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 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, 64 (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.

I

The Court devotes much attention to the Twenty-first Amendment, yet little to the terms of the Webb-Kenyon Act. This is a mistake, because that Act's language displaces any negative Commerce Clause barrier to state regulation of liquor sales to in-state consumers.

A

The Webb-Kenyon Act immunizes from negative Commerce Clause review the state liquor laws that the Court holds are unconstitutional. The Act "prohibit[s]" any "shipment or transportation" of alcoholic beverages "into any State" when those beverages are "intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State."[1] State laws that regulate liquor imports in the

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[1] The Webb-Kenyon Act provides:

"The shipment or transportation, in any manner or by any means whatsoever, of any spiritous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the

manner described by the Act are exempt from judicial scrutiny under the negative Commerce Clause, as this Court has long held. See *McCormick & Co.* v. *Brown,* 286 U. S. 131, 139–140 (1932); *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 324 (1917); *Seaboard Air Line R. Co.* v. *North Carolina,* 245 U. S. 298, 303–304 (1917). The Webb-Kenyon Act's language, in other words, "prevent[s] the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws." *Clark Distilling*, *supra*, at 324.

The Michigan and New York direct-shipment laws are within the Webb-Kenyon Act's terms and therefore do not run afoul of the negative Commerce Clause. Those laws restrict out-of-state wineries from shipping and selling wine directly to Michigan and New York consumers. *Ante*, at 5–6. Any winery that ships wine directly to a Michigan or New York consumer in violation of those state-law restrictions is a "person interested therein" "intend[ing]" to "s[ell]" wine "in violation of" Michigan and New York law, and thus comes within the terms of the Webb-Kenyon Act.

This construction of the Webb-Kenyon Act is no innovation. The Court adopted this reading of the Act in *McCormick & Co.* v. *Brown, supra*, and Congress approved it shortly thereafter in 1935 when it reenacted the Act without alteration, 49 Stat. 877; see, *e.g., Keene Corp.* v. *United States,* 508 U. S. 200, 212–213 (1993) (applying presumption that reenacted statute incorporates settled

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United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spiritous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited." 27 U. S. C. §122.

judicial construction). *McCormick* considered a state law that prohibited out-of-state manufacturers (as well as in-state manufacturers) from shipping liquor to a licensed in-state dealer without first obtaining a wholesaler permit. The Court held that by shipping liquor into the State without a license, the out-of-state manufacturer "[fell] directly within the terms of" the Webb-Kenyon Act, thus violating it. 286 U. S., at 143; see also *Rainier Brewing Co.* v. *Great Northern Pacific S. S. Co.,* 259 U. S. 150, 152–153 (1922) (holding that under the Webb-Kenyon Act, beer importers must "carry" beer into the State "in the manner allowed by the laws of that State"). While the law at issue in *McCormick* did not discriminate against out-of-state products, the construction of the Webb-Kenyon Act it adopted applies equally to state laws that so discriminate. If an out-of-state manufacturer shipping liquor to an in-state distributor without a license "s[ells]" liquor "in violation of any law of such State" within the meaning of Webb-Kenyon, as *McCormick* held, an out-of-state winery directly shipping wine to consumers in violation of even a discriminatory state law does so as well. The Michigan and New York laws are indistinguishable in relevant part from the state law upheld in *McCormick*.[2]

The Court answers that the Webb-Kenyon Act's text "readily can be construed as forbidding 'shipment or transportation' only where it runs afoul of the States' generally applicable laws governing receipt, possession, sale, or use." *Ante*, at 19. What the Court means by "gen-

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[2] The Court notes that *McCormick* held that the Webb-Kenyon Act only authorized "valid" laws, the suggestion being that *McCormick*'s holding applies only to nondiscriminatory (and hence "valid" laws). *Ante*, at 19. The Court takes this word out of context. By "valid" laws, *McCormick* meant laws not pre-empted by the National Prohibition Act, rather than laws that treated in-state and out-of-state products equally. See 286 U. S., at 143–144 (finding the legislation "valid" because the National Prohibition Act did not pre-empt it).

erally applicable" laws is unclear, for the Court concedes that the Webb-Kenyon Act allows States to pass laws discriminating against out-of-state wholesalers. See *ante*, at 21, 25–26. By "generally applicable [state] laws," therefore, the Court apparently means all state laws except for those that "discriminate" against out-of-state liquor products. See *ante*, at 19–20, 25–26.

The Court leaves unexplained how this ad hoc exception follows from the Act's text. The Act's language leaves no room for this exception. The Act does not condition a State's ability to regulate the receipt, possession, and use of liquor free from negative Commerce Clause immunity on the character of the state law. It does not mention "discrimination," much less discrimination against out-of-state liquor products. Instead, it prohibits the interstate shipment of liquor into a State "in violation of any law of such State." 27 U. S. C. §122. "[A]ny law of such State" means any law, including a "discriminatory" one.

The Court's distinction between discrimination against manufacturers and discrimination against wholesalers is equally unjustified. There is no warrant in the Act's text for treating regulated entities differently depending on their place in the distribution chain: The Act applies in undifferentiated fashion to "any person interested therein." A wine manufacturer shipping wine directly to a consumer is an interested party, just as an out-of-state liquor wholesaler is.[3]

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[3] The Court also states that the "Webb-Kenyon Act expresses no clear congressional intent to depart from the principle . . . that discrimination against out-of-state goods is disfavored." *Ante*, at 19. That is not correct. It is settled that the Webb-Kenyon Act explicitly abrogates negative Commerce Clause review of state laws that fall within its terms. See *supra*, at 3. There is no reason to require another clear statement for each sort of law to which it might apply. The only question is whether, fairly read, the Webb-Kenyon Act covers Michigan's and New York's direct-shipment laws. As I have explained, it does.

The contrast between the language of the Webb-Kenyon Act and its predecessor, the Wilson Act, casts still more doubt on the Court's reading. The Wilson Act provided that liquor shipped into a State was "subject to the operation and effect of the laws of such State . . . to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory." §121. Even if this language does not authorize States to discriminate against out-of-state liquor products, see *ante*, at 15, the Webb-Kenyon Act has no comparable language addressing discrimination. The contrast is telling. It shows that the Webb-Kenyon Act encompasses laws that discriminate against both out-of-state wholesalers and out-of-state manufacturers.

