

1	IN THE SUPREME COURT OF THE UNITED STATES		
2	- - - - -x		
3	JENNIFER M. GRANHOLM,	:	
4	GOVERNOR OF MICHIGAN, et al.,	:	
5	Petitioners,	:	
6	v.	:	No. 03-1116
7	ELEANOR HEALD, et al.;	:	
8	MICHIGAN BEER & WINE	:	
9	WHOLESALE ASSOCIATION,	:	
10	Petitioners,	:	
11	v.	:	No. 03-1120
12	ELEANOR HEALD, et al.;	:	
13		:	
14	AND	:	
15		:	
16	JUANITA SWEDENBURG, et al.,	:	
17	Petitioners,	:	
18	v.	:	No. 03-1274
19	EDWARD D. KELLY,	:	
20	CHAIRMAN, NEW YORK DIVISION	:	
21	OF ALCOHOLIC BEVERAGE CONTROL,	:	
22	STATE LIQUOR AUTHORITY, et al.	:	
23	- - - - -x		
24	Washington, D.C.		
25	Tuesday, November 7, 2004		

1 The above-entitled matter came on for oral
2 argument before the Supreme Court of the United States at
3 10:07 a.m.

4

5 APPEARANCES:

6 CLINT BOLICK, ESQ., Washington, D.C.; on behalf of the
7 Petitioners, Jennifer M. Granholm, et al., in
8 03-1274.

9 KATHLEEN SULLIVAN, ESQ., Stanford, California; on behalf
10 of the Respondents, Eleanor Heald, et al., in 03-1116
11 and 03-1120.

12 THOMAS L. CASEY, ESQ., Solicitor General, Lansing,
13 Michigan, on behalf of the Petitioners, Eleanor
14 Heald, et al., in 03-1116 and 03-1120.

15 CAITLIN HALLIGAN, ESQ., Solicitor General, New York, N.Y.;
16 on behalf of the Respondents, Edward D. Kelly, et
17 al., in 03-1274.

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P R O C E E D I N G S

[10:07 a.m.]

JUSTICE STEVENS: We will now hear argument in
Granholm against Heald and two related cases.

Mr. Bolick.

ORAL ARGUMENT OF CLINT BOLICK

ON BEHALF OF PETITIONERS IN 03-1274

MR. BOLICK: Justice Stevens, and may it please
the Court:

For 124 years, as state power over alcohol has
ebbed and flowed, one principle has remained virtually
constant, that states may regulate alcohol by one set of
rules, not by two. New York and Michigan consigned out-
of-state wine, and only out-of-state wine, to the three-
tier system for closing the market to thousands of small
family-run wineries and their customers for the benefit of
a liquor distributor oligopoly.

Discrimination is the core concern of the
Commerce Clause, and it sends a powerful signal that the
state is engaged, not in legitimate regulation, but in
economic protectionism. The states and the liquor
distributors make a sweeping argument that this Court has
consistently rejected, that the Twenty-First Amendment
creates plenary state authority.

JUSTICE KENNEDY: Well, under your view, could

1 the three-tier system, itself, be challenged by a New
2 Jersey wholesaler wanting to sell in New York, or a New
3 York wholesaler wanting to sell in New Jersey?

4 MR. BOLICK: Yes, Justice Kennedy.

5 JUSTICE KENNEDY: So, under your view, the whole
6 three-tier system has to go down?

7 MR. BOLICK: No, Justice Kennedy. So long as
8 the state does not discriminate against out-of-state
9 entities, it is free to, as this Court --

10 JUSTICE KENNEDY: Well, under my hypothetical.
11 I don't know exactly how -- the way it works, you have to
12 be a New York wholesaler to sell to a New York retailer.
13 Under your view, a New Jersey wholesaler could sell to a
14 New York retailer.

15 MR. BOLICK: That is -- or a challenge, as you
16 ask the question, Justice Kennedy, could be mounted to
17 that, under the same theory that we're advocating here.
18 The state may have a different set of defenses that it
19 doesn't have here. But --

20 JUSTICE KENNEDY: But so far as -- the rationale
21 is the same.

22 MR. BOLICK: The --

23 JUSTICE KENNEDY: It seems to me that, under
24 your rationale, that that in-state licensing system has to
25 fall if there's a New Jersey wholesaler.

