lies solely in Section 2's grant of core powers, and that grant cannot include laws with a protectionist purpose. In its examination of Section 2's core powers, the majority rejected that argument that the Commerce Clause rules applicable to out-of-state alcohol products and producers do not apply to state laws regulating in-state alcohol distribution.

The Bottom Line: Section 2 of the Twenty-first Amendment allows each state leeway to enact measures to address the public health and safety effects of alcohol use and other legitimate interests, but it does not provide the States the ability to adopt protectionist measures with no demonstrable connection to those interests.[3] If a challenger alleges through competent pleadings that an alcohol law materially discriminates against out-of-state competitors or otherwise shields in-state interests with protectionist measures, the government will have to provide competent and persuasive "concrete evidence" to justify the law's discriminatory effect; "mere speculation" or "unsupported assertions" are insufficient.[4] Moreover, that justification will require proving that the law:

(i) serves a bona fide public health and safety purpose or "some other legitimate non-protectionist ground;"
(ii) actually functions as an "essential element" of the state's means to achieving its legitimate end purpose; and
(iii) is necessary because nondiscriminatory alternatives would be insufficient to further those legitimate purposes.[5]

These evidentiary justification requirements will apply to any alcohol laws that work a discriminatory, protectionist effect on the marketplace.

COMPLETE ANALYSIS

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[1] SCOTUS Case No. 18-96 (decided June 26, 2019); 588 U.S. ___ (2019).
[2] 544 U.S. 460 (2005).
[3] Majority opinion by Alito, J., *Tennessee Wine & Spirits Retailers Association v. Thomas*, Case No. 18-96 (Decided June 26, 2019), at pp. 20-32.
[4] *Id*.
[5] *Id.*

Background: The Evolution of Alcohol Regulation in America

American commerce generally embraces the entrepreneur who is free to employ talents, creativity, and marketing savvy to pursue economic success in a relatively free, *laissez faire* competitive arena. In stark contrast, the marketplace for alcohol is a heavily regulated, strictly structured environment where entrepreneurial criteria, such as market efficiency, competition and penetration, often are subjugated to countermanding public interests. Classic examples are restricted advertising to protect minors, burdensome licensing to ensure payment of taxes, and even anti-competitive constraints ostensibly imposed in the name of temperance.

"Temperance" is an archaic term that is used (and often misused) in a variety of different ways. Here, the term "temperance" is intended to encompass the broad range of political, social, economic and cultural dictates associated with the regulation of alcohol. These dictates include sheltering minors, discouraging irresponsible or excess consumption, assuring payment of taxes, discouraging contraband (whether adulterated, tainted, or counterfeit), and promoting the operation of an orderly licensing system that facilitates government's ability to control and account for how alcohol beverages are produced, marketed, transported, sold, and consumed. The element of public accountability is a very important responsibility that was instrumental to the development of the three-tier system following Prohibition.

A stark difference between Then and Now lies in the inefficiencies built into state alcohol regulation. These inefficiencies were accepted, and even desired following the repeal of Prohibition, as a way of reinforcing temperance objectives. Immediately after the repeal of Prohibition, the U.S. Supreme Court decided a series of cases which seemed to make it clear that the Twenty-first Amendment meant what it said, namely that when it came to alcohol, the states had the last word in how it should be regulated.

As time passed and the ardor of those responsible for the repeal of Prohibition cooled, that judicial perspective began to change and the proverbial pendulum began to swing. Commercial and economic interests committed to the advancing development of regional, national and even international markets within the alcohol industry began thinking about, then moving toward, and ultimately litigating over the inherent conflict between free trade and purposely inefficient temperance.

Today, the post-Prohibition inefficiencies are at odds with a national marketplace supported by a globalized economy. While the Twenty-first Amendment[6] arguably remained a shield in the eyes of traditional "old school" alcohol regulators, the Constitution's dormant Commerce Clause has become the rallying point for those who seek to bring the industry back into the mainstream of commercial evolution and progress.[7]

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[6] The Twenty-first Amendment repealed Prohibition in 1933, and explicitly declared that transporting liquor into a state "in violation of the laws thereof, is hereby prohibited." Congress also enacted a statute prohibiting alcohol shipments in violation of state laws. 27 U.S.C. §122.

[7] The Commerce Clause is contained in Article I of the Constitution, which outlines the affirmative powers of the Congress. Article I, Section 8 of the Constitution enumerates Congress' power to control the nation's commerce.

