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It's 1919 Somewhere: What Tennessee Wine & Spirits Retailers Association v. Thomas Means for the National Hangover of the Twenty-First Amendment, the Dormant Commerce Clause, and Federal Legalization of Intoxicating Substances.

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It's 1919 Somewhere

WHAT *TENNESSEE WINE & SPIRITS RETAILERS ASSOCIATION V. THOMAS* MEANS FOR THE NATIONAL HANGOVER OF THE TWENTY-FIRST AMENDMENT, THE DORMANT COMMERCE CLAUSE, AND FEDERAL LEGALIZATION OF INTOXICATING SUBSTANCES

INTRODUCTION: THE ALCOHOL PROBLEM

The United States has a drinking problem; or rather, an alcohol problem.[1] Since the earliest days of colonization, alcohol has played an important role in the cultural and economic fabric of our country, serving a variety of uses from social lubricant to makeshift currency.[2] For just as long, alcohol has been a source of controversy, offending the sensibilities of those who view its consumption as a damper on economic productivity, or even a moral wrong.[3]

While on an intuitive level this issue does not seem inherently endemic to our historic understanding of our liberties as Americans, few matters are as central to our national identity as the regulation of alcohol.[4] Alcohol regulation implicates a core question that is endemic to many debates in our federalist system:[5] how is a national government supposed to regulate a substance or behavior that a vocal group of citizens finds offensive while preserving another group's freedom to partake in such behaviors?[6]

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[1] *See* DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 7 (2010).

[2] *See* TOM STANDAGE, A HISTORY OF THE WORLD IN 6 GLASSES 115–16 (2005).

[3] *Id*. at 116.

[4] *See* SEAN BEIENBURG, PROHIBITION, THE CONSTITUTION, AND STATES' RIGHTS 8 (2019) ("Prohibition eventually exposed two related fault lines in American political thought: the proper role of individual rights and choice against government regulation . . . and the proper allocation of state and federal power.").

[5] *See* THE FEDERALIST NO. 45, at 286 (James Madison) (New. Am. Library 2003) ("[A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, [l]et the former be sacrificed to the latter.").

[6] *See* BEIENBURG, *supra* note 4; *see also* OKRENT, *supra* note 1, at 83–84 (noting how in the political battle prior to the passage of the Eighteenth Amendment, anti-Prohibition activists could be characterized as being culturally out-of-step with the "archetypal American").

This dilemma reached a fever pitch during the early twentieth century, when Congress passed the Eighteenth Amendment, which constitutionalized a ban on "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."[7] This national Prohibition began as a result of special interest groups looking to eliminate what they perceived as a social wrong.[8] The movement gained traction through association with other civil rights campaigns, such as the abolition of slavery or gender equality.[9]

However, it soon became clear that the answer to this conflict would not come through overarching federal regulation. Between the ratification of the Eighteenth Amendment in 1919 and its repeal in 1933, support for national Prohibition waned as the public was disheartened by the federal government's strict enforcement regime.[10] Concurrently, state legislators chafed under the frictional political climate that the amendment engendered.[11]

By the end of Prohibition, it seemed that this conflict had reached an effective stalemate with the ratification of the Twenty-First Amendment, which replaced, yet did not totally repeal, the prohibitory Eighteenth Amendment.[12] By establishing that "[t]he 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," section 2 of the Twenty-First Amendment was a compromise, allowing states to continue Prohibition at the discretion

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[7] U.S. CONST. amend. XVIII, § 1, *repealed by* U.S. CONST. amend. XXI.

[8] *See* BEIENBURG, *supra* note 4, at 9 ("[L]oosely aligned moral societies picked up the torch of temperance . . . as many of the same reformers engaged in the abolitionist movement sought to improve society through voluntarist solutions like temperance education . . . . ").

[9] *See id.* at 9–10 ("Like other nineteenth-century reform movements, antialcohol efforts partly developed from women's moral uplift organizations."); RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920 24 (1995) ("[T]he first temperance advocates to confront liquor sellers directly . . . were middle-class women.").

[10] *See* W. H. Stayton, *The Prohibition Law Is Discriminatory and Hypocritical*, *in* AMENDMENTS XVIII AND XXI PROHIBITION AND REPEAL 59, 59–62 (Sylvia Engdahl ed., 2009) (arguing that the "increased arrests" caused by Prohibition "show conclusively the unpopularity of the law and the consequent impossibility of its enforcement"); *see also* OKRENT, *supra* note 1, at 255 (detailing how, during the mid-1920s, "[b]y one accounting, U.S. attorneys across the country spent, at minimum, 44 percent of their time and resources on Prohibition prosecutions").

[11] *See* BEIENBURG, *supra* note 4, at 209–12.

[12] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2467 (2019).

of their state legislatures.[13] This was not a hollow promise, as at least one state continued to prohibit the possession of alcohol until 1966.[14]

After Prohibition, the question of who had what authority over the regulation of alcohol continued to plague the state and federal governments, as the rebirth of state liquor markets implicated issues arising under the commerce clause.[15] While this conflict existed prior to Prohibition,[16] it became strained as states' ventures to explore their powers under the Twenty-First Amendment ran headlong into Congress's expansion of its authority under the dormant commerce clause (DCC).[17] Over time, clearly defined grants of authority began to emerge, such as the acceptance of the three-tiered system of regulation.[18] Under the three-tiered system, states issue licenses for producers, wholesalers, and retailers of alcohol, with the caveat that "participants at each tier generally may be involved in only one major stage of bringing an alcoholic beverage to market."[19] Throughout its recent Twenty-First Amendment cases, the Supreme Court has frequently reiterated that the three-tiered system is "unquestionably legitimate."[20] However, the compromises that created this state-based regulatory system occurred haphazardly, creating inconsistencies in the Court's

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[13] U.S. CONST. amend. XXI, § 2; *see also Tenn. Wine & Spirits*, 139 S. Ct at 2467 (noting that section 2 "gave each State the option of banning alcohol if its citizens so chose").

[14] *Prohibition Void, Mississippi Told; State Repealed It by Taxing Liquor, A Judge Rules*, N.Y. TIMES (Apr. 9, 1966), https://www.nytimes.com/1966/04/09/archives/prohibition-void-mississippi-told-state-repealed-it-by-taxing.html [https://perma.cc/NS9U-65DQ].

[15] *See* State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 61–62 (1936), *abrogated by* Granholm v. Heald, 544 U.S. 460, 485–86 (2005). The commerce clause, codified in Article I, Section 8 of the Constitution gives Congress the authority "[t]o regulate commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. While the provision was originally read narrowly as a safeguard against state protectionism, it later expanded to give Congress the authority over almost any commercial good or behavior. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379. U.S. 241, 258 (1964) (holding that the commerce clause gives Congress the authority to regulate public accommodations at local businesses); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209–11 (1824) (enumerating Congress's regulatory power under the commerce clause). For further analysis, see Section I.B of this note.

[16] *See* Kidd v. Pearson, 128 U.S. 1, 25–26 (1888) (holding that an Iowa law that banned the manufacture of alcohol within the state for the purposes of exportation does not violate the commerce clause).

[17] While not explicit within the text of the Constitution, the DCC refers to the principle that Congress may prohibit a state's regulation of its own intrastate commerce if the state regulation would needlessly encumber interstate commerce. *See, e.g.*, *Granholm*, 544 U.S. at 493 (holding that New York and Michigan statutes banning out-of-state wineries from selling directly to consumers are violative of the DCC); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 273 (1984) (holding that a Hawaii law exempting a liquor unique to the state from a wholesaler tax violates the DCC).

[18] *See Tenn. Wine & Spirits*, 139 S. Ct. at 2457.

[19] Alexa Bordner, Note, *How New York Drinks: If and How Third-Party Providers Can Integrate with the Three-Tier System*, 83 BROOK. L. REV. 251, 252 (2017).

[20] *Granholm*, 544 U.S. at 489 (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990)).

Twenty-First Amendment jurisprudence that further obfuscate which regulations are and are not permissible under the DCC.[21]

The most recent skirmish on this front was heard before the Supreme Court in 2019, in *Tennessee Wine & Spirits Retailers Association v. Thomas*.[22] At issue in *Tennessee Wine & Spirits* was a Tennessee law that required all individuals applying for retail liquor licenses within the state to have been a resident of Tennessee for at least two years.[23] In their defense of the law, the respondents, "a trade association of [Tennessee] liquor stores," argued that section 2 of the Twenty-First Amendment allowed Tennessee to regulate the distribution of alcohol, even if such regulation discriminated against interstate commerce.[24] The Court held that the Tennessee law was unconstitutionally violative of the DCC.[25] In an opinion written by Justice Alito, the majority presented a history of the legislation leading to Prohibition and its eventual conclusion with the passage of the Twenty-First Amendment.[26] The majority's interpretation of this history led it to conclude that the amendment was merely meant to "'constitutionaliz[e]' the basic understanding of the extent of the [s]tates' power to regulate alcohol that prevailed before Prohibition," namely that states have the power to ban alcohol if they so choose.[27]

Justice Gorsuch, joined by Justice Thomas, wrote a dissenting opinion in which he argued that the same history of the Twenty-First Amendment cited by the majority led to the conclusion that states had the full power to pass residential requirement laws as a part of their Twenty-First Amendment powers.[28] In particular, Justice Gorsuch expressed concern that the Court's ruling would leave the states ill-suited "to ensure retailers will be amenable to state regulatory oversight," as the sale of alcohol moves from in-state to online retailers.[29]

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[21] *See* Amy Murphy, Note, *Discarding the* North Dakota *Dictum: An Argument for Strict Scrutiny of the Three-Tier Distribution System*, 110 MICH. L. REV. 819, 819 (2012) (arguing that the three-tier distribution system "imposes a physical presence requirement" that would violate the DCC based on the court's reasoning in *Granholm*); *see also* Jonathan M. Rotter & Joshua S. Stambaugh, *What's Left of the Twenty-First Amendment?*, 6 CARDOZO PUB. L., POL'Y, & ETHICS J. 601, 625–26 (2008).

