AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Federalism: States and the Commerce Clause

**Tennessee Wine and Spirits Retailers Association v. Thomas**, \_\_\_ U.S. \_\_\_ (2019)

*Tennessee Wine and Spirits Retailers Association is a trade association that threatened to sue Russell Thomas, the Executive Director of the Tennessee Alcoholic Beverage Commission (TABC), if Thomas granted licenses to operate local liquor stores to several companies whose owners either resided outside of Tennessee or had recently moved to Tennessee. The trade association maintained that granting the license would violate a Tennessee law requiring the owners of a liquor store to have resided in Tennessee for at least two years. The TABC, relying on an opinion of the state attorney general, maintained the Tennessee law violated the dormant commerce clause. The trade association agreed that a law requiring most businesses to be owned by Tennessee residents would violate the dormant commerce clause, but insisted that Section 2 of the Twenty-First Amendment vested states with the power to pass discriminatory legislation when regulating instate sales of alcoholic beverages. In order to clarify matters, Thomas filed a lawsuit asking the court to issue a declaratory judgment that the Tennessee law was unconstitutional. The local district court declared the residency law unconstitutional and that decision was affirmed by the Court of Appeals for the Sixth Circuit. The Tennessee Wine and Spirits Retailers Association appealed to the Supreme Court of the United States.*

*The Supreme Court, by a 7-2 vote, sustained the Sixth Circuit. Justice Samuel Alito’s majority opinion held that the Tennessee law unconstitutionally discriminated against interstate commerce and that Tennessee had failed to demonstrate a constitutionally sufficient reason to justify the residency requirement. All nine justices agreed that a state law requiring candy stores to be owned and operated by state residents would be unconstitutional. Why would this be a very easy case? What difference do the Alito majority opinion and the Justice Neil Gorsuch dissent think the Twenty-First Amendment make? How does each opinion describe the history of the Twenty-First Amendment, and how did that history influence their decision? Who has the better of the argument? Justice Gorsuch and Justice Clarence Thomas are the two most committed originalists on the Court. Does that commitment help explain the voting alignment in* Tennessee Wine*?*

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Icca0f75c97fa11e9b22cbaf3cb96eb08) delivered the opinion of the Court.

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The Court of Appeals held that Tennessee’s 2-year residency requirement violates the Commerce Clause, which provides that “[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” “Although the Clause is framed as a positive grant of power to Congress,” we have long held that this Clause also prohibits state laws that unduly restrict interstate commerce. “This ‘negative’ aspect of the Commerce Clause” prevents the States from adopting protectionist measures and thus preserves a national market for goods and services.  This interpretation, generally known as “the dormant Commerce Clause,” has a long and complicated history. Its roots go back as far as *Gibbons v. Ogden* (1824), where Chief Justice Marshall found that a version of the dormant Commerce Clause argument had “great force.” . . .

In recent years, some Members of the Court have authored vigorous and thoughtful critiques of this interpretation. But the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. And without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising. That is so because removing state trade barriers was a principal reason for the adoption of the Constitution. . . . [I]it would be strange if the Constitution contained no provision curbing state protectionism, and at this point in the Court’s history, no provision other than the Commerce Clause could easily do the job. . . . It is not surprising, then, that our cases have long emphasized the connection between the trade barriers that prompted the call for a new Constitution and our dormant Commerce Clause jurisprudence. . . .

Under our dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to “ ‘advanc[e] a legitimate local purpose.’ Tennessee’s 2-year durational-residency requirement plainly favors Tennesseans over nonresidents, and neither the Association nor the dissent below defends that requirement under the standard that would be triggered if the requirement applied to a person wishing to operate a retail store that sells a commodity other than alcohol. Instead, their arguments are based on § 2 of the Twenty-first Amendment, to which we will now turn.

Section 2 of the Twenty-first Amendment provides as follows:

“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

Although the interpretation of any provision of the Constitution must begin with a consideration of the literal meaning of that particular provision, reading § 2 to prohibit the transportation or importation of alcoholic beverages in violation of *any*state law would lead to absurd results that the provision cannot have been meant to produce. Under the established rule that a later adopted provision takes precedence over an earlier, conflicting provision of equal stature, such a reading of § 2 would mean that the provision would trump any irreconcilable provision of the original Constitution, the Bill of Rights, the Fourteenth Amendment, and every other constitutional provision predating ratification of the Twenty-first Amendment in 1933. . . .