1 MR. BOLICK: It has to pass constitutional
2 muster.

3 JUSTICE BREYER: And when you say there is no
4 precedent -- I mean, I think a much more modest claim than
5 you're making, the claim simply that a state cannot
6 discriminate against out-of-state liquor -- i.e., the
7 physical liquid -- which is really more modest and keeps
8 the three-tier effect -- now, your -- that claim, that
9 they couldn't do that, was really what was advanced in
10 Young's Market. I read the briefs in that case. The
11 briefs presented that Court -- you could have written
12 those briefs. And the difficulty for you is, it
13 articulated that more modest version very clearly, made a
14 tremendously strong case, that was not forbidden by
15 Section 2 of the Twenty-First Amendment. And this Court
16 squarely rejected it.

17 MR. BOLICK: Your Honor, Young's Market -- the
18 result in Young's Market was correct --

19 JUSTICE BREYER: The result, I understand, you
20 could put on the basis of there being no discrimination.

21 MR. BOLICK: Exactly.

22 JUSTICE BREYER: Reading Justice Brandeis'
23 opinion, I can't believe that that was the basis for his
24 result.

25 MR. BOLICK: The -- the cases that followed

1 Young's Market and purported to apply its reasoning took a
2 very sweeping view of the Twenty-First Amendment. The
3 Court began trenching on that very broad view immediately
4 in 1939.

5 JUSTICE GINSBURG: But why wasn't that broad
6 view appropriate, given the difference between the
7 language of the Wilson Act, which has had the words "to
8 the same extent and in the same manner," and the Webb-
9 Kenyon Act, which became the second section of the Twenty-
10 First Amendment, leaves out "to the same extent and the
11 same manner." It just says that "alcoholic beverage so
12 that the state can bar importation for delivery of, or use
13 therein, in violation of laws thereof." It doesn't say
14 "nondiscriminatory laws."

15 MR. BOLICK: Yes, Justice Ginsburg, the -- there
16 was no need for the Webb-Kenyon Act to repeat the language
17 of the Wilson Act. The Wilson Act dealt with the question
18 of discrimination. The Webb-Kenyon Act dealt with
19 questions that arose subsequent to the enactment of the
20 Wilson Act. And as this Court has held in Craig versus --

21 JUSTICE GINSBURG: Well, maybe that's the Act,
22 but when they put it in the Constitution, why didn't they
23 adopt the language, "to the same extent and in the same
24 manner"?

25 MR. BOLICK: I think the reason for that is

1 because it was so obvious that the state could not, prior
2 to prohibition, discriminate. It was not only embodied in
3 the Wilson Act, but it was embodied in at least three
4 cases of this Court.

5 JUSTICE SOUTER: But it was not obvious to the
6 person who at least drafted the Webb-Kenyon in the first
7 instance, because as I -- as I understand it, there was an
8 anti-discrimination provision, and that was then dropped.
9 And do we know why it was dropped?

10 MR. BOLICK: It was dropped essentially because
11 it was redundant.

12 JUSTICE SOUTER: Well, but is that a -- is that
13 on a legislative history record somewhere? Do we know
14 that?

15 MR. BOLICK: No, Justice Souter, that is not
16 expressly on the record. What is on the record, however,
17 is that the Court was aiming -- or, excuse me, the
18 Congress was aiming at specific Supreme Court decisions.
19 There -- and it -- and the one case that was clearest on
20 point on discrimination was Scott versus Donald, applying
21 both the Commerce Clause and the Wilson Act to forbid
22 discrimination. And there was -- there is nothing in the
23 legislative history to indicate that Congress intended to
24 overturn that decision. And as this Court has held in
25 Craig versus Boren, and elsewhere, by enacting the Twenty-

1 First Amendment, Congress clearly intended to incorporate
2 both the Wilson Act and the Webb-Kenyon Act and to restore
3 to the states the police power that they had before
4 prohibition. Emphatically, discrimination was not a part
5 of that police power. It was a very accepted context.

6 So, too, is it today. When the -- when the
7 liquor distributors in the states asked this Court to
8 overturn the Bacchus decision and to adopt a plenary view
9 of the Twenty-First Amendment, it is not just asking you
10 to overturn the Bacchus decision; it is asking you to
11 overturn cases starting with the Midcal decision in 1980,
12 the more recent Healy decision, and others, that have held
13 that the core purposes of the Commerce Clause and the
14 Twenty-First Amendment must be harmonized, that the
15 Commerce Clause was never intended to be obliterated.