In support of its conclusion that the Webb-Kenyon Act did not authorize States to discriminate, the Court relies heavily on *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311 (1917). *Ante*, at 18–19. Its reliance is misplaced. *Clark Distilling* held that the Webb-Kenyon Act authorized a nondiscriminatory state law, 242 U. S., at 321–322, and so had no direct occasion to pass on whether the Act also authorized discriminatory laws. Nothing in it implicitly decided that unsettled question in the manner the Court suggests.

To the extent that it is relevant, *Clark Distilling* supports the view that the Webb-Kenyon Act authorized States to discriminate. Contrary to the Court's suggestion, *Clark Distilling* did not say (on pages 321, 322 or elsewhere) that the Webb-Kenyon Act "empowered [States] to forbid shipments of alcohol to consumers for personal use, provided that [they] treated in-state and out-of-state liquor on the same terms." *Ante*, at 18. Instead, *Clark Distilling* construed the Webb-Kenyon Act to "extend that which was done by the Wilson Act" in that its "purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt

of liquor through such commerce in States contrary to their laws." 242 U. S., at 324. The Court takes this passage only to refer to "nondiscriminatory" state laws, *ante*, at 18, but this is not correct. The passage the Court cites implies that the Webb-Kenyon Act also abrogated the nondiscrimination principle of the negative Commerce Clause, since that principle flows from the "immunity characteristic of interstate commerce," no less than any other negative Commerce Clause doctrine. In other words, *Clark Distilling* recognized that the Webb-Kenyon Act took "the protection of interstate commerce away from *all receipt and possession of liquor prohibited by state law*." 242 U. S., at 325 (emphasis added). *Clark Distilling* thus confirms what the text of the Webb-Kenyon Act makes clear: The Webb-Kenyon Act "extended" the Wilson Act by completely immunizing all state laws regulating liquor imports from negative Commerce Clause restraints.[4]

B

Straying from the Webb-Kenyon Act's text, the Court speculates that Congress intended the Act merely to overrule a discrete line of this Court's negative Commerce Clause cases invalidating "nondiscriminatory" state liquor regulation laws, including *Vance* v. *W. A. Vandercook Co.,* 170 U. S. 438 (1898), and *Rhodes* v. *Iowa,* 170 U. S. 412 (1898). *Ante*, at 15–21. According to the majority, *ante*, at

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[4] The Court also opines that, quite apart from the Webb-Kenyon Act, the Wilson Act "expressly precludes States from discriminating." *Ante*, at 19. It does not. The Wilson Act "precludes" States from nothing. Instead, it authorizes them to regulate liquor free of negative Commerce Clause restraints by "subject[ing]" imported liquor "to the operation" of state law, taking state law as it finds it. 27 U. S. C. §121. Even if, as the Court suggests, the Wilson Act does not authorize States to discriminate, *ante*, at 15, the Webb-Kenyon Act extends that authorization to cover discriminatory state laws. The only question here is the scope of the broader, more inclusive Webb-Kenyon Act. The Court's argument therefore adds nothing to the analysis.

20–21, the Webb-Kenyon Act left untouched this Court's cases preventing States from regulating liquor in "discriminatory" fashion. See, *e.g., Scott* v. *Donald,* 165 U. S. 58 (1897) *(Scott); Walling* v. *Michigan,* 116 U. S. 446 (1886); and *Tiernan* v. *Rinker,* 102 U. S. 123 (1880). The plain language of the Webb-Kenyon Act makes the Court's guesswork about Congress' intent unnecessary. But even taken on its own terms, the majority's historical argument is unpersuasive. History reveals that the Webb-Kenyon Act overturned not only *Vance* and *Rhodes*, but also *Scott* and therefore its "nondiscrimination" principle.

The origins of the Webb-Kenyon Act are in this Court's decision in *Leisy* v. *Hardin,* 135 U. S. 100 (1890). *Leisy* held that States were prohibited from regulating the resale of alcohol imported from outside the State so long as the liquor stayed in its "original packag[e]." *Id.*, at 124–125. This rule made it more difficult for States to prohibit the in-state consumption of liquor. Even if a State banned the domestic production of liquor altogether, *Leisy* left it powerless to stop the flow of liquor from outside its borders.

Congress reacted swiftly by enacting the Wilson Act in August of 1890. The Wilson Act authorized States to regulate liquor "upon arrival in such State" whether "in original packages or otherwise," 27 U. S. C. §121, and therefore subjected imports to state jurisdiction "upon arrival within the jurisdiction of the State." *Rhodes*, *supra*, at 433 (Gray, J., dissenting). The Wilson Act accordingly abrogated *Leisy* and similar decisions by subjecting liquor imports to the operation of state law once the liquor came within a State's geographic borders.

Rather than holding that the Wilson Act meant what it said, three decisions of this Court construed the Act to be a virtual nullity. The first was *Scott*, *supra*. South Carolina had decided to regulate traffic in liquor by monopolizing the sale and distribution of liquor. All liquor, whether

produced in or out of the State, could be sold to consumers in the State only by the state commissioner of alcohol. *Id.,* at 66–68, n. 1, 92. The law thus prohibited out-of-state manufacturers and wholesalers, as well as their in-state counterparts, from shipping liquor directly to consumers.

The appellee, Donald, was a citizen of South Carolina who had ordered liquor directly from out-of-state shippers for his own personal use, rather than through the state monopoly system as South Carolina law required. *Id.*, at 59; see also *Scott* v. *Donald,* 165 U. S. 107, 108–109 (1897) *(Donald).* South Carolina officials seized the liquor he ordered after it had crossed South Carolina lines, but before he had received it. Donald sued the officials for damages, as well as an injunction allowing him to import liquor directly from out-of-state shippers for his own personal use. *Scott*, *supra,* at 69–70; *Donald, supra,* at 109–110.

The Court held that South Carolina's ban on the direct shipment of liquor unconstitutionally interfered with the right of out-of-state entities to ship liquor directly to consumers for their personal use, entitling Donald to damages and injunctive relief. *Scott*, *supra,* at 78, 99–100; *Donald, supra,* at 114; see also *Vance*, *supra*, at 452 (describing the "ruling" of *Scott* to be that a State could not "forbid the shipment into the State from other States of intoxicating liquors for the use of a resident"). The Court reasoned that the ban on importation, "in effect, discriminate[d] between interstate and domestic commerce in commodities to make and use which are admitted to be lawful." *Scott*, 165 U. S., at 100. The Court reserved the question whether a state monopoly system that allowed consumers to import liquor directly was constitutional; for the Court, it "suffic[ed]" that South Carolina's ban on imports "discriminate[d] against the bringing of such articles in, and importing them from other States." *Id.*, at 101. The Court's excuse for holding that the Wilson Act did not save the State's ban on importation was the same as the

Court's excuse today: that the Wilson Act did not authorize "discriminatory" state legislation. *Ibid*. On this basis, the Court affirmed Donald's damages award. *Ibid*.