[22] *Tenn. Wine & Spirits*, 139 S. Ct. at 2449.

[23] *Id*. at 2457.

[24] *Id*. at 2458–59.

[25] *Id*. at 2473–76.

[26] *Id*. at 2456, 2463–67.

[27] *Id*. at 2467 (first alteration in original) (citing Craig v. Boren, 429 U.S. 190, 206 (1976)).

[28] *Id*. at 2476–80 (Gorsuch, J., dissenting).

[29] *Id.* at 2482; Oral Argument at 42:35, *Tenn. Wine & Spirits*, 139 S. Ct. 2449 (No. 18-96), https://www.oyez.org/cases/2018/18-96 [https://perma.cc/35TL-3FYV] [hereinafter Oral Argument] ("But isn't the next business model just to try and operate as the Amazon of liquor?").

At a glance, *Tennessee Wine & Spirits* can be read as a simple reiteration of the Court's DCC jurisprudence as it pertains to the Twenty-First Amendment throughout the late twentieth and early twenty-first centuries.[30] To that end, one might be led to assume that the Amendment is a *fait accompli*, nothing more than a band-aid placed over the wounds opened by the Eighteenth Amendment.[31] After all, the Noble Experiment[32] came and went just shy of a century ago.

However, if construed carefully, the impact of the Twenty-First Amendment could easily reverberate for another hundred years. As Prohibition fades further into hindsight, how the Court interprets states' regulatory power under the Twenty-First Amendment may have vast effects on the emerging legalization of other similarly regarded intoxicating substances, such as marijuana[33] or psychotropic drugs.[34]

As of December 2020, fifteen states, along with the District of Columbia, have legalized marijuana for recreational use, despite the drug's classification as a Schedule I drug under the Controlled Substances Act.[35] Legalization of marijuana in the United States has largely occurred through the establishment of regulatory schemes at the state level and a declination on the part of the federal government to enforce its laws within states'

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[30] *Compare Tenn. Wine & Spirits*, 139 S. Ct. at 2469 ("[T]he developments leading to the adoption of the Twenty-first Amendment have convinced us that the aim of section 2 was not to give States a free hand to restrict the importation of alcohol for purely protectionist purposes."), *with* Granholm v. Heald, 544 U.S. 460, 484–85 (2005) ("The [Twenty-First] Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods."), *and Craig*, 429 U.S. at 206 ("Even here, however, the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause . . . . ").

[31] *See Tenn. Wine & Spirits*, 139 S. Ct. at 2462–63.

[32] The use of the phrase "Noble Experiment" to refer to Prohibition emerged from a speech by President Herbert Hoover, in which he referred to the Eighteenth Amendment as a "great social and economic experiment, noble in motive and far-reaching in purpose." HERBERT HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY, 1920-1933 201–02 (1952). Ironically, Hoover was not amused with the popularity the "unfortunate phrase" soon achieved. *Id.* at 202.

[33] *See* BEIENBURG, *supra* note 4, at 241 ("[T]he states' constitutional fight over Prohibition in the 1920s . . . is even more relevant to the conflict between state legalization of marijuana and ongoing federal prohibition of that substance.").

[34] *See* Jon Murray, *Denver First in U.S. to Decriminalize Psychedelic Mushrooms*, DENVER POST (May 10, 2019, 9:00 AM), https://www.denverpost.com/2019/05/08/denver-psychedelic-magic-mushroom/ [https://perma.cc/F6L4-XBKX].

[35] Controlled Substances Act (CSA) 21 U.S.C. § 812(c); *Marijuana Legalization*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/legalization/ [https://perma.cc/LH4L-NGL3].

borders.[36] Eventually, further pursuit of marijuana legalization will necessitate federal legislation on the matter.[37]

This note articulates a more nuanced reading of section 2 of the Twenty-First Amendment that better accommodates the tension between the state and federal governments with regard to states' rights to regulate the sale and distribution of alcohol—a framework that could be employed in the future when considering conflict pertaining to the federal legalization of marijuana. More specifically, this note argues that the Court's continued reading of section 2 of the Twenty-First Amendment in *Tennessee Wine & Spirits* as an "on-off" switch for the complete prohibition of alcohol within a state will ultimately leave the courts ill-equipped to handle conflict between the state and federal governments for the seemingly inevitable federal legalization of marijuana. This interpretation ultimately leaves the states to mire in the no-man's land of ill-defined powers that currently plagues them with regard to alcohol regulation,[38] particularly as the industry comes to embrace online retail and mobile delivery services.[39] As a solution, this note presents an alternative approach to analyzing section 2 arguments under the existing DCC framework that provides more leeway to states in crafting their regulation of intoxicating substances.

Part I of this note outlines a brief history of alcohol regulation and the DCC, and how those doctrines intersect in

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[36] *See* BEIENBURG, *supra* note 4, at 241–43; Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 CASE W. RES. L. REV. 769, 772 (2015) ("The history of marijuana legalization over the past decades suggests that, at least on some issues, contemporary nullification is a winning strategy.").

[37] *See* BEIENBURG, *supra* note 4, at 246. The parties advocating for the legalization of marijuana have largely avoided presenting legalization as a states' rights issue, likely in an effort to earn constituents in "generally progressive-leaning states," as the issue of states' rights has become a touchstone of modern conservative politics. *Id*. at 246–48. Granted, the Court has already considered the issue of conflict between federal and state marijuana regulation in 2005, when it held that the federal government had the authority under the commerce clause to prohibit the private cultivation of medical marijuana for personal use, despite a California statute authorizing that same behavior. Gonzalez v. Raich, 545 U.S. 1, 9 (2005). However, in that case, the federal government was using the commerce clause to authorize its enforcement of the CSA. *Id*. at 15. In contrast, if (and most likely when) a conflict of state and federal marijuana regulation comes before the Court under a regime of federal legalization, the most analogous doctrine to govern its analysis would likely be its Twenty-First Amendment jurisprudence. *See* BEIENBURG, *supra* note 4, at 249 (articulating the possibility of a federal marijuana law that echoes the interpretation of the Webb-Kenyon Act underpinning the Court's reasoning in *Tennessee Wine & Spirits*).

[38] *See* discussion *infra* Section III.B.

[39] *See generally Adult Beverage E-commerce Leader Drizly Now Available in Over 100 Markets Across North America*, PR NEWSWIRE (June 22, 2018, 9:10 AM), https://www.prnewswire.com/news-releases/adult-beverage-e-commerce-leader-drizly-now-available-in-over-100-markets-across-north-america-300670755.html [https://perma.cc/9VE2-F423] [hereinafter *Adult Beverage E-commerce*].

Tennessee Wine & Spirits. Part II of this note summarizes the facts and analysis of *Tennessee Wine & Spirits* and explores the potential impact of the Court's holding on the existing methods of alcohol regulation available to states, with particular emphasis on the emergence of online retailers and third-party distributors. Finally, Part III proposes an alternate reading of section 2 of the Twenty-First Amendment that would grant states limited capabilities to override the DCC in their regulation of alcohol.

I. BACKGROUND: THE TWENTY-FIRST AMENDMENT AND THE DORMANT COMMERCE CLAUSE

The central issue in *Tennessee Wine & Spirits*—as in most Twenty-First Amendment cases—stems from a long-standing conflict between two constitutional provisions: the Twenty-First Amendment and the Commerce Clause.[40] The dialog between these two provisions is complicated by their distinct, but similarly complex, jurisprudential histories.

A. The Twenty-First Amendment: Prohibition as a States' Rights Issue

In *Tennessee Wine & Spirits*, the Court reinforced the well-established understanding that the Twenty-First Amendment was meant to be a compromise between the Prohibition states and the alcohol-drinking states to preserve states' interest in the enforcement of their police powers.[41] However, these divided ideologies did not always coexist so easily. While early prohibition efforts were rooted in an amalgamation of social issues, initially states' rights was not one them.[42] However, as the northern-stemming temperance movement began to migrate south, it was swept into the region's fervent defense of state sovereignty.[43] Additionally, as these efforts led to the passage of state Prohibition laws, subsequent lawsuits brought by liquor manufacturers forced anti-

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[40] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461–62 (2019).

[41] *Id.* at 2467.

[42] *See* BEIENBURG, *supra* note 4, at 9–10.

