TWEAKING THE TWENTY-FIRST AMENDMENT: AN ARGUMENT AGAINST DURATIONAL-RESIDENCY REQUIREMENTS FOR ALCOHOL BEVERAGE WHOLESALERS AND RETAILERS

INTRODUCTION

Say you lived in Washington D.C. and owned a successful restaurant, the profitability of which depended in part on its wine, beer, and liquor sales. The restaurant was successful enough to begin looking for a second location. You determine that Bethesda, Maryland is an ideal location because it is only *seven miles* from your D.C. residence, but there is one problem: the Maryland Code of Alcoholic Beverages imposes a two-year durational-residency requirement on restaurant owners seeking a restaurant liquor license.[1] In order to sell alcohol at the new restaurant, you have to establish a second residence in Bethesda, live there for two years, and face the associated costs.

The Commerce Clause gives the U.S. Congress power to "regulate Commerce . . . among the several States."[2] This affirmative grant of power

1. *See* MD. CODE ANN., Alcoholic Beverages § 4-109(a)(4) (West 2016) (requiring an applicant for a liquor license to have been a resident for the "2 years immediately before filing the application"); *see also* Aaron Kraut, *Liquor License Residency Requirement a Hurdle to Some*, BETHESDA MAG. (Jan. 23,n. 2 2ht-13.7(,)-10.5awawa.,b-10.7e(,)-10.5hesan.en.g(n.)3.6(zn.)3.6((on")ne.)]TJ /(at)-10.oe,nc 0 Tw 8.52 -0-10(been a "bona fide resident of [the] state during the two-year period immediately preceding the date upon which application is made." T

ENN. CODE ANN. § 57-3-204(b)(2)(A) (West 2016). This statute was ruled unconstitutional by the U.S. District Court for the Middle District of Tennessee in *Byrd v. Tennessee Wine & Spirits Retailers Ass'n*, 259 F. Supp. 3d 785 (M.D. Tenn. 2017). The case has been appealed to the Sixth Circuit, but no decision had been issued at the time this

on must be incorporated under the laws of Missouri, and all of its officers na fide residents" of Missouri for at least three years. *Id.* § 311.060.3. In nnot obtain an "alcoholic beverage retailer's permit of any type unless he outstanding common stock is owned by persons who have been esidents of Indiana for five (5) years." I

ND. CODE § 7.1-3-21-5(a) (2017); *see also* Greg Trotter, *Binny's Expansion to Indiana Thwarted by State Liquor Law Changes*, CHI. TRIB. (Apr. 15, 2016, 2:00 PM), http://www.chicagotribune.com/business/ct-binnys-indiana-expansion-0417-biz-20160415-story.html [https://perma.cc/V6K4-537Q?type=image].

2. U.S. CONST. art. I, § 8, cl. 3.

implies a negative converse known as the dormant Commerce Clause, which prohibits the States from passing legislation that improperly burdens or discriminates against interstate commerce.[3] Normally, when a state statute discriminates on its face, in its purpose, or in its effect against interstate commerce, a strict scrutiny test is applied, and the State must advance "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives" in order to validate the statute.[4] At a minimum, imposing a durational-residency requirement on alcohol beverage wholesalers and retailers discriminates in its effect against interstate commerce because it denies out-of-state residents access to the alcohol market on equal terms as in-state residents.[5] However, Section 2 of the Twenty-first Amendment can save state alcohol regulations, such as durational-residency requirements, from Commerce Clause scrutiny.[6] Section 2 of the Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[7]

3. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 626–28 (1978) (holding a state law unconstitutional because it discriminated against articles of interstate commerce); Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 145 (1970) (holding a state law unconstitutional because it improperly burdened interstate commerce); *see also* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988) ("It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the powers of the States to discriminate against interstate commerce.").

4. *New Energy Co. of Ind.*, 486 U.S. at 278; *see also Philadelphia*, 437 U.S. at 628. A state statute that discriminates against interstate commerce faces a "virtually *per se* rule of invalidity." *Id.* at 624.

