

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

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6  
7 August Term, 2008

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9 (Argued: January 20, 2009

Decided: July 1, 2009)

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11 Docket No. 07-4781-cv  
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14 ARNOLD'S WINES, INC., D/B/A/ KAHN'S FINE WINES & SPIRITS, BUY RITE, INC., DOING BUSINESS  
15 AS CROWN LIQUORS, JOSHUA T. BLOCK, SHARON SILBER,

16  
17 *Plaintiffs-Appellants,*

18  
19 -v.-

20  
21 DANIEL B. BOYLE, CHAIRMAN OF THE NEW YORK STATE LIQUOR AUTHORITY, IN HIS OFFICIAL  
22 CAPACITY, LAWRENCE J. GEDDA, COMMISSIONER OF THE DIVISION OF ALCOHOLIC BEVERAGE  
23 CONTROL, IN HIS OFFICIAL CAPACITY, NEW YORK STATE LIQUOR AUTHORITY,

24  
25 *Defendants-Appellees,*

26  
27 EBER BROTHERS WINE & LIQUOR CORP., CHARMER INDUSTRIES, INC., METROPOLITAN PACKAGE  
28 STORE ASSOCIATES, INC.,

29  
30 *Intervenor-Defendants-Appellees.*

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34  
35 Before:

36 WALKER, CALABRESI, and WESLEY, *Circuit Judges.*

37  
38 Appeal from an order of the United States District Court for the Southern District of New  
39 York (Holwell, J.), entered on October 1, 2007, granting defendants' motions to dismiss

1 Appellants' request for a declaratory judgment invalidating sections 100(1), 102(1)(a), and  
2 102(1)(b) of New York's Alcoholic Beverage Control Law as violative of the Commerce Clause  
3 of the United States Constitution, Article I, Section 8, Clause 3.  
4

5 AFFIRMED.  
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9

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12 Bloomington, IN, and Robert D. Epstein, Epstein Cohen Donahoe &  
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14

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19 *Appellees*.  
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29 *Appellee Metropolitan Package Store Association, Inc.*  
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35 *Beer Institute*.  
36

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39

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42 and Karin Moore, Wine & Spirits Wholesalers of America, Inc.,

1 Washington, D.C., of counsel), for Amici Curiae Wine & Spirits  
2 Wholesalers of America, Inc., National Beer Wholesalers Association, and  
3 Sazerac Company.  
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7 WESLEY, Circuit Judge:

8 This case asks us to chart a course between two constitutional provisions that delineate  
9 the boundaries of a state’s power to regulate commerce, one an express grant, the other an  
10 implied limitation. Section 2 of the Twenty-first Amendment provides: “The transportation or  
11 importation into any State, Territory, or possession of the United States for delivery or use  
12 therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. Const.  
13 amend. XXI, § 2. The Commerce Clause reserves for Congress the power “[t]o regulate  
14 Commerce . . . among the several States,” thus implicitly limiting the states’ power to do so.  
15 U.S. Const. art. 1, § 8, cl. 3. Here, we must determine whether New York’s alcohol regulatory  
16 regime is properly within the scope of section 2 of the Twenty-first Amendment, such that it does  
17 not run afoul of the dormant Commerce Clause. We conclude that the challenged regime is  
18 permissible under the Twenty-first Amendment insofar as it requires that all liquor sold within  
19 the State of New York pass through New York’s three-tier regulatory system.  
20

21 **BACKGROUND**

22 Appellant Arnold’s Wines, Inc., doing business as Kahn’s Fine Wines & Spirits, a wine  
23 retailer operating two stores in the Indianapolis, Indiana area, would like to sell its products  
24 directly to New York consumers. Appellants Joshua T. Block and Sharon Silber, New York

1 residents, would like to be able to buy and receive wine directly from out-of-state retailers.

2 Appellants thus brought this action in the United States District Court for the Southern District of  
3 New York against the New York State Liquor Authority and individual officials of the New York  
4 State Liquor Authority, pursuant to 42 U.S.C. § 1983, seeking a declaratory judgment finding  
5 sections 100(1), 102(1)(a), and 102(1)(b) of New York’s Alcoholic Beverage Control Law  
6 (“ABC Law”) unconstitutional to the extent that they prohibit out-of-state wine retailers from  
7 selling and delivering wine directly to New York consumers. Two licensed New York  
8 wholesalers and an association of licensed New York retailers were granted leave to appear as  
9 intervenor-defendants.

10 The district court (Holwell, J.), in a well-reasoned decision, granted defendants’ motion  
11 to dismiss, holding that the challenged sections are an integral part of the three-tier alcohol  
12 regulatory system consistent with the authority granted to New York by the Twenty-first  
13 Amendment. *Arnold’s Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 413-14 (S.D.N.Y. 2007).  
14 Appellants timely filed this appeal.

15 *A. New York’s Regulatory Scheme*

16 Sections 100(1), 102(1)(a), and 102(1)(b) of New York’s ABC Law require that all liquor  
17 sold, delivered, shipped, or transported to a New York consumer first pass through an entity  
18 licensed by the State of New York. Section 100(1) states, “No person shall manufacture for sale  
19 or sell at wholesale or retail any alcoholic beverage within the state without obtaining the  
20 appropriate license therefor required by this chapter.” N.Y. Alco. Bev. Cont. Law § 100(1)

1 (McKinney 2000 & Supp. 2006).<sup>1</sup> The other two provisions make it illegal to ship alcoholic  
2 beverages to an unlicensed entity within the state (i.e., a consumer). *Id.* § 102(1)(a)-(b).

3           These provisions are part of the three-tier licensing structure for the sale and distribution  
4 of alcoholic beverages established in New York shortly after the passage of the Twenty-first  
5 Amendment. The main purpose of the three-tier system was to preclude the existence of a “tied”  
6 system between producers and retailers, a system generally believed to enable organized crime to  
7 dominate the industry. The three tiers are: (1) the producer, (2) the distributor or wholesaler, and  
8 (3) the retailer. Under this system, the producer sells to a licensed in-state wholesaler, who pays  
9 excise taxes and delivers the alcohol to a licensed in-state retailer. The retailer, in turn, sells the  
10 alcohol to consumers, collecting sales taxes where applicable. In New York, only in-state and  
11 out-of-state wineries may bypass the three-tier system to ship directly to consumers. *Id.* §§ 79-c,  
12 79-d. All other out-of-state producers and sellers must ship to state-licensed wholesalers within  
13 the three-tier system. *Id.* § 102(1)(a)-(b); *see also Arnold’s Wines*, 515 F. Supp. 2d at 403-04.