[43] *Id.* at 10–11. It is worth noting, as Beienburg concedes, that many southern proponents of Prohibition adopted the states' rights argument for Prohibition, along with many other issues, as a method of implementing racially discriminatory policies in a post-bellum political climate. *Id.*

prohibitionists to focus their legal arguments on the conflict these laws created between state and federal law.[44]

However, taking state Prohibition statutes nationwide would prove to be a more difficult task.[45] Through the late nineteenth century, states struggled to implement extraterritorial Prohibition through a legislative tug-of-war with the judiciary.[46] Early attempts to prohibit the importation of liquor led the Court to establish the "original package" doctrine—a doctrine indicating that states could not prevent the importation and sale of liquor from out of state, so long as the liquor remained in its original package.[47] Consequently, states were limited in the degree to which they could prohibit the sale of alcohol within their borders.[48]

In response, Congress attempted to rejuvenate the hamstrung states' prohibitory efforts by passing the Wilson Act in 1890.[49] By declaring that "[a]ll fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory . . . shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory," the act sought to give each state a right, akin to a right of first refusal, to police alcohol within its borders.[50] If a state did not exercise this right, it would succumb to the Court's original package doctrine as the proverbial "[l]aw of the [l]and."[51]

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[44] *See* Mugler v. Kansas, 123 U.S. 623, 675 (1887) (holding that a Kansas law prohibiting the manufacture of liquor for sale within the state was not in violation of the Fourteenth Amendment's Due Process Clause); *see also* HAMM, *supra* note 9, at 55 ("The legitimacy of state prohibition laws raised perplexing issues of federalism that the liquor industry could exploit in its struggle against the movement.").

[45] *See* HAMM, *supra* note 9, at 57 ("While radical prohibitionist organizations called for federal legislation . . . they played little role in shaping the legislation that Congress passed [in 1890].").

[46] *See Tenn. Wine & Spirits*, 139 S. Ct. at 2464–65.

[47] *Id.*; *see also* Leisy v. Hardin, 135 U.S. 100, 159–160 (1890) (Gray, J., dissenting) (noting that beyond the original package doctrine, a more restrictive anti-import statute would require federal legislation), *abrogated by* Granholm v. Heald, 544 U.S. 460 (2005); Bowman v. Chicago & Nw. Ry. Co., 125 U.S. 465, 513–15 (1888) (Harlan, J., dissenting) (arguing that the original package doctrine is a sufficient prohibitory measure to "protect the health and morals of the people"). For a more detailed review of these opinions, see Lindsay Rogers, *Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act*, 4 VA. L. REV. 174, 187–95 (1916).

[48] *Granholm*, 544 U.S. at 478 ("[State prohibitory statutes] could ban the production of domestic liquor, but these laws were ineffective because out-of-state liquor was immune from any state regulation so long as it remained in its original package." (internal citations omitted)).

[49] *Tenn. Wine & Spirits*, 139 S. Ct. at 2465 ("[T]he strategy of those who favored the Wilson Act was for Congress to eliminate the problem that had surfaced in *Bowman* and *Leisy* by regulating the interstate shipment of alcohol.").

[50] 27 U.S.C. § 121; *Tenn. Wine & Spirits*, 139 S. Ct. at 2465 ("[The Wilson Act's] goal was more modest: to leave it up to each State to decide whether to admit alcohol.").

[51] U.S. CONST. art. VI, cl. 2. Under what is known as the supremacy clause of the U.S. Constitution, when there is a conflict between federal and state law, the federal law applies. *See id.*; *see also* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 769 (1994).

However, the Wilson Act only demonstrated the gap in understanding between Congress and the Court as to the authority each state had over alcohol.[52] Shortly after the act's adoption, the Court narrowly read the statute so that it did not take effect until the alcohol in question had been delivered to the individual who had ordered it, a reading which ultimately "failed to relieve the dry states' predicament."[53] Effectively, the Court's ruling meant that the act only applied to individuals seeking to consume alcohol in dry states, leaving the alcohol industry itself fully intact in those same states.[54]

Once it became evident that the Wilson Act would not achieve its legislative purpose, Congress again sought to augment the states' prohibitory authority through the Webb-Kenyon Act.[55] In contrast to the Wilson Act, which framed Prohibition as a grant to states' police power, the Webb-Kenyon Act's ban on "the shipment or transportation . . . of any spiritous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State . . . into any other State . . . either in the original package or otherwise, in violation of any law of such State" served as a federal affirmation of existing state law.[56]

Additionally, while the Wilson Act was reluctantly upheld by the Supreme Court, the Webb-Kenyon Act received far more enthusiastic support from the Justices.[57] For a brief period, as more states began to implement a variety of prohibitory legislation, the Webb-Kenyon Act was held up as a perfect balance of federal and state interests, ensuring that "dry America would be sheltered from its neighbors' vices and wet America unburdened by its neighbors' moralism."[58] However, this balance was not meant to last, as prohibition advocates interpreted the Supreme Court's affirmation of the Webb-Kenyon Act as a signal to campaign for complete Prohibition at the federal level.[59]

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[52] An early draft of the Wilson Act bill was supported by the understanding that *Leisy v. Harden* gave Congress the authority to enact legislation that was more permissive to the states. Lindsay Rogers, *Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act*, 4 VA. L. REV. 288, 295–96 (1917).

[53] *Tenn. Wine & Spirits*, 139 S. Ct. at 2466 (citing *Granholm*, 544 U.S. at 480; Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898); Rhodes v. Iowa, 170 U.S. 412 (1898)).

[54] *Id.* at 2465–66.

[55] *Id.* at 2466 (citing 27 U.S.C. § 122).

[56] *Id.* at 2466 n.10 (first and second alterations in original); *see* BEIENBURG, *supra* note 4, at 28.

[57] *See* Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 332 (1917).

[58] *See* BEIENBURG, *supra* note 4, at 28.

[59] *See* HAMM, *supra* note 9, at 225 ("Indeed, many drys saw the *Clark* decision as a key step to total [P]rohibition.").

While this goal was eventually achieved with the ratification of the Eighteenth Amendment in 1919,[60] by the end of the next decade the cause had lost the limited public support that had pushed Prohibition through Congress.[61] Consequently, by this time, Congress had to determine how to implement a repeal measure that would satisfy the remaining anti-prohibition advocates while maintaining the dry states' valued Eighteenth Amendment rights.[62]

The solution was implemented by dividing the Twenty-First Amendment into two substantive guarantees: section 1 of the amendment repeals federal Prohibition under the Eighteenth Amendment and section 2 prohibits "[t]he 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."[63] As careful readers might note, this language echoes that of the Webb-Kenyon and Wilson Acts, allowing Congress to revert back to the federally endorsed state regulatory schemes established under those laws.[64] With that, the Noble Experiment of Prohibition was over. However, the amendment it left in its wake would prove to be no less vexing to those seeking to incorporate this new constitutional right into the increasingly comprehensive federal regulatory system.[65]

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[60] *See* U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

[61] This article will not address the causes of Prohibition's failure in detail, as they are highly complex and multifarious. However, in summary, they include a rise in organized crime, stifling of commerce by federal regulators, and even the deaths of civilians due to the poisoning of alcohol by the federal government. *See generally* David J. Hanson, *Many Advocates of Prohibition Became Disillusioned by its Consequences and Sought Repeal*, *in* AMENDMENTS XVIII AND XXI PROHIBITION AND REPEAL, *supra* note 10, at 77, 77–83 (describing how business owners who supported Prohibition became frustrated with the costly regulations that accompanied it); Emily G. Owens, *The American Temperance Movement and Market-Based Violence*, 16 AM. L. & ECON. REV. 433, 441–45 (2014) (indicating the correlation between Prohibition and homicide rates in regions known for organized crime during the Prohibition era); Deborah Bloom, *The Chemist's War*, SLATE (Feb. 19, 2010, 10:00 AM), https://slate.com/technology/2010/02/the-little-told-story-of-how-the-u-s-government-poisoned-alcohol-during-prohibition.html [https://perma.cc/M3R8-WGSU] (detailing the Federal alcohol denaturing program that led to the deaths of thousands by drinking poisoned alcohol during Prohibition).

[62] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2467 (2019).

[63] U.S. CONST. amend. XXI, §§ 1–2. Section 3 of the Twenty-First Amendment merely establishes that the Amendment must be ratified "within seven years" of its presentation to the states. U.S. CONST. amend. XXI, § 3. As the Amendment was ratified by the end of the year in which it was introduced, it is, at least for the purposes of this article, effectively moot. *See Repeal of Prohibition*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendment/amendment-xxi [https://perma.cc/VTJ8-DKX4].

[64] *See* Craig v. Boren, 429 U.S. 190, 205–06 (1976).

[65] *See* State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936) (analyzing how the newly ratified Twenty-First Amendment impacts the Court's commerce clause analysis).

B. Interpreting the Twenty-First Amendment Under the DCC

Article I, section 8 of the U.S. Constitution grants Congress the power "[t]o regulate commerce with foreign Nations, and among the several States."[66] This provision, known as the commerce clause, was born out of the Founding Fathers' eagerness to prevent the interstate protectionism that had rendered the Articles of Confederation nonviable as a framework for national government.[67] Consequently, case law over the following decades led to the understanding that the power to regulate commerce is shared between Congress and the states.[68]

Many of the Court's early commerce clause cases, at least in relation to the regulation of alcohol, focused on maintaining the balance of federal control over commerce and states' eagerness to regulate the sale and production of alcohol.[69] In these early cases, state regulations were given wide deference by the Court, even as it impacted commerce beyond that state's borders.[70] However, this deference was likely due to a then-narrow reading of Congress's commerce clause power.[71]

In the aftermath of Prohibition, state regulation of alcohol and federal regulation of interstate commerce did not mix together so easily.[72] In early cases, the Court read into the recently ratified Twenty-First Amendment a broad grant of authority.[73] In fact, the Court's interpretation of the amendment was so broad that it

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[66] U.S. CONST. art. I, § 8, cl. 3.

