

Granholm v. Heald,  
Michigan Beer & Wine Wholesalers Association v.  
Heald,  
&  
Swedenburg v. Kelly

\_\_\_ U.S. \_\_\_ (May 16, 2005)

**Justice KENNEDY. delivered the opinion of the Court.**

These consolidated cases present challenges to state laws regulating the sale of wine from out-of-state wineries to consumers in Michigan and New York. The details and mechanics of the two regulatory schemes differ, but the object and effect of the laws are the same: to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint. It is evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the States' borders.

We hold that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, Art. I, § 8, cl. 3, and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment. Accordingly, we affirm the judgment of the Court of Appeals for the Sixth Circuit, which invalidated the Michigan laws; and we reverse the judgment of the Court of Appeals for the Second Circuit, which upheld the New York laws.

I.

Like many other States, Michigan and New York regulate the sale and importation of alcoholic beverages, including wine, through a three-tier distribution system. Separate licenses are required for producers, wholesalers, and retailers. The three-tier scheme is preserved by a complex set of overlapping state and federal regulations. For example, both state and federal laws limit vertical integration between tiers. We have held previously that States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment. As relevant to today's cases, though, the three-tier system is, in broad terms and with refinements to be discussed, mandated by Michigan and New York only for sales from out-of-state wineries. In-state wineries, by contrast, can obtain a license for direct sales to consumers. The differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce.

This discrimination substantially limits the direct sale of wine to consumers, an otherwise emerging and significant business. From 1994 to 1999, consumer spending on direct wine shipments doubled, reaching \$500 million per year, or three percent of all wine sales. The expansion has been influenced by several related trends. First, the number of small wineries in the United States has significantly increased. By some estimates there are over 3,000 wineries in the country, . . . more than three times the number 30 years ago. At the same time, the wholesale market has consolidated. Between 1984 and 2002, the number of licensed wholesalers dropped

from 1,600 to 600. The increasing winery-to-wholesaler ratio means that many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. This has led many small wineries to rely on direct shipping to reach new markets. Technological improvements, in particular the ability of wineries to sell wine over the Internet, have helped make direct shipments an attractive sales channel.

Approximately 26 States allow some direct shipping of wine, with various restrictions. Thirteen of these States have reciprocity laws, which allow direct shipment from wineries outside the State, provided the State of origin affords similar nondiscriminatory treatment. In many parts of the country, however, state laws that prohibit or severely restrict direct shipments deprive consumers of access to the direct market. According to the Federal Trade Commission (FTC), "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine."

The wine producers in the cases before us are small wineries that rely on direct consumer sales as an important part of their businesses. . . .

A.

We first address the background of the suit challenging the Michigan direct-shipment law. Most alcoholic beverages in Michigan are distributed through the State's three-tier system. . . .

Under Michigan law, wine producers, as a general matter, must distribute their wine through wholesalers. There is, however, an exception for Michigan's approximately 40 in-state wineries, which are eligible for "wine maker" licenses that allow direct shipment to in-state consumers. The cost of the license varies with the size of the winery. For a small winery, the license is \$25. Out-of-state wineries can apply for a \$300 "outside seller of wine" license, but this license only allows them to sell to in-state wholesalers.

\* \* \*

B.

New York's licensing scheme is somewhat different. It channels most wine sales through the three-tier system, but it too makes exceptions for in-state wineries. As in Michigan, the result is to allow local wineries to make direct sales to consumers in New York on terms not available to out-of-state wineries. Wineries that produce wine only from New York grapes can apply for a license that allows direct shipment to in-state consumers. These licensees are authorized to deliver the wines of other wineries as well, but only if the wine is made from grapes "at least seventy-five percent the volume of which were grown in New York State." An out-of-state winery may ship directly to New York consumers only if it becomes a licensed New York winery, which requires the establishment of "a branch factory, office or storeroom within the state of New York."

\* \* \*

## C.

We consolidated these cases and granted certiorari on the following question: “Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment?”

For ease of exposition, we refer to the respondents from the Michigan challenge (Nos. 03-1116 and 03-1120) and the petitioners in the New York challenge (No. 03-1274) collectively as the wineries. We refer to their opposing parties—Michigan, New York, and the wholesalers and retailers—simply as the States.

## II.

### A.

Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States. States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate "reflect [s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests. Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented.

Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms. The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid. State laws that protect local wineries have led to the enactment of statutes under which some States condition the right of out-of-state wineries to make direct wine sales to in-state consumers on a reciprocal right in the shipping State. California, for example, passed a reciprocity law in 1986, retreating from the State's previous regime that allowed unfettered direct shipments from out-of-state wineries. Prior to 1986, all but three States prohibited direct-shipments of wine. The obvious aim of the California statute was to open the interstate direct-shipment market for the State's many wineries. The current patchwork of laws—with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war.