14           This licensing scheme allows the state to oversee the financial relationships among  
15 manufacturers, wholesalers, and retailers, *see* N.Y. Alco. Bev. Cont. Law §§ 101, 105(16)-(17),  
16 106(13)-(14), as well as the ways these entities price goods and make sales, *see id.* §§ 101-aa,  
17 101-b(2)-(3). The State Liquor Authority may inspect any premises where alcoholic beverages

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<sup>1</sup> With the exception of wineries, *see id.* §§ 79-c, 79-d, all manufacturers’ products must pass through the three-tier system. Manufacturers operating within the State of New York are required to obtain a license granted by the state, as well as distribute their products through licensed wholesalers and retailers. *See id.* §§ 100(1), 100(2). Manufacturers operating outside of the state, and therefore not licensed by the state, similarly must ship their products to a licensed in-state wholesaler or retailer for resale to New York consumers. *See id.* §§ 100(2), 102(1).

1 are manufactured, stored, or sold, as well as the books and records kept on such premises. *Id.* §§  
2 18(4), 103(7), 104(10), 105(15), 106(12). New York asserts that the three-tier regulatory system  
3 allows the state to collect taxes more efficiently and prevent the sale of alcohol to minors.

4 Relevant in this particular case, New York-licensed retailers, the final tier in the state’s  
5 three-tier system, may obtain off-premises licenses permitting them to deliver alcohol directly to  
6 consumers’ homes “in vehicles owned and operated by such licensee[s], or hired and operated by  
7 such licensee[s] from a trucking or transportation company registered with the liquor authority.”  
8 *Id.* § 105(9). New York retail off-premises licensees must comply with a set of highly detailed  
9 regulations governing the location, physical characteristics, and operating hours of their  
10 premises, as well as their financial relationships with producers and wholesalers, and the manner  
11 in which they keep books and records for all their transactions. *Id.* § 105(1)-(23). Out-of-state  
12 retailers without an in-state operation cannot obtain a New York retail off-premises license. It is  
13 this distinction—that New York-licensed retailers, but not out-of-state retailers, may deliver liquor  
14 directly to New York residents—that Appellants challenge in this case.

## 16 DISCUSSION

17 Appellants argue that New York’s ban on direct sales to consumers by out-of-state liquor  
18 retailers discriminates against interstate commerce and thus violates the Commerce Clause. The  
19 Commerce Clause provides that Congress has the power to “regulate Commerce with foreign  
20 Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I § 8, cl.3. It  
21 is well established that the affirmative implies the negative, and that the Commerce Clause

1 establishes a “dormant” constraint on the power of the states to enact legislation that interferes  
2 with or burdens interstate commerce. *See, e.g., Dennis v. Higgins*, 498 U.S. 439, 447 (1991).  
3 Thus, states may not pass laws that discriminate against out-of-state economic interests unless  
4 those laws “advance[] a legitimate local purpose that cannot be adequately served by reasonable  
5 nondiscriminatory alternatives.” *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

6           However, the Supreme Court has made clear that the Twenty-first Amendment alters  
7 dormant Commerce Clause analysis of state laws governing the importation of alcoholic  
8 beverages. *E.g., Granholm v. Heald*, 544 U.S. 460, 488-89 (2005). Ratified in 1933, the  
9 Twenty-first Amendment repealed the Eighteenth Amendment and ended Prohibition. Section 2  
10 of the Amendment provides: “The transportation or importation into any State, Territory, or  
11 possession of the United States for delivery or use therein of intoxicating liquors, in violation of  
12 the laws thereof, is hereby prohibited.” The purpose of section 2 was to protect certain core  
13 interests of the states in “promoting temperance, ensuring orderly market conditions, and raising  
14 revenue” through regulation of the production and distribution of alcoholic beverages. *North*  
15 *Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion).

16           The Twenty-first Amendment is thus in tension with the Commerce Clause, as section 2  
17 “grants the States virtually complete control over whether to permit importation or sale of liquor  
18 and how to structure the liquor distribution system.” *Granholm*, 544 U.S. at 488 (quoting *Cal.*  
19 *Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)) (internal  
20 quotation marks omitted). But state powers under the Twenty-first Amendment are not without  
21 limitation; the Amendment does not immunize all regulation of alcoholic beverages from

1 Commerce Clause scrutiny. *Id.* State policies are only “protected under the Twenty-first  
2 Amendment when they treat liquor produced out of state the same as its domestic equivalent.”  
3 *Id.* at 489.

4 Most recently, in *Granholm v. Heald*, the Supreme Court addressed the difficulties  
5 inherent in the intersection of these two constitutional provisions. Analyzing the Wilson Act and  
6 the Webb-Kenyon Act—two pre-Prohibition statutes that influenced the drafting of section 2 of  
7 the Twenty-first Amendment—the Court concluded that section 2’s purpose was to return to the  
8 states only the Commerce Clause immunity provided by those two Acts. *Id.* at 483. The  
9 Twenty-first Amendment was intended “to allow States to maintain an effective and uniform  
10 system for controlling liquor by regulating its transportation, importation, and use. The  
11 Amendment did not give States the authority to pass nonuniform laws in order to discriminate  
12 against out-of-state goods.” *Id.* at 484-85.

13 The *Granholm* Court set forth the test for determining the constitutionality of state liquor  
14 regulations. If the state measure discriminates in favor of in-state producers or products, the  
15 regulatory regime is not automatically saved by the Twenty-first Amendment simply by virtue of  
16 the special nature of the product regulated. *See id.* at 484-87. Rather, if the court finds the law  
17 discriminatory, it will only be upheld if it reasonably advances legitimate state interests “that  
18 cannot be adequately served by reasonable nondiscriminatory alternatives.” *Id.* at 489 (quoting  
19 *Limbach*, 486 U.S. at 278) (internal quotation marks omitted).

20 Applying this framework, the *Granholm* Court struck down laws in New York and  
21 Michigan that created exceptions to the states’ three-tier distribution systems, allowing in-state



1 wineries to bypass the three tiers and ship directly to consumers, while preventing out-of-state  
2 wineries from doing so. *Id.* at 466. The Court found that the “differential treatment requir[ing]  
3 all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer  
4 before reaching consumers” impermissibly discriminated against interstate commerce. *Id.* at  
5 473-74; *see also id.* at 467. Thus, the Court found that the New York and Michigan laws were  
6 not immunized by the Twenty-first Amendment.