[67] Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1890 (2011) ("[M]any people in the [late eighteenth century], including . . . some of the most influential Framers, believed interstate discrimination to be an extremely serious problem meriting a profound response.").

[68] S*ee* Maine v. Taylor, 477 U.S. 131, 151 (1986) (holding that a Maine statute imposing bans on imported baitfish did not violate the commerce clause); S.C. State Highway Control Dep't v. Barnwell Bros, Inc., 303 U.S. 177, 189 (1938) (holding a South Carolina law imposing weight limits on trucks travelling on state highways was within the state's regulatory authority).

[69] *See* Kidd v. Pearson, 128 U.S. 1, 22–23 (1888); Thurlow v. Mass. (*License Cases*), 46 U.S. (5. How.) 504, 530 (1847).

[70] *See Kidd*, 128 U.S. at 22 ("It is true that . . . [the challenged state legislation's] effects may reach beyond the State by lessening the amount of intoxicating liquors exported. But it does not follow that, because the products of a domestic manufacture may ultimately become the subjects of interstate commerce, at the pleasure of the manufacturer, the legislation of the state respecting such manufacture is an attempted exercise of the power to regulate commerce exclusively conferred upon congress.").

[71] *Kidd* was decided on the Court's reasoning that interstate commerce did not include manufacturing, a distinction the Court would later reject. *Compare* Kidd v. Pearson, 128 U.S. at 22–23, *with* Wickard v. Filburn, 317 U.S. 111, 124 (1942) ("Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us.").

[72] *See* State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936), *abrogated by* Granholm v. Heald, 544 U.S. 460 (2005).

[73] *See id.*

threatened to override Congress's authority under the commerce clause[74] and even the equal protection clause.[75]

The buzz of this newfound authority, however, quickly wore off.[76] Shortly after the ratification of the Twenty-First Amendment, the Court was already experimenting with an expansive conception of the commerce clause that would prove necessary to support the federal regulation that was essential to then-President Roosevelt's New Deal Program.[77]

Additionally, this era heralded a reconsideration of the Court's DCC jurisprudence.[78] Previously, DCC inquiries hinged on whether the state regulation at issue directly or indirectly affected interstate commerce.[79] Yet in the New Deal era, the Court's inquiry focused on whether the state commercial regulation upset the balance between Congress's and states' respective regulatory powers.[80] In other words, the Court's prior analysis hinged on the state regulation's proximity to interstate commerce, while its new analysis focused on whether the state was attempting to regulate commercial activity that was best suited to federal oversight.[81] While this new standard was better adapted to the broad scope of commerce in an increasingly

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[74] *Id*. (holding that a state had the right to charge a fee for a liquor importation license under the Twenty-First Amendment, even though such a provision would ordinarily be violative of the DCC).

[75] Mahoney v. Joseph Triner Corp., 304 U.S. 401, 404 (1938) (affirming a state statute that requires state approval of all brands of imported liquor on the grounds that "[a] classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth"), *abrogated by* Granholm v. Heald, 544 U.S. 460 (2005). The equal protection clause of the Fourteenth Amendment provides that a state cannot "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[76] *See* Duckworth v. Arkansas, 314 U.S. 390, 392 (1941) (holding that an Arkansas statute banning the importation of liquor without a license did not raise a Twenty-First Amendment question).

[77] *See* Wickard v. Filburn, 317 U.S. 111, 124 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 28–31 (1937) (holding that the commerce clause grants Congress the authority to regulate a labor dispute within a multi-state corporation, even though the dispute in question took place entirely within Pennsylvania); *see also About NLRB: 1937 Act Held Constitutional*, NAT'L LABOR REL. BOARD, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1937-act-held-constitutional [https://perma.cc/P364-A6SE].

[78] *See* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 436–46 (2008) (detailing the evolution of the Court's DCC analysis).

[79] *Id*.

[80] *Id*. at 445–46.

[81] *See id.* For example, during this period, the Court held that states could pass regulations limiting the size and weight of trucks that travelled on state highways. *See* S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 196 (1938). Conversely, the Court held that a state could not pass a regulation that would force trains to modify their length to pass through the state. *See* S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 783–84 (1945).

modernized economy,[82] it still failed to yield "a coherent set of rules to decide [DCC] cases sensibly."[83]

In the decades that followed, as federal regulation under the DCC persisted and liquor laws became more permissive nationwide,[84] the Twenty-First Amendment began to seem like a remnant from a bygone era.[85] Additionally, in many of these late twentieth century cases, the Twenty-First Amendment became an unsuccessful last-ditch argument for alcohol laws that were blatantly protectionist[86] or unconstitutional on other, frequently discriminatory, grounds.[87] Yet paradoxically, when deciding these cases, the Court frequently reiterated the Twenty-First Amendment's status as an unassailable grant of authority to the states.[88]

Two cases best reflect the modern standard for conflicts between state authority under the Twenty-First Amendment and federal regulation under the DCC.[89] In *Bacchus Imports, Ltd. v. Dias,* the Court considered whether a Hawaii liquor tax that included an exemption for a type of brandy unique to the state was unconstitutional on DCC grounds.[90] In its defense, the state argued that it had the authority to implement the tax under section 2 of the Twenty-First Amendment.[91] The Court rejected the state's Twenty-First Amendment argument on the grounds that the state's goal of "promot[ing] a local industry" was not "designed to promote temperance or carry out any other purpose of the Twenty-first Amendment."[92] While the majority in *Bacchus*

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[82] *See S. Pac. Co.*, 325 U.S. at 767 ("Thus the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress.").

[83] *See* Denning, *supra* note 78, at 448. In particular, Denning notes that in the absence of underpinning doctrinal principles, the rules that the Court employs to decide an issue may haphazardly become "calcifi[ed]," and subsequently mistaken for doctrine. *Id.* at 449–53.

[84] *See generally* NAT'L ALCOHOL BEVERAGE CONTROL ASS'N, DRY AMERICA IN THE 21ST CENTURY (2016) (detailing the decreased support for "dry" jurisdictions across the greater United States).

[85] *See* Craig v. Boren, 429 U.S. 190, 206 (1976) ("Once passing beyond the consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful.").

[86] *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 272–73 (1984).

[87] *See Craig*, 429 U.S. at 204–05.

[88] *Id.* at 206 ("This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause."); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964) ("[T]he scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned.").

[89] *See* Granholm v. Heald, 544 U.S. 460, 467 (2005); *Bacchus*, 468 U.S. at 265, 273.

[90] *Bacchus*, 468 U.S. at 265–66. The reasoning behind plaintiffs' argument in *Bacchus*—with which the Court ultimately agreed—is that by placing a tax on all liquor except certain liquors native to Hawaii, the state is ultimately discriminating against liquors made outside of Hawaii. *Id*. at 265–66, 273.

[91] *Id*. at 274.

[92] *Id*. at 276.

admitted that Court's prior section 2 jurisprudence was difficult to parse,[93] *Bacchus* signaled that the Twenty-First Amendment would no longer support states' attempts to regulate the intrastate liquor market for purely commercial purposes.[94] However, the Court would not engage in significant discourse on which state purposes would be "sufficiently implicated"[95] by the Twenty-First Amendment for another two decades.[96]

At issue in *Granholm v. Heald*, the second of these two cases, was a set of Michigan and New York laws that allowed in-state wineries to ship their products directly to consumers, but forbade out of state wineries from doing the same.[97] Relying on the line of cases interpreting the Wilson Act, the Court concluded that there was nothing in the legislation preceding the Twenty-First Amendment to indicate that states ever had the power to override the DCC in their regulation of alcohol.[98] In doing so, the Court abrogated many the earliest cases interpreting the Twenty-First Amendment[99] and reaffirmed its recent precedent favoring a more narrow reading.[100]

In the aftermath of *Granholm*, lower courts struggled to reconcile the protections of the Twenty-First Amendment with the Court's strong repudiation of any interpretation that favored discrimination against interstate commerce.[101] Indeed, the Court's dismissal of a broad interpretation of the Twenty-First Amendment in *Granholm* begged the question of which rights were retained by the states under the amendment, other than the

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[93] *Id.* at 274 ("No clear consensus concerning the meaning of [section 2] is apparent.").

[94] *See* Rotter & Stambaugh, *supra* note 21 ("The most notable of these developments was the Court's position in *Bacchus* that states may regulate the use and transportation of alcohol within their borders . . . if the regulations are consistent with the 'core concerns' of the Twenty-first Amendment.").

[95] *Bacchus*, 468 U.S. at 275.

[96] Most of the Court's Twenty-First Amendment cases between *Bacchus* and *Granholm* focused on conflicts between state authority under the Twenty-First Amendment and First Amendment Free Speech guarantees. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) ("[T]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."); Rubin v. Coors Brewing Co., 514 U.S. 476, 486 (1995) ("States clearly possess ample authority to ban the disclosure of alcohol content—subject, of course, to the same First Amendment restrictions that apply to the Federal Government.").