In response to *Scott*, Senator Tillman of South Carolina quickly introduced the first version of what became the Webb-Kenyon Act. His bill explicitly attempted to reverse the *Scott* decision. The Senate Report on the bill noted that "[t]he effect of [*Scott* was] to throw down all the barriers erected by the State law, in which she is protected by the Wilson bill, and allow the untrammeled importation of liquor into the State upon the simple claim that it is for private use." S. Rep. No. 151, 55th Cong., 1st Sess., 5 (1897). The Report also addressed *Scott*'s holding that South Carolina's ban on importation was "discriminatory" and adopted the *Scott* dissenter's view that the ban on importation effected "no discrimination against citizens of other States." S. Rep. No. 151, at 5. The bill accordingly would have amended the Wilson Act to grant States "absolute control of . . . liquors or liquids within their borders, by whomsoever produced and for whatever use imported." 30 Cong. Rec. 2612 (1897). The bill passed in the Senate without debate. It failed in the House, perhaps because the House Judiciary Committee added an amendment that barred discrimination against the products of other States, leaving *Scott* intact. H. R. Rep. No. 667, 55th Cong., 2d Sess., 1 (1898).

Meanwhile, the Court continued to narrow the reach of the Wilson Act. In *Rhodes* and *Vance*, the Court even more broadly stripped States of their control over liquor regulation. *Rhodes* did so by holding that the phrase "upon arrival in such State" in the Wilson Act meant that state law could regulate imports only after their delivery to a consignee within the State. 170 U. S., at 421 (internal quotation marks omitted). This meant that States could regulate imported liquor, even when in its original package, but only after it had been delivered to the eventual

consignee. *Rhodes*, in other words, read the Wilson Act to overturn *Leisy,* but not *Bowman* v. *Chicago & Northwestern R. Co.,* 125 U. S. 465 (1888), which had recognized a constitutional right to import liquor in its original package free from state regulation until it reached its consignee. *Rhodes*, *supra*, at 423. Like *Leisy*, then, *Rhodes* seriously hampered the ability of States to intercept liquor at their borders.

Vance involved the constitutionality of a law very similar to the law struck down in *Scott*. After its loss in *Scott*, South Carolina amended its ban on importation. Rather than flatly banning imports unless they went through the state monopoly system, the new law allowed out-of-state wholesalers and manufacturers to ship liquor directly to consumers, but only if the consumer showed that the liquor passed a state-administered test of its purity. *Vance*, 170 U. S., at 454–455.

Vance had two distinct holdings. First, the Court struck down this condition on the direct importation of liquor as an impermissible burden on "the constitutional right of the non-resident to ship into the State and of the resident in the State to receive for his own use." *Id.*, at 455. The Court derived the right to direct importation primarily from the "ruling" of *Scott* that a State could not "forbid the shipment into the State from other States of intoxicating liquors for the use of a resident." 170 U. S., at 452.

Second, the Court held that, apart from its ban on direct shipments of liquor to consumers, South Carolina's monopoly over liquor distribution was otherwise constitutional. *Id.*, at 450–452. It rejected the argument that this monopoly system was unconstitutionally discriminatory. In particular, the Court reasoned that the monopoly system was not discriminatory because *Scott* had held (a holding that *Rhodes* had fortified) that South Carolina consumers had a constitutional right to import liquor for their own personal use, even if a State otherwise monopo-

lized the sale and distribution of liquor.[5] A monopoly system, the Court implied, was nondiscriminatory under the rule of *Scott* only if it also allowed consumers to import liquor from out-of-state shippers for their own personal use. Three Justices in *Vance* dissented from that holding, on the ground that such a state monopoly system constituted unconstitutional discrimination under, among other cases, *Scott* and *Walling* v. *Michigan,* 116 U. S. 446 (1886). 170 U. S., at 462–468 (opinion of Shiras, J., joined by Fuller, C. J., and McKenna, J.).

Rhodes and *Vance* swept more broadly than *Scott*. *Rhodes* held that States lacked power to regulate imported liquor before it reached the consignee, regardless of whether the liquor was intended for the consignee's personal use, see *supra*, at 10; it did not, as the Court implies, simply repeat *Scott*'s holding that consumers had a right to import liquor for their own personal use. *Ante*, at 17. *Rhodes*' holding, for example, made it easier for bootleggers to circumvent state prohibitions on the resale of imported liquor, because it enabled them to order large quantities of liquor directly from out-of-state interests. For its part, *Vance* held that the right to import for personal use recognized in *Scott* applied even if the State conditioned the right to import directly on compliance with regulatory conditions (*e.g.,* a state-administered purity test). Those broader holdings, consequently, spurred more vigorous congressional attempts to return control of liquor

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[5] See *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 451–452 (1898) ("But the weight of [the argument that the state monopoly system is discriminatory] is overcome when it is considered that the Interstate Commerce clause of the Constitution guarantees the right to ship merchandise from one State into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the act of Congress [*i.e.*, the Wilson Act] which allows state authority to attach to the original package before sale but only after delivery. *Scott* v. *Donald, supra; Rhodes* v. *Iowa*").

regulation to the States. See R. Hamm, Shaping the Eighteenth Amendment 206–212 (1995) (hereinafter Hamm); Rogers, Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act, 4 Va. L. Rev. 353, 364–365 (1917). The legislative debate in subsequent years accordingly focused on their effect. That may be what misleads the majority into believing that the Webb-Kenyon Act took aim only at *Rhodes* and *Vance*.

Yet early versions of the Webb-Kenyon Act, not to mention the Act itself, also overturned *Scott*'s holding that banning the direct shipment of liquor for personal use was unconstitutionally discriminatory. Like Senator Tillman's initial bill, other early versions of the Webb-Kenyon Act took aim at *Scott*, *Rhodes*, and *Vance*. They made clear that out-of-state liquor was subject to state law immediately upon entering the State's territorial boundaries, even if intended for personal use. See Hamm 206, 208.