7 Having concluded that the challenged laws were not authorized by the Twenty-first  
8 Amendment, the *Granholm* Court next undertook the standard dormant Commerce Clause  
9 analysis, determining whether the discriminatory statutes served a legitimate local purpose that  
10 could not be accomplished through nondiscriminatory means. *See id.* at 489. The Court noted  
11 that there were a number of nondiscriminatory practices by which the states could achieve their  
12 stated goals of facilitating tax collection and preventing minors from consuming alcohol. *See id.*  
13 at 489-93. Accordingly, it struck down the New York and Michigan laws as violative of the  
14 Commerce Clause. *Id.* at 493.

15 In reaching its conclusion, the Court repeatedly emphasized that the three-tier systems in  
16 place in both states did not themselves violate the Constitution. Specifically, the Court stated  
17 that it is “unquestionably legitimate” for a state to bar the importation of alcoholic beverages if it  
18 bans the sale and consumption of alcohol altogether, or to “funnel sales through the three-tier  
19 system.” *Id.* at 489. *Granholm* is best seen as an attempt to harmonize prior Court holdings  
20 regarding the power of the states to regulate alcohol within their borders—a power specifically  
21 granted to the states by the Twenty-first Amendment—with the broad policy concerns of the

1 Commerce Clause. *See, e.g., North Dakota*, 495 U.S. at 432; *Capital Cities Cable, Inc. v. Crisp*,  
2 467 U.S. 691, 712-13 (1984); *Midcal*, 445 U.S. at 110. *Granholm* validates evenhanded state  
3 policies regulating the importation and distribution of alcoholic beverages under the Twenty-first  
4 Amendment. It is only where states create discriminatory exceptions to the three-tier system,  
5 allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws  
6 are subject to invalidation based on the Commerce Clause. *Granholm*, 544 U.S. at 489; *see also*  
7 *Brooks v. Vassar*, 462 F.3d 341, 351-53 (4th Cir. 2006).

8 *A. Application of the Granholm Analysis to New York’s ABC Law*

9 Appellants challenge provisions that make no distinction between liquor produced in  
10 New York and liquor produced out of the state: both may be shipped directly to New York  
11 consumers by licensed in-state retailers. *See Granholm* 544 U.S. at 487; *Healy v. Beer Inst.*, 491  
12 U.S. 324, 335-37 (1989); *Brown-Forman Distillers Corp. v. N. Y. State Liquor Auth.*, 476 U.S.  
13 573, 582-83 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). Appellants seek to  
14 mimic the concerns addressed in *Granholm* by contending that the New York law is invalid  
15 because it grants in-state retailers benefits not afforded to out-of-state retailers. This argument  
16 comes up short under *Granholm* for several reasons.

17 First, because in-state retailers make up the third tier in New York’s three-tier regulatory  
18 system, Appellants’ challenge to the ABC Law’s provisions requiring all wholesalers and  
19 retailers be present in and licensed by the state, N.Y. Alco. Bev. Cont. Law § 100(1), is a frontal  
20 attack on the constitutionality of three-tier system itself. However, the *Granholm* Court  
21 specifically acknowledged the vital role of the three-tier system in the exercise of states’ section

1 2 powers. The Court reaffirmed that the three-tier system is an “unquestionably legitimate”  
2 exercise of the states’ powers under the Twenty-first Amendment to regulate the importation and  
3 use of alcohol. *Granholm*, 544 U.S. at 488-89.<sup>2</sup> Appellants’ argument is therefore directly  
4 foreclosed by the *Granholm* Court’s express affirmation of the legality of the three-tier system.

5 Appellants reply that the language in *Granholm* endorsing the three-tier system is merely  
6 dicta. In *Granholm*, the states explicitly argued that the challenged regulations were essential  
7 elements of the three-tier system. They attempted to justify their regulations by citing prior  
8 Supreme Court cases that acknowledged the three-tier system as a legitimate exercise of state  
9 power under the Twenty-first Amendment. In reaching its holding, the *Granholm* Court noted  
10 that the challenged regulations were discriminatory exceptions to, rather than integral parts of,  
11 the underlying three-tier systems. *See id.* Had the three-tier system itself been unsustainable  
12 under the Twenty-first Amendment, the *Granholm* Court would have had no need to distinguish  
13 it from the impermissible regulations at issue. As Judge Holwell stated in his opinion below, “if  
14 dicta this be, it is of the most persuasive kind.” *Arnold’s Wines*, 515 F. Supp. 2d at 412.

15 Second, New York’s ABC Law treats in-state and out-of-state liquor evenhandedly under  
16 the state’s three-tier system, and thus complies with *Granholm*’s nondiscrimination principle.

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<sup>2</sup> The *Granholm* dissenters specifically endorsed the constitutionality of the three-tier system as well. *Id.* at 495 (Stevens, J., dissenting) (“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?” (quoting *State Bd. of Equalization of Cal. v. Young’s Mkt. Co.*, 299 U.S. 59, 62-63 (1936)); *id.* at 517 (Thomas, J., dissenting) (affirming the existence of the “widespread, unquestioned acceptance of the three-tier system of liquor regulation”).

1     *See Granholm*, 544 U.S. at 489. New York requires that all liquor—whether originating in state  
2     or out of state—pass through the three-tier system. N.Y. Alco. Bev. Cont. Law §§ 102 *et seq.*  
3     Alcohol sold by in-state retailers directly to consumers in New York has already passed through  
4     the first two tiers—producer and wholesaler—and been taxed and regulated accordingly. Requiring  
5     out-of-state liquor to pass through a licensed in-state wholesaler and retailer adds no cost to  
6     delivering the liquor to the consumer not equally applied to in-state liquor. Rather, the New  
7     York regulatory scheme mandates that both in-state and out-of-state liquor pass through the same  
8     three-tier system before ultimate delivery to the consumer.