[97] Granholm v. Heald, 544 U.S. 460, 466–67 (2005).

[98] *Id.* at 478 ("By its own terms, the Wilson Act did not allow States to discriminate against out-of-state liquor . . . . ").

[99] *Id.* at 485–86.

[100] *Id.* at 488. While the Court cited *Bacchus* to support its argument that the Twenty-First Amendment does not allow for state protectionism, it once again declined to conduct *Bacchus*'s inquiry into whether the states' statutes implicated core concerns of the Amendment, or even to further elucidate those concerns. *Id.*

[101] *See* Rotter & Stambaugh, *supra* note 21, at 648–49 ("What 'discrimination' means under [the holding of *Granholm*] is now the subject of lower court opinions that have already parted ways on significant issues.").

right to implement complete Prohibition.[102] Further clarification, if any, would be uncorked in *Tennessee Wine & Spirits*.

II. *TENNESSEE WINE & SPIRITS RETAILERS ASSOCIATION V. THOMAS*

In *Tennessee Wine & Spirits*, the Court considered whether a durational residency requirement for retail liquor licenses violated the DCC.[103] The majority in *Tennessee Wine & Spirits* answered this question in the affirmative, holding that section 2 of the Twenty-First Amendment did not give states the right to implement protectionist measures, even in its regulation of alcohol.[104] In the process, it employed an analysis that, like *Granholm* and *Bacchus* before, vastly limited the scope of Twenty-First Amendment jurisprudence.[105]

A. Facts and Background: Residency Requirements and Retail

At issue in *Tennessee Wine & Spirits* was a provision of Tennessee law governing the requirements for retail liquor licenses in the state.[106] Under this law, "any individual . . . who has not been a bona fide resident of [Tennessee] during the two year period" prior to that individual's application for a retail liquor license is ineligible to receive a license.[107] Before the events giving rise to the case, the Tennessee Alcoholic Beverage Commission (TABC) had stopped enforcing the law at the recommendation of the attorney general, who had advised that the law violated the DCC.[108]

As a result of the TABC's nonenforcement policy, when two businesses owned by nonresidents applied for liquor licenses in 2016, their applications were slated for approval by the TABC.[109]

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[102] *See Granholm*, 544 U.S. at 488–89 ("A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective.").

[103] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019).

[104] *Id.* at 2476.

[105] *See* discussion *infra* Section II.C.

[106] *Tenn. Wine & Spirits*, 139 S. Ct. at 2456–57. Tennessee regulates the sale of alcohol using the three-tiered system, in which distributors, wholesalers, and retailer within the alcohol trade are regulated separately. *Id.* at 2457. For a further discussion of the three-tiered system, see *infra* Part III of this note.

[107] TENN. CODE. ANN. § 57-3-204(b)(2)(A). The law also required ten years of residency to renew a retail liquor license, and that all corporations applying for a retail liquor license must be entirely owned by Tennessee residents. TENN. CODE. ANN. § 57-3-204(b)(3)(B). However, only the former was at issue in *Tennessee Wine & Spirits*. *Tenn. Wine & Spirits*, 139 S. Ct. at 2457.

[108] *Tenn. Wine & Spirits*, 139 S. Ct. at 2457–58.

[109] *Id*. at 2458.

Before the licenses could be granted, the Tennessee Wine & Spirits Retailers Association (the Association) threatened to file suit against the TABC for their violation of the durational residency requirement.[110] In response to a request for a declaratory judgment by the TABC, the Middle District of Tennessee held that the residency requirement was unconstitutional.[111] On appeal, the Sixth Circuit affirmed,[112] although the Court did not agree unanimously on whether, as the Association argued, the state had the authority to impose the two-year residency requirement under section 2 of the Twenty-First Amendment.[113] The Court granted the Association's petition for certiorari to consider "the disagreement among the Courts of Appeals about how to reconcile our modern Twenty-first Amendment and [DCC] precedents."[114]

B. Analysis: A Tale of Two Prohibitions

The majority in *Tennessee Wine & Spirits* began its analysis with a brief history of the DCC.[115] Although the Court acknowledged recent criticisms from some Justices, it reiterated the doctrine's intended function of preventing protectionism among the states.[116] Additionally, the Court highlighted the need to read each constitutional provision, i.e., section 2 of the Twenty-First Amendment and the DCC, as part of a comprehensive regulatory scheme.[117]

The majority then examined the legislative history of the Twenty-First Amendment.[118] In particular, the majority emphasized states' difficulty in passing prohibitory regulation within the confines of the commerce clause, a process that culminated in the passage of the Wilson and Webb-Kenyon Acts, and later, the Eighteenth Amendment.[119] From this, the majority reinforced its precedential interpretation of section 2 as being "meant to

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[110] *Id*.

[111] *Id*. (citing Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 259 F. Supp. 3d 785, 797 (M.D. Tenn. 2017)).

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

[113] *See id.* at 629 (Sutton, J., concurring).

[114] *Tenn. Wine & Spirits*, 139 S. Ct. at 2459.

[115] *Id*. at 2459–60 ("[T]he proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law.").

[116] *Id*. at 2457.

[117] *Id*. at 2460 ("[I]t would be strange if the Constitution contained no provision curbing state protectionism, and . . . no provision other than the Commerce Clause could easily do the job.").

[118] *Id*. at 2463–68.

[119] *Id*. at 2464–67.

'constitutionaliz[e]' the basic understanding of the extent of the States' power to regulate alcohol" under the Webb-Kenyon Act.[120]

Turning to the issue at bar, the majority rejected the Association's attempts to distinguish Tennessee's durational residency requirement from the protectionist measures that the Court had previously invalidated in cases like *Granholm* or *Bacchus*.[121] Furthermore, the majority distinguished its recent Twenty-First Amendment cases from those decided shortly after the amendment's ratification, which the majority read as too deferential to the states and thus untenable under the Court's current DCC doctrine.[122]

After reaffirming its narrow reading of states' powers under section 2, the majority analyzed the durational residency requirement in light of the DCC's requirement that facially discriminatory statutes be narrowly tailored to serve the local interests that the statute was enacted to protect.[123] In doing so, it rejected the Association's arguments that the provision is meant to aid in "oversight over liquor store operators" or to ensure that license holders will serve as "responsible neighborhood proprietor[s]."[124] Consequently, the majority affirmed the Sixth Circuit's holding of the durational residency statute as unconstitutional.[125]

Justice Gorsuch, in a dissent joined by Justice Thomas, rejected the majority's interpretation of early precedent.[126] Particularly, the dissent argued that by presenting the Twenty-First Amendment to the states for ratification, Congress, as the legislative body that has the power to regulate interstate commerce, meant to codify an "exception to the . . . Commerce Clause."[127] Consequently, the dissent casts the majority's Twenty-First Amendment jurisprudence as a retrofitting of the doctrine to accommodate an expansive DCC.[128]

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[120] *Id.* at 2467 (alteration in original) (quoting Craig v. Boren, 429 U.S. 190, 206 (1976)).

[121] *Id.* at 2471–72.

[122] *Id.* at 2472–74.

[123] *Id.* at 2461, 2474; *see also* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (establishing that a statute that discriminates against interstate commerce on its face must be "justified in view of the character of the local interests and the available methods of protecting them"). This type of analysis is commonly referred to as "strict scrutiny." *See* Denning, *supra* note 78, at 421–22.

[124] *Tenn. Wine & Spirits*, 139 S. Ct. at 2475–76.

[125] *Id.* at 2476.

[126] *Id.* at 2477–81 (Gorsuch, J., dissenting).

[127] *Id.* at 2478 (quoting Craig v. Boren, 429 U.S. 190, 206 (1976)).

[128] *See id.* at 2480–81.

C. Aftermath: Section 2 as an "On-Off Switch"

On its face, the holding of *Tennessee Wine & Spirits* merely affirms *Granholm*'s holding that section 2 of the Twenty-First Amendment does not give states the authority to enact protectionist measures in the alcohol market.[129] However, the Court's analysis in *Tennessee Wine & Spirits* represents an even greater limitation of section 2—one that drastically limits states' power to regulate alcohol.[130]

Post-*Granholm*, scholars posited that if state alcohol regulations were to be subject to the same anti-protectionist limitations that other state regulations were bound by under the DCC, then section 2 would do little more than preserve a state's right to implement the complete prohibition of alcohol within its borders.[131] For example, a state action to regulate the method of ordering alcohol from manufacturers would draw DCC scrutiny from federal courts.[132] While the Court in *Tennessee Wine & Spirits* did not explicitly adopt this limited interpretation, the Court's analysis indicates that such a reading may have been its implied intent.[133]

In *Tennessee Wine & Spirits*, the Court held that section 2 "allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests."[134] Taken on its own, this text implies that section 2 still confers some unique authority on the states, namely, the authority to restrict the sale and use of alcohol for the safety of its citizens.[135] However, when considered in the context of the Court's recent Twenty-First Amendment cases,[136] it becomes evident that even when states attempt to regulate alcohol in the interest of public health, the

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[129] *Id.* at 2474 (majority opinion).

[130] *Id.* at 2474.