. . . . In attempting to understand how § 2 and other constitutional provisions work together, we have looked to history for guidance, and history has taught us that the thrust of § 2 is to “constitutionaliz[e]” the basic structure of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment.

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By the late 19th century, the Court was firmly of the view that the Commerce Clause by its own force restricts state regulation of interstate commerce. Dormant Commerce Clause cases from that era “advanced two distinct principles,” an understanding of which is critical to gauging the States’ pre-Prohibition power to regulate alcohol.  First, the Court held that the Commerce Clause prevented States from discriminating “against the citizens and products of other States,” Second, the Court “held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce.” At the time of these decisions, the “original-package doctrine” defined the outer limits of Congress’s authority to regulate interstate commerce.  Under that doctrine, “goods shipped in interstate commerce were immune from state regulation while in their original package,” because at that point they had not yet been comingled with the mass of domestic property subject to state jurisdiction.  Applying this doctrine to state alcohol laws, the Court struck down an Iowa statute that required importers to obtain special certificates, as well as another Iowa law that, with limited exceptions, banned the importation of liquor,

These decisions left dry States “in a bind.”  States could ban the production and sale of alcohol within their borders, but those bans “were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package.” . . . Representatives of those States and temperance advocates thus turned to Congress, which passed two laws to solve the problem.

. . . [T]he Wilson Act aimed to obviate the problem presented by the “original-package” rule. . . . Its critical provision specified that all alcoholic beverages “transported into any State or Territory” were subject “upon arrival” to the same restrictions imposed by the State “in the exercise of its police powers” over alcohol produced in the State. . . . Despite Congress’s clear aim, the Wilson Act failed to relieve the dry States’ predicament. [Tthe Court read the Act’s reference to the “arrival” of alcohol in a State to mean delivery to the consignee, not arrival within the State’s borders. [T]he upshot was that residents of dry States could continue to order and receive imported alcohol. . . .

The aim of the Webb-Kenyon Act was to give each State a measure of regulatory authority over the importation of alcohol. . . . The Act provided that the shipment of alcohol into a State for use in any manner, “either in the original package or otherwise,” “in violation of any law of such State,” was prohibited.  This formulation is significant for present purposes because it would provide a model for § 2 of the Twenty-first Amendment.

The Webb-Kenyon Act attempted to fix the hole in the Wilson Act and thus to “eliminate the regulatory advantage ... afforded imported liquor,”  but its wording, unlike the Wilson Act’s, did not explicitly mandate equal treatment for imported and domestically produced alcohol. . . . [*Granholm*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006595534&pubNum=0000780&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*v. Heald* (2005) held, over a strenuous dissent, that the Webb-Kenyon Act did not purport to authorize States to enact protectionist measures.

There is good reason for this holding. As we have noted, the Court’s pre-Webb-Kenyon Act decisions upholding state liquor laws against challenges based on constitutional provisions other than the Commerce Clause had cautioned that protectionist laws disguised as exercises of the police power would not escape scrutiny. The Webb-Kenyon Act, by regulating commerce, could obviate dormant Commerce Clause problems, but it could not override the limitations imposed by these other constitutional provisions and the traditional understanding regarding the bounds of the States’ inherent police powers. . . .

. . . . [T]the text of § 2 “closely follow[ed]” the operative language of the Webb-Kenyon Act, and this naturally suggests that § 2 was meant to have a similar meaning. . . .  Accordingly, we have inferred that § 2 was meant to “constitutionaliz[e]” the basic understanding of the extent of the States’ power to regulate alcohol that prevailed before Prohibition. And as recognized during that period, the Commerce Clause did not permit the States to impose protectionist measures clothed as police-power regulations. . . .

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Although some Justices have argued that § 2 shields all state alcohol regulation—including discriminatory laws—from any application of dormant Commerce Clause doctrine,[16](https://1.next.westlaw.com/Document/Icca0f75c97fa11e9b22cbaf3cb96eb08/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740350000016bfce431c1d34d6239%3FNav%3DCASE%26fragmentIdentifier%3DIcca0f75c97fa11e9b22cbaf3cb96eb08%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.History*oc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f75251cd164dae369f9c40127cbd2263&list=CASE&rank=10&sessionScopeId=be46dca8fde1ba15bf92671b3c62fc7615a1c5ef5f80d890df131a3924f648d9&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.History*oc.Search%29#co_footnote_B00172048565014) the Court’s modern § 2 precedents have repeatedly rejected that view. We have examined whether state alcohol laws that burden interstate commerce serve a State’s legitimate § 2 interests. And protectionism, we have stressed, is not such an interest. . . . . Most recently, in [*Granholm*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006595534&pubNum=0000780&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), we struck down a set of discriminatory direct-shipment laws that favored in-state wineries over out-of-state competitors. . . .