16 And when you look at the core values of the two
17 clauses, they do not clash. The core purpose of the
18 Commerce Clause is nondiscrimination. The core purpose of
19 the Twenty-First Amendment is temperance. And if you have
20 a discriminatory statute, it sends a very strong signal
21 that, in fact --

22 JUSTICE KENNEDY: Well, it's not only
23 temperance, but it's control over revenues.

24 Can you tell me, is the -- is there a New York
25 State excise tax on alcohol?

1 accountability concerns that the state may raise.

2 JUSTICE SOUTER: What --

3 MR. BOLICK: Under --

4 JUSTICE SOUTER: -- what do you make of the
5 argument that there's no practical way, except at great
6 expense, to audit compliance if they're out of state?

7 MR. BOLICK: Justice Souter, this is one of the
8 most regulated industries in America, of course, and the
9 model legislation that has been adopted by a number of
10 states includes record-keeping provisions, it requires
11 that wineries --

12 JUSTICE SOUTER: Well, I will grant that's
13 required, but the argument, as I understand it, is, to
14 find out whether they're doing what they are required to
15 do, you've got to drop in unexpectedly and make an audit.
16 And that's one thing in the state; it's another thing
17 across the country.

18 MR. BOLICK: No, it's important to recognize,
19 Justice Souter, that under the three-tier system, which is
20 -- which is where the states of New York and Michigan are
21 saying that the other state wineries have to go -- the
22 three-tier system does not do that. The states already
23 rely on the Federal Government and the other states to
24 police the wineries.

25 JUSTICE SOUTER: So you're --

1 MR. BOLICK: Should they --

2 JUSTICE SOUTER: -- saying they are not dropping
3 in to local wineries to do audits, in fact?

4 MR. BOLICK: They may, in some instances. It is
5 primarily a federal -- a federal activity.

6 JUSTICE SOUTER: What do we have in the record
7 on that?

8 MR. BOLICK: There is not -- there is not a
9 great deal on the record, either way, on that, Your Honor.

10 JUSTICE SCALIA: I don't know what you mean by
11 "it's primarily a federal activity," that the Federal
12 Government polices compliance with the state tax laws?

13 MR. BOLICK: That's correct, Your Honor. Under
14 the --

15 JUSTICE SCALIA: How does that occur?

16 MR. BOLICK: -- under the Federal Alcohol
17 Administration Act, any violation of a state law is a
18 federal offense and it is a violation -- so basically,
19 whether it's under-age access, whether it's taxation,
20 whatever --

21 JUSTICE KENNEDY: But does the federal authority
22 make a routine audit to see that the state tax has been
23 paid?

24 MR. BOLICK: Basically, every single time that
25 there is a transaction, it is recorded by the U.S. Trade

1 and Tax Bureau.

2 And if it may please the Court, I'd like to
3 reserve the rest of my time --

4 JUSTICE STEVENS: Yes.

5 MR. BOLICK: -- for rebuttal.

6 JUSTICE GINSBURG: I have just one further
7 question. Justice Kennedy asked you, "What about the
8 wholesaler? What about the retailer?" What about
9 alcoholic beverages other than wine?

10 MR. BOLICK: Justice Ginsburg, very important
11 question. We are here today because a majority of states
12 have chosen to regulate wine distinctively. And a handful
13 of them, including Michigan and New York, have chosen to
14 do so in a discriminatory manner. So long as states do
15 not discriminate, in terms of direct shipping with regard
16 to other alcohol -- and they don't; there's a flat
17 prohibition across the United States, in terms of beer and
18 other types of spirits -- we will not be here, because
19 there would be no discrimination; there would be a single
20 rule, and that rule would be, no one gets to do it.

21 JUSTICE GINSBURG: Thank you.

22 JUSTICE STEVENS: Ms. Sullivan?

23 ORAL ARGUMENT OF KATHLEEN SULLIVAN

24 ON BEHALF OF RESPONDENTS IN 03-1116 AND 03-1120

25 MS. SULLIVAN: Justice Stevens, and may it

1 please the Court:

2 Nothing in today's case, Justice Kennedy,
3 requires you to take on the three-tier system, for the
4 issue that is presented here is a very narrow one.

5 JUSTICE KENNEDY: Well, it's very narrow, but
6 the rationale is sweeping, and that's why I asked. I just
7 don't know if the in-state licensure system, which is the
8 cornerstone of the three-tier distribution system, can
9 survive under your rationale, assuming the hypothetical
10 where a New Jersey wholesaler has all of the -- you know,
11 the physical facilities and so forth that the New York
12 wholesaler does.