The version that eventually became the Webb-Kenyon Act was likewise designed to overturn the holdings of all three cases, and thus to reverse *Scott*'s "nondiscrimination" principle. The House Report says that the bill was "intended to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a State or Territory and intended to be used therein in violation of the law of such State or Territory." H. R. Rep. No. 1461, 62d Cong., 3d Sess., 1 (1913). Thus, the bill targeted *Scott*'s notion (as applied by *Vance*) that imports destined for personal use were exempt from state regulation. There was no mention of an exception for "discriminatory" state laws, though such an amendment to an earlier version of the Webb-Kenyon Act had been proposed before, see *supra*, at 10; the idea was that imports were subject to state law once within a State's geographic borders, regardless of the law's character. In fact, proponents of the final version of the bill defeated proposed amendments that would have restrained States from restricting

imports destined for personal use, and thereby would have left *Scott* intact. Hamm 215; 49 Cong. Rec. 2921 (1913); see also H. R. Rep. No. 2337, 58th Cong., 2d Sess., 2–3 (1904) (prior unenacted version drawing exception for shipments for in-state personal use).

In contrast to those unenacted amendments, the Webb-Kenyon Act reversed *Scott, Rhodes*, and *Vance* by forbidding the importation of liquor "intended to be received, possessed, sold or in any manner used . . . in violation of any law of such state"—regardless of the nature of the state law or the imported liquor's intended use. See *Seaboard Air Line R. Co.,* 245 U. S., at 304 (noting that the Webb-Kenyon Act allowed States to regulate "irrespective of any personal right in a consignee there to have and consume liquor"). That is why, just four years after its enactment, this Court described the Webb-Kenyon Act as removing "the protection of interstate commerce away from *all receipt and possession of liquor prohibited by state law*." *Clark Distilling*, 242 U. S., at 325 (emphasis added).

The foregoing historical account belies the majority's claim that the Webb-Kenyon Act left *Scott* untouched. The Court reasons that the Webb-Kenyon Act overturned only those decisions that "'in effect afford[ed] a means by subterfuge and indirection to set [state liquor laws] at naught,'" *ante*, at 18 (quoting *Clark Distilling*, *supra*, at 324), a description the Court takes to cover *Rhodes* and *Vance*, but not *Scott*. However, *Scott*'s holding, by precluding state monopoly systems from prohibiting direct shipments of liquor to consumers, "set [state liquor laws] at naught" just as *Rhodes* and *Vance* did. The Court concedes that the Webb-Kenyon Act "close[d] the direct-shipment gap" and that *Scott* recognized a constitutional right for consumers to import liquor directly for their own personal use. *Ante*, at 16, 18. These concessions cannot be squared with Court's simultaneous suggestion, *ante*, at 18–21, that the Webb-Kenyon Act left *Scott* untouched.

The only way to overturn *Scott*'s direct-shipment holding was to abrogate its premise that South Carolina's monopoly system was unconstitutionally discriminatory, as Senator Tillman recognized from the start. See *supra*, at 9–10. Reversing *Scott*'s holding that a State could not ban direct shipments of liquor to consumers was a core concern of the Webb-Kenyon Act.

Repudiating *Scott*'s nondiscrimination holding was also essential to ensuring the constitutionality of state liquor licensing schemes and state monopolies on the sale and distribution of liquor. This is so because the constitutionality of these state systems remained in some doubt even after *Vance*. As explained, *Vance* upheld South Carolina's monopoly system (stripped of its ban on direct shipments) as "nondiscriminatory" only because that system had preserved the constitutional right established in *Scott* and *Rhodes* to send and receive direct shipments of liquor free of state interference. *Supra*, at 11–12. The Court admits that the Webb-Kenyon Act abolished that right. *Ante*, at 18. Had the Webb-Kenyon Act done so without also allowing the States to discriminate, *Vance*'s reasoning implied that the Court was likely to strike down state monopoly systems, and therefore probably licensing schemes as well, as unduly "discriminatory." See 170 U. S., at 451 (equating a state monopoly scheme with a private licensing scheme). The only way to stave off that holding, and so to preserve States' ability to regulate liquor traffic, was to overturn *Scott*'s "nondiscrimination" reasoning. Faced with a Judiciary that had narrowly construed the Wilson Act, see *supra*, at 8–12, Congress drafted the Webb-Kenyon Act to authorize *all* state regulation of importation, whether or not "discriminatory." Just as *Rhodes* read the Wilson Act to repudiate *Leisy* but not *Bowman*, see *supra*, at 10, the majority reads the Webb-Kenyon Act to repudiate *Rhodes* but not *Scott*, committing an analogous error. I would not so construe the Webb-Kenyon Act.

C

The majority disagrees with this historical account primarily by disputing my reading of *Scott*. It reads *Scott* to have held two things: first, that certain discriminatory provisions of South Carolina's monopoly system were not authorized by the Wilson Act, and therefore were unconstitutional; and second, that Donald had a constitutional right to import liquor directly from out-of-state shippers. *Ante*, at 15–17. This recharacterization of *Scott* (together with its mischaracterization of *Rhodes*' holding, see *supra*, at 10) is the basis for the Court's contention that the Webb-Kenyon Act only overruled *Scott*'s second holding, leaving the first untouched. *Ante*, at 18–21.

The Court misreads *Scott*. *Scott* had only one holding: that the state monopoly system unconstitutionally discriminated against Donald by allowing him to purchase liquor from in-state stores, but not directly from out-of-state interests. The issue of direct importation was squarely at issue in *Scott*, not simply "implicit." *Ante*, at 17. This was the only basis, after all, for affirming Donald's damages award for interference with his ability to import goods directly from outside the State. *Scott*'s reasoning that the South Carolina law was unconstitutionally discriminatory was the basis for affirming that award, not a separate and distinct holding.