[131] *See* Rotter & Stambaugh, *supra* note 21, at 608 ("[I]f liquor is subject to all of the constraints of the Dormant Commerce Clause . . . a state can choose either (1) to be dry, and permit no liquor . . . or (2) to allow all alcohol without respect to its geographic origin.").

[132] *See* Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423, 432–33 (6th Cir. 2008) (finding that a Kentucky law requiring shipments from small wineries to be ordered in person was discriminatory against interstate commerce and, thus, merited strict scrutiny).

[133] *See Tenn. Wine & Spirits*, 139 S. Ct. at 2455 ("[S]ection 2 [of the Twenty-First Amendment] . . . gave each State the option of banning alcohol if its citizens so chose.").

[134] *Id.* at 2474. However, the Court also held that "[section 2] does not license the States to adopt protectionist measures with no demonstrable connections to [public health] interests." *Id.*

[135] *See id.* at 2462 ("[T]he interpretation of any provision of the Constitution must begin with a consideration of the literal meaning of that particular provision . . . . ").

[136] *See id.* at 2474–76; *see also* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 715 (1984) ("Although a state regulatory scheme obviously need not amount to a comprehensive attack on the problems of alcohol . . . the selective approach Oklahoma has taken . . . suggests limits on the substantiality of the interests it asserts here.").

Court still interrogates the effectiveness of the regulation in protecting this public health interest, an inquiry that precisely echoes the narrow tailoring requirement of discriminatory regulation under the DCC.[137] When state regulations fail to meet this standard, the Court ultimately suggests less discriminatory measures that amount to modifications of the state's existing implementation of the three-tiered system.[138]

Consequently, under this reasoning, the only unassailable authority available to states after *Tennessee Wine & Spirits* is to employ section 2 as an "on-off switch," allowing states to either ban alcohol completely or allow it subject to the DCC's antidiscrimination restrictions.[139]

III. SECTION 2 IN THE DIGITAL AGE

The majority's holding in *Tennessee Wine & Spirits* continues the judicial trend of obscuring the meaning of section 2 as it relates to the DCC.[140] Further, the analytical framework employed to arrive at this holding presents regulatory challenges to an increasingly modernized liquor industry.[141] Yet all the same, the issue of reconciling these seemingly contradictory provisions so that the Twenty-First Amendment retains some semblance of purpose persists. This section introduces a novel analysis for DCC inquiries that implicate section 2 using a more deferential standard for state regulation motivated by public health—one that is already recognized under the Court's existing DCC jurisprudence—to better accommodate the purposes of both provisions.

A. "Liquor Like Everything Else"[142]

The majority's reasoning in *Tennessee Wine & Spirits* indicates a strong step toward alcohol being regulated like any other good under the DCC.[143] Under this standard, any regulation

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[137] *See* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354–55 (1951) (holding that a state cannot discriminate against interstate commerce, "even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available").

[138] *See Tenn. Wine & Spirits*, 139 S. Ct. at 2476. In particular, the majority in *Tenn. Wine & Spirits* suggests that the state implement existing statutes that "promote responsible sales and consumption practices" through "limit[ing] both the number of retail licenses and the amount of alcohol that may be sold to an individual" and "mandat[ing] more extensive training for managers and employees." *Id*.

[139] *See* Rotter & Stambaugh, *supra* note 21, at 608.

[140] *See Tenn. Wine & Spirits*, 139 S. Ct. at 2470.

[141] *See* Oral Argument, *supra* note 29; *see also* Bordner, *supra* note 19, at 266.

[142] *See* Rotter & Stambaugh, *supra* note 21, at 611.

[143] *See Tenn. Wine & Spirits*, 139 S. Ct. at 2469–70 ("[T]he Court has repeatedly declined to read section 2 as allowing the States to violate the 'nondiscrimination

that discriminates against interstate commerce is analyzed with strict scrutiny.[144] Admittedly, it is difficult to interpret statutes like the durational residency requirement at issue in *Tennessee Wine & Spirits* as anything more than a protectionist measure, particularly when read in conjunction with the other statutory provisions.[145] However, the blatant protectionism at play in *Tennessee Wine & Spirits* does not eliminate the possibility of a discriminatory measure that is narrowly tailored to serve a legitimate local public health purpose.[146]

Simply put, the public health concerns at play in the regulation of alcohol are different from those that govern the regulation of milk,[147] fruit,[148] or most other products at issue in the Court's DCC jurisprudence.[149] In its earliest form, Prohibition was conceived as a way to prevent the societal harms caused by overconsumption of alcohol, such as poverty or domestic abuse.[150] From early temperance reformers' perspectives, these problems were exacerbated by a federally mandated interstate market that made alcohol readily accessible.[151]

The lack of a legitimate public health exception or presumption in the Court's Twenty-First Amendment jurisprudence leads to courts implementing a commerce clause-based analysis that few state statutes can withstand, even if they are largely motivated by nondiscriminatory purposes.[152] As the Court's interpretation of the DCC has expanded to accommodate an increasingly national economy,[153] it has also given less consideration to public health (i.e., temperance) as a legitimate

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principle' that was a central feature of the regulatory regime that the provision was meant to constitutionalize.").

144 Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-55 (1951); *see also* Denning, *supra* note 78, at 421–22.

145 While the dissent posits that the durational residency requirement at issue in *Tennessee Wine & Spirits* might have the ultimate effect of raising the price of alcohol, and thereby discouraging its purchase, *Tenn. Wine & Spirits*, 139 S. Ct. at 2483–84 (Gorsuch, J., dissenting), considering that (1) the Tennessee statute made it almost impossible for a non-Tennessean to participate in the retail liquor market and (2) *Tennessee Wine & Spirits* arose out of a retail association's objection to the TBAC's non-enforcement of the durational residency requirement, the majority's classification of the statute as protectionist is warranted. *Id.* at 2456–58, 2474 (majority opinion).

146 *See* Denning, *supra* note 78, at 421–22.

147 *See Dean Milk*, 340 U.S. at 350.

148 *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 138 (1970).

149 *See* Rotter & Stambaugh, *supra* note 21, at 614–15.

150 *See* BEIENBURG, *supra* note 4, at 10 ("Temperance movements argued that alcohol . . . . contributed not only to women's physical harm but also to their poverty.").

151 *See* HAMM, *supra* note 9, at 2 ("Clearly, as [temperance reformers] perceived, the federal system complicated temperance reformers' tasks.").

152 *See* Elyse Grossman & James F. Mosher, *Public Health, State Alcohol Pricing Policies, and the Dismantling of the 21st Amendment: A Legal Analysis*, 15 MICH. ST. U. J. MED. & L. 177, 198–200 (2011).

153 *See* sources *supra* note 141 and accompanying text.

justification for states' rights under section 2.[154] Yet at the same time, the Court continues to acknowledge that there is some alcohol-specific power, however residual, that is still reserved for the states.[155] Paradoxically, throughout *Tennessee Wine & Spirits*, the majority reiterates the necessity of reading the Twenty-First Amendment and the DCC as part of a "unified constitutional scheme."[156] This unification process, however, seems to focus less on finding a way for the two doctrines to coexist than for one to be narrowly interpreted such that it is swallowed by the other.[157]

This is not to say that section 2 should give states unlimited authority to override the DCC, or even that the Court's recent Twenty-First Amendment cases were incorrectly decided. Rather, the fractured analysis underpinning the Court's interpretation of section 2 has led to the formation of an *ad hoc* doctrine that leaves states without a clear standard by which to craft prohibitive statutes so that they will not be struck down under the DCC, even as the market for alcohol grows more complicated.

B. The Three-Tiered Distribution System and Third-Party Providers

After the Court's holding in *Tennessee Wine & Spirits*, it would seem that the three-tiered system of distribution remains one of the only methods of state alcohol regulation that the Court will find permissible.[158] Yet the Court's endorsement of the three-tiered system serves as an example of the complicated reasoning

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[154] *See* Grossman & Mosher, *supra* note 152, at 198–99 ("[T]he courts have shifted to curtailing the scope of the 21st Amendment in favor of protecting interstate commerce interests . . . . at the expense of the states' interest in protecting its citizens from the potential harms of alcohol.").

[155] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2474 (2019); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 275–76 (1984).

[156] *Tenn. Wine & Spirits*, 139 S. Ct. at 2462.

[157] Granted, one could argue that by requiring that state statutes that discriminate against interstate commerce be narrowly tailored to support a legitimate local interest, which includes public health, the DCC effectively protects the same state interests as section 2. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349, 353 (1951). Yet this explanation still does not acknowledge that under this unified scheme, an entire Constitutional amendment is being interpreted into a state of virtual obsolescence, as no state in the country currently exercises its right to implement complete Prohibition. Notably, this was a concern held by some Justices during the Court's early Twenty-First Amendment jurisprudence. *See* Duckworth v. Arkansas, 314 U.S. 390, 399 (1941) (Jackson, J., concurring) ("If the Twenty-first Amendment is not to be resorted to for the decision of liquor cases, it is on the way to becoming another 'almost forgotten' clause of the Constitution.").

[158] *See Tenn. Wine & Spirits*, 139 S. Ct. at 2474–76; *see also id.* at 2483 (Gorsuch, J., dissenting) (arguing that *Granholm* affirmed the Court's support of the three-tiered system in *North Dakota*); Rotter & Stambaugh, *supra* note 21, at 644 (questioning if, after *Granholm*, "the three-tier system [will] be the only remaining mark of the years of political turmoil that preceded the passage of the Twenty-first Amendment?").

that guides modern Twenty-First Amendment jurisprudence.[159] Generally, under the three-tiered distribution system, a state's alcohol market is divided among "producers, wholesalers, and retailers."[160] Each level of the distribution system receives a different license from the state, and each level, listed above in descending order, can only sell alcohol to the level below it.[161]

In *North Dakota v. United States*,[162] the Court noted that the three-tiered system is "unquestionably legitimate,"[163] a dictum that the Court has reiterated in subsequent Twenty-First Amendment cases.[164] However, several complications arise when evaluating the applicability of this statement. *North Dakota* was a plurality opinion that did not involve a DCC challenge.[165] Additionally, the plurality in *North Dakota* based its support of the dictum on *Young's Market*, a case that has since been abrogated by the Court in *Granholm*.[166]

Although litigants in many recent Twenty-First Amendment cases have argued that the three-tiered distribution system would not survive the heightened standard of review applied to state alcohol laws in recent Twenty-First Amendment cases,[167] the Court continues to hold firm to its legitimacy.[168] Yet lower court cases have

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[159] *See, e.g.*, Murphy, *supra* note 21, at 823 (arguing that the three-tiered system, if "subjected to more rigorous scrutiny," might be found to violate the DCC).

[160] *Tenn. Wine & Spirits*, 139 S. Ct. at 2457.

[161] *Id.* Additionally, wholesalers are also allowed to sell to other wholesalers, and retailers are allowed to sell to consumers. *Id.*

[162] North Dakota v. United States, 495 U.S. 423 (1990). At issue in *North Dakota* was a state statute that required special labelling on shipments of alcohol to military bases within North Dakota by out-of-state distributors. *Id.* at 426.

[163] *Id.* at 432. This phrase has been referred to by at least one author as the "*North Dakota* Dictum," a term which this note will continue to employ. *See* Murphy, *supra* note 21, at 823.

[164] *See Tenn. Wine & Spirits*, 139 S. Ct. at 2471 (citing Granholm v. Heald, 544 U.S. 460, 488–89 (2005)); *Granholm*, 544 U.S. at 488–89 (citing *North Dakota*, 495 U.S. at 432).

[165] *North Dakota*, 495 U.S. at 426; *see also* Murphy, *supra* note 21, at 833. *North Dakota* did not raise a DCC issue because the party being burdened was the Federal government, and thus the case did not concern interstate commerce. *North Dakota*, 495 U.S. at 434–39.

[166] *North Dakota*, 495 U.S. at 432 (citing State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59 (1936), *abrogated by Granholm*, 544 U.S. 460).

[167] *Tenn. Wine & Spirits*, 139 S. Ct. at 2471; *Granholm*, 544 U.S. at 488–89; Brooks v. Vassar, 462 F.3d 341, 352 (4th Cir. 2006).

[168] *Granholm*, 544 U.S. at 489 (citing *North Dakota*, 495 U.S. at 432). The *North Dakota* Dictum is a prime example of a calcified doctrine, which occurs when the Court "confuse[s] the doctrine with the constitutional value or command it is supposed to implement." *See* Denning, *supra* note 78, at 449–52. Granted, in some DCC cases, the Court has differentiated between discriminating against interstate goods and discriminating against out-of-state producer. *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 125 (1978). However, the Court does not appear to have ever suggested this as an avenue to shore up its support of the *North Dakota* Dictum.

determined that "states have not produced compelling arguments to justify the system's discriminatory aspects."[169]

As state alcohol markets begin to incorporate technology into the sale and delivery of alcohol, the rigidity of the three-tiered distribution may yet prove to be a barrier to efficient regulation. Consider the integration of third-party provider (TPP) services into New York's retail liquor market. Most TPPs take the form of a mobile application that allows consumers to order alcohol for delivery from local retail liquor stores.[170] These services vary in the degree to which they work with the retail liquor stores to market to consumers, raising concerns as to whether TPPs are "availing" themselves of the stores' retail licenses.[171]

For example, the New York State Liquor Authority (NYSLA) held that ShipCompliant, which "worked with an advertiser to provide licensees . . . with a mechanism to sell their products online through unlicensed Internet advertising platforms," violated state liquor laws by "allow[ing] an advertiser to engage in conduct constituting the sale of alcoholic beverages by an unlicensed entity."[172] In contrast, NYSLA held that Drizly, a marketing service which allowed consumers to place orders for delivery from local liquor stores, was not violative because it allowed retailers to "maintain[] full control of its operation and pay[] a flat fee for strictly marketing services."[173]

NYSLA[174] has issued several declaratory rulings adjudicating the validity of TPP services under New York State liquor laws.[175] In its early consideration as to whether various TPPs are availing themselves of a retailer's liquor license, NYSLA has focused on the degree to which: (1) the TPP acts in place of the retailer; and (2) the TPP "ha[s] an ownership or financial interest in the [retail liquor store]."[176] However, in subsequent rulings,

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[169] *See* Murphy, *supra* note 21, at 843 (citing Anheuser-Busch, Inc. v. Schnorf, 738 F. Supp. 2d 793 (N.D. Ill. 2010); Siesta Village Mkt., LLC v. Granholm, 596 F. Supp. 2d 1035 (E.D. Mich. 2008)).

[170] *See, e.g.*, Operation of Smartphone/Web Application Drizly, Declaratory Ruling 2013-02526, at 1 (N.Y. State Liquor Auth. Sept. 25, 2013), https://sla.ny.gov/system/files/documents/2018/09/2013-02526-operationofsmarphone-webapplicationdrizly.pdf [https://perma.cc/X5YE-YBYL] ("Drizly is a smartphone/web app that enables customers to purchase alcoholic beverages for delivery.").

[171] *See* Bordner, *supra* note 19, at 276.

[172] *Id.* at 266.

[173] *Id.* at 268.

[174] *Agency Mission Statement*, N.Y. STATE LIQUOR AUTHORITY, https://sla.ny.gov/agency-mission-statement [https://perma.cc/F6ZA-QXC8] ("The [NYSLA] . . . seeks to work cooperatively with community leaders and industry members to ensure participation by all agency stakeholders in the licensing and enforcement processes.").

[175] *See* Bordner, *supra* note 19, at 265–72.

[176] *Id.* at 268 (first alteration in original) (citing Operation of Smartphone/Web Application Drizly, Declaratory Ruling 2013-02526, at 2).

NYSLA has created exceptions to these original considerations, occasionally contradicting itself in the process.[177]

Consequently, without firm principles guiding its regulation, this system has descended into "an 'anything goes' attitude toward TPP relationships with licensees."[178] Furthermore, it is theorized that other TPPs have interpreted this scattershot regulation as a grant of leniency by the state.[179] As a result, these TPPs "have likely not requested . . . evaluation of their business models," making it "likely that those companies are availing themselves of their partners' licenses to sell alcohol."[180] In other words, because the states are so strongly encouraged by the Supreme Court to hold fast to the three-tiered system, TPPs may be able to effectively engage in the sale of alcohol without a license in what might otherwise be seen as a violation of those states' laws.[181]

Despite these complications, other states have issued regulations that echo NYSLA's TPP rulings.[182] However, these efforts have yet to yield regulatory measures that could provide a uniform framework for implementation across states with diverse economic landscapes.[183]

NYSLA's struggle to establish clear regulatory guidelines for TPPs demonstrates that even as the Court supports the constitutionality of the three-tiered system, notwithstanding the murky precedent for this support, the proliferation of TPP services has led to a host of complications that this "unquestionably legitimate" system was meant to prevent.[184] As these services continue to take hold in the retail liquor market,[185] as they have in the wake of the COVID-19 pandemic,[186] they will only exacerbate the shaky underpinnings of the three-tiered system.

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[177] *Id*. at 269.

[178] *Id*. at 272.

[179] *Id*. at 273.

[180] *Id*.

[181] *See id*.

[182] *Id*. at 280–81. For example, California allows TPPs to operate without a license, even if this means the TPPS are involved with "taking part in the exchange of money." *Id*. In contrast, the District of Columbia prohibits TPPs from collecting payment directly from consumers. *Id*.

[183] *Id*. at 283.

[184] *See id*. at 253–54 ("TPPs unquestionably challenge the structure of the three-tier system.").

[185] *Id*.

[186] *See* Cameron Costa, *Drinking, Social Distancing and a Booze-Delivery-App Boom*, CNBC (Mar. 31, 2020, 10:42 AM), https://www.cnbc.com/2020/03/27/drinking-coronavirus-social-distancing-and-alcohol-delivery-app-boom.html [https://perma.cc/9CYK-3PPW].

C. *Leniency for Public-Health Motivated Alcohol Laws*

Tennessee Wine & Spirits indicates the Court's desire to subject discriminatory state alcohol laws to strict scrutiny, as though alcohol were any other good under the DCC.[187] However, as the above argument demonstrates, such an approach obfuscates the states' powers under section 2 of the Twenty-First Amendment to the point of near obsolescence, yielding a regulatory scheme that is both self-contradictory and difficult to adapt to an increasingly technologized market. The majority and dissenting opinions in *Tennessee Wine & Spirits* reflect the "winner take all" discourse surrounding the conflict between the Twenty-First Amendment and the DCC, where one doctrine is presented as subservient to or overriding the other.[188] However, these interpretations create a false dichotomy where one does not need to exist.

There are two solutions to this conflict between section 2 and the DCC. The Court could overrule the *North Dakota* Dictum, holding that the three-tiered distribution system is unconstitutionally discriminatory against interstate commerce under the DCC. While this approach has its appeal in the interest of doctrinal consistency, the three-tiered distribution system is so thoroughly entrenched in most state alcohol markets[189] that to abolish it would require an overhaul of alcohol regulation on a nearly national level.[190] Additionally, this approach does little to address the Court's continued, albeit ambiguous, acknowledgement of states' power to regulate alcohol under section 2.

Alternatively, courts could subject state alcohol regulation to a lower standard of DCC review if the state can show that it was enacted in the interest in public health, rather than with a purpose to discriminate against out of state alcohol commerce. Under the Court's modern DCC jurisprudence, through what is known as the *Pike* standard, a state regulation that does not on its face discriminate against interstate commerce is analyzed by comparing the benefits conferred by the regulation to the burden the regulation

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[187] *See* Rotter & Stambaugh, *supra* note 21, at 625–26.

[188] *Compare* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2470 (2019) ("[T]he Court has repeatedly declined to read section 2 as allowing the States to violate the . . . regulatory regime that the provision was meant to constitutionalize."), *with Tenn. Wine & Spirits*, 139 S. Ct. at 2482 (Gorsuch, J., dissenting) ("[T]his Court has lately begun flexing its dormant Commerce Clause muscles . . . to strike down state laws even in core areas of state authority under section 2.").

[189] *See* NAT'L ALCOHOL BEVERAGE CONTROL ASS'N, THE THREE-TIER SYSTEM: A MODERN VIEW 4–5 (2015).

[190] *See* Murphy, *supra* note 21, at 843–46. While Murphy suggests that "the Constitution mandates" that "state legislatures develop new regulatory schemes" in place of the three-tier system, this seems like a costly solution for a problem that could be solved through a more nuanced interpretation of the Constitutional provisions at play. *Id.* at 846.

places on interstate commerce.[191] Arguably, courts already engage in this analysis to some degree when applying strict scrutiny to discriminatory statutes, in that they operate under the implicit assumption that the benefits the state gains from the discriminatory statute could likely be obtained through a more narrowly tailored statute.[192] In other words, under the *Pike* standard, the regulation at issue is given a proverbial judicial benefit of the doubt with regard to its motivations for discriminating against interstate commerce, whereas under strict scrutiny, the state must argue in favor of its regulation against the barrier of the court's suspicion.[193]

Analyzing state alcohol regulation under the *Pike* standard would encourage courts to consider the actual effects of the state regulation rather than dismiss it in favor of some modification to the three-tier system. Additionally, allowing public health-based state alcohol regulation to circumvent strict scrutiny would give more credence to the Court's continued assertion of the Twenty-First Amendment's conferral of rights to the states while continuing to affirm its holding that the amendment does not allow states to override the DCC.

Ultimately, this approach would allow states to regulate the alcohol market for a legitimate government purpose while preventing statutes that serve solely protectionist measures. Opponents of this approach might highlight the difficulty of sorting out which state regulations are actually motivated by a discriminatory purpose, as public health or temperance is raised in defense of the discriminatory statutes in almost every Twenty-First Amendment case discussed herein.[194] However, the Court has developed methods of determining the intended purpose of legislation, whether through examining a statute's legislative history, or by imposing a more holistic inquiry into the "motivating

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[191] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

[192] *See* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) ("Our issue then is whether the discrimination inherent in the [ ] ordinance can be justified in view of the character of the local interests and the available methods of protecting them.").

[193] *Compare Pike*, 397 U.S. at 142 ("[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."), *and Dean Milk*, 340 U.S. at 354 (holding that, under strict scrutiny, states cannot pass discriminatory regulations "even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available").

[194] *See, e.g.*, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2475–76 (2019); *see also* Grossman & Mosher, *supra* note 152, at 199 (detailing the failure of state legislatures to "articulate [the temperance purpose] and to have it reflected in [prohibitory statutes]").

factor[s]" behind the statute.[195] Thus, the question of intent could be answered by imposing a pleading requirement where, to receive a more deferential standard of review, states must prove that the statute was enacted to serve the purpose of the core concerns of the Twenty-First Amendment.

Additionally, if a prohibitory law otherwise poses an unjust burden on an individual's rights, its repeal could be pursued through other constitutional provisions better suited to that purpose, such as the First Amendment's free speech clause[196] or the Fourteenth Amendment's due process[197] and equal protection clauses,[198] as they have in the past.[199]

CONCLUSION: SMOKE ON THE HORIZON

In *Tennessee Wine & Spirits*, the Supreme Court continued its trend of minimizing states' authority under the Twenty-First Amendment in relation to the DCC.[200] In the process, it further called into doubt the future of a doctrine that has proven to be unwieldy from its inception, yielding contradictory adjudicatory standards and unclear grants of authority. Furthermore, as state alcohol markets continue to become further enmeshed with internet commerce, it is evident that this problem will not go away.[201]

However, this does not have to be the case. The Court can adopt a middle-ground solution by incorporating an exception for public health-motivated alcohol regulation into its existing DCC analysis by analyzing the regulation under the more deferential *Pike* standard.[202] This would grant states the leeway to draft specialized

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[195] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977) (enumerating the factors a court could consider to infer discriminatory intent in equal protection claims.); Julian Cyril Zebot, Note, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1091 (2002) ("[T]he difficulty of ascertaining motive is not unique to the dormant Commerce Clause.").

[196] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) (holding that a Rhode Island law limiting the display of advertisements featuring liquor prices to be violative of the First Amendment).

[197] *See* Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971) (holding that a Wisconsin statute that allowed police to post warnings to retail liquor stores so that they could not sell alcohol to individuals without notice was violative of the Due Process Clause).

[198] *See* Craig v. Boren, 429 U.S. 190, 204 (1976) (holding that an Oklahoma law that established a higher minimum drinking age for men than women for the consumption of low-alcohol beer was violative of the equal protection clause).

[199] *Tenn. Wine & Spirits*, 139 S. Ct. at 2477 (Gorsuch, J. dissenting) ("Everyone agrees that state laws must still comply with, say, the First Amendment or the Equal Protection Clause.").

[200] *Id.* at 2473 (majority opinion).

[201] *See Adult Beverage E-commerce*, *supra* note 39.

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

alcohol regulations that the Twenty-First Amendment was meant to confer, while preserving the rights of the federal government to review that regulation as part of a comprehensive national economy.

Additionally, a more pragmatic Twenty-First Amendment jurisprudence would have applications beyond the regulation of alcohol. In broad strokes, the similarities between Prohibition and the criminalization of marijuana are readily apparent.[203] Both goods were the subject of controversial federal regulation in the early twentieth century in response to public outcry.[204] Subsequently, in the waning of that federal regulation, both goods have been regulated under a multitude of legislative systems by the states.[205]

The constitutional argument opposing the criminalization of marijuana has been largely untouched, despite having stronger constitutional underpinnings than Prohibition.[206] This is particularly strange, as the current presidential administration has publicly acknowledged the regulation of marijuana as a state issue.[207] Given this admission, the pursuit of federal legislation granting states the right to regulate marijuana appears to be a viable path to widespread decriminalization.[208] As marijuana legalization at the federal level becomes more cognizable, a Twenty-First Amendment jurisprudence that incorporates enumerated exceptions to the DCC would prove helpful in drafting federal legalization legislation and resolving any state-federal conflicts that occur within the legal marijuana market.[209]

Consequently, it is not unrealistic to consider a federal marijuana legalization statute that echoes the Webb-Kenyon Act, giving states limited authority to police the substance within their borders.[210] By interpreting the Twenty-First Amendment in a way that resolves the conflict that it creates between the federal government and state governments, both the courts and state

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[203] *See* BEIENBURG, *supra* note 4, at 241 ("[T]he states' constitutional fight over Prohibition in the 1920s . . . is even more relevant to the conflict between state legalization and ongoing federal prohibition of [marijuana]. Structurally speaking, the issues appear to be quite similar at the state level, and, in the most important policy aspects, they are.").

[204] Herbert E. Tucker, *Back to the Future: How the Legalization of Marijuana Echoes the Prohibition Era*, 44 COLO. LAW. 87, 87 ("Both the prohibition of alcohol and criminalization of cannabis were created through legislation promulgated in an atmosphere of hysteria rooted in fear and racial bias.").

[205] *Id*. at 89.

[206] *See* BEIENBURG, *supra* note 4, at 243.

[207] Kyle Jaeger, *President Trump Reiterates His Administration Will Let States Legalize Marijuana*, MARIJUANA MOMENT (Aug. 30, 2019), https://www.marijuanamoment.net/president-trump-reiterates-his-administration-will-let-states-legalize-marijuana/ [https://perma.cc/5SA9-E3RQ].

[208] *See* BEIENBURG, *supra* note 4, at 243.

[209] *See id*. at 241–42.

[210] *See id*. at 249.

legislatures could transform this current doctrine into a more comprehensive framework to regulate intoxicating substances. Ultimately, decisions like *Tennessee Wine & Spirits* represent another stumble in the United States' unsteady record of alcohol regulation. It's high time for a more controlled solution.

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