The Association resists this reading. Although it concedes (as it must under [*Granholm*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006595534&pubNum=0000780&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))) that § 2 does not give the States the power to discriminate against out-of-state alcohol *products and producers*, the Association presses the argument, echoed by the dissent, that a different rule applies to state laws that regulate in-state alcohol distribution. There is no sound basis for this distinction. . . . [*Granholm*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006595534&pubNum=0000780&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) never said that its reading of history or its Commerce Clause analysis was limited to discrimination against products or producers. On the contrary, the Court stated that the Clause prohibits state discrimination against all “ ‘out-of-state economic *interests*,’” and noted that the direct-shipment laws in question “contradict[ed]” dormant Commerce Clause principles because they “deprive[d] *citizens* of their right to have access to the markets of other States on equal terms.” . . .

. . . . At issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers, but the durational-residency requirement that Tennessee has chosen to impose on new applicants for liquor store licenses. Such a requirement is not an essential feature of a three-tiered scheme. Many such schemes do not impose durational-residency requirements—or indeed any residency requirements—on individual or corporate liquor store owners. . . .

In support of the argument that the Tennessee scheme is constitutional, the Association and its *amici* claim that discriminatory distribution laws, including in-state presence and residency requirements, long predate Prohibition and were adopted by many States following ratification of the Twenty-first Amendment. . . . This argument fails for several reasons. Insofar as it relies on state laws enacted shortly after the ratification of the Twenty-first Amendment and this Court’s early decisions interpreting it, the Association and the dissent’s argument does not take into account the overly expansive interpretation of § 2 that took hold for a time in the immediate aftermath of its adoption. . . . Insofar as the Association’s argument is based on state laws adopted prior to Prohibition, it infers too much from the existence of laws that were never tested in this Court. Had they been tested here, there is no reason to conclude that they would have been sustained. During that time, the Court repeatedly invalidated, on dormant Commerce Clause grounds, a variety of state and local efforts to license those engaged in interstate business,  and as noted, pre-Prohibition decisions of this Court and the lower courts held that state alcohol laws that discriminated against interstate commerce were unconstitutional.

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If we viewed Tennessee’s durational-residency requirements as a package, it would be hard to avoid the conclusion that their overall purpose and effect is protectionist. Indeed, two of those requirements—the 10-year residency requirement for license renewal and the provision that shuts out all publicly traded corporations—are so plainly based on unalloyed protectionism that neither the Association nor the State is willing to come to their defense. The provision that the Association and the State seek to preserve—the 2-year residency requirement for initial license applicants—forms part of that scheme. But we assume that it can be severed from its companion provisions, see [883 F.3d at 626–628](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2043864556&pubNum=0000506&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RP&fi=co_pp_sp_506_626&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_506_626), and we therefore analyze that provision on its own. . . .

Since the 2-year residency requirement discriminates on its face against nonresidents, it could not be sustained if it applied across the board to all those seeking to operate any retail business in the State. But because of § 2, we engage in a different inquiry. Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy, but as we pointed out in [*Granholm*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006595534&pubNum=0000780&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), “mere speculation” or “unsupported assertions” are insufficient to sustain a law that would otherwise violate the Commerce Clause.  Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2.

The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety. . . . The Association claims that the requirement ensures that retailers are “amenable to the direct process of state courts,” Brief for Petitioner 48 (internal quotation marks omitted), but the Association does not explain why this objective could not easily be achieved by ready alternatives, such as requiring a nonresident to designate an agent to receive process or to consent to suit in the Tennessee courts. Similarly unpersuasive is the Association’s claim that the 2-year requirement gives the State a better opportunity to determine an applicant’s fitness to sell alcohol and guards against “undesirable nonresidents” moving into the State for the purpose of operating a liquor store. The State can thoroughly investigate applicants without requiring them to reside in the State for two years before obtaining a license. . . . According to the Association, the requirement makes it more likely that retailers will be familiar with the communities served by their stores, and this, it is suggested, will lead to responsible sales practices. . . . No evidence has been offered that durational-residency requirements actually foster such sales practices, and in any event, the requirement now before us is very poorly designed to do so.