While South Carolina law also allowed the state alcohol administrator to discriminate against out-of-state liquor when purchasing liquor for sale through the monopoly system, *ante*, at 15, any constitutional defect with those portions of the law would have been at most grounds for allowing Donald to purchase out-of-state liquor through the state monopoly system, as the dissent argued (and as the majority strains to characterize *Scott* 's actual holding, *ante*, at 16). See 165 U. S., at 104–106 (Brown, J., dissenting). But *Scott* rejected that view and held that the broader discrimination effected by the law was grounds for

allowing Donald to import liquor directly himself, bypassing the monopoly system entirely. *Scott*'s holding therefore rested on a conclusion that a ban on direct importation was "discrimination" under the negative Commerce Clause. That conclusion was natural for Justice Shiras, the author of *Scott*, whose view apparently was that all state monopoly systems, even ones that seem nondiscriminatory to our modern eyes, were unconstitutionally discriminatory. See *Vance*, *supra*, at 465, 467 (Shiras, J., dissenting) (citing the nondiscrimination cases *Walling* v. *Michigan,* 116 U. S. 446 (1886), and *Minnesota* v. *Barber,* 136 U. S. 313 (1890)). The Court's narrower understanding of "discrimination" is anachronistic.

Vance confirms this reading of *Scott*. *Vance* correctly characterized *Scott* as establishing a right for consumers to receive shipments of liquor directly from out-of-state sources. 170 U. S., at 452. It also characterized *Scott*'s reasoning as resting on the discriminatory character of the state law. 170 U. S., at 449. These two descriptions, taken together, suggest that the discriminatory character of the law was the basis for *Scott*'s holding that Donald had a constitutional right to receive liquor directly, instead of a separate holding. Moreover, *Vance* also implied that a monopoly system that did not allow consumers to receive liquor directly was unconstitutionally discriminatory. See *supra*, at 11–12. That suggestion supports the idea that *Scott* considered a ban on such direct shipments to be discriminatory.

Brennen v. *Southern Express Co.*, 106 S. C. 102, 90 S. E. 402 (1916), likewise bolsters that *Scott* considered South Carolina's ban on direct importation to be unconstitutionally discriminatory, quite apart from the provisions that authorized the state administrator of alcohol to prefer local products over out-of-state ones. See *ante*, at 15 (describing discriminatory provisions). In *Brennen*, the court considered the constitutionality of a state monopoly sys-

tem that channeled all liquor through state dispensaries by banning direct shipments, but that allowed a consumer to import directly one gallon of liquor per month for his own personal use. 106 S. C., at 107–108, 90 S. E., at 403. Though out-of-state liquor had equal access to the state run liquor dispensaries, see generally 2 S. C. Crim. Code §§794–878 (1912) (providing for otherwise nondiscriminatory state-run monopoly system), the court held that this system unconstitutionally discriminated against out-of-state liquor because it allowed consumers to purchase only a limited quantity of liquor via direct shipments, yet unlimited amounts from state stores. The court noted that "there was no limit to the quantity which a citizen who patronized the dispensaries might buy and keep in his possession for personal use," whereas the law limited direct-shipment purchases to a specific quantity each month. 106 S. C., at 108, 90 S. E., at 403. This, the court reasoned, "was therefore clearly a discrimination made in favor of liquors bought from the dispensaries," and so was unconstitutionally discriminatory under the rule of *Scott*. 106 S. C., at 108, 90 S. E., at 403–404. The court thus recognized that *Scott*'s reasoning implied that a state monopoly system was unconstitutionally discriminatory unless it allowed consumers to purchase liquor directly from out-of-state shippers on the same terms as they could purchase liquor from the state monopoly system.

Brennan refutes the Court's characterization of *Scott*. It shows that the South Carolina system at issue in *Scott* was "discriminatory" because it banned direct importation, not because its provisions authorized the state alcohol administrator to prefer local products. Even the Court concedes that the Webb-Kenyon Act abrogated the right to direct importation recognized in *Scott*. See *ante*, at 16, 18. It follows that the Act also overturned the nondiscrimination reasoning that was the foundation of that right.

In sum, the Webb-Kenyon Act authorizes the discrimi-

natory state laws before the Court today.

II

There is no need to interpret the Twenty-first Amendment, because the Webb-Kenyon Act resolves these cases. However, the state laws the Court strikes down are lawful under the plain meaning of §2 of the Twenty-first Amendment, as this Court's case law in the wake of the Amendment and the contemporaneous practice of the States reinforce.

A

Section 2 of the Twenty-first 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." As the Court notes, *ante*, at 21, this language tracked the Webb-Kenyon Act by authorizing state regulation that would otherwise conflict with the negative Commerce Clause. To remove any doubt regarding its broad scope, the Amendment simplified the language of the Webb-Kenyon Act and made clear that States could regulate importation destined for in-state delivery free of negative Commerce Clause restraints. Though the Twenty-first Amendment mirrors the basic terminology of the Webb-Kenyon Act, its language is broader, authorizing States to regulate all "transportation or importation" that runs afoul of state law. The broader language even more naturally encompasses discriminatory state laws. Its terms suggest, for example, that a State may ban imports entirely while leaving in-state liquor unregulated, for they do not condition the State's ability to prohibit imports on the manner in which state law treats domestic products.

The state laws at issue in these cases fall within §2's broad terms. They prohibit wine manufacturers from "transport[ing] or import[ing]" wine directly to consumers

in New York and Michigan "for delivery or use therein." Michigan law does so by requiring all out-of-state wine manufacturers to distribute wine through licensed in-state wholesalers. *Ante*, at 5. New York law does so by prohibiting out-of-state wineries from shipping wine directly to consumers unless they establish an in-state physical presence, something that in-state wineries naturally have. *Ante*, at 6–7, 11–12. The Twenty-first Amendment prohibits out-of-state wineries from shipping wine into Michigan and New York in violation of these laws. In holding that the Constitution prohibits Michigan's and New York's laws, the majority turns the Amendment's text on its head.

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.,* 299 U. S. 59 (1936), 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. *Id.*, at 60–61. 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." *Id.*, at 62. 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." *Ibid.* 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." *Id.*, at 63. And far from "not consider[ing]" the historical argument that forms the core of the majority's reasoning, *ante*, at 22, *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." 299 U. S., at 63–64 (footnote omitted).

The plaintiffs in *Young's Market* advanced virtually the same historical argument the Court today accepts. Brief for Appellees, O. T. 1936, No. 22, pp. 57–75. *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.