13 MS. SULLIVAN: All that we ask in this case,
14 Justice Kennedy, is that you strike down Michigan and New
15 York's decision to apply the three-tier system to everyone
16 except their own in-state --

17 JUSTICE KENNEDY: Well, I know, but what --

18 MS. SULLIVAN: -- producers of wine --

19 JUSTICE KENNEDY: -- but you're -- all you're
20 asking is for a rationale that's sweeping.

21 MS. SULLIVAN: Justice Kennedy, in our case, we
22 want to suggest that it is -- just as in Healy and Bacchus
23 -- that a law that discriminates in favor of in-state
24 producers and against out-of-state producers loses its
25 immunity afforded by the Twenty-First Amendment. As

1 Justice Scalia said in concurrence in Healy, a liquor
2 law's discriminatory character eliminates the immunity
3 afforded by the Twenty-First Amendment.

4 It's really the state's position, aided by their
5 wholesaler allies, that it is the sweeping one. Their
6 position is that every state law that regulates the
7 importation of liquor is, per se, valid if it has any
8 conceivable rational connection to a state purpose. So,
9 for example, if Michigan wanted to simply bar all
10 California wines, facially exclude California wines,
11 saying, "There are too many of them, it interferes with" -
12 -

13 JUSTICE GINSBURG: Your answer to Justice
14 Kennedy, I glean from what you said, that if New York took
15 away the direct-sale privilege that in-state wineries get,
16 then out-of-state wineries wouldn't be any better off, but
17 they'd have nothing to complain about.

18 MS. SULLIVAN: That's exactly correct, Justice
19 Ginsburg. As you've said in the context of gender
20 discrimination, you can cure an equal-protection problem
21 by leveling up or leveling down. In this case, we would
22 suggest that the principle of free trade that was the
23 reason, the principal reason, for the framing of the
24 Constitution and has been reflected in over a century of
25 dormant Commerce Clause jurisprudence, suggests that you

1 should -- the remedy should be to open the markets to out-
2 of-state producers --

3 JUSTICE GINSBURG: But that's a decision for the
4 state to make. I mean, the -- what --

5 MS. SULLIVAN: Correct, Your Honor.

6 JUSTICE GINSBURG: Not for this Court.

7 MS. SULLIVAN: That's correct, Your Honor.

8 JUSTICE STEVENS: You don't deny that a state --
9 that Michigan could bar all out-of-state wine -- not just
10 -- not just California, but they could bar all out-of-
11 state wines?

12 MS. SULLIVAN: That's correct, Justice Stevens,
13 if it were in aid, and only if it were in aid, of the
14 states -- and necessary to serve the state's internal
15 purposes.

16 JUSTICE STEVENS: The only reason being given to
17 give a monopoly to local producers, that's their --

18 MS. SULLIVAN: That's --

19 JUSTICE STEVENS: -- whole purpose. But could
20 they do that?

21 MS. SULLIVAN: The state can have a monopoly if
22 it's, itself, a market participant. What the state may --

23 JUSTICE STEVENS: No, I'm saying just to look at
24 the -- just limit to the market to -- the only market
25 participants would be Michigan wine --

1 MS. SULLIVAN: Private --

2 JUSTICE STEVENS: -- wineries.

3 MS. SULLIVAN: Justice Stevens, a state may not

4 discriminate against out-of-staters for the sole purpose

5 of economic protectionism.

6 JUSTICE BREYER: Well, I'm trying to think of

7 what Brandeis could have been thinking.

8 MS. SULLIVAN: In Young's Market.

9 JUSTICE BREYER: Yes, that's right. And this is

10 a reconstruction, because I have no doubt, and you have no

11 doubt, that Section 2 was meant to end that part of the

12 dormant Commerce Clause that would come under the name of

13 original package doctrine --

14 MS. SULLIVAN: Correct.

15 JUSTICE BREYER: -- which meant that the foreign

16 liquor has to be treated better than domestic liquor.

17 Now, he's thinking, "Why is that? What is that package

18 doctrine?" And the answer is, the dormant Commerce Clause

19 -- it's part of the dormant Commerce Clause -- the dormant

20 Commerce Clause is the implication from the existence of

21 the commerce power in the Constitution. So if we have an

22 amendment that says "that aspect of the dormant Commerce

23 Clause doesn't apply," that means the dormant Commerce

24 Clause doesn't apply, because you can't divide the dormant

25 Commerce Clause into six different parts, or even two.

1 MS. SULLIVAN: But Justice --

2 JUSTICE BREYER: Now, maybe -- I think that's

3 how he's reasoning.