The Commerce Clause prevents states from interfering with interstate commerce by expressly granting Congress the power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes."[8] Over time, the regulation of commerce "among the several states" has been construed to mean that because only Congress can regulate interstate commerce, states are impliedly barred from interfering with interstate commerce. Courts have fashioned this inferred grant of power to Congress as a "dormant" limit on the states. Thus arose the judicially-created dormant Commerce Clause doctrine.

The latest installment of the debate between state alcohol regulation and interstate alcohol commerce involves what industry observers are calling *Granholm II* – the U.S. Supreme Court's decision in *Tennessee Wine & Spirits Retailers Association v. Thomas*. This case required the Court to interpret and construe its original holding in *Granholm* relative to Tennessee's durational residency requirements licensure, and in doing so again balance the seemingly disparate elements of the Constitution embodied by the dormant Commerce Clause doctrine and the Twenty-first Amendment.

The Tennessee Wine & Spirits Association Litigation

Ratification of the 21st Amendment in 1933 did more than repeal the 18th Amendment and formally ended national Prohibition. Thanks to a political deal cut by Franklin Roosevelt and the Democrats in the 1932 national election, ratification also returned to the states broad power to regulate alcohol beverages within their respective borders.

The *Tennessee Wine & Spirits* case considered exactly how expansive that regulatory power is. In particular, the Court considered whether the Twenty-first Amendment allows Tennessee to impose a two-year residency requirement for anyone who wants a retail license to sell alcohol there, or if instead the state's power is limited by a judicially-created doctrine known as "the dormant Commerce Clause," which bars states from discriminating against interstate commerce.

The dispute began when Total Wine & Spirits, the alcohol industry's most dynamic off-premises chain retailer with nearly 200 stores in 23 states, decided to move into the Tennessee market. Total is not shy about challenging longstanding state alcohol laws that the company deems to be irrelevant to modern business, having challenged alcohol laws in numerous states, including Maryland,[9] Massachusetts,[10] South Carolina[11] and, most recently, Connecticut.[12]

When it arrived in Tennessee, Total discovered a state law that required the company to reside in Tennessee for two years before it could apply for a retail alcohol beverage license. Specifically, under Tennessee Code Annotated § 57-3-204(b)(2)(A), an individual must have "been a bona

[8] U.S. Const. art I, §8, cl. 3.
[9] *TFWS, Inc. v. Schaefer* 242 F.3d 198 (4th Cir. 2001).
[10] *Massachusetts Fine Wines & Spirits, LLC v. Alcoholic Beverages Control Commission,* 34 Mass.L.Rptr. 3792017, WL 4185405 (Superior Court of Massachusetts, Suffolk County, July 25, 2017).
[11] *Retail Services & Systems, Inc. v. South Carolina Department of Revenue,* 419 S.C. 469 799 S.E.2d 665 (2017).
[12] *Connecticut Fine Wine and Spirits d/b/a Total Wine & More v. Seagull,* 916 F.3d 160 (2d Cir. 2019).

fide resident of [Tennessee] during the two-year period immediately preceding the date upon which application is made to the [Tennessee Alcoholic Beverage C]ommission."[13]

Total did not satisfy the durational residency requirement for an off-premises alcohol retail license with the Tennessee ABC, so the agency deferred voting on the license application. The Tennessee Wine and Spirits Retailers Association, which represented Tennessee business owners and was the petitioner in the case before the U.S. Supreme Court, informed the Tennessee ABC that the durational residency requirement was compulsory, and that granting the license sought by Total would lead to litigation. In response, the state Attorney General filed an action in state court seeking a declaratory judgment as to the constitutionality of the durational-residency requirements. The Retailers Association removed the action to federal district court, and the litigation dance began.[14]

Durational residency requirements are imposed by many states and are predicate qualifications for alcohol licensing.[15] Yet, the U.S. Court of Appeals for the Sixth Circuit's decision in Byrd v. Tennessee Wine and Spirits Retailers Assn., affirmed a Middle District of Tennessee federal trial court decision finding that the "durational-residency" requirements imposed by Tennessee laws governing alcohol beverage retail licensees are unconstitutional under the "dormant" Commerce Clause doctrine. According to the Sixth Circuit:

> [N]either Byrd nor the Association argues that a reasonable, nondiscriminatory alternative cannot achieve Tennessee's goals. And at oral argument, Fine Wines described several alternative means: requiring (1) a retailer's general manager to be a resident of the state, (2) both in-state and out-of-state retailers to post a substantial bond to receive a license, and (3) public meetings regarding the issuance of a license. Arguably, Tennessee can achieve its goals through nondiscriminatory means. For instance, it could implement technological improvements, such as creating an electronic database to monitor liquor retailers. But neither Byrd nor the Association argues that a reasonable, nondiscriminatory alternative cannot achieve Tennessee's goals. Therefore, Byrd and the Association have not met their burden.