Young's Market was no outlier. The next Term, the Court upheld a Minnesota law that prohibited the importation of 50-proof liquor, concluding that "discrimination against imported liquor is permissible." *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401, 403 (1938). One Term after that, the Court upheld two state laws that prohibited the importation of liquor from States that discriminated against domestic liquor. See *Indianapolis Brewing Co.* v. *Liquor Control Comm'n,* 305 U. S. 391, 394 (1939) (noting that the Twenty-first Amendment permitted States to "discriminat[e] between domestic and imported intoxicating liquors"); *Joseph S. Finch & Co.* v. *McKittrick,* 305

U. S. 395, 398 (1939). In sum, the Court recognized from the start that "[t]he Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132, 138 (1939); accord, *Duckworth* v. *Arkansas,* 314 U. S. 390, 398–399 (1941) (Jackson, J., concurring in result); *Carter* v. *Virginia,* 321 U. S. 131, 138–139 (1944) (Black, J., concurring); *id.*, at 139–143 (Frankfurter, J., concurring). The majority gives short shrift to these persuasive contemporaneous constructions of the Twenty-first Amendment, as JUSTICE STEVENS properly stresses. *Ante*, at 3–4 (dissenting opinion).

B

The widespread, unquestioned acceptance of the three-tier system of liquor regulation, see *ante*, at 2–3, 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. *Ante*, at 25–26; see also *supra,* at 15. 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. Skilton, State Power Under the Twenty-First Amendment, 7 Brooklyn L. Rev. 342, 345–346 (1938); L. Harrison & E. Laine, After Repeal: A Study of Liquor Control Administration 43 (1936).

These liquor regulation schemes discriminated against out-of-state economic interests, just as Michigan's and

New York's direct-shipment laws do. State monopolies that did not permit direct shipments to consumers, for example, were thought to discriminate against out-of-state wholesalers and retailers by favoring in-state products. See *Vance*, 170 U. S., at 451–452; *supra*, at 11–12. Private licensing schemes discriminated as well, often by requiring in-state residency or physical presence as a condition of obtaining licenses.[6] Even today, the requirement that liquor pass through a licensed in-state wholesaler is a core component of the three-tier system. As the Court concedes, each of these schemes is within the ambit of the Twenty-first Amendment, even though each discriminates against out-of-state interests. *Ante*, at 2–3, 25–26.

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[6] See Note, Economic Localism in State Alcoholic Beverage Laws–Experience Under the Twenty-First Amendment, 72 Harv. L. Rev. 1145, 1148–1149, and n. 25 (1959) (hereinafter Economic Localism); see also 3 Colo. Stat. Ann., ch. 89, §4(a) (1935) (residency requirement); 17 Fla. Stat. Ann. §561.24 (1941) (prohibiting out-of-state manufacturers from being distributors); Ill. Rev. Stat., ch. 43, §120 (Smith-Hurd 1937) (residency requirement); Ind. Stat. Ann. §3730(c) (1934) (residency requirement); 1 Md. Ann. Code, Art. 2B, §13 (1939) (residency requirement); 4B Ann. Laws of Mass., ch. 138, §§18, 18A (1965) (residency requirements); 5 Comp. Laws Mich. §9209–32 (Supp. 1935) (residency requirement); 1 Mo. Rev. Stat. §4906 (1939) (citizenship requirement); Neb. Comp. Stat., ch. 53, Art. 3, §53–328 (1929 and Cum. Supp. 1935) (residency requirement); §53–317 (physical presence requirement); 1 Nev. Comp. Laws §3690.05 (Supp. 1931–1941) (residency and physical presence requirements); 2 Rev. Stat. of N. J. §33:1–25 (1937) (citizenship and residency requirements); N. C. Code Ann. §3411(103)(1½) (1939) (residency requirement); 1 N. D. Rev. Code §5–0202 (1943) (citizenship and residency requirements); Ohio Code Ann. §6064–17 (1936) (residency and physical presence requirements); R. I. Gen. Laws, ch. 163, §4 (1938) (residency requirement); 1 S. D. Code §5.0204 (1939) (residency requirement); Vt. Rev. Stat., Tit. 28, ch. 271, §6156 (1947) (residency requirement); 8 Rev. Stat. Wash. §7306–23G (Supp. 1940) (physical presence requirement); §7306–27 (citizenship and residency requirements); Wis. Stat. §176.05(9) (1937) (citizenship and residency requirements); Wyo. Rev. Stat. Ann. §59–104 (Supp. 1940) (citizenship and residency requirements).

Many States had laws that discriminated against out-of-state products in addition to out-of-state wholesalers and retailers. See Kallenbach, Interstate Commerce in Intoxicating Liquors Under the Twenty-First Amendment, 14 Temp. L. Q. 474, 483–484 (1940); T. Green, Liquor Trade Barriers: Obstructions to Interstate Commerce in Wine, Beer, and Distilled Spirits 12–19, and App. I (1940) (hereinafter Green).[7] For example, 21 States required that producers who had no physical presence within the State first obtain a special license or certificate before doing business within the State, thus subjecting them to two layers of licensing fees. *Id.*, at 12. Thirteen States charged lower licensing fees for wine manufacturers who used locally grown grapes. *Id.*, at 13. Arkansas went so far as to create a blanket exception to its licensing scheme for locally produced wine. See 2 Pope's Digest of Stat. of Ark. §§14099, 14105, 14113 (1937). Eight States taxed out-of-state liquor products at greater rates than in-state products. Green 13. Twenty-nine States exempted exports from excise taxes that were applicable to imports. *Id.,* at 14. At least 10 States (plus the District of Columbia) imposed special licensing requirements on solicitors of out-of-state liquor products. See Harrison & Laine, *supra*, at 194–195. Like the California law upheld in *Young's Market*, 10 States charged wholesalers who dealt in imports greater licensing fees. Economic Localism 1150; Crabb, State Power Over Liquor Under the Twenty-First

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[7] See also, *e.g.,* Ill. Rev. Stat., ch. 43, §115(h) (Smith-Hurd 1937) (special license for growers of locally grown grapes); Comp. Laws Mich. §9209–55 (Supp. 1935) (exemption from malt tax for in-state manufacturers); Nev. Comp. Laws §3690.15 (Supp. 1931–1941) (special importer's fees; lower license fees for manufacturers and wholesalers who deal in in-state products); N. M. Stat. Ann. §72–806 (Supp. 1938) (licensing exemption for in-state wineries); R. I. Gen. Laws Ann., ch. 167, §8 (1938) (authorizing state agency to impose retaliatory tax); Utah Rev. Stat. §46–8–3 (Supp. 1939) (requiring state commission to prefer locally grown products).