Allowing States to discriminate against out-of-state wine "invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."

B.

The discriminatory character of the Michigan system is obvious. Michigan allows in-state wineries to ship directly to consumers, subject only to a licensing requirement. Out-of-state wineries, whether licensed or not, face a complete ban on direct shipment. The differential treatment requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers. These two extra layers of overhead increase the cost of out-of-state wines to Michigan consumers. The cost differential, and in some cases the inability to secure a wholesaler for small shipments, can effectively bar small wineries from the Michigan market.

The New York regulatory scheme differs from Michigan's in that it does not ban direct shipments altogether. Out-of-state wineries are instead required to establish a distribution operation in New York in order to gain the privilege of direct shipment. This, though, is just an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system..

The New York scheme grants in-state wineries access to the State's consumers on preferential terms. The suggestion of a limited exception for direct shipment from out-of-state wineries does nothing to eliminate the discriminatory nature of New York's regulations. In-state producers, with the applicable licenses, can ship directly to consumers from their wineries.. Out-of-state wineries must open a branch office and warehouse in New York, additional steps that drive up the cost of their wine. . For most wineries, the expense of establishing a bricks-and-mortar distribution operation in 1 State, let alone all 50, is prohibitive. It comes as no surprise that not a single out-of-state winery has availed itself of New York's direct-shipping privilege. . . .

\* \* \*

We have no difficulty concluding that New York, like Michigan, discriminates against interstate commerce through its direct-shipping laws.

III

State laws that discriminate against interstate commerce face "a virtually per se rule of invalidity." The Michigan and New York laws by their own terms violate this proscription. The two States, however, contend their statutes are saved by § 2 of the Twenty-first Amendment, which provides:

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

The States' position is inconsistent with our precedents and with the Twenty-first Amendment's history. Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.

A.

Before 1919, the temperance movement fought to curb the sale of alcoholic beverages one State at a time. The movement made progress, and many States passed laws restricting or prohibiting the sale of alcohol. This Court upheld state laws banning the production and sale of alcoholic beverages, but was less solicitous of laws aimed at imports. In a series of cases before ratification of the Eighteenth Amendment the Court, relying on the Commerce Clause, invalidated a number of state liquor regulations.

These cases advanced two distinct principles. First, the Court held that the Commerce Clause prevented States from discriminating against imported liquor. In *Walling v. Michigan*, 116 U.S. 446 (1886), for example, the Court invalidated a Michigan tax that discriminated against liquor imports by exempting sales of local products. The Court held that States were not free to pass laws burdening only out-of-state products:

“A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.”

Second, the Court held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce. For example, in *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888), the Court struck down an Iowa statute that required all liquor importers to have a permit. *Bowman* and its progeny rested in part on the since-rejected original-package doctrine. Under this doctrine goods shipped in interstate commerce were immune from state regulation while in their original package. . . . *Bowman* reserved the question whether a State could ban the sale of imported liquor altogether. In *Leisy v. Hardin*, 135 U.S. 100 (1890), the Court held that Iowa could not ban the sale of imported liquor in its original package.

*Leisy* left the States in a bind. They could ban the production of domestic liquor, but these laws were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package. To resolve the matter, Congress passed the Wilson Act (so named for Senator Wilson of Iowa), which empowered the States to regulate imported liquor on the same terms as domestic liquor . . . .

\* \* \*

Although the Wilson Act increased the States' authority to police liquor imports, it did not solve all their problems [because] . . . the Wilson Act did not authorize States to prohibit direct shipments for personal use. . . .

\* \* \*

. . . Congress responded to the direct-shipment loophole in 1913 by enacting the Webb-Kenyon Act, . . . entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases." . . . The constitutionality of the Webb-Kenyon Act itself was in doubt. . . . In *Clark*

*Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917), a divided Court upheld the Webb-Kenyon Act against a constitutional challenge.

The Court construed the Act to close the direct-shipment gap left open by the Wilson Act. States were now empowered to forbid shipments of alcohol to consumers for personal use, provided that the States treated in-state and out-of-state liquor on the same terms. . . .

\* \* \*

The Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state. . . . States were required to regulate domestic and imported liquor on equal terms. . . .

### B.

The ratification of the Eighteenth Amendment in 1919 provided a brief respite from the legal battles over the validity of state liquor regulations. With the ratification of the Twenty-first Amendment 14 years later, however, nationwide Prohibition came to an end. Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment. Section 2 of the Twenty-first Amendment is at issue here.

Michigan and New York say the provision grants to the States the authority to discriminate against out-of-state goods. The history we have recited does not support this position. To the contrary, it provides strong support for the view that § 2 restored to the States the powers they had under the Wilson and Webb-Kenyon Acts. "The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes."