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[13] Tennessee law also imposes a ten-year residency requirement to renew a liquor license. However, that facially confusing component of the statute was severed from the pending litigation to allow the litigants and the courts to focus on the core issue of balancing state regulation against dormant Commerce Clause concerns.

[14] The procedural history of this case is slightly more complex than summarized. Total Wine was a license applicant, along with Doug and Mary Ketchum, who moved to Tennessee to buy a liquor store after doctors told them that the weather in their home state of Utah was bad for their disabled daughter. When Total Wine and the Ketchums applied for licenses to run off-premises alcohol retail stores in Nashville and Memphis, respectively, the Tennessee Alcoholic Beverage Commission was poised to approve their applications, until the Retailers Association, citing the state's durational residency requirement, threatened to sue the state. The retailers' threat prompted the Tennessee ABC and the Tennessee Attorney General to go to federal court, seeking a ruling on whether the residency requirement is constitutional.

[15] Today, 15 states impose some form of durational-residency requirement for wholesalers, with some states requiring as little as 30 days of residence and others requiring as long as five years. *See* Ariz. Admin. Code § R19-1-201(A)(1)(b) (residency); Ark. Code Ann. § 3-4-606(a)-(b) (five years); Ind. Code Ann. § 7.1-3-21- 3 (five years); Ky. Rev. Stat. Ann. § 243.100(1)(f) (one year); La. Stat. Ann. § 26:80(A)(2) (two years); Me. Rev. Stat. tit. 28-A, § 1401(5) (six months); Md. Code Ann., Alcoholic Beverages, § 3- 102 (two years); Mo. Rev. Stat § 311.060.2(3)-3 (three years); N.C. Gen. Stat. Ann. § 18B-900(a)(2) (residency); Okla. Stat. Ann. tit. 37A, § 2-146(A)(1) (five years); S.C. Code Ann. § 61-6- 110(2) (30 days); Tenn. Code Ann. § 57-3-203(b)(1) (two years); Wis. Stat. Ann. § 125.04(5)(a)2 (90 days).

> In summary, the durational-residency requirements in § 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) are unconstitutional because (1) they are facially discriminatory and (2) neither Byrd nor the Association has shown that a nondiscriminatory alternative cannot achieve Tennessee's goals.[16]

While Total was quite pleased with the Sixth Circuit's decision, the Retailers Association was not. When the State of Tennessee declined to take action, the trade association filed a petition for *certiorari* with the U.S. Supreme Court seeking review of the Sixth Circuit's decision.

Despite the expectations of many who deemed the Tennessee case a poor choice for revisiting *Granholm* due to the unique set of circumstances,[17] the U.S. Supreme Court granted *certiorari* review through a one sentence order issued on September 27, 2018. The case was fully briefed and oral arguments were held on January 16, 2019.

The "Circuit Split"

Including the Sixth Circuit's decision in the *Tennessee Wine & Spirits Association* case, two federal appellate courts previously struck down state residency requirements for alcohol beverage licensees under the dormant Commerce Clause doctrine, claiming that the state regulations unduly burdened interstate commerce by unfairly discriminating against out-of-state actors in order to benefit their in-state competitors.[18] In contrast, three federal appellate courts had upheld the state alcohol laws citing the states' inherent police powers, bolstered by the Twenty-first Amendment to the Constitution.[19] These cases together created a "Circuit Split," and uncertainty for both regulators and industry members throughout the nation.

For over a decade, numerous vested interests had been hoping for such a Circuit Split, in order to push for a case to present to the Supreme Court of the United States as a vehicle for extending *Granholm v. Heald* to the retail tier. Advocates such as the National Association of Wine Retailers viewed the *Tennessee Wine & Spirits Association* case as the perfect opportunity to convince the U.S. Supreme Court that America's three-tier system of alcohol regulation is no longer relevant in a world where e-commerce and globalization have made state-by-state regulation an undue burden on commerce. Just as *Granholm* found that state laws were required to treat out-of-state wineries on an equal footing with in-state wineries, these advocates wanted the same rule applied to the retail tier – thus empowering the creation of a nationwide retail market for wine. They apparently got what they wished for.