4 MS. SULLIVAN: But --

5 JUSTICE BREYER: And if he is, and even if he

6 isn't, why isn't that right?

7 MS. SULLIVAN: Justice Breyer, the Young's

8 Market language permitting state discrimination is,

9 indeed, broad, but it's been superceded by 40 years of

10 this Court's jurisprudence harmonizing the Twenty-First

11 Amendment with the rest of the Constitution. Remember,

12 Justice Brandeis, in Young's Market, didn't even think the

13 Equal Protection Clause applied to liquor imports, a

14 position that's inconsistent with Craig against Boren.

15 And nobody would suggest today that equal protection

16 permits a state to import only from male-owned wineries or

17 only import wine from white-owned wineries.

18 So there -- the 40 years of jurisprudence --

19 JUSTICE STEVENS: But Craig against Boren was --

20 MS. SULLIVAN: -- has been --

21 JUSTICE STEVENS: -- had nothing to do with the

22 Commerce Clause.

23 MS. SULLIVAN: Correct, Your Honor, but if -- if

24 there were a law -- the states are claiming that any law

25 governing --

1 JUSTICE STEVENS: Nothing to do with
2 importation, either.

3 MS. SULLIVAN: But the dormant Commerce Clause
4 reflects a fundamental structural principle that is every
5 bit as much a part of the Constitution as the Equal
6 Protection Clause upheld in Craig v. Boren. Indeed this
7 Court, in cases from McCulloch to the Eleventh Amendment
8 cases and state sovereignty cases, has recognized that a
9 principle of the Constitution is no less fundamental
10 because it is a structural implication of the text. So
11 the dormant Commerce Clause stands on the same footing as
12 the affirmative power of Congress and on -- it's the same
13 footing as the Equal Protection Clause at issue --

14 JUSTICE STEVENS: Do you think Congress --

15 MS. SULLIVAN: -- in Craig v. Boren --

16 JUSTICE STEVENS: -- could enact a statute
17 authorizing the states to do just what they've done here?

18 MS. SULLIVAN: Absolutely, but it has not. And
19 the Wilson Act -- to go back to Justice Souter's question
20 and Justice Ginsburg's question -- Congress could
21 authorize it as it has done, for example, in the McCarran-
22 Ferguson Act, allowing the states to discriminate against
23 out-of-state industry with respect to the industry of
24 insurance. It has not done so here. Webb-Kenyon did not
25 authorize discrimination, and the Wilson Act forbade

1 discrimination for just -- reasons Justice Ginsburg
2 described. It said you may regulate imports of liquor in
3 the same manner as local liquor laws. And, of course, the
4 purpose of Section 2 was to allow to the dry states to
5 keep dry by preventing all those original packages from
6 piling up in the railway stations and being open to
7 bootleggers throughout the state, undermining the dry
8 policies of the state. Wilson forbade discrimination.
9 Web Kenyan didn't authorize it.

10 And in Congress' most recent articulation of its
11 view of the harmony between the Twenty-First Amendment and
12 the rest of the Constitution, the Twenty-First Amendment
13 Enforcement Act, passed in 2000, enacted in 2000, Congress
14 has a rules-of-construction section that says, "We view
15 any state plea to the federal courts to enforce their laws
16 as reflecting the jurisprudence of this court." And, in
17 fact, floor debate on that rules-of-construction section
18 reflected allusions to Bacchus, Healy, and the other cases
19 that said dormant commerce -- the negative implications of
20 the Commerce Clause, no less than the Equal Protection
21 Clause or the Due Process Clause or the Establishment
22 Clause, constrain the states in their regulation of
23 importation of liquor.

24 So with all respect to Justice Brandeis, Justice
25 Breyer, the Young's Market statements about discrimination

1 have been superceded.

2 What New York and Michigan have done here is say
3 that one set of exceptions apply only to in-state
4 producers, just as Connecticut, in Healy, said, "If you
5 just sell beer within our state, you don't have to face
6 price ceilings that you have to face if you do business
7 over in Massachusetts or Rhode Island." Just as in
8 Bacchus, the -- you struck down a decision -- an excise
9 tax exemption that said, "If you're an importer of liquor,
10 you have to pay an excise tax, but if you're a local
11 producