HOW I STOPPED WORRYING AND LEARNED TO LOVE THE DORMANT COMMERCE CLAUSE

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During its recent term, the Supreme Court decided *Tennessee Wine & Spirit Retailers Ass'n v. Thomas*, a case pitting the Commerce Clause, or rather the Dormant Commerce Clause Doctrine ("DCCD"), against Section 2 of the Twenty-first Amendment.[1] In a 7-2 decision, the Court held that the DCCD's prohibition of state-level protectionist legislation trumped the Twenty-first Amendment's grant of seemingly plenary authority over alcohol sales.[2] The Court's opinion indicates, much to the chagrin of law students and bar examinees, that the DCCD remains an enduring part of the United States Constitution's structure.[3]

As a refresher for those a few years removed from their constitutional law class,[4] the DCCD, also known as the Negative Commerce Clause, "prevents the States from adopting protectionist measures,"[5] and the doctrine acts as a means to promote a national economy.[6] As indicated by its name, the DCCD does not come from express constitutional text, but is implied by the Constitution's delegation to Congress of the power to regulate commerce "among the several states."[7] As the Court articulated, "[I]f a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to advanc[e] a legitimate local purpose."[8] While the DCCD's roots stretch back

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[1] Tenn. Wine & Spirit Retailers Ass'n. v. Thomas, 139 S. Ct. 2449, 2457, 2476 (2019).

[2] *See id.* at 2457.

[3] *See id.* at 2460 ("But the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. . . . [A]t this point in the Court's history, no provision other than the Commerce Clause could easily do the job [of curbing state protectionism].").

[4] This includes the author.

[5] *Id.* at 2459 (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988)).

[6] *See* Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124, 1127 (2015); *see also* Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 385 n.2 (2003) (giving a general overview of the state of the Dormant Commerce Clause).

[7] *Thomas*, 139 S. Ct. at 2477 (Gorsuch, J., dissenting) ("[T]he dormant Commerce Clause doctrine cannot be found in the text of any constitutional provision but is (at best) an implication from one.").

[8] *Id.* at 2461 (internal quotations omitted) (citations omitted).

to at least 1824,[9] it has faced sustained criticism.[10] Despite these critiques, including those from sitting justices,[11] the Court has taken the position that the framers intended for the DCCD to exist and that the doctrine is a necessary prophylactic against state protectionism.[12]

On the other side of this case is the Twenty-first Amendment, which repealed the Eighteenth Amendment and Prohibition.[13] Section 2 of the amendment also permitted the states to prohibit and regulate alcohol's importation and transportation.[14] According to the majority, Section 2's language largely mirrored the language of the Webb-Kenyon Act, a pre-Prohibition law which permitted state regulation of alcohol, and the case law surrounding the Webb-Kenyon Act provides guidance for interpreting Section 2.[15] The Commerce Clause was understood to supersede Webb-Kenyon and to prevent states from imposing protectionist "police-power" laws relating to alcohol.[16] To some extent, courts have read Section 2 as granting states plenary power for regulating alcohol,[17] but more recent decisions have held that Section 2 still must yield to other constitutional provisions.[18] The disagreement over the limits of Section 2's grant of authority to the states is at the heart of *Thomas*.

In *Thomas*, a portion of Tennessee's three-tiered alcohol-distribution statutory scheme was the latest victim of the Dormant Commerce Clause.[19] A Tennessee law required individual liquor store owners seeking their initial license to be residents of Tennessee for the previous two years, and to renew the license (which expired after one year), the individuals had to "show continuous residency in the State for a period of 10 consecutive years."[20] For corporately-owned liquor stores, each shareholder, officer, and director also had to "satisfy the durational-residency requirements applicable to individuals."[21] The Tennessee Attorney General issued two opinions describing the statutory scheme as an impermissibly discriminatory restraint