The Supreme Court's Decision

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[16] *Tennessee Wine & Spirits Retailers Association*, 883 F.3d at 625-26.

[17] As the Supreme Court's majority opinion aptly noted: "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. Indeed, two of those requirements — the 10-year residency requirement for license renewal and the provision that shuts out all publicly traded corporations — are so plainly unalloyed protectionism that neither the Association nor the State is willing to come to their defense. *Tennessee Wine & Spirits Retailers Association v. Thomas,* Case No. 18-96 (Decided June 26, 2019), at p. 32.

[18] See also, *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir.), *cert. denied sub nom. Tex. Package Stores Ass'n, Inc. v. Fine Wine & Spirits of N. Tex.*, LLC, ___ U.S. ___, 137 S. Ct. 494 (2016).

[19] *See, Southern Wine & Spirits of America Inc. v. Division of Alcohol and Tobacco Control,* 731 F.3d 799 (8th Cir. 2013); *Arnold's Wines Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009); *Brooks v. Vassar,* 462 F.3d 341, 352 (4th Cir. 2006).

A key tenant of the U.S. Supreme Court's decision in *Tennessee Wine & Spirits Retailers Association v. Thomas* is the understanding that Section 2 of the Twenty-first Amendment grants the states a limited latitude with respect to the regulation of alcohol. But, that limited latitude does not allow the states to violate the "nondiscrimination principle" that was a central feature of the regulatory regime the Amendment was meant to "constitutionalize."[20]

The Court in its majority opinion used the term "constitutionalize" to mean that alcohol regulation receives extra respect under the Twenty-first Amendment compared to other conflicting statutes. However, such regulations must comport with (and arguably yield to in all but clear and convincing cases) the constitutional protections afforded by the First Amendment, the Due Process Clause of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Commerce Clause.

A. Reaffirmation of the Dormant Commerce Clause Doctrine

Much of the *Tennessee Wine & Spirits Retailers Association* case is grounded in the Court's reaffirmation of the dormant Commerce Clause doctrine, a judicially-created concept that prohibits states from adopting laws that create undue burdens on interstate commerce. Under this doctrine, "if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to 'advanc[e] a legitimate local purpose.'"[21]

Numerous authorities over the years, including constitutional originalists such as Justices Antonin Scalia and Clarence Thomas, questioned the provenance and legitimacy of the dormant Commerce Clause doctrine, arguing that it does not exist in the Constitution and was an unauthorized exercise of judicial power.[22] However, as the majority opinion makes clear:

> [T]he proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. And 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[23] . . .

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[20] Majority opinion by Alito, J., *Tennessee Wine & Spirits Retailers Association v. Thomas*, Case No. 18-96 (Decided June 26, 2019), at pp. 20-32, citing *Granholm v. Heald*, 544 U. S. 460, 487 (2005).

[21] *Id.* at p. 10, citing *Department of Revenue of Ky. v. Davis*, 553 U. S. 328, 338 (2008); *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U. S. 93, 100–101 (1994); *Maine v. Taylor*, 477 U. S. 131, 138 (1986).

[22] *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U. S. 564, 609–620 (1997) (Thomas, J., dissenting); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U. S. 232, 259– 265 (1987) (Scalia, J., concurring in part and dissenting in part); *See also*, opinion of Gorsuch, J. (dissenting), *Tennessee Wine & Spirits Retailers Association v. Thomas*, Case No. 18-96 (Decided June 26, 2019),at page 2-3 (deeming the dormant Commerce Clause doctrine "peculiar").

