AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era—Judicial Power and Constitutional Authority

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Granholm v. Heald, 544 U.S. 460 (2005)

Eleanor Heald (a wine reviewer living in Michigan) was among a group of individuals, small wineries, and trade associations that filed suit against the governor of Michigan, Jennifer Granholm, in federal district court challenging the constitutionality of the state's system of alcohol regulation. A similar suit was filed against the state of New York, which had a similar regulatory scheme. Michigan regulated liquor sales through a "three-tier" system in which alcohol producers may only sell in in-state wholesalers, and those wholesalers may only sell to in-state retailers. Retailers must receive a state license to sell to individual consumers. In-state wine producers could, however, sell directly to in-state consumers. The district court upheld the Michigan regulations, but the circuit court reversed (the New York case received the opposite results in the district and circuit courts). In a 5–4 decision, the U.S. Supreme Court struck both state regulations, allowing direct-to-consumer wine sales by out-of-state wineries in the numerous states that had discriminated against such sales. For the majority, the general nondiscrimination principles of the dormant commerce clause applied to alcoholic beverages as it did for other commercial goods. For the dissenters, the history of Prohibition, the adoption of the Twenty-First Amendment protected state regulation of liquor from the general application of commerce-clause doctrine. Since the decision, Congress has repeatedly considered, but not adopted, new legislation to ban out-of-state wine sales.

What are the general constitutional principles regarding state regulation of goods imported from out of state? How can Congress alter those general principles? Why might liquor be different? Does the way in which Prohibition was ended reinforce or undermine the uniqueness of liquor as an article of commerce? Should the terms of the Twenty-First Amendment be given their plain meaning or be read against the background of commerce clause doctrine? What is the significance for this case of the Webb–Kenyon Act, a pre–Eighteenth Amendment federal statute that prohibited the interstate shipment of liquor to dry states? Why might the Court have taken this unusual line-up in this case, with Stevens joining the conservatives and Scalia joining the liberals? Why might Congress be open to restricting interstate wine sales?

JUSTICE KENNEDY delivered the opinion of the Court.

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Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." . . . This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States. . . . States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. . . .

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Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms. The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity,

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that the Constitution and, in particular, the Commerce Clause were designed to avoid. State laws that protect local wineries have led to the enactment of statutes under which some States condition the right of out-of-state wineries to make direct wine sales to in-state consumers on a reciprocal right in the shipping State. . . . The current patchwork of laws—with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war. . . .

The discriminatory character of the Michigan system is obvious. Michigan allows in-state wineries to ship directly to consumers, subject only to a licensing requirement. Out-of-state wineries, whether licensed or not, face a complete ban on direct shipment. The differential treatment requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers. . . .

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State laws that discriminate against interstate commerce face "a virtually per se rule of invalidity." *Philadelphia v. New Jersey* (1978). The Michigan and New York laws by their own terms violate this proscription. . . .

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. . . . In a series of cases before ratification of the Eighteenth Amendment the Court, relying on the Commerce Clause, invalidated a number of state liquor regulations.

These cases advanced two distinct principles. First, the Court held that the Commerce Clause prevented States from discriminating against imported liquor. . . .

Second, the Court held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce. . . .

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The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.

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. . . . 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. States may also assume direct control of liquor distribution through state-run outlets. . . . State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

. . . . We still must consider whether either state regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." . . .

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Even were we to credit the States' largely unsupported claim that direct shipping of wine increases the risk of underage drinking, this would not justify regulations limiting only out-of-state direct shipments. . . .

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. . . . The States have not shown that tax evasion from out-of-state wineries poses such a unique threat that it justifies their discriminatory regimes.

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Affirmed.

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JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins, dissenting.

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The New York and Michigan laws challenged in these cases would be patently invalid under well-settled dormant Commerce Clause principles if they regulated sales of an ordinary article of commerce rather than wine. But ever since the adoption of the Eighteenth Amendment and the Twenty-first Amendment, our Constitution has placed commerce in alcoholic beverages in a special category. Section 2 of the Twenty-first Amendment expressly provides 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."