Amendment, 12 U. Det. L. J. 11, 27 (1948); Green 13. Many States also passed antiretaliation statutes limiting or banning imports from other States that themselves discriminated against out-of-state liquor. Economic Localism 1152; Green 14. All told, at least 41 States had some sort of law that discriminated against out-of-state products, many if not most of which (contrary to the Court's suggestion, *ante*, at 22) predated *Young's Market* and its progeny. See, *e.g.,* Green App. I. This contemporaneous state practice refutes the Court's assertion, *ante*, at 21–22, 25, that the Twenty-first Amendment allowed States to discriminate against out-of-state wholesalers and retailers, but not against out-of-state products.

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. *Ante*, at 22. Most of the commentators and judges the Court cites did not adopt the construction of the Amendment the Court embraces. For example, some argued that the Twenty-first Amendment only allowed States to enact nondiscriminatory prohibition laws—*i.e.,* to allow "dry states to remain dry." See Note, 55 Yale L. J. 815, 816–817 (1946); de Ganahl, The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-First Amendment, 8 Geo. Wash. L. Rev. 819, 822–823 (1940); Friedman, Constitutional Law: State Regulation of Importation of Intoxicating Liquor Under the Twenty-First Amendment, 21 Cornell L. Q. 504, 511–512 (1936); Recent Cases, Constitutional Law—Twenty-first Amendment, 85 U. Pa. L. Rev. 322, 323 (1937); W. Hamilton, Price and Price Policies 426 (1938). The Court, by contrast, concedes that a State could have a discriminatory licensing or monopoly scheme. *Ante*, at 25–26. The Court must concede this, given that state practice shows that the Twenty-first Amendment authorized such prac-

tices, and given that the Webb-Kenyon Act allowed States to enforce their own licensing laws, even if they did not prohibit the use and consumption of liquor entirely. Others apparently defended the position that the Twenty-first Amendment did no more than prevent Congress from permitting the direct importation of liquor into a State, leaving the Constitution untouched. See *Joseph Triner Corp.* v. *Arundel*, 11 F. Supp. 145, 146–147 (Minn. 1935); *Young's Market Co.* v. *State Bd. of Equalization of Cal.*, 12 F. Supp. 140, 142 (SD Cal. 1935), rev'd, 299 U. S. 59 (1936). Still others did not state a clear view on the scope of the Twenty-first Amendment. See generally Legislation, Liquor Control, 38 Colum. L. Rev. 644 (1938); Wiser & Arledge, Does the Repeal Amendment Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislating on Intoxicating Liquors in Interstate Commerce?, 7 Geo. Wash. L. Rev. 402 (1939) (arguing that the Twenty-first Amendment did not repeal the Equal Protection Clause). 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. See *ante*, at 5 (STEVENS, J., dissenting).

The majority's reliance on the difference between discrimination against manufacturers (and therefore, their products) and discrimination against wholesalers and retailers is difficult to understand. The pre-Twenty-first Amendment "nondiscrimination" principle enshrined in this Court's negative Commerce Clause cases could not have prohibited discrimination against the producers of out-of-state goods, while permitting discrimination against out-of-state services like wholesaling and retailing. See *Lewis* v. *BT Investment Managers, Inc.,* 447 U. S. 27, 42 (1980) (invalidating state law that discriminated against

banks, bank holding companies, and trust companies with out-of-state business operations); *Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* 342 U. S. 389, 394–395 (1952) (invalidating tax that discriminated against solicitors for out-of-state-licensed businesses). Discrimination against out-of-state wholesalers and retailers also risks allowing "economic protectionism." The Court's concession that the Twenty-first Amendment allowed States to require all liquor traffic to pass through in-state wholesalers and retailers shows that States may also have direct-shipment laws that discriminate against out-of-state wineries.

III

Though the majority dismisses this Court's early Twenty-first Amendment case law, it relies on the reasoning, if not the holdings, of our more recent Twenty-first Amendment cases. *Ante*, at 23–26. But the Court's later cases do not require the result the majority reaches. Moreover, I would resolve any conflict in this Court's precedents in favor of those cases most contemporaneous with the ratification of the Twenty-first Amendment.

A

The test set forth in this Court's more recent Twenty-first Amendment cases shows that Michigan's and New York's direct-shipment laws are constitutional. In *Bacchus Imports, Ltd.* v. *Dias,* 468 U. S. 263 (1984), this Court established a standard for determining when a discriminatory state liquor regulation is permissible under the Twenty-first Amendment. At issue in *Bacchus* was a Hawaii statute that imposed a 20 percent excise tax on liquor, but exempted certain locally produced products from the tax. The Court held that the Twenty-first Amendment did not save the discriminatory tax. The Court reasoned that the Twenty-first Amendment did not permit state laws that constituted "mere economic protec-

tionism," because the Twenty-first Amendment's "central purpose . . . was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.*, at 276. The Court noted that the State did "not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledg[ed] that the purpose was 'to promote a local industry.'" *Ibid.* (quoting Brief for Appellee Dias, O. T. 1983, No. 82–1565, p. 40). The Court therefore struck down the tax, "because [it] violate[d] a central tenet of the Commerce Clause but [was] not supported by any clear concern of the Twenty-first Amendment." 468 U. S., at 276; accord, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority,* 476 U. S. 573, 584–585 (1986) ("[O]ur task . . . is to reconcile the interests protected by the" Twenty-first Amendment and the negative Commerce Clause).

Michigan's and New York's direct-shipment laws are constitutional under *Bacchus*. Allowing States to regulate the direct shipment of liquor was of "clear concern" to the framers of the Webb-Kenyon Act and the Twenty-first Amendment. *Bacchus*, *supra*, at 276. The driving force behind the passage of the Webb-Kenyon Act was a desire to reverse this Court's decisions that had precluded States from regulating the direct shipment of liquor by out-of-state interests. See *supra*, at 14–15. The laws struck down in *Scott* v. *Donald,* 165 U. S. 58 (1897), and *Vance* v. *W. A. Vandercook Co.,* 170 U. S. 438 (1898), required out-of-state manufacturers to ship liquor through the State's liquor regulation scheme—exactly what the Michigan and New York schemes do. By contrast, there is little evidence that purely protectionist tax exemptions like those at issue in *Bacchus* were of any concern to the framers of the Act and the Amendment.