[23] Majority opinion by Alito, J., *Tennessee Wine & Spirits Retailers Association v. Thomas*, Case No. 18-96 (Decided June 26, 2019), at p. 7. Justice Alito and the majority argue that the dormant Commerce Clause doctrine is constitutionally justifiable because "removing state trade barriers was a principal reason for the adoption of the Constitution. Under the Articles of Confederation, States notoriously obstructed the interstate shipment of goods. "Interference with the arteries of commerce was cutting off the very lifeblood of the nation." M. Farrand, *The Framing of the Constitution of the United States* 7 (1913). The Annapolis Convention of 1786 was convened to address this critical problem, and it culminated in a call for the Philadelphia Convention that

> More recently, we observed that our dormant Commerce Clause cases reflect a "central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[24]

The Court's decision in *Tennessee Wine & Spirits Retailers Association* makes clear that the dormant Commerce Clause doctrine is here to stay, and that any state alcohol law attempting to discriminate against out-of-state competitors or otherwise offer protectionist safe harbors for in-state interests will have to overcome that doctrine.

B. Renunciation of the 21st Amendment?

In contrast to its full-throated reaffirmation of the dormant Commerce Clause doctrine, the majority in *Tennessee Wine & Spirits Retailers Assn.* gave pretty short shrift[25] to the continuing relevance of the Twenty-first Amendment. Most legal authorities agree that whatever power remains with the Twenty-first Amendment resides in Section 2, which contains the "core powers" afforded to the states for regulation of the alcohol industry within their respective borders. Section 2 provides:

> 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.[26]

The majority's analysis of remaining Twenty-first Amendment power began with a rejection of the notion that Section 2 means what it says. According to the majority: "*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*

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framed the Constitution in the summer of 1787. At that Convention, discussion of the power to regulate interstate commerce was almost uniformly linked to the removal of state trade barriers, *see* Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 *Minn. L. Rev*. 432, 470–471 (1941), and when the Constitution was sent to the state conventions, fostering free trade among the States was prominently cited as a reason for ratification. In *The Federalist No. 7*, Alexander Hamilton argued that state protectionism could lead to conflict among the States, *see The Federalist No. 7*, pp. 62–63 (C. Rossiter ed. 1961), and in *The Federalist No. 11*, Hamilton touted the benefits of a free national market, *id*., at 88–89. In *The Federalist No. 42,* James Madison sounded a similar theme. *Id*., at 267–268. In light of this background, the majority of justices argued "it would be strange if the Constitution contained no provision curbing state protectionism, and at this point in the Court's history, no provision other than the Commerce Clause could easily do the job." Majority opinion by Alito, J., *Tennessee Wine & Spirits Retailers Association v. Thomas*, Case No. 18-96 (Decided June 26, 2019), at pp. 7-8.

[24] *Id*. at p. 10, citing *Granholm*, 544 U. S., at 472 (quoting *Hughes v. Oklahoma*, 441 U. S. 322, 325–326 (1979)).

[25] The term "short shrift," although often used in modern parlance, is an idiom often not properly understood. The meaning is "rapid and unsympathetic dismissal; curt treatment." According to the Oxford English Dictionary, the word "s*hrift"* is derived from the archaic verb "*shrive*," meaning "*to impose a penance upon*." In its original form *short shrift* referred to a brief period of penance granted to a person condemned to death so s/he could be cured of immorality before execution. *OED* definition of "shrift," accessible online at http://www.oed.com/view/Entry/178859. One usually does not want to be in the position of receiving a short shrift.

[26] U.S. Const. Amend. XXI, sec. 2.

alcoholic beverages in violation of any state law would lead to absurd results that the provision cannot have been meant to produce."[27]

Similarly, the majority dispensed with the "established rule" of jurisprudence that a late-adopted law (such as the Twenty-first Amendment, ratified in 1933) takes precedence over an earlier, conflicting laws of equal stature.[28] According to the majority, "*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*."[29]

The majority went on to disavow the reasoning of its precedents decided in the years following ratification of the Twenty-first Amendment, dismissing "the overly expansive interpretation of §2 that took hold for a time in the immediate aftermath of its adoption."[30] The Court reaffirmed instead a conclusion voiced in *Granholm* 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 §2 was not to give States a free hand to restrict the importation of alcohol for purely protectionist purposes."[31]

C. No More Deference to the State

Back in the day, jurisprudence consistently emphasized that courts were not legislatures. Absent the involvement of a protected class or constitutional right entitled to heightened judicial scrutiny, the government needed only to demonstrate that the law in question was rationally related to its intended purpose in order to survive legal challenge.[32] As the noted American jurist and legal scholar Charles B. Elliott once wrote in 1890: "Whatever weight the courts are justified in giving to the fact that a statute has received the approval of the legislative and executive

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[27] Majority opinion by Alito, J., *Tennessee Wine & Spirits Retailers Association v. Thomas*, Case No. 18-96 (Decided June 26, 2019), at pp. 11 (Footnote omitted).

[28] In a footnote, the majority acknowledged the validity of this established rule *See Id*. at n5, citing *United States v. Tynen*, 11 Wall. 88, 92 (1871); *Posadas v. National City Bank*, 296 U. S. 497, 503 (1936); *A. Scalia & B. Garner, Reading Law* 327– 328 (2012); 1A N. Singer & J. Singer, *Sutherland on Statutory Construction* §23:9 (7th ed. 2009).

[29] *Id*. So much for the reasoning of Justice Louis Brandeis and his Supreme Court colleagues who, in the years immediately following ratification of the Twenty-first Amendment, made clear that Section 2 granted each state plenary power "to forbid all importations which do not comply with the conditions which it prescribes," including laws that discriminated against out-of-state products. *State Bd. of Equalization of Cal. v. Young's Market Co., 299 U. S. 59, 62 (1936)*; *see also Mahoney v. Joseph Triner Corp*., 304 U. S. 401, 403 (1938); *Ziffrin, Inc. v. Reeves*, 308 U. S. 132, 138–139 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U. S. 391, 394 (1939).

[30] Majority opinion by Alito, J., *Tennessee Wine & Spirits Retailers Association v. Thomas*, Case No. 18-96 (Decided June 26, 2019), at p. 29.

[31] *Id*. at p. 23, citing *Granholm v. Heald*, 544 U.S. at 486-87.

[32] *See, e.g., United States v. Harris*, 106 U.S. 629, 635 (1883) (Woods, J.) ("Proper respect for a co-ordinate branch of the government requires the courts . . . to give effect to the presumption that [the legislature] will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated."),

departments, is due to this presumption, that they have acted in good faith and have actually considered the question with care."[33]

This certainly was a motivating sentiment when the U.S. Supreme Court, only a few short years after the ratification of the Twenty-first Amendment, determined that "[t]he substantive power of the State to prevent the sale of intoxicating liquor is undoubted."[34] Between 1936 and 1939, the U.S. Supreme Court on four separate occasions considered and upheld state alcohol regulations against Commerce Clause and other constitutional challenges, citing the decision of the American people to ratify the Twenty-first Amendment.[35]

And yet, perhaps the most telling and compelling element of the Court's new decision in *Tennessee Wine & Spirits Retailers Association* lies in that portion of the majority opinion where Justice Alito went through an argument-by-argument repudiation of rationales that were offered to defend Tennessee's durational residency requirement for alcohol licensure:

- ***The law was needed for public health and safety***: "[T]his argument is implausible on its face."[36]

- ***The law ensures that licensees are amenable to the direct process of state courts***: "[T]he Association does not explain why this objective could not easily be achieved by ready alternatives, such as requiring a nonresident to designate an agent to receive process or to consent to suit in the Tennessee courts."[37]

- ***The law gives the state a better opportunity to determine an applicant's fitness to sell alcohol and guards against "undesirable nonresidents" moving into the state for the purpose of operating a liquor store***: "The State can thoroughly investigate applicants without requiring them to reside in the State for two years before obtaining a license. Tennessee law already calls for criminal background checks on all applicants, *see* Tenn. Code Ann. §57–3–208, and more searching checks could be demanded if necessary. As the Fifth Circuit observed in a similar case, "[i]f [the State] desires to scrutinize its applicants thoroughly, as is its right, it can devise nondiscriminatory means short of saddling applicants with the 'burden' of residing in the State."[38]

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[33] Charles B. Elliott, "The Legislatures and the Courts: The Power to Declare Statutes Unconstitutional," *Political Science Quarterly,* vol. 5, No. 2 at p. 257 (The Academy of Political Science 1890); this document is accessible online at: https://www.jstor.org/stable/pdf/2139554.pdf

[34] *Indianapolis Brewing Co. v. Liquor Control Comm. of the State of Michigan*, 305 U.S. 391, 394 (1939), citing *Mugler v. Kansas,* 123 U.S. 623 (1887). Note that *Granholm v. Heald* subsequently abrogated *Indianapolis Brewing Co.*, along with the other post-Prohibition cases construing the Twenty-first Amendment. *Granholm*, 544 U.S. at 485-86.

[35] *See State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59 (1936); *Indianapolis Brewing Co. v. Liquor Control Comm'n,* 305 U.S. 391 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939); and *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939).

[36] Majority opinion by Alito, J., *Tennessee Wine & Spirits Retailers Association v. Thomas*, Case No. 18-96 (Decided June 26, 2019), at p. 33.

[37] *Id.*, citing *Cooper v. McBeath*, 11 F. 3d 547, 554 (5th Cir. 1994).

[38] *Id.* at p. 34, citing *Cooper v. McBeath*, 11 F. 3d at 554 (5th Cir. 1994).

- ***The law effectively achieves a legitimate regulatory purpose.*** "The 2-year residency requirement, in any event, poorly serves the goal of enabling the State to ensure that only law-abiding and responsible applicants receive licenses. As the Tennessee attorney general explained, if a nonresident moves to the State with the intention of applying for a license once the 2-year period ends, the TABC will not necessarily have any inkling of the future applicant's intentions until that individual applies for a license, and consequently, the TABC will have no reason to begin an investigation until the 2-year period has ended. And all that the 2-year requirement demands is residency. A prospective applicant is not obligated during that time to be educated about liquor sales, submit to inspections, or report to the State."[39]

- ***The 2-year residency requirement is needed to enable the State to maintain oversight over liquor store operators***. "The 2-year residency requirement is not needed to enable the State to maintain oversight over liquor store operators. In *Granholm*, it was argued that the prohibition on the shipment of wine from out-of-state sources was justified because the State could not adequately monitor the activities of nonresident entities. Citing "improvements in technology," we found that argument insufficient. 544 U. S., at 492. *See also Cooper*, *supra*, at 554 ("In this age of split-second communications by means of computer networks . . . there is no shortage of less burdensome, yet still suitable, options"). In this case, the argument is even less persuasive since the stores at issue are physically located within the State. For that reason, the State can monitor the stores' operations through on-site inspections, audits, and the like. See §57–3–104. Should the State conclude that a retailer has "fail[ed] to comply with state law," it may revoke its operating license. *Granholm*, 544 U. S., at 490. This "provides strong incentives not to sell alcohol" in a way that threatens public health or safety."[40]

- ***The law would promote responsible alcohol consumption because the durational residency requirement makes it more likely that retailers will be familiar with the communities served by their stores, which will lead to responsible sales practices***. "No evidence has been offered that durational-residency requirements actually foster such sales practices, and in any event, the requirement now before us is very poorly designed to do so. For one thing, it applies to those who hold a license, not to those who actually make sales. For another, it requires residence in the State, not in the community that a store serves. The Association cannot explain why a proprietor who lives in Bristol, Virginia, will be less knowledgeable about the needs of his neighbors right across the border in Bristol, Tennessee, than someone who lives 500 miles away in Memphis. And the rationale is further undermined by other features of Tennessee law, particularly the lack of durational-residency requirements for owners of bars and other establishments that sell alcohol for on-premises consumption."[41]

- ***There are no obvious, more tailored alternatives to the law***. This was not an argument raised by the petitioners, but it certainly was a point of decision-making for the Court. "[T]here are obvious alternatives that better serve that goal without discriminating against nonresidents. State law empowers the relevant authorities to limit both the number of retail licenses and the amount of alcohol that may be sold to an individual. *Cf.* §57–3–208(c) (permitting local governments to "limit . . . the number of licenses issued within their jurisdictions"); §57–3–

[39] *Id.* (Citation omitted).

[40] *Id.* at pp. 34-35.

[41] *Id.* at pp. 35-36.

> 204(d)(7)(C) (imposing volume limits on certain sales of alcohol to patrons); Rules of TABC, ch. 0100–01, §0100–01–.03(15) (2018) (same). The State could also mandate more extensive training for managers and employees and could even demand that they demonstrate an adequate connection with and knowledge of the local community. *Cf., e.g.,* Tenn. Code Ann. §57–3–221 (requiring managers of liquor stores to obtain permits, satisfy background checks, and undergo "alcohol awareness" training). And the State of course remains free to monitor the practices of retailers and to take action against those who violate the law."[42]

These repudiations were especially powerful because the State of Tennessee had done little to defend its durational residency requirement. As Justice Alito caustically, but accurately, noted:

> During the course of this litigation, the Association relied almost entirely on the argument that Tennessee's residency requirements are simply "not subject to Commerce Clause challenge," 259 F. Supp. 3d, at 796, and the State itself mounted no independent defense. As a result, the record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests.[43]

D. Victory for Interstate Retailers and a National Market for Alcohol Beverages?

Finally, it must be noted that this "*Granholm II*" decision may prove most important for the impact it arguably has on legitimizing a national marketplace for alcohol beverages. As noted above advocates for interstate retailers such as the National Wine Retailers Association have fought for over a decade to extend the rationale of *Granholm* beyond just wineries selling and shipping directly to consumers. The retailers believe they, too, are entitled to make DtC sales without interstate discrimination.