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

\* \* \*

Our more recent cases, furthermore, confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers.

### C.

The modern § 2 cases fall into three categories.

First, the Court has held that state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment. The Court has applied this rule in the context of the First

Amendment, the Establishment Clause, the Equal Protection Clause, Craig, the Due Process Clause, and the Import-Export Clause.

Second, the Court has held that § 2 does not abrogate Congress' Commerce Clause powers with regard to liquor. The argument that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause" for alcoholic beverages has been rejected. . . .

Finally, and most relevant to the issue at hand, the Court has held that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause. *Bacchus Imports, Ltd. v. Dias*, 468 U. S. 263, 276 (1984). . . .

*Bacchus* provides a particularly telling example of this proposition. At issue was an excise tax enacted by Hawaii that exempted certain alcoholic beverages produced in that State. The Court rejected the argument that Hawaii's discrimination against out-of-state liquor was authorized by the Twenty-first Amendment. "The central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." Despite attempts to distinguish it in the instant cases, *Bacchus* forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny.

\* \* \*

The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

#### IV.

Our determination that the Michigan and New York direct-shipment laws are not authorized by the Twenty-first Amendment does not end the inquiry. We still must consider whether either State regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." The States offer two primary justifications for restricting direct shipments from out-of-state wineries: keeping alcohol out of the hands of minors and facilitating tax collection. We consider each in turn.

The States, aided by several amici, claim that allowing direct shipment from out-of-state wineries undermines their ability to police underage drinking. Minors, the States argue, have

easy access to credit cards and the Internet and are likely to take advantage of direct wine shipments as a means of obtaining alcohol illegally.

The States provide little evidence that the purchase of wine over the Internet by minors is a problem. Indeed, there is some evidence to the contrary. A recent study by the staff of the FTC found that the 26 States currently allowing direct shipments report no problems with minors' increased access to wine. This is not surprising for several reasons. First, minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor. Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who, in the words of the past president of the National Conference of State Liquor Administrators, "want instant gratification." Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions. Under our precedents, which require the "clearest showing" to justify discriminatory state regulation, this is not enough.

Even were we to credit the States' largely unsupported claim that direct shipping of wine increases the risk of underage drinking, this would not justify regulations limiting only out-of-state direct shipments. As the wineries point out, minors are just as likely to order wine from in-state producers as from out-of-state ones. . . . In addition, the States can take less restrictive steps to minimize the risk that minors will order wine by mail. For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package.

The States' tax-collection justification is also insufficient. Increased direct shipping, whether originating in state or out of state, brings with it the potential for tax evasion. . . . [In Michigan, if] licensing and self-reporting provide adequate safeguards for wine distributed through the three-tier system, there is no reason to believe they will not suffice for direct shipments.

New York and its supporting parties also advance a tax-collection justification for the State's direct-shipment laws. While their concerns are not wholly illusory, their regulatory objectives can be achieved without discriminating against interstate commerce. In particular, New York could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping. . . . Licensees could be required to submit regular sales reports and to remit taxes. Indeed, various States use this approach for taxing direct interstate wine shipments, and report no problems with tax collection.

\* \* \*

In summary, the States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The "burden is on the State to show that 'the discrimination is demonstrably justified.'" The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable. Michigan and New York have not satisfied this exacting standard.

V.

States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.

We affirm the judgment of the Court of Appeals for the Sixth Circuit; and we reverse the judgment of the Court of Appeals for the Second Circuit and remand the case for further proceedings consistent with our opinion.

It is so ordered.

**Justice STEVENS, with whom Justice O'CONNOR joins, dissenting.**

\* \* \*

The New York and Michigan laws challenged in these cases would be patently invalid under well settled dormant Commerce Clause principles if they regulated sales of an ordinary article of commerce rather than wine. But ever since the adoption of the Eighteenth Amendment and the Twenty-first Amendment, our Constitution has placed commerce in alcoholic beverages in a special category. Section 2 of the Twenty-first Amendment expressly provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Today many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products. That was definitely not the view of the generations that made policy in 1919 when the Eighteenth Amendment was ratified or in 1933 when it was repealed by the Twenty-first Amendment. On the contrary, the moral condemnation of the use of alcohol as a beverage represented not merely the convictions of our religious leaders, but the views of a sufficiently large majority of the population to warrant the rare exercise of the power to amend the Constitution on two occasions. The Eighteenth Amendment entirely prohibited commerce in "intoxicating liquors" for beverage purposes throughout the United States and the territories subject to its jurisdiction. While § 1 of the Twenty-first Amendment repealed the nationwide prohibition, § 2 gave the States the option to maintain equally comprehensive prohibitions in their respective jurisdictions.

