

The Twenty-First Amendment and the End of Prohibition, Part 4: State Power over Alcohol and the Commerce Clause

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This Legal Sidebar is the fourth in a six-part series that discusses the [Twenty-First Amendment to the Constitution](#). The Twenty-First Amendment repealed the [Eighteenth Amendment](#), which prohibited the manufacture, sale, or transportation of “intoxicating liquors” for “beverage purposes” within the United States. As interpreted by the Supreme Court, Section 2 of the Twenty-First Amendment [recognizes](#) that states may regulate or prohibit alcoholic beverages within their jurisdictions for legitimate, nonprotectionist purposes, such as health or safety.

Since the Twenty-First Amendment’s ratification in 1933, the Supreme Court has grappled with difficult questions about how the Constitution allocates the power to regulate alcoholic beverages between the federal and state governments. Such questions implicate the concept of [federalism](#), which refers to the division and sharing of power between the national and state governments. Accordingly, understanding how the Twenty-First Amendment interplays with other constitutional provisions may assist Congress in its legislative activities. Additional information on this topic is available at the [Constitution Annotated: Analysis and Interpretation of the U.S. Constitution](#).

State Power over Alcohol and the Commerce Clause

Although Section 1 of the Twenty-First Amendment repealed nationwide Prohibition, [Section 2](#) [authorized](#) states to regulate or prohibit the importation, transportation, sale, distribution, and use of alcoholic beverages within their borders. Questions about the extent of state authority to regulate beverages imported from other states or a foreign country have played a prominent role in the Supreme Court’s Twenty-First Amendment jurisprudence.

In its [early decisions](#) interpreting the Twenty-First Amendment, the Supreme Court held that states could adopt legislation discriminating against alcoholic beverages imported from other states in favor of those of in-state origin without violating the Commerce Clause. Because Section 2 of the Amendment authorizes states to prohibit *all* imports of alcoholic beverages, the Court [reasoned](#) that states could impose “lesser” forms of regulation on such imports, including discriminatory regulations and taxes.

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More recent cases, however, [have recognized](#) that state regulation of alcoholic beverages is limited by the [Dormant Commerce Clause doctrine](#). Absent contrary federal legislation, this doctrine [restricts](#) state power to discriminate against imported products and other out-of-state economic interests, including those of consumers, producers, and retail liquor-store license applicants. The Supreme Court has also held that the [Commerce Clause](#) and [Import-Export Clause](#) restrain state power to regulate international trade in alcoholic beverages, including imports and exports.

Modern Doctrine on State Power over Alcohol and Discrimination Against Interstate Commerce

In 2005, the Supreme Court [confirmed](#) that the Twenty-First Amendment does not authorize states to regulate alcoholic beverages contrary to general Dormant Commerce Clause principles. The Court [held](#) that discrimination in favor of local products can be upheld only if the state “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” This interpretation stemmed from the Court’s conclusion that the Twenty-First Amendment restored the states’ pre-Prohibition powers “to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use” in a manner that did not discriminate against out-of-state goods.

Consequently, in [Granholm v. Heald](#), the Supreme Court struck down regulatory schemes in Michigan and New York that discriminated against out-of-state wineries. Both states employed a “three-tier system” requiring separate state licenses for producers, wholesalers, and retailers. The Court first affirmed its prior cases holding that, as a general matter, “States can mandate a three-tier distribution scheme in the exercise of their authority” under the Twenty-First Amendment. However, within their three-tier systems, Michigan and New York accorded certain advantages to in-state wineries by creating special licensing systems allowing them to ship wine directly to in-state consumers. While recognizing that both states possessed significant authority to regulate the importation and sale of liquor, the Court wrote that the challenged systems “involve[d] straightforward attempts to discriminate in favor of local producers . . . contrary to the Commerce Clause,” and that these schemes could not be “saved” by the Twenty-First Amendment.

The states argued in *Granholm* that their restrictions on out-of-state wineries’ direct shipments passed muster under Dormant Commerce Clause principles because they advanced two legitimate local purposes: “keeping alcohol out of the hands of minors and facilitating tax collection.” The Supreme Court rejected these claims, concluding that there was insufficient evidence to show that prohibiting direct shipments would solve either of these problems. The Court also suggested that states could achieve “their regulatory objectives . . . without discriminating against interstate commerce.”

The Court struck down another discriminatory regulatory regime in [Tennessee Wine and Spirits Retailers Ass’n v. Thomas](#). In that case, the Court considered specific aspects of Tennessee’s three-tier system. In particular, Tennessee would issue new retail licenses only to individuals who had been residents of the state for the previous two years. In defense of the law, a trade association representing Tennessee liquor stores argued that the case was not governed by *Granholm*. In the trade association’s view, *Granholm*’s analysis was limited to laws that discriminate against out-of-state products and producers, whereas Tennessee’s provision concerned “the licensing of domestic retail alcohol stores.” The Court disagreed, explaining that instead, *Granholm* established that the Constitution “prohibits state discrimination against all ‘out-of-state economic interests.’”

Ultimately, the Court concluded in *Tennessee Wine* that the challenged law was unconstitutional because its “predominant effect” was protectionism, writing that the law had “at best a highly attenuated relationship to public health or safety.” The trade association argued that the provision was justified because it made retailers “amenable to the direct process of state courts,” allowed the state “to determine an applicant’s fitness to sell alcohol,” and “promote[d] responsible alcohol consumption.” In the Court’s

view, however, there was no “‘concrete evidence’ showing that the two-year residency requirement actually promote[d] public health or safety; nor [was] there evidence that nondiscriminatory alternatives would be insufficient to further those interests.”

Imports, Exports, Foreign Commerce, and Alcohol

Although the Twenty-First Amendment [recognized](#) the states’ authority to control the “importation” of alcoholic beverages, it did not displace other provisions of the Constitution that restrict the states’ power over international trade between the United States and foreign countries. One such provision, the [Import-Export Clause](#), generally prohibits states from laying “imposts” or “duties” on imports or exports with foreign nations, absent congressional consent, except for purposes of covering charges associated with state inspection laws. In *Department of Revenue v. James B. Beam Distilling Co.*, the Supreme Court held that the Twenty-First Amendment had not repealed the Import-Export Clause with respect to alcoholic beverages. Thus, the State of Kentucky lacked authority to levy an excise tax on imported Scotch whiskey while the liquor remained in an unbroken package in the original importer’s possession and had not been resold or used within the state.

The [Commerce Clause](#), which gives Congress power to regulate interstate and foreign commerce, also limits the states’ regulatory authority over international trade in alcoholic beverages. The Supreme Court has [held](#) that the Commerce Clause “operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country or another State.” The Court thus [nullified](#) New York’s attempt to prohibit the importation of out-of-state liquor for delivery to a retailer at John F. Kennedy Airport that sold the beverages duty-free to departing international airline passengers. In rejecting the state’s argument that the Twenty-First Amendment authorized prohibition as a means of preventing the diversion of liquor into the state’s local market, the Court observed that the transactions were supervised by federal customs authorities and destined for delivery to passengers upon their arrival in a foreign country.

Click [here](#) to continue to Part 5.

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