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[9] *See id.* at 2459.
[10] *See id.* at 2459–60.
[11] Justices Gorsuch and Thomas dissented from the Court's decision and generally criticized the doctrine. *See id.* at 2478.
[12] *See id.* at 2460–61.
[13] U.S. CONST. amend. XXI, § 1; *Thomas*, 139 S. Ct. at 2467.
[14] U.S. CONST. amend. XXI, § 2; *Thomas*, 139 S. Ct. at 2467.
[15] *See Thomas*, 139 S. Ct. at 2467–68.
[16] *See id.*
[17] *Id.* at 2468.
[18] *Id.* at 2469 (citing cases and constitutional provisions).
[19] *See id.* at 2457.
[20] *Id.*
[21] *Thomas*, 139 S. Ct. at 2457.

on trade, and the Tennessee Alcoholic Beverage Control Board ("TABC") refused to enforce the residency requirements on new liquor license applicants.[22] The statute, while seemingly dormant itself, was axed when the Tennessee Wine and Spirits Retailers Association ("TWSRA"), an in-state trade association, sued[23] (and lost) seeking a declaration that TABC was required to enforce the Tennessee law and had to deny licenses to two non-resident license applicants.[24] The district court ruled that the provisions of the Tennessee laws were unconstitutional, and the Sixth Circuit, in a split decision, affirmed.[25]

In reaching its decision, Justice Alito's majority relied on Section 2's text, history, and precedent involving the interplay of Prohibition-era laws and the Commerce Clause, as well as its view of the Commerce Clause's overall scope. First, the Court opined that the text of Section 2 does not address, let alone permit, discriminatory regulations regarding licensing of domestic alcohol retailers.[26] Second, the Court ruled that history and the Court's precedents made clear that states retained the power to regulate alcohol for the legitimate purpose of protecting public health and welfare, but that they are not allowed to enact protectionist measures unrelated to those interests.[27] Finally, building on the second point, the Court stated that no doctrine other than the DCCD had the power to combat protectionism—a key concern of the framers.[28]

As a result of *Thomas*, the Court has developed a new Commerce Clause test for regulations invoking Section 2:

> But because of [Section] 2, we engage in a different inquiry. Recognizing that [Section] 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens,

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[22] *Id.* at 2457–58. Along the way, the Tennessee General Assembly, in enacting a statement of legislative intent, "found that protection of 'the health, safety[,] and welfare' of Tennesseans called for 'a higher degree of oversight, control[,] and accountability for individuals involved in the ownership, management[,] and control' of [liquor stores]." *Id.* at 2458. Still, the state's attorney general opined that the statutory scheme was impermissibly discriminatory, and TABC refused to enforce the law. *Id.* at 2458.

[23] TWSRA originally sued in state court, but the case was removed to the United States District Court for the Middle District of Tennessee. *Id.*

[24] *See id.*

[25] *Thomas*, 139 S. Ct. at 2458.

[26] *See id.* at 2471.

[27] *See id.* at 2474.

[28] *Id.* at 2460.

> we ask *whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground*. Section 2 gives the States regulatory authority that they would not otherwise enjoy, but as we pointed out in *Granholm*, "mere speculation" or "unsupported assertions" are insufficient to sustain a law that would otherwise violate the Commerce Clause. *Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2.*[29]

Justice Gorsuch's dissent, joined by Justice Thomas, took a staunchly different view. The dissent, too, relied on the same sources as the majority—the text of Section 2, historical practice, and judicial precedent—to make its case.[30] Justice Gorsuch wrote, "The point of [Section] 2 was to allow each State the opportunity to assess for itself the costs and benefits of free trade in alcohol."[31] The dissent also argued that historical precedent supported its position, in a stark contrast to the majority's reading of the cases.[32] Specifically, the dissent pointed to the 2005 decision in *Granholm v. Heald* as being enough to save Tennessee's residency requirement because *Granholm* upheld states' authority to require alcohol to be "purchased from a licensed in-state wholesaler."[33] Additionally, the dissent countered the majority's textual interpretation by taking the position that the residency-requirement law necessarily applied to the predicate acts of importation and transportation.[34]

The *Thomas* decision evokes the cynical observation that "History is written by the winners."[35] This maxim is true in this case because the seven-justice majority adopted its version as the correct version of history when deciding whether precedent permitted the DCCD to trump Section 2. The Court went to a great deal of effort to outline the history of the DCCD, its

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[29] *Id.* at 2474 (internal citation omitted) (emphasis added).