9             This is in stark contrast to the challenged regulations in *Granholm*. The New York and  
10     Michigan laws struck down by the Court in *Granholm* created specific exceptions to the states’  
11     three-tier systems favoring in-state producers. 544 U.S. at 474. This was exactly the type of  
12     economic protectionist policy the Commerce Clause sought to forestall, and where the *Granholm*  
13     Court drew the line. *See id.* at 489. While the Twenty-first Amendment grants the states broad  
14     powers to regulate the transportation, sale, and use of alcohol within their borders, it simply does  
15     not immunize attempts to discriminate in favor of local products and producers. *Id.*; *see also*  
16     *Bacchus*, 468 U.S. at 276. The challenged regulations here are evenhanded and permissibly  
17     aimed at “combat[ing] the perceived evils of an unrestricted traffic in liquor,” rather than  
18     accomplishing “mere economic protectionism.” *Bacchus*, 468 U.S. at 276. Thus, New York’s  
19     alcohol regulatory scheme properly falls within the state’s powers granted by section 2 of the  
20     Twenty-first Amendment.

21             Because New York’s three-tier system treats in-state and out-of-state liquor the same, and

1 does not discriminate against out-of-state products or producers, we need not analyze the  
2 regulation further under Commerce Clause principles. Sections 100(1), 102(1)(a), and 102(1)(b)  
3 of New York’s ABC Law are an integral part of New York’s three-tier system.<sup>3</sup> Because New  
4 York’s laws evenhandedly regulate the importation and distribution of liquor within the state, we  
5 hold that they do not run afoul of the Commerce Clause.

### 7 CONCLUSION

8 Sections 100(1), 102(1)(a), and 102(1)(b) of New York’s Alcoholic Beverage Control  
9 Law, instituting a three-tier system for the regulation of alcoholic beverages, do not discriminate  
10 against out-of-state producers in violation of the Commerce Clause of the United States  
11 Constitution, Article I, Section 8, Clause 3, and are thus a valid exercise of the state’s rights  
12 under the Twenty-first Amendment. For the foregoing reasons, the district court’s order of

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<sup>3</sup> Appellants’ complaints of discrimination have somewhat of a hollow ring. Although they assert a willingness to comply with New York’s regulatory scheme if allowed to deliver liquor directly to New York consumers, this would be virtually impossible without either an absurd operational result, or a dismantling of New York’s entire three-tier scheme. For example, were they to comply with the existing system, Indiana-based Arnold Wines would be required to purchase its liquor inventory from New York wholesalers, only to ship the wine back across the country to New York consumers. *See* N.Y. Alco. Bev. Cont. L. § 102(3-b). Even if Appellants were willing to live with this rather absurd arrangement, it would violate Indiana laws requiring licensed liquor retailers to purchase inventory from licensed Indiana wholesalers. *See* Ind. Code §§ 7.1-3-14-4, 7.1-3-15-3(a). But even if Appellants succeed in their challenge to the in-state retailer requirements of New York, under existing New York Law, Arnold’s Wines would not qualify for a retail license because multi-store operations are not eligible for retail licenses in New York. *See* N.Y. Alco. Bev. Cont. L. §§ 63(5), 79(2). Of course, the multi-store operations restriction is written in the context of in-state retailers. Ultimately, because it is demonstrably impossible for out-of-state retailers like Arnold Wines to comply with New York’s existing three-tier scheme, granting them the relief they seek would require us to invalidate New York’s three-tier system.

1      October 1, 2007 granting defendants' motions to dismiss is hereby AFFIRMED.

1 CALABRESI, *Circuit Judge*, concurring:

2 I join fully in Judge Wesley’s opinion. I write separately to emphasize the unusual nature  
3 of judicial interpretation of the Twenty-First Amendment, a constitutional provision that, over  
4 seventy-five years, has been defined and redefined to accommodate changing social needs and  
5 norms. There is good evidence that when the Twenty-First Amendment was first adopted,  
6 section two of that amendment was intended to give states near-total control over alcohol  
7 regulation. That complete control was a stark exception to the otherwise limited scope of state  
8 commerce regulation. In the ensuing decades however, as attitudes toward alcohol have changed  
9 and its commerce has become more nationalized, the Supreme Court has increasingly read the  
10 Twenty-First Amendment more narrowly, and excluded from its protection any number of state  
11 regulatory schemes that, to be sure, discriminated against interstate commerce. This “updating”  
12 of the Twenty-First Amendment raises important theoretical questions about the role of courts in  
13 interpreting constitutional provisions that may well have become anachronistic. But apart from  
14 these “legal process” issues, the jurisprudence that the Supreme Court has created through this  
15 updating presents other problems. Regrettably, it often leaves lower courts at a loss in seeking to  
16 figure out what the Twenty-First Amendment means and what if any governing principles may be  
17 derived from the High Court’s Twenty-First Amendment decisions.

18  
19 I.

20 A.

21 “The history of state regulation of alcoholic beverages dates from long before adoption of  
22 the Eighteenth Amendment.” *Craig v. Boren*, 429 U.S. 190, 205 (1976). As early as the *License*

1 *Cases*, 46 U.S. (5 How.) 504, 579 (1847), the Supreme Court “recognized a broad authority in  
2 state governments to regulate the trade of alcoholic beverages within their borders free from  
3 implied restrictions under the Commerce Clause.” *Craig*, 429 U.S. at 205. Soon enough,  
4 however, the Supreme Court started to trim away at the edges of that regulatory power. Thus, by  
5 the late nineteenth century, the Supreme Court began to “undercut the theoretical underpinnings  
6 of the *License Cases*.” *Id.* And, while the Supreme Court continued to permit states to ban  
7 alcohol altogether, *see Granholm v. Heald*, 544 U.S. 460, 476 (2005); *Mugler v. Kansas*, 123  
8 U.S. 623 (1887), the Court, in a series of cases during the 1880s, struck down on dormant  
9 Commerce Clause grounds state laws banning or burdening the sale of imported liquor. *See*  
10 *Granholm*, 544 U.S. at 476-77 (collecting cases); *see also, e.g., Leisy v. Hardin*, 135 U.S. 100  
11 (1890); *Bowman v. Chicago & Nw. Ry. Co.*, 125 U.S. 465 (1888).

12 In 1890, Congress tried to resolve the doctrinal “bind” the Court had created: states  
13 “could ban the production of domestic liquor . . . but these laws were ineffective because  
14 out-of-state liquor was immune from any state regulation as long as it remained in its original  
15 package.” *Granholm*, 544 U.S. at 478. At the same time, the legislators tried to address schemes  
16 of state protectionism. They did this by passing the Wilson Act, which stated that “All . . .  
17 intoxicating liquors or liquids transported into any State or Territory . . . shall upon arrival in  
18 such State or Territory be subject to the operation and effect of the laws of such State or Territory  
19 enacted in the exercise of its police powers, to the same extent and in the same manner as though  
20 such liquids or liquors had been produced in such State or Territory . . .” 27 U.S.C. § 121. This  
21 act—as described recently in *Granholm*—allowed states “to regulate imported liquor on the same  
22 terms as domestic liquor” but “did not allow States to discriminate against out-of-state liquor.”