Moreover, if the three-tier liquor regulation system falls within the "core concerns" of the Twenty-first Amendment,

then so do Michigan's and New York's direct-shipment laws. The same justifications for requiring wholesalers and retailers to be in-state businesses equally apply to Michigan's and New York's direct-shipment laws. For example, States require liquor to be shipped through in-state wholesalers because it is easier to regulate in-state wholesalers and retailers. State officials can better enforce their regulations by inspecting the premises and attaching the property of in-state entities; "[p]resence ensures accountability." 358 F. 3d 223, 237 (CA2 2004). It is therefore understandable that the framers of the Twenty-first Amendment and the Webb-Kenyon Act would have wanted to free States to discriminate between in-state and out-of-state wholesalers and retailers, especially in the absence of the modern technological improvements and federal enforcement mechanisms that the Court argues now make regulating liquor easier. *Ante*, at 28–29. Michigan's and New York's laws simply allow some in-state wineries to act as their own wholesalers and retailers in limited circumstances. If allowing a State to require all wholesalers and retailers to be in-state companies is a core concern of the Twenty-first Amendment, so is allowing a State to select only in-state manufacturers to ship directly to consumers, and therefore act, in effect, as their own wholesalers and retailers.

B

The Court places much weight upon the authority of *Bacchus*. *Ante*, at 24–25. This is odd, because the Court does not even mention, let alone apply, the "core concerns" test that *Bacchus* established. The Court instead *sub silentio* casts aside that test, employing otherwise-applicable negative Commerce Clause scrutiny and giving no weight to the Twenty-first Amendment and the Webb-Kenyon Act. *Ante*, at 8–12, 26–30. The Court therefore at least implicitly acknowledges the unprincipled nature of

the test *Bacchus* established and the grave departure *Bacchus* was from this Court's precedents. See 468 U. S., at 278–287 (STEVENS, J., dissenting); *James B. Beam Distilling Co.* v. *Georgia,* 501 U. S. 529, 554–557 (1991) (O'CONNOR, J., dissenting). *Bacchus* should be overruled, not fortified with a textually and historically unjustified "nondiscrimination against products" test.

Bacchus' reasoning is unpersuasive. It swept aside the weighty authority of this Court's early Twenty-first Amendment case law, see 468 U. S., at 281–282 (STEVENS, J., dissenting), because the *Bacchus* Court thought it "'an absurd oversimplification'" to conclude that "'the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause,'" *id.*, at 275 (quoting *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324, 331–332 (1964)). The Twenty-first Amendment did not impliedly repeal the Commerce Clause, but that does not justify *Bacchus*' narrowing of the Twenty-first Amendment to its "core concerns."

The Twenty-first Amendment's text has more modest effect than *Bacchus* supposed. Though its terms are broader than the Webb-Kenyon Act, the Twenty-first Amendment also parallels the Act's structure. In particular, the Twenty-first Amendment provides that any importation into a State contrary to state law violates the Constitution, just as the Webb-Kenyon Act provides that any such importation contrary to state law violates federal law. Its use of those same terms of art shows that just as the Webb-Kenyon Act repealed liquor's negative Commerce Clause immunity, the Twenty-first Amendment likewise insulates state liquor laws from negative Commerce Clause scrutiny. Authorizing States to regulate liquor importation free from negative Commerce Clause restraints is a far cry from precluding Congress from regulating in that field at all. See *Bacchus*, *supra*, at 279, n. 5 (STEVENS, J., dissenting). Moreover, *Bacchus*' concern that the Twenty-first Amendment repealed the Commerce

Clause is no excuse for ignoring the independent force of the Webb-Kenyon Act, which equally divested discriminatory state liquor laws of Commerce Clause immunity.

Stripped of *Bacchus*, the Court's holding is bereft of support in our cases. *Bacchus* is the only decision of this Court holding that the Twenty-first Amendment does not authorize the in-state regulation of imported liquor free of the negative Commerce Clause. Given the uniformity of our early case law supporting even discriminatory state laws regulating imports into States, then, Michigan's and New York's laws easily pass muster under this Court's cases.

Nevertheless, in support of *Bacchus*' holding that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," the Court cites *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority,* 476 U. S. 573 (1986), and *Healy* v. *Beer Institute,* 491 U. S. 324 (1989). *Ante*, at 24–25. At issue in those cases was the constitutionality of protectionist legislation that controlled the price of liquor in other States. *Brown-Forman*, *supra*, at 582–583; *Healy*, *supra*, at 337–338. In invalidating such a statute, *Brown-Forman* found that the Twenty-first Amendment, by its terms, gives "New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States." 476 U. S., at 585; see also *Healy*, *supra*, at 342–343 (following *Brown-Forman*'s construction). *Brown-Forman* and *Healy* are beside the point in these cases. *Brown-Forman* did not involve a facially discriminatory law. See 476 U. S., at 579. And unlike *Healy*, there is no claim here that the Michigan and New York laws do anything but regulate within their own borders, thereby interfering with the ability of other States to exercise their own Twenty-first Amendment power.

Equally inapposite are the cases the Court cites concerning state laws that violate other provisions of the Consti-

tution or Acts of Congress. *Ante*, at 23–24. Cases involving the relation between the Twenty-first Amendment and Congress' affirmative Commerce Clause power are irrelevant to whether the Twenty-first Amendment protects state power against the negative implications of the Commerce Clause. See *James B. Beam*, *supra*, at 556 (O'CONNOR, J., dissenting); *Bacchus*, *supra*, at 279, and n. 5 (STEVENS, J., dissenting). Similarly, my interpretation of the Twenty-first Amendment would not free States to regulate liquor unhampered by other constitutional restraints, like the First Amendment and the Equal Protection Clause. As this Court explained in *Craig* v. *Boren,* 429 U. S. 190, 205–207 (1976), the text and history of the Twenty-first Amendment demonstrate that it displaces liquor's negative Commerce Clause immunity, not other constitutional provisions.

IV

The Court begins its opinion by detailing the evils of state laws that restrict the direct shipment of wine. *Ante*, at 2–4. It stresses, for example, the Federal Trade Commission's opinion that allowing the direct shipment of wine would enhance consumer welfare. FTC, Possible Anticompetitive Barriers to E-Commerce: Wine 3–5 (July 2003), available at http://www.ftc.gov/os/2003/07/winereport2.pdf (as visited May 12, 2005, and available in Clerk of Court's case file). 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. See *supra*, at 7–12. 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.