[30] *Id.* at 2480 (Gorsuch, J., dissenting) ("Straying from the text, state practice, and early precedent, and leaning instead on the [Twenty-first] Amendment's famously sparse legislative history, the Court says it can find no evidence that [Section] 2 was *intended* to authorize 'protectionist' state laws.").

[31] *Id.* at 2481.

[32] *See generally Thomas*, 139 S. Ct. at 2481–83 (dissent's discussion of historical development).

[33] *Id.* at 2483 (internal quotations omitted) (quoting Granholm v. Heald, 544 U.S. 460, 489 (2005)).

[34] *See id.* at 2477 n.1 (Gorsuch, J., dissenting).

[35] George Orwell, *As I Please*, TRIBUNE (Feb. 4, 1944), http://galileo.phys.virginia.edu/classes/inv_inn.usm/orwell3.html.

roots in pre-Prohibition alcohol statutes, and the fallout from Prohibition's demise under the Twenty-first Amendment.[36] While admitting that some of the earliest cases interpreting Section 2 "seemed to feint" in the direction of granting states broad authority in the regulation of alcohol,[37] the Court took the position that "the Court's modern [Section] 2 precedents have repeatedly rejected" the view "that [Section] 2 shields all state alcohol regulation—including discriminatory laws—from any application of dormant Commerce Clause doctrine."[38] Again, this overtly rejected the dissent's view of how historical precedent actually developed,[39] and because seven is greater than two, the majority's view of history—and the power of the DCCD—prevails.

The majority also discussed the DCCD's practical value in the constitutional scheme. The Court essentially took the position that the Commerce Clause is the only provision of the Constitution that can curb overtly protectionist measures, and other provisions such as the Import-Export Clause (Art. 1, § 10, cl. 2) or the Privileges and Immunities Clause (Art. IV, § 2) were incapable of providing the necessary support.[40] Specifically, the Court cited to an article by Professor Brannon Denning, which addressed the shortcomings of the Privileges and Immunities Clause to provide the same protections as the DCCD.[41] Professor Denning's article highlighted four specific gaps of the Privileges and Immunities Clause that the DCCD closed: (1) the DCCD protects the rights of corporations,[42] (2) the DCCD allows a market-participant exception,[43] (3) the DCCD allows for congressional redelegation of authority,[44] and (4) the DCCD combats underprotection of interstate commerce.[45] In light of these shortcomings, the Dormant Commerce Clause's predominance and prohibitions against protectionism are necessary.[46] Denning and the Court both agree that the framers intended for the Commerce Clause to preserve federal control of

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[36] *See Thomas*, 139 S. Ct. at 2459–61, 2463–70.
[37] *Id.* at 2468.
[38] *Id.* at 2469.
[39] *Id.* at 2481 (Gorsuch, J., dissenting).
[40] *Id.* at 2460–61.
[41] *Id.* at 2461 (citing Denning, *supra* note 6, at 393–97).
[42] Denning, *supra* note 6, at 394–96.
[43] *Id.* at 396–97.
[44] *Id.* at 397–99.
[45] *Id.* at 399–404.
[46] *See Thomas*, 139 S. Ct. at 2461, 2461 n.4. However, the dissent would be quick to point out that Congress's power to redelegate has already taken effect because the Webb-Kenyon Act is still in place and had been previously approved to provide states broad authority to regulate alcohol sales and distribution. *See id.* at 2477–79 (Gorsuch, J., dissenting).

interstate commerce, though it is up for debate whether the framers intended this much control.[47]