\* \* \*

In the years following the ratification of the Twenty-first Amendment, States adopted manifold laws regulating commerce in alcohol, and many of these laws were discriminatory. . . . Today's

decision may represent sound economic policy and may be consistent with the policy choices of the contemporaries of Adam Smith who drafted our original Constitution; it is not, however, consistent with the policy choices made by those who amended our Constitution in 1919 and 1933.

My understanding (and recollection) of the historical context reinforces my conviction that the text of § 2 should be "broadly and colloquially interpreted." Indeed, the fact that the Twenty-first Amendment was the only Amendment in our history to have been ratified by the people in state conventions, rather than by state legislatures, provides further reason to give its terms their ordinary meaning. Because the New York and Michigan laws regulate the "transportation or importation" of "intoxicating liquors" for "delivery or use therein," they are exempt from dormant Commerce Clause scrutiny.

\* \* \*

**Justice THOMAS, with whom THE CHIEF JUSTICE, Justice STEVENS, and Justice O'CONNOR join, dissenting.**

A century ago, this Court repeatedly invalidated, as inconsistent with the negative Commerce Clause, state liquor legislation that prevented out-of-state businesses from shipping liquor directly to a State's residents. The Webb-Kenyon Act and the Twenty-first Amendment cut off this intrusive review, as their text and history make clear and as this Court's early cases on the Twenty-first Amendment recognized. The Court today seizes back this power, based primarily on a historical argument that this Court decisively rejected long ago in *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59 (1936). Because I would follow *Young's Market* and the language of both the statute that Congress enacted and the Amendment that the Nation ratified, rather than the Court's questionable reading of history and the "negative implications" of the Commerce Clause, I respectfully dissent.

\* \* \*

II.  
A.

\* \* \*

The majority's holding is also at odds with this Court's early Twenty-first Amendment case law. In *State Bd. of Equalization of Cal. v. Young's Market Co.*, this Court considered the constitutionality of a California law that facially discriminated against beer importers and, by extension, out-of-state producers. The California law required wholesalers to pay a special \$500 license fee to import beer, in addition to the \$50 fee California charged for wholesalers to distribute beer generally. California law thus discriminated against out-of-state beer by charging wholesalers of imported beer 11 times the fee charged to wholesalers of domestic beer.

*Young's Market* held that this explicit discrimination against out-of-state beer products came within the terms of the Twenty-first Amendment, and therefore did not run afoul of the negative

Commerce Clause. The Court reasoned that the Twenty-first Amendment's words are "apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." The Court rejected the argument that a State "must let imported liquors compete with the domestic on equal terms," declaring that "[t]o say that, would involve not a construction of the Amendment, but a rewriting of it." It recognized that a State could adopt a "discriminatory" regulation of out-of-state manufacturers as an incident to a "lesser degree of regulation than total prohibition," for example, by imposing "a state monopoly of the manufacture and sale of beer," or by "channel[ing] desired importations by confining them to a single consignee." And far from "not consider[ing]" the historical argument that forms the core of the majority's reasoning, *Young's Market* expressly rejected its relevance:

"The plaintiffs argue that limitation of the broad language of the Twenty-first Amendment is sanctioned by its history; and by the decisions of this Court on the Wilson Act, the Webb-Kenyon Act and the Reed Amendment. As we think the language of the Amendment is clear, we do not discuss these matters."

The plaintiffs in *Young's Market* advanced virtually the same historical argument the Court today accepts. *Young's Market* properly reasoned that the text of our Constitution is the best guide to its meaning. That logic requires sustaining the state laws that the Court invalidates.

\* \* \*

## B.

The widespread, unquestioned acceptance of the three-tier system of liquor regulation, and the contemporaneous practice of the States following the ratification of the Twenty-first Amendment confirm that the Amendment freed the States from negative Commerce Clause restraints on discriminatory regulation. Like the Webb-Kenyon Act, the Twenty-first Amendment was designed to remove any doubt regarding whether state monopoly and licensing schemes violated the Commerce Clause, as the majority properly acknowledges. Accordingly, in response to the end of Prohibition, States that made liquor legal imposed either state monopoly systems, or licensing schemes strictly circumscribing the ability of private interests to sell and distribute liquor within state borders.

These liquor regulation schemes discriminated against out-of-state economic interests, just as Michigan's and New York's direct-shipment laws do. . . .

\* \* \*

Rather than credit the lay consensus this state practice reflects, the Court relies instead on scattered academic and judicial commentary arguing that the Twenty-first Amendment did not permit States to enact discriminatory liquor legislation. . . . Instead of following this confused mishmash of elite opinion—the same sort of elite opinion that drove the expansive interpretation of the negative Commerce Clause that prompted the Twenty-first Amendment—I would credit the uniform practice of the States whose people ratified the Twenty-first Amendment.

\* \* \*

#### IV.

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