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Not only is the 2-year residency requirement ill suited to promote responsible sales and consumption practices but there are obvious alternatives that better serve that goal without discriminating against nonresidents. State law empowers the relevant authorities to limit both the number of retail licenses and the amount of alcohol that may be sold to an individual. The State could also mandate more extensive training for managers and employees and could even demand that they demonstrate an adequate connection with and knowledge of the local community. . . .

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Icca0f75c97fa11e9b22cbaf3cb96eb08), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Icca0f75c97fa11e9b22cbaf3cb96eb08) joins, dissenting.

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. . . . The [Twenty-Second] Amendment . . . embodied a classically federal compromise: Nationwide prohibition ended, but States gained broad discretion to calibrate alcohol regulations to local preferences. And under the terms of this compromise, Tennessee’s law imposing a two-year residency requirement on those who seek to sell liquor within its jurisdiction would seem perfectly permissible.

Of course, § 2 does not immunize state laws from *all* constitutional claims. Everyone agrees that state laws must still comply with, say, the First Amendment or the Equal Protection Clause.  But the challenge before us isn’t based on any constitutional provision like that. Instead, we are asked to decide whether Tennessee’s residency requirement impermissibly discriminates against out-of-state residents and recent arrivals in violation of the “dormant Commerce Clause” doctrine. . . . Unlike most constitutional rights, the dormant Commerce Clause doctrine cannot be found in the text of any constitutional provision but is (at best) an implication from one. . . . But precisely because the Constitution assigns *Congress*the power to regulate interstate commerce, that body is free to rebut any implication of unconstitutionality that might otherwise arise under the dormant Commerce Clause doctrine by authorizing States to adopt laws favoring in-state residents.  . . . . In the Webb-Kenyon Act of 1913, Congress gave the States wide latitude to restrict the sale of alcohol within their borders. Not only is that law still on the books today, § 2 of the Twenty-first Amendment closely “followed the wording of the 1913 Webb-Kenyon Act.”  Accordingly, the people who adopted the Amendment naturally would have understood it to constitutionalize an “exception to the normal operation of the [dormant] Commerce Clause.” . . .

What the relevant constitutional and statutory texts suggest, history confirms. . . . States started adopting residency requirements as early as 1834, when New Hampshire began requiring any person who sold liquor “in any quantity less than one gallon” to obtain a license “from the selectmen of the town or place where such person resides.” . . . At the time these residency requirements were adopted they were widely understood to be constitutional, and courts generally upheld them against legal challenges. . . . Things became more contentious only toward the end of the 19th century. By then, this Court had begun to take a more muscular approach to the dormant Commerce Clause and started using that implied doctrine to strike down state laws that restricted the sale of imported liquor. But this judicial activism did not go unnoticed, and in 1890 Congress responded by passing the Wilson Act. That law sought to bolster the authority of States to regulate the distribution of liquor within their borders by providing that liquor shipped into a State would “upon arrival in such State ... be subject to the operation and effect of the laws of such State ... to the same extent and in the same manner as though such [liquor] had been produced in such State.” . . . In the Webb-Kenyon Act of 1913, Congress went so far as to “[take] the protection of interstate commerce *away*” from the distribution of liquor within a State’s borders.  The language Congress used could not have been plainer: The Act “prohibited” any “shipment or transportation” of alcoholic beverages “into any State” when they 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.” . . .

This history bears special relevance because everyone agrees that, whatever other powers § 2 grants the States, at a minimum it “ ‘constitutionaliz[ed]’ ” the similarly worded Webb-Kenyon Act. . . . Because “centralized regulation did not work,” the Twenty-first Amendment both ended nationwide prohibition in § 1 and authorized local control in § 2. . . . Consistent with this widespread public understanding of the Amendment’s terms, at least 18 States adopted residency requirements for retailers within the first 15 years after its ratification.[4](https://1.next.westlaw.com/Document/Icca0f75c97fa11e9b22cbaf3cb96eb08/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740350000016bfce431c1d34d6239%3FNav%3DCASE%26fragmentIdentifier%3DIcca0f75c97fa11e9b22cbaf3cb96eb08%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.History*oc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f75251cd164dae369f9c40127cbd2263&list=CASE&rank=10&sessionScopeId=be46dca8fde1ba15bf92671b3c62fc7615a1c5ef5f80d890df131a3924f648d9&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.History*oc.Search%29#co_footnote_B00272048565014)