1     *Granholm*, 544 U.S. at 478.

2             The Wilson Act posed many interpretive challenges for the courts. The text of the  
3     statute—read literally—seemed to permit obvious end-runs around its anti-protectionist aims.  
4     The Supreme Court, however, readily interpreted the act in light of that purpose. Thus, in *Scott*  
5     *v. Donald*, 165 U.S. 58 (1897), the Court struck down, as a violation of the Wilson Act, a South  
6     Carolina liquor regulatory scheme that required all liquor sales to be channeled through a state  
7     liquor commissioner. The South Carolina Act instructed the commissioner to “purchase his  
8     supplies from the brewers and distillers in this State when their product reaches the standard  
9     required by this Act: Provided, Such supplies can be purchased as cheaply from such brewers and  
10    distillers in this State as elsewhere.” 1895 S.C. Acts 732. And South Carolina law limited the  
11    State’s markup on locally produced wines to a 10-percent profit but imposed no such cap in the  
12    case of imported wines. 165 U.S. at 93. The result of all this was invalid discrimination against  
13    out-of-state liquor.

14            The Court explained that the Wilson Act was “not intended to confer upon any State the  
15    power to discriminate injuriously against the products of other States in articles whose  
16    manufacture and use are not forbidden, and which are, therefore, the subjects of legitimate  
17    commerce.” *Id.* at 100. The Court further held that the Wilson Act mandated “equality or  
18    uniformity of treatment under state laws,” and did not allow South Carolina to provide “an unjust  
19    preference” to its products “as against similar products of the other States.” *Id.* at 101.

20            In the late nineteenth century, states also attempted to regulate liquor by banning its direct  
21    shipment, for personal use, from out-of-state sources to citizens within the state. But the  
22    Supreme Court soon interpreted the Wilson Act as prohibiting such state laws. *See Vance v.*

1 *W.A. Vandercook Co.*, 170 U.S. 438 (1898); *Rhodes v. Iowa*, 170 U.S. 412 (1898). In 1913,  
2 Congress responded by passing the Webb-Kenyon Act which prohibits “[t]he shipment or  
3 transportation . . . of any . . . intoxicating liquor of any kind from one State, Territory, or District  
4 . . . into any other State, Territory, or District . . . [for the purpose of being] received, possessed,  
5 sold, or in any manner used . . . in violation of any law of such State, Territory, or District.” 37  
6 Stat. 699, 699-700 (codified at 27 U.S.C. § 122). It is not precisely clear what kind of regulation  
7 the Webb-Kenyon Act meant to allow. But, as it was interpreted—much later—in *Granholm*, the  
8 Webb-Kenyon Act “forb[ade] ‘shipment or transportation’ only where it runs afoul of the State’s  
9 generally applicable laws governing receipt, possession, sale, or use.” *Granholm*, 544 U.S. at  
10 482 (internal quotation marks omitted). The result was that states could prohibit direct  
11 “shipments of alcohol to consumers for personal use, provided that the States treated in-state and  
12 out-of-state liquor on the same terms.” *Id.* at 481.

## 13 B.

14 In 1919, the Eighteenth Amendment was ratified and prohibition began. In 1933,  
15 however, prohibition was repealed by the passage of the Twenty-First Amendment. While  
16 section one of the Twenty-First Amendment merely repealed prohibition, section two did more.  
17 That section stated that “[t]he transportation or importation into any State . . . for delivery or use  
18 therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. Const.  
19 Amend. XXI § 2.

20 The language of section two is rather opaque. In its terms, it does not authorize any state  
21 regulation but rather just forbids people from transporting alcohol into a state in ways that violate

1 that state’s laws.<sup>1</sup> Courts, nevertheless, have consistently (and understandably) read the section  
2 to authorize broad state regulation.

3 There is evidence that the intent of section two was to give complete regulatory authority  
4 to the states over alcohol.<sup>2</sup> During the congressional debate about section two, for example, one  
5 senator stated that the “purpose of section 2 is to restore to the States by constitutional  
6 amendment absolute control in effect over interstate commerce affecting intoxicating liquors  
7 which enter the confines of the States.” 76 Cong. Rec. 4143 (1933) (statement of Senator  
8 Blaine). And Justice Black, who while a Senator participated in the passage of the Twenty-First  
9 Amendment in the Senate, clearly believed that section two was intended to return “‘absolute  
10 control’ of liquor traffic to the States, free of all restrictions which the Commerce Clause might  
11 before that time have imposed.” *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324,  
12 338 (1964) (Black, J., dissenting)

13 Not surprisingly, therefore, the Supreme Court “made clear in the early years following  
14 adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally  
15 unconfined by traditional Commerce Clause limitations when it restricts the importation of

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<sup>1</sup> As Larry Tribe once quipped, “there are two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under color of no law, can violate the United States Constitution. One is to enslave somebody . . . . The other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws.” Lawrence H. Tribe, *How To Violate the Constitution Without Really Trying*, 12 Const. Commentary 217, 220 (1995).

<sup>2</sup> It is noteworthy, however, that the text of section two “closely follows the Webb-Kenyon and Wilson Acts,” a similarity that the Supreme Court has, in more recent times, held “express[ed] the framers’ clear intention of constitutionalizing the Commerce Clause framework established under those statutes.” *Craig*, 429 U.S. at 205-06; *accord Granholm*, 544 U.S. at 485.

1 intoxicants destined for use, distribution, or consumption within its borders.” *Hostetter*, 377  
2 U.S. at 330; *accord Craig*, 429 U.S. at 206. And, in this period, the Court upheld near-total  
3 control over domestic alcohol commerce by states, even to the point of opening the door to  
4 “liquor-related political trade wars among the states.” Lawrence H. Tribe, *American*  
5 *Constitutional Law* § 6-27, at 1168 (3d ed. 2000); *see, e.g., Indianapolis Brewing Co. v. Liquor*  
6 *Control Comm’n*, 305 U.S. 391 (1939) (upholding Michigan’s prohibition of in-state beer dealers  
7 selling beer made in Indiana); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *State*  
8 *Board v. Young’s Market Co.*, 299 U.S. 59, 64 (1936). Justice Brandeis, for example, observed  
9 in *Young’s Market* that “to construe the [Twenty-First] Amendment as saying, in effect: The  
10 State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture  
11 and sale within its borders; but if it permits such manufacture and sale, it must let imported  
12 liquors compete with the domestic on equal terms . . . . would involve not a construction of the  
13 Amendment, but a rewriting of it.” *Id.* at 62.