The majority did "win" the final battle over the text of the Twenty-first Amendment. The dissent argued that the text of the article "embodied a classically federal compromise: Nationwide prohibition ended, but States gained broad discretion to calibrate alcohol regulations to local preferences."[48] Moreover, Section 2's language, in light of its understood meaning at the time it was adopted (in light of Webb-Kenyon) would have meant that Section 2 created an exception to normal Commerce Clause law.[49] However, the majority claimed that Section 2's text, under a literal reading, does not cover "laws restricting the licensing of domestic retail alcohol stores."[50]

The Court's rationale may hold weight with some textualists.[51] Section 2 specifically enables states to pass laws governing the "transportation or importation" of alcohol.[52] A primary tenet of textualism is that the text addresses and says what it says and then omits what it omits.[53] Thus, if Section 2 does not address regulations that do not relate to transportation or importation—*e.g.*, licensing of retailers inside the state—then Section 2 and its prior interpretations should provide no guidance for deciding the issue in *Thomas*. Textualism also recognizes deference to *stare decisis*,[54] and the Court's analysis of its own precedent may justify its take on Section 2's text. Additionally, if Section 2's text lacks any reference to in-state licensing, then concerns about the Twenty-first Amendment's

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[47] *See id.* at 2459–60; Denning, *supra* note 6, at 400–04 (discussing the Privileges & Immunities Clause's shortcomings in protecting interstate commerce as intended); *see also id.* at 413, 413 n.136 (discussing critics' rejection of the scope of the DCCD's power).
[48] *See Thomas*, 139 S. Ct. at 2477 (Gorsuch, J., dissenting).
[49] *See id.* at 2478.
[50] *Id.* at 2471.
[51] The Court's rationale must have been convincing to Justice Kavanaugh, whose preference for textualism has been noted. Alex Swoyer, *Brett Kavanaugh Best Described as 'Originalist,' Say Legal Scholars*, WASH. TIMES (Sept. 3, 2018), https://www.washingtontimes.com/news/2018/sep/3/brett-kavanaugh-best-described-as-originalist-say-/. However, Justice Gorsuch and Justice Thomas, also noted textualists, rejected this view because the commerce involved was inherently interstate. *See Thomas*, 139 S. Ct. at 2477; Elizabeth Slattery & Tiffany Bates, *Neil Gorsuch Just Finished Year 1 on the Supreme Court. Here's How He's Making His Mark*, THE HERITAGE FOUND. (Apr. 11, 2018), https://www.heritage.org/courts/commentary/neil-gorsuch-just-finished-year-1-the-supreme-court-heres-how-hes-making-his-mark.
[52] U.S. CONST. amend. XXI, § 2.
[53] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (2012) (Omitted-case canon).
[54] *Id.* at 41.

potential supremacy over the earlier-adopted constitutional provisions are assuaged.[55] Following the majority's position on Section 2's textual gap to its logical conclusion, the Court did not necessarily have to create a separate test for applying the DCCD to state alcohol regulations[56] and could have applied standard DCCD analysis.

Pick your poison and, at least according to the seven justices in the majority, the Commerce Clause reigns supreme over Section 2 of the Twenty-first Amendment. While the Court addressed textual considerations and the practicality of the DCCD in protecting interstate commerce, it appeared to be the Court's historical viewpoint that carried the day. The Court rejected interpretations from opinions close in time with Section 2's adoption, and instead relied on "more modern" opinions to decide that states are still prohibited from adopting discriminatory laws—even over alcohol under a scheme that may have been adopted to expressly permit the laws. Simply put, the majority won, and now it gets to write history—and the law.

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[55] *See Thomas*, 139 S. Ct. at 2462 (discussing the argument that the Twenty-first Amendment carries supremacy because of its ratification after earlier provisions); SCALIA & GARNER, *supra* note 58, at 327–28.

[56] *See Thomas*, 139 S. Ct. at 2474 ("But because of [Section] 2, we engage in a different inquiry.").