5. *See* Or. Waste Sys., Inc. v. Dept. of Envtl. Quality of Or., 511 U.S. 93, 99 (1994) ("'Discrimination' simply means differential treatment of in-

to dominate the industry."[15] Curbing alcohol consumption was another goal of the three-tier system.[16] However, some States use their regulatory power under the three-tier system to impose durational-residency requirements on alcohol beverage wholesalers and retailer rd ret16 c

state wineries to have a "physical presence" in the state before their wine received the same treatment as in-state wine.[32]

B. Strict Scrutiny Test Triggered

The Court had "no difficulty" in determining that these statutes discriminated against interstate commerce because they gave preferential treatment to in-state producers.[33] As a result, the statutes "deprive[d] citizens of their right to have access to the markets of other States on equal terms."[34]

If a state statute discriminates on its face, in its purpose, or in its effect against an out-of-state interest or interstate commerce, then the statute faces a "virtually *per se* rule of invalidity" and a strict scrutiny test is applied.[35] In order to validate the statute, the State must show that the discriminatory regulation "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[36] These statutes are routinely struck down unless "the discrimination [they impose] is demonstrably justified by a valid factor unrelated to economic protectionism."[37] Here, if the challenged statutes were not alcohol regulations, the Court would immediately apply a strict scrutiny test.

C. Does the Twenty-First Amendment Save the Statutes from Commerce Clause Scrutiny?

The Court recognized that the statutes faced "a virtually *per se* rule of rul0s704 0 Tw (Id J /TT.3(a)-/TT0 Tcf J.2(lid)-5)5 >5er seC.

II. CIRCUIT SPLIT: EIGHTH CIRCUIT VS. FIFTH CIRCUIT

A. The Applicability of the Granholm *Test Outside the Producer Tier*

The *Granholm* test focused on the physical product—alcohol; yet, the statutes at issue regulated the producers.[57] When considering a regulation of the producer tier, a test that focuses on the treatment of the product makes sense because the producer tier *produces* the alcohol products. Producers and products are so intertwined that a statute regulating one has a direct impact on the other.[58] The test created by *Granholm* is specifically tied to the producer tier, and it is important to recognize that the *Granholm* test is limited to discrimination benefitting alcohol on the basis of its in-state production status.

Granholm's test and its focus on the physical product should not extend to the wholesaler and retailer tiers because these tiers are inherently different from the producer tier.[59] A State cannot require all alcohol sold in the state to be produced in the state.[60] For example, Anheuser-Busch has production operations in eleven states, but consumers can buy its products in all fifty states.[61] Thus, *Granholm* recognized that producers do not have to be in state, but their products may have to pass through the in-state alcohol distribution system before reaching

the Three-Tier System: Its Impact on U.S. Craft Beer and You, CRAFTBEER.COM (Mar. 6, 2017),

("SWSA"),[66] operates its wholesale alcohol business in thirty-two other states and the District of Columbia.[67] Even though Southern Missouri is incorporated in Missouri, it was not free to do business in Missouri simply because its officers and directors were Florida residents.[68]

1. Did the Statute Have a Discriminatory Purpose?

SWSA pointed to a news report quoting one of the legislation's sponsors back in 1947, which said the law "was intended to prevent a few big national distillers from monopolizing the wholesale liquor business in Missouri."[69] Thus, SWSA argued that the purpose of the statute was "mere economic protectionism,"[70] and relied on *Bacchus Imports, Ltd. v. Dias* to argue that alcohol regulations motivated by protectionist intent are unconstitutional.[71] However, the Eighth Circuit rejected the "mere economic protectionism" argument for several reasons.[72]

In dismissing this argument, the Eighth Circuit relied heavily on a "purpose clause" that was added to the statute in 2007, sixty years after the residency requirement was adopted.[73] It provides that the purpose of this chapter is "to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals such as maintaining an orderly marketplace composed of state-licensed alcohol producers, importers, distributors, and retailers."[74] The Eighth Circuit treated this "purpose clause" as controlling because SWSA offered no support for the proposition that a later legislature "cannot supplant an earlier legislature's intended purpose by enacting an express statutory purpose provision."[75]

2. Eighth Circuit's Test 005 Tc -0.46 0 Td5(2)]TJ 0 Tc 0 T(e4(t 07(w)1 TcTc 0 T)nrS6T(t 01(r(2)((e]TJ t

of-state liquor products or producers."[85] Ironically, the statute does not regulate products or producers—it regulates wholesalers. Thus, because Missouri's durational-residency requirement meets the Eighth Circuit's two-part test, the Twenty-first Amendment protects it from Commerce Clause scrutiny.

SWSA attacked the first part of this test and contended that the durational-residency requirement is not "protected" because it is not an "inherent" or "integral" part of the alcohol distribution system.[86] But according to the Eighth Circuit, "[t]here is no archetypal three-tier system from which the 'integral' or 'inherent' elements of that system may be gleaned."[87] Even if there was, the Supreme Court in *Granholm* cited "in-state wholesaler" in the first sentence after it declared the three-tier system "unquestionably legitimate."[88] Thus, according to the Eighth Circuit, it follows that in-state wholesalers must be an "inherent" or "integral" i s ss-1(ie4.2(c)-4.2(la.71s)-r)-1.6( )0.53system.