Seven justices of the Supreme Court appear to have agreed.

The respondents in the *Tennessee Wine & Spirits Association* case argued that *Granholm*'s application of the dormant Commerce Clause doctrine was limited to protectionist discrimination affecting only alcohol producers and products.[44] The in-state retailers' trade association contended that a different rule applied to laws regulating the lower tiers of the "unquestionably legitimate" three-tier system. However, the Supreme Court determined otherwise.

As Justice Alito wrote in the majority's decision of the case:

> The Association and the dissent point out that *Granholm* repeatedly spoke of discrimination against out-of-state products and producers, but there is an obvious explanation: The state laws at issue in *Granholm* discriminated against out-of-state producers. And *Granholm* never said that its reading of history or its Commerce Clause analysis was limited to discrimination against products or producers. On the contrary,

[42] *Id.* at p. 36.
[43] *Id.* at p. 33.
[44] *Id.* at p. 26.

> the Court stated that the Clause prohibits state discrimination against all "'out-of-state economic interests,'", and noted that the direct-shipment laws in question "contradict[ed]" dormant Commerce Clause principles because they "deprive[d] citizens of their right to have access to the markets of other States on equal terms." *Granholm* also described its analysis as consistent with the rule set forth in *Bacchus, Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U. S. 573 (1986), and *Healy* [*v. Beer Institute*, 491 U. S. 324 (1989)] that "'[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. . . Although *Granholm* spoke approvingly of [the three-tier system] basic model, it did not suggest that §2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme. 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. Such a requirement is not an essential feature of a three-tiered scheme. Many such schemes do not impose durational-residency requirements — or indeed any residency requirements — on individual or corporate liquor store owners. Other three-tiered schemes differ in other ways. Because we agree with the dissent that, under §2, States "remai[n] free to pursue" their legitimate interests in regulating the health and safety risks posed by the alcohol trade, each variation must be judged based on its own features."'[45]

CONCLUSION

So, where does the law on the constitutionality of state alcohol laws stand today? The majority decision in *Tennessee Wine & Spirits Association v. Thomas* reaffirms the proposition that any state law, including alcohol laws governing in-state distribution, can be challenged for allegedly violating the dormant Commerce Clause doctrine. Any beliefs that the Twenty-first Amendment limits judicial review of alcohol laws to a rational-basis or minimal scrutiny level appear to be now and forever gone.

If a challenger alleges through competent pleadings that an alcohol law materially discriminates against out-of-state competitors or otherwise shields in-state interests with protectionist measures, the government will have to provide competent and persuasive "concrete evidence" -- "mere speculation" or "unsupported assertions" are insufficient[46] -- that the challenged law:

(i) serves a bona fide public health and safety purpose or "some other legitimate non-protectionist ground;"
(ii) actually functions as an "essential element" of the state's means to achieving its legitimate end purpose; and
(iii) is necessary because nondiscriminatory alternatives would be insufficient to further those legitimate purposes.[47]

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[45] *Id.* at pp. 27-28 (Emphasis added; certain citations omitted).
[46] *Id.*
[47] *Id.*

The majority opinion makes clear that promotion of responsible sales and consumption practices for alcohol beverages is an interest that the Court recognizes as legitimate.[48] For example, the Court cited with approval state law empowering the relevant authorities to limit both the number of retail licenses and the amount of alcohol that may be sold to an individual.

However, when a law materially discriminates against non-residents, or otherwise contravenes the dormant Commerce Clause doctrine, a strong majority of the U.S. Supreme Court has decided that such a law will not withstand judicial scrutiny unless it meets the standard of review outlined above.

Although the Court did not address the full scope of its decisions, the rationale of the decision logically and presumably encompasses state laws that draw distinctions between in-state and out-of-state retailers. Query whether it even extends to the wholesale tier? Time will tell.

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[48] *Id*. at p. 36.