14 C.

15 To the extent that the Supreme Court’s early interpretation was correct, however,  
16 “rewriting” is exactly what happened. In 1964, in *Hostetter v. Idlewild Bon Voyage Liquor*  
17 *Corp.*, 377 U.S. 324 (1964), the Supreme Court held that a state cannot regulate passage of liquor  
18 through that state when the point of final delivery was a duty-free concession within the state, for  
19 example, delivery on board an airplane regulated by the customs service. The Court interpreted  
20 section two not as “repeal[ing] the Commerce Clause wherever regulation of intoxicating liquors  
21 is concerned,” an interpretation that the Court called an “absurd simplification,” but rather stated  
22 that each of the two provisions “must be considered in the light of the other, and in the context of

1 the issues and interests at stake in any concrete case.” *Id.* at 331-32 (internal quotation marks  
2 omitted). Relying heavily on legislative history (and perhaps his own knowledge of what he had  
3 intended), Justice Black strongly disagreed. *See id.* at 338 (Black, J., dissenting). And, in 1976,  
4 in a case notable for its equal protection holding, the Supreme Court reaffirmed the point made in  
5 *Hostetter*. *See Craig*, 429 U.S. at 206 (reasoning that section two “created an exception to the  
6 normal operation of the Commerce Clause” but “does not pro tanto repeal the Commerce  
7 Clause”).

8 In a series of cases in the 1980s, the Court applied this principle seemingly to narrow  
9 further the powers conferred upon states by the Twenty-First Amendment. First, in *Bacchus*  
10 *Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court struck down a Hawaii tax exemption that  
11 favored certain locally-produced alcohol and that was, by the state’s own admission, intended to  
12 be protectionist. The Court reasoned that protectionism was not “the central purpose” of section  
13 two and that “[s]tate laws that constitute mere economic protectionism are . . . not entitled to the  
14 same deference as laws enacted to combat the perceived evils of an unrestricted traffic in  
15 liquor.”<sup>3</sup> *Id.* at 276. Justice Stevens vigorously objected, and described an inquiry into the  
16 purpose of a liquor law as “a totally novel approach to the Twenty-First Amendment.” *Id.* at 287  
17 (Stevens, J. dissenting).

18 Next, in *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986),  
19 and *Healy v. Beer Inst.*, 491 U.S. 324 (1989), the Court struck down on dormant commerce  
20 grounds two state laws that required liquor producers to affirm that they were not charging any

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<sup>3</sup> The Court described the “obscurity of the legislative history of section two,” and dismissed Justice Brandeis’s opinion in *Young’s Market* as “broad language.” *Id.* at 274.

1 higher prices in those states than in other states. The Court reasoned that the Twenty-First  
2 Amendment does not permit states to regulate sales in other states. 476 U.S. at 585.

3  
4 D.

5 The Supreme Court’s most recent foray into the question of the applicability of the  
6 Twenty-First Amendment to the dormant Commerce Clause came in *Granholm v. Heald*, 544  
7 U.S. 460 (2005). In light of the rather extensive deference to state regulation of alcohol, there  
8 developed, even in recent times, complex state statutes that made it difficult to purchase alcohol  
9 from out of state. These statutes gave rise to the constitutional question of whether states could  
10 set up regulatory regimes where the “object and effect” was “to allow in-state wineries to sell  
11 wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at  
12 the least, to make direct sales impractical from an economic standpoint.” *Granholm*, 544 U.S. at  
13 466.

14 At issue in *Granholm* were portions of New York’s and Michigan’s alcoholic regulatory  
15 laws. The Court described these regimes as creating a three-tier system that “is, in broad terms  
16 and with refinements to be discussed, mandated . . . only for sales from out-of-state wineries.”  
17 544 U.S. at 467. Under Michigan’s then-existing regime, out-of-state wine producers were  
18 required to “distribute their wine through wholesalers” whereas in-state producers could obtain a  
19 license to sell directly to consumers. *Id.* at 468-69. Under New York’s regime at the time,  
20 wineries could ship to consumers in New York only if they could establish a physical presence in  
21 New York and/or primarily used grapes grown in New York. *Id.* at 470.

22 After observing (without explaining the significance of the fact) that states had formed

1 reciprocal trade agreements for direct shipping, as part of “an ongoing, low-level trade war,” *id.*  
2 at 473, the Court found that Michigan’s regime expressly prevented direct sales from out-of-  
3 state wineries to consumers and that New York’s regime created a sometimes prohibitive burden  
4 on out-of-state wineries that wished to sell directly to consumers. (This burden included a  
5 physical presence requirement, something about which dormant Commerce Clause cases had  
6 long expressed suspicion, *id.* at 473-76).

7 In determining whether the Twenty-First Amendment protected the Michigan and New  
8 York regulatory schemes, the Court analyzed the Wilson and Webb-Kenyon Acts, which it  
9 asserted the Twenty-First Amendment had “constitutionaliz[ed].” *Id.* at 484 (quoting *Craig*, 429  
10 U.S. at 205-06). The Court concluded that “[t]he aim of the Twenty-first Amendment was to  
11 allow States to maintain an effective and uniform system for controlling liquor by regulating its  
12 transportation, importation, and use,” but that “[t]he Amendment did not give States the authority  
13 to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had  
14 not enjoyed at any earlier time.” *Id.* at 484-85. The Court cited several relatively recent cases,  
15 including *Healy*, *Brown-Forman*, and *Bacchus Imports*, as standing for the proposition that “state  
16 regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause,” 544  
17 U.S. at 487.