> community and thus subject to negative externalities—drunk driving, domestic abuse, underage drinking—that liquor distribution may produce. . . . The legislature logically could conclude that in-state residency facilitates law enforcement against wholesalers, because it is easier to pursue in-state owners, directors, and officers than to enforce against their out-of-state counterparts.[92]

Yet, there was doubt as to whether the residency requirement was even rationally related to these interests. The deputy state supervisor for the Division, who testified on *behalf* of the Division, could not "'think of any' relationship between the residency requirement and the safety of Missouri citizens."[93] Additionally, Missouri already had one nonresident wholesaler who was grandfathered in.[94]

C. Fifth Circuit: The Twenty-First Amendment Does Not Authorize Durational-

Baskets.com v. Steen, the Fifth Circuit held that physical

compelled to negotiate with each other regarding favored or disfavored status for their own citizens."[117] That is why we have a rule prohibiting improper state discrimination against interstate commerce—it is "essential to the foundations of the Union."[118] It was a central concern of the Framers because "economic Balkanization . . . had plagued relations among the Colonies and later among the States under the Articles of Confederation."[119] The nondiscrimination principle of the Commerce Clause prevents rivalries among the States and the "proliferation of trade zones."[120] Other Supreme Court cases examining state alcohol regulations have expressed this concern:

> [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.[121]

The practical effect of allowing Missouri to require all officers and directors of a wholesale company to be Missouri residents for-5(lc -0.018 Tw -12.4(f)-e M)-207Tw o(e)-4.1(n)-5.t tS2(r)-

the Supreme Court gave the Wilson Act a restricted construction and held that the Act authorized States to regulate only the resale of imported liquor.[131] Thus, States had no power to regulate alcohol that entered its border in its "original package."[132]

b. Textual Analysis

Congress' intent to constitutionalize the Webb-Kenyon Act is further evidenced by the language of Section 2, which resembles that of the Webb-Kenyon Act. The Webb-Kenyon Act regulated the "shipment or transportation" of alcohol "to be received, possessed, sold, or in any manner used . . . in violation of any law of such State."[144] Section 2 regulates the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof."[145] This resemblance is evidence of "the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes."[146]

The language "shipment or transportation" and "transportation or importation" indicates that Congress wanted to give States the power to prevent alcohol *products* from entering their borders. This intention is further shown by Congress' desire to protect "dry" States.[147] However, once a State opens its alcohol market, it may not open it only to in-state interests.[148]

If anything, Section 2 reaches more narrowly than the Webb-Kenyon Act. The Webb-Kenyon Act refers to alcohol that is "to be received, possessed, sold, or in any manner used."[149] Section 2 only refers to "delivery or use."[150] And the Webb-Kenyon Act was not even a grant of interstate commerce power to the States.[151] It only removed the interstate immunity from alcohol.[152] If Congress only intended to remove the interstate character from alcohol, and nothing else, then it does not follow that Congress intended to give States power to impose durational-residency requirements on alcohol wholesalers and retailers.

144. Webb-Kenyon Act, 49 Stat. 877, 27 U.S.C. § 122 (1935) (originally enacted as Act of Mar. 1, 1913, ch. 90, § 1, 37 Stat. 699).

145. U.S. CONST. amend XXI, § 2.

146. *Granholm*, 544 U.S. at 484 (quoting Craig v. Boren, 429 U.S. 190, 206 (1976)) (internal quotation marks omitted).

147. *See* 76 CONG. REC. 4170 (1933) (statement of Sen. Borah) ("[A]s I understand, this is the question of striking out section 2, which provides for the protection of the so-called dry States."); 76 CONG. REC. 4171 (1933) (statement of Sen. Wagner) ("[I]f the dry States want additional assurance that they will be protected I shall have no objection."); 76 CONG. REC. 4518 (1933) (statement of Rep. Robinson) ("Section 2 attempts to protect dry States."); 76 CONG. REC. 4519 (1933) (statement of Rep. Garber) ("Section 2 prohibits the transportation or importation of intoxicating liquors for delivery or use into any of the several States where the laws of the State prohibit such. This section, it is claimed, will protect dry States."); 76. CONG. REC. 4526 (1933) (statement of Rep. Tierney) ("[Section 2] will aid and protect the so-called dry States in permitting them to exclude, if their citizens so wish, all liquor traffic in their domains.").

148. Peoples Super Liquor Stores, Inc. v. Jenkins, 432 F. Supp. 2d 200, 221 (D. Mass. 2006) ("*Granholm* cannot be held to sanction protectionist policies at any of the tiers.").

149. 27 U.S.C. § 122.