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The views of judges who lived through the debates that led to the ratification of those Amendments are entitled to special deference. Foremost among them was Justice Brandeis, whose understanding of a State's right to discriminate in its regulation of out-of-state alcohol could not have been clearer:

> "The plaintiffs ask us to limit [the Twenty-First Amendment's] broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it. . . . Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?" *State Board of Equalization of California v. Young's Market Co.* (1936)

In the years following the ratification of the Twenty-first Amendment, States adopted manifold laws regulating commerce in alcohol, and many of these laws were discriminatory. . . . The notion that discriminatory state laws violated the unwritten prohibition against balkanizing the American economy—while persuasive in contemporary times when alcohol is viewed as an ordinary article of commerce—would have seemed strange indeed to the millions of Americans who condemned the use of the "demon rum" in the 1920's and 1930's. . . . Today's decision may represent sound economic policy and may be consistent with the policy choices of the contemporaries of Adam Smith who drafted our original Constitution; it is not, however, consistent with the policy choices made by those who amended our Constitution in 1919 and 1933.

. . . . Because the New York and Michigan laws regulate the "transportation or importation" of "intoxicating liquors" for "delivery or use therein," they are exempt from dormant Commerce Clause scrutiny.

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JUSTICE THOMAS, with whom CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

A century ago, this Court repeatedly invalidated, as inconsistent with the negative Commerce Clause, state liquor legislation that prevented out-of-state businesses from shipping liquor directly to a State's residents. The Webb–Kenyon Act and the Twenty-first Amendment cut off this intrusive review, as their text and history make clear and as this Court's early cases on the Twenty-first Amendment

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recognized. The Court today seizes back this power, based primarily on a historical argument that this Court decisively rejected long ago. . . .

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The Webb–Kenyon Act [of 1913] immunizes from negative Commerce Clause review the state liquor laws that the Court holds are unconstitutional. The Act "prohibit[s]" any "shipment or transportation" of alcoholic beverages "into any State" when those beverages are "intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State." . . . The Webb–Kenyon Act's language, in other words, "prevent[s] the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws."

The Michigan and New York direct-shipment laws are within the Webb–Kenyon Act's terms and therefore do not run afoul of the negative Commerce Clause. . . .

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There is no need to interpret the Twenty-first Amendment, because the Webb–Kenyon Act resolves these cases. However, the state laws the Court strikes down are lawful under the plain meaning of § 2 of the Twenty-first Amendment, as this Court's case law in the wake of the Amendment and the contemporaneous practice of the States reinforce.

Section 2 of the Twenty-first Amendment 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." As the Court notes, this language tracked the Webb–Kenyon Act by authorizing state regulation that would otherwise conflict with the negative Commerce Clause. To remove any doubt regarding its broad scope, the Amendment simplified the language of the Webb–Kenyon Act and made clear that States could regulate importation destined for in-state delivery free of negative Commerce Clause restraints. Though the Twenty-first Amendment mirrors the basic terminology of the Webb–Kenyon Act, its language is broader, authorizing States to regulate all "transportation or importation" that runs afoul of state law. The broader language even more naturally encompasses discriminatory state laws. . . .

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. . . . The Court's focus on these effects suggests that it believes that its decision serves this Nation well. I am sure that the judges who repeatedly invalidated state liquor legislation, even in the face of clear congressional direction to the contrary, thought the same. The Twenty-first Amendment and the Webb–Kenyon Act took those policy choices away from judges and returned them to the States. Whatever the wisdom of that choice, the Court does this Nation no service by ignoring the textual commands of the Constitution and Acts of Congress. The Twenty-first Amendment and the Webb–Kenyon Act displaced the negative Commerce Clause as applied to regulation of liquor imports into a State. They require sustaining the constitutionality of Michigan's and New York's direct-shipment laws. I respectfully dissent.

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