This Court’s initial cases also reflected the same understanding of the Amendment’s effect. Just a few years after ratification, a unanimous Court upheld discriminatory state liquor laws against a dormant Commerce Clause attack, explaining that “to construe the Amendment as saying, in effect: [the State] must let imported liquors compete with the domestic on equal terms ... would involve not a construction of the Amendment, but a rewriting of it.” . . . Straying from the text, state practice, and early precedent, and leaning instead on the Amendment’s famously sparse legislative history, the Court says it can find no evidence that § 2 was *intended* to authorize “protectionist” state laws. But even there plenty of evidence can be found that those who ratified the Amendment wanted the States to be able to regulate the sale of liquor free of judicial meddling under the dormant Commerce Clause—and there is no evidence they wanted judges to have the power to decide that state laws restricted competition “too much.” After all, both before Prohibition and after repeal, robust competition in the liquor industry was far from universally considered an unalloyed good; lower prices enabled higher consumption and invited social problems along the way. The point of § 2 was to allow each State the opportunity to assess for itself the costs and benefits of free trade in alcohol. Reduced competition and increased prices were foreseeable consequences of allowing such unfettered state regulation, but they were consequences the people willingly accepted with the compromise of the Twenty-first Amendment.[7](https://1.next.westlaw.com/Document/Icca0f75c97fa11e9b22cbaf3cb96eb08/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740350000016bfce431c1d34d6239%3FNav%3DCASE%26fragmentIdentifier%3DIcca0f75c97fa11e9b22cbaf3cb96eb08%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.History*oc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f75251cd164dae369f9c40127cbd2263&list=CASE&rank=10&sessionScopeId=be46dca8fde1ba15bf92671b3c62fc7615a1c5ef5f80d890df131a3924f648d9&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.History*oc.Search%29#co_footnote_B00302048565014)

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. . . . A residency requirement may not be the only way to ensure retailers will be amenable to state regulatory oversight, but it is surely one reasonable way of accomplishing that admittedly legitimate goal. Residency also increases the odds that retailers will have a stake in the communities they serve. As Judge Sutton observed in the proceedings below, this same commonsense rationale may explain why Congress requires federal court of appeals judges to live within their circuits,  Surely, Tennessee cannot be faulted for sharing a similar view. Of course, Tennessee’s residency requirement reduces competition in the liquor market by excluding nonresidents or recent arrivals. But even that effect might serve a legitimate state purpose by increasing the price of alcohol and thus moderating its use, an objective States have always remained free to pursue under the bargain of the Twenty-first Amendment.

. . . . To claim [*Granholm*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006595534&pubNum=0000780&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[*v. Heald* (2005)]’s support, the majority is . . . forced to characterize [*Granholm*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006595534&pubNum=0000780&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s framing of the issue before it as purely incidental—the state laws at issue there happened to discriminate against out-of-state products, so the Court just happened to talk a lot about products. . . . The distinction between producers and other levels of the distribution system was integral to its reasoning and result—in fact, it was precisely how [*Granholm*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006595534&pubNum=0000780&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) sought to reconcile its result with the longstanding tradition of state residency requirements. So yes, [*Granholm*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006595534&pubNum=0000780&originatingDoc=Icca0f75c97fa11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))held that the Twenty-first Amendment does not protect laws that discriminate against out-of-state products, but it *also* expressly reaffirmed the “ ‘unquestionabl[e] legitima[cy]’ ” of state laws that require “ ‘all liquor sold for use in the State [to] be purchased from a licensed in-state wholesaler.’ ” . . .

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. . . . Like it or not, those who adopted the Twenty-first Amendment took the view that reasonable people can disagree about the costs and benefits of free trade in alcohol. They left us with clear instructions that the free-trade rules this Court has devised for “cabbages and candlesticks” should not be applied to alcohol.  Under the terms of the compromise they hammered out, the regulation of alcohol wasn’t left to the imagination of a committee of nine sitting in Washington, D. C., but to the judgment of the people themselves and their local elected representatives. State governments were supposed to serve as “laborator[ies]” of democracy, with “broad power to regulate liquor under § 2.”  If the people wish to alter this arrangement, that is their sovereign right. But until then, I would enforce the Twenty-first Amendment as they wrote and originally understood it.