150. U.S. CONST. amend XXI, § 2.

151. *See Granholm*, 544 U.S. at 481–82.

152. *Id.* at 482.

does not even mention products and producers, is not going to discriminate against out-of-state products and producers. The Eighth Circuit took a protection that *Granholm* established for the producer tier,[159] and then applied it to the wholesaler tier without providing a rationale. This jump cannot be made because the statutes in *Granholm* regulated producers, who *produce* the product.[160] Hence, the holding: "State policies are protected under the Twenty-first Amendment when they treat *liquor* produced out of state the same as its domestic equivalent."[161] The Missouri statute in *Southern Wine* regulated *citizens*. So the holding, "state policies are protected . . . when they treat *liquor* produced out of state the same as its domestic equivalent,"[162] does not logically follow.

The Fifth Circuit recognized the Eighth Circuit's error when it held that "state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor."[163] The Eighth Circuit even interpreted *Granholm* as drawing "a bright line between the producer tier and the rest of the system."[164] But it still took a protection for the producer tier and applied it to the wholesaler tier. Further, *Granholm* never examined state alcohol regulations at the wholesaler or retailer tiers. Thus, if it wished to establish this precedent, it would have stated that this protection applies to the wholesaler and retailer tier.

b. The Statute Hid Behind Missouri's Distribution System

The Eighth Circuit recognized that the nondiscrimination principle applies to products and producers, but it did not apply the nondiscrimination principle to wholesalers. It should have examined whether the statute discriminated against out-of-state wholesalers. The Eighth Circuit likely chose not to apply an important Comme

first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler."[166] Based on this, the Eighth Circuit asserted: "If it is beyond question that States may require wholesalers to be 'in-state' without running afoul of the Commerce Clause, then we think States have flexibility to define the requisite degree of 'in-state' presence . . . ."[167] However, *North Dakota v. United States* was a plurality opinion.[168] And the quote cited by the Supreme Court was from a concurring opinion in which no other Justice joined. This is too weak of a foundation on which to rest such a strong assertion as the Eighth Circuit advanced.

Further, the Eighth Circuit believes that there are no "inherent" or "integral[(w)5.1(h)-1(o)-1(lJ)Tj 3.466 0 T

> externalities—drunk driving, domestic abuse, underage drinking—that liquor distribution may produce. Missouri residents . . . are more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-to-day . . . . [I]n-state residency facilitates law enforcement against wholesalers, because it is easier to pursue in-state owners, directors, and officers than to enforce against their out-of-state counterparts.[174]

However, the deputy state supervisor for the Division, who testified *on behalf of* the Division, said that "wholesalers have little impact upon the direct sale of alcohol to minors, and that he could not think of any relationship between the residency requirement and the safety of Missouri citizens."[175] But even if Missouri can provide "concrete evidence" that the durational-residency requirement actually serves the above purposes, it still would not survive strict scrutiny. *Granholm* held that "rationales, such as facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability" can be achieved though non-discriminatory alternatives.[176] Being subject to the negative externalities that liquor distribution may produce is not necessary for someone to be socially responsible. There are less discriminatory ways to require wholesalers to be socially responsible. Additionally, in this modern era, "conducting an interstate investigation would seem just as easy as conducting an intrastate one,"[177] and "improvements in technology have eased the burden of monitoring out-of-state [citizens]."[178]

other words, the citizen of State A, who elects to become a permanent resident of State B, has the right to be treated like other citizens of State B. The citizen of State A should not have to wait three years to be treated like other citizens of State B. "Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year."[181] Thus, the Privileges and Immunities Clause is an alternative path that alcohol beverage wholesalers and retailers can use to subject durational-residency requirements to strict scrutiny.

CONCLUSION

Justice Stevens' dissent in *Granholm* recognized that today, alcohol is viewed as "an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products."[182] But back when the Twenty-first was passed, alcohol was known as "demon rum" and millions of Americans condemned its use.[183] The circumstances that justified the passage of the Twenty-first Amendment are not as evident today. There is no longer a legitimate state interest in the alcohol market. Even if there was, durational-residency requirements do not advance it. This Comment does not propose that the Twenty-first Amendment serves no purpose in our day and age. Further, it does not propose a rewriting of the Amendment to expressly narrow the States' power. Rather, this Comment urges courts to follow the holding of the Fifth Circuit when analyzing the constitutionality of durational-residency requirements for alcohol wholesalers and retailers. From *Young's Market Co.*[184] to *Granholm*, the States' reach under the Twenty-first Amendment has been narrowed. It is time for future courts to finish the job and subject durational-residency requirements to Commerce Clause scrutiny.

KEEGAN J.