SUPREME COURT OF THE UNITED STATES

Nos. 03–1116, 03–1120 and 03–1274

JENNIFER M. GRANHOLM, GOVERNOR OF MICHIGAN, ET AL., PETITIONERS
03–1116 *v.*
ELEANOR HEALD ET AL.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION, PETITIONER
03–1120 *v.*
ELEANOR HEALD ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JUANITA SWEDENBURG, ET AL., PETITIONERS
03–1274 *v.*
EDWARD D. KELLY, CHAIRMAN, NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL, STATE LIQUOR AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May 16, 2005]

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins, dissenting.

Congress' power to regulate commerce among the States includes the power to authorize the States to place burdens on interstate commerce. *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408 (1946). Absent such congressional approval, a state law may violate the unwritten rules described as the "dormant Commerce Clause" either by

imposing an undue burden on both out-of-state and local producers engaged in interstate activities or by treating out-of-state producers less favorably than their local competitors. See, *e.g.*, *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137 (1970); *Philadelphia* v. *New Jersey,* 437 U. S. 617 (1978). A state law totally prohibiting the sale of an ordinary article of commerce might impose an even more serious burden on interstate commerce. If Congress may nevertheless authorize the States to enact such laws, surely the people may do so through the process of amending our Constitution.

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.[1] On the con-

---

[1] In the words of Justice Jackson: "The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular Constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to

trary, 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.

The views of judges who lived through the debates that led to the ratification of those Amendments are entitled to special deference. Foremost among them was Justice Brandeis, whose understanding of a State's right to discriminate in its regulation of out-of-state alcohol could not have been clearer:

> "The plaintiffs ask us to limit [§2's] broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it. . . . 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 impor-

---

get out of legal bounds.' It was their unsatisfactory experience with that method that resulted in giving liquor an exclusive place in constitutional law as a commodity whose transportation is governed by a special, constitutional provision." *Duckworth* v. *Arkansas*, 314 U. S. 390, 398–399 (1941) (opinion concurring in result).

> tation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?" *State Bd. of Equalization of Cal.* v. *Young's Market Co.,* 299 U. S. 59, 62–63 (1936).[2]

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.[3] So-called "dry states" entirely prohibited such commerce; others prohibited the sale of alcohol on Sundays; others permitted the sale of beer and wine but not hard liquor; most created either state monopolies or distribution systems that gave discriminatory preferences to local retailers and distributors. The notion that discriminatory state laws violated the unwritten prohibition against balkanizing the American economy—while persuasive in contemporary times when alcohol is viewed as an ordinary article of commerce—would have seemed strange indeed to the millions of Americans who condemned the use of the "demon rum" in the 1920's and 1930's. Indeed, they expressly authorized the "balkanization" that today's decision condemns. 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;[4] it is not,

---

[2] According to Justice Black, who participated in the passage of the Twenty-first Amendment in the Senate, §2 was intended to return "'absolute control' of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324, 338 (1964) (dissenting opinion).

[3] See generally Green, Interstate Barriers in the Alcoholic Beverage Field, 7 Law & Contemp. Prob. 717 (1940); *post*, at 22–25 (THOMAS, J., dissenting).

[4] Cf. *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 169 (1920) (Holmes, J., dissenting) ("I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against special drink. The fathers of the Constitution so far as I know ap-

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." *Carter* v. *Virginia,* 321 U. S. 131, 141 (1944) (Frankfurter, J., concurring).[5] 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.

As JUSTICE THOMAS has demonstrated, the text of the Twenty-first Amendment is a far more reliable guide to its meaning than the unwritten rules that the majority enforces today. I therefore join his persuasive and comprehensive dissenting opinion.

---

proved it").

[5] As he added in that case, "since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play." *Carter* v. *Virginia*, 321 U. S., at 143.