18 Interestingly, however, the Court also wrote that its holding would not “call into question  
19 the constitutionality of the three-tier system” insofar as “[t]he Twenty-first Amendment grants  
20 the States virtually complete control over whether to permit importation or sale of liquor and  
21 how to structure the liquor distribution system.”” *Id.* at 488 (quoting *California Retail Liquor*  
22 *Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). And the Court stated, clear

1 as day, that “the three-tier system itself is ‘unquestionably legitimate.’” *Id.* (quoting *North*  
2 *Dakota v. United States*, 495 U.S. 423, 432 (1990)). Indeed, the Court cited Justice Scalia’s  
3 concurrence in the judgment in *North Dakota* and, in an explanatory parenthetical, quoted Justice  
4 Scalia’s statement that “‘The Twenty-first Amendment . . . empowers North Dakota to require  
5 that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.’”  
6 *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 497 U.S. at 447 (Scalia, J., concurring in  
7 judgment)). The Court, however, concluded this affirmation of the three-tier system by stating  
8 that “[s]tate policies are protected under the Twenty-first Amendment when they treat liquor  
9 produced out of state the same as its domestic equivalent” but that “[t]he instant cases, in  
10 contrast, involve straightforward attempts to discriminate in favor of local producers.” *Id.*

## 11 12 II.

13  
14 The evolving interpretation of the Twenty-First Amendment raises important questions  
15 about the role of courts. It is possible that the Twenty-First Amendment was originally intended  
16 and understood to have the complex shape that it has assumed in the past few decades. But, as  
17 many distinguished justices have contended—initially in opinions for the Court and more  
18 recently in dissent—it seems more likely that the Twenty-First Amendment, when enacted,  
19 meant to carve out from dormant Commerce Clause scrutiny the area of alcohol regulation.  
20 Nevertheless, it appears that the Supreme Court has increasingly “updated” the Twenty-First  
21 Amendment, and it is this judicial process that I wish, briefly, to address.

## 22 A.



1           When the Twenty-First Amendment was first adopted and courts interpreted section two  
2 to authorize virtually limitless state regulation, the United States was a different place than it is  
3 today. Laws frequently regulated “morals,” and alcohol was often viewed as immoral. And even  
4 setting “morals” aside, the prevailing view of alcohol was that it was a unique product that posed  
5 unusual dangers, both directly as an intoxicant, and indirectly, as a stream of commerce that  
6 generated corruption and crime.<sup>4</sup> It was therefore left to individual states to decide, in light of  
7 their own local values, needs, and experiences, how to contend with that product.

8           Justice Jackson described this understanding when he wrote in 1941 that “[t]he people of  
9 the United States knew that liquor is a lawlessness unto itself.” *Duckworth v. Arkansas*, 314 U.S.  
10 390, 398 (1941) (Jackson, J., concurring in result). Jackson reasoned that those who created the  
11 Twenty-First Amendment

12           determined that [alcohol] should be governed by a specific and particular  
13 constitutional provision. They did not leave it to the courts to devise special  
14 distortions of the general rules as to interstate commerce to curb liquor’s  
15 ‘tendency to get out of legal bounds.’ It was their unsatisfactory experience with  
16 that method that resulted in giving liquor an exclusive place in constitutional law  
17 as a commodity whose transportation is governed by a special constitutional  
18 provision.  
19

20 *Id.* at 398-99. Put differently, even those who might think that certain kinds of liquor regulation  
21 pose no benefit to temperance or public safety still wanted a broad, overinclusive authorization  
22 for state regulation, so as to prevent courts or Congress from chipping away at the states’ power  
23 to regulate.

24           In the ensuing decades however, attitudes towards alcohol have changed, and its

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<sup>4</sup> For especially interesting discussions of criminalization of vice, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 572-76 (2001); and William J. Stuntz, *Race, Class, and Drugs*, 98 Colum. L. Rev. 1795 (1998).

1 commerce has become more nationalized. As Justice Stevens observed in his *Granholm* dissent,  
2 “[t]oday many Americans, particularly those members of the younger generations who make  
3 policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the  
4 same market and legal controls as other consumer products.” *Granholm*, 544 U.S. at 494  
5 (Stevens, J. dissenting). But, “[t]hat was definitely not the view of the generations that made  
6 policy in 1919 when the Eighteenth Amendment was ratified or in 1933 when it was repealed by  
7 the Twenty-first Amendment.” *Id.*

8         Nowadays, alcohol is not prohibited by any state,<sup>5</sup> and the beer industry is one that runs  
9 theme parks rather than organized crime dens. It is not surprising, therefore, that when courts in  
10 the ‘60s, ‘70s, ‘80s, and today consider the notion of a Twenty-First Amendment that authorizes  
11 any state regulation, even regulation that would otherwise clearly violate the dormant Commerce  
12 Clause, they find it hard to fathom such a constitutional rule. But, as Justice Stevens said,  
13 quoting Justice Marshall, “[t]he Constitution does not prohibit legislatures from enacting stupid  
14 laws.” *N.Y. State Bd. of Elec. v. Lopez-Torres*, 128 S. Ct. 791, 801 (2008) (Stevens, J.  
15 concurring).

## 17 B.

18         This problem of how courts should deal with seemingly anachronistic legal provisions is  
19 one with which judges and scholars have long struggled. It may appear to a judge that a legal  
20 provision is “born in another age,” *Quill v. Vacco*, 80 F.3d 716, 732 (2d Cir. 1996) (Calabresi, J.,  
21 concurring in the result), but what is he or she to do?

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<sup>5</sup> There are still some local governments that do ban alcohol entirely.

1           In the context of anachronistic *statutes*, scholars and judges have made varied suggestions  
2 about what to do. They have considered any number of approaches including draconian  
3 adherence—perhaps even over-adherence—to a statute’s original meaning; bold rewriting and  
4 updating; common-law evolution; use of interpretive tools that reflect current political  
5 preferences; and sending particularly dubious statutes back to legislatures for a “second look.”  
6 *See, e.g.*, Guido Calabresi, *A Common Law for the Age of Statutes* 16-26, 31-43, 163-66 (1982).

7           Interpreting the *Constitution*, with respect to out-of-date constitutional provisions,  
8 presents a more complex set of challenges. Because the U.S. Constitution is so difficult to  
9 amend, a provision that has become anachronistic is even less likely to be repaired by the  
10 political branches than is an out-of-date statute. But while courts may, perhaps, be viewed as  
11 engaging in a dialogue with the political branches when “updating” anachronistic statutes  
12 through “interpretation,” such a dialogue is far more difficult and dangerous in the context of  
13 constitutional law. For a court cannot easily assume that the political branches will be able  
14 correct even egregious constitutional interpretative errors.

15           Some constitutional provisions were written to evolve over time. The Eighth  
16 Amendment’s prohibition on cruel and unusual punishment would mean little if courts were  
17 expected simply to comb through history books and determine what, in the late eighteenth  
18 century, the framers thought was “cruel.” The Fourth Amendment’s prohibition on  
19 “unreasonable” searches similarly permits evolution and prevents that constitutional provision  
20 from becoming tethered to another time.<sup>6</sup> Conversely, some provisions were not written to be

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<sup>6</sup> Whether, when, and as to what provisions such updating should be carried out by courts as against legislatures is, of course, another question.

1 updated. The President of the United States must be at least 35 years old. That number is not to  
2 be “inflation adjusted.” See Steven G. Calabresi, *Too Young for the No. 1 Job?*, Chi. Trib., July  
3 22, 2008, at C13.

4 But what are courts to do when a constitutional provision neither clearly invites nor  
5 clearly prohibits updating? Some have argued that courts should interpret them in a common law  
6 fashion. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L.  
7 Rev. 877, 893 (1996). Others have asserted that courts should respond, in some sense, to the  
8 popular will. See, e.g., Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the*  
9 *Court*, 115 Harv. L. Rev. 4 (2001); Robert Post & Reva Siegel, *Popular Constitutionalism,*  
10 *Departmentalism, and Judicial Supremacy*, 92 Cal. L. Rev. 1027 (2004). And some contend that  
11 courts should adhere, as best they can, to an original understanding (whatever that may be) of the  
12 provision in question. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev.  
13 849 (1989).

14 To be sure, the Constitution as a whole does and must evolve. Moreover, as the Court  
15 may have done in its recent readings of the Twenty-First Amendment, history can be made into a  
16 tool for bringing the Charter into line with current needs. But judges are not historians with  
17 fancy robes and life tenure. And historical reinterpretation always poses the risk that courts will  
18 too readily “imagine the past [to] remember the future.”<sup>7</sup>

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<sup>7</sup> See Lewis B. Namier, *Conflicts: Studies in Contemporary History* 69-70 (1942)(“When discoursing or writing about history, [people] imagine it in terms of their own experience, and when trying to gauge the future they cite supposed analogies from the past: till, by double process of repetition, they imagine the past and remember the future.”). Alexander Bickel has quoted Namier’s discussion of history with approval in an analysis of judicial lawmaking. See Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 13 (1970); see also Brett G. Scharffs, *Law as Craft*, 54 Vand. L. Rev. 2245, 2314-15 (2001) (asserting that I have taken a

1 More fundamentally, and regardless of whether history is the chosen tool,<sup>8</sup> any sort of  
2 updating can be dangerous. It may permit courts, especially well-meaning ones, to substitute  
3 their own notions of modern needs for those of the majority. Moreover, when a rereading results  
4 in the erection of a constitutional barrier, it may remove serious issues from the democratic  
5 process and from legislative deliberation. Cf. J. Harvie Wilkinson III, *Of Guns, Abortions, and*  
6 *the Unraveling Rule of Law*, 95 Va. L. Rev. 253 (2009); Richard A. Posner, *In Defense of*  
7 *Looseness: The Supreme Court and Gun Control*, New Republic, Aug. 27, 2008, at 32.

8 Additionally, this sort of updating presents another problem, and one that is especially  
9 apparent in the context of the Twenty-First Amendment: It can leave state legislatures and lower  
10 federal courts with no firm understanding of what the law actually is. When one clear rule  
11 simply replaces a previous rule, the law is easy enough to understand. But when the High Court  
12 carves out one exception after another, it becomes difficult to know how any individual case  
13 should come out. From the vantage point of a court of appeals, the law frequently is fixed; and  
14 then we readily follow the Supreme Court. But in this area, absent a perfectly analogous case,  
15 we are all too frequently left to try to guess at the currently applicable rule from the Court's

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similar position when teaching a common-law course).

<sup>8</sup> Distinguished jurists have, on occasion, been even more skeptical of court uses of history. I once suggested to Justice Felix Frankfurter that the clause in the Constitution requiring that the President be “a natural born Citizen . . . of the United States” meant only that if a person was born out of wedlock (i.e. “naturally born”) that person had to be a Citizen at birth to be eligible to be President. I did this jokingly, knowing that Frankfurter, like me, had been born abroad. I added, even more fancifully, that the clause was likely there to exclude from the Presidency the much admired, but also feared, Alexander Hamilton, who was said to be of “illegitimate” birth. The scholar-justice immediately answered, “I’ll buy that,” and then added—not in jest, I believe—“and anyway it’s as good as most of what goes for history on this Court!”

1 evolving jurisprudence, a jurisprudence that seems more focused on updating constitutional  
2 meaning than with principled judgments. To the student and teacher of the law, it appears clear  
3 that the meaning of the Twenty-First Amendment is changing. But it is difficult to know just  
4 how much the Supreme Court wants that amendment to evolve.

5 This leaves lower courts in a difficult situation; we strive to interpret what the law “is”  
6 while knowing well that there is no “is” but only a direction. In such circumstances, the best that  
7 we can do is to look to the bulk of cases decided by the Supreme Court and read with special care  
8 its latest decision—at the moment, *Granholm*. For, while the general direction of Supreme Court  
9 jurisprudence has been toward prohibiting any discriminatory state regulation, it is not for our  
10 court to say how far or how fast we should move along that vector. As a result, we must look to  
11 the run of Supreme Court cases that have permitted broad state regulation, and then consider the  
12 existing exceptions, particularly those both described and limited in the recent controlling  
13 *Granholm* case, and, on that basis, decide.

14 When we do that, we can only come out one way. To be sure, the case before us could be  
15 viewed as merely a small step beyond *Granholm*. But, in fact, for the reasons ably given in  
16 Judge Wesley’s opinion, to strike down the state law under review would, at the same time,  
17 require us to ignore too much of the background jurisprudence and to extend the trend well  
18 beyond *Granholm* while ignoring some of its most specific language.

19 An extension of this sort is not for us to make. Although one might well argue that some  
20 of the deeper updating notions underlying *Granholm* suggest that the Supreme Court will  
21 ultimately go further than it there did, we cannot decide the case before us on the basis of such  
22 prognostications. If the Supreme Court wishes further to meld the Twenty-First Amendment into

1 the broad constitutional landscape, so be it. But unless and until it does, Judge Wesley's analysis  
2 seems to me to be exactly right, and I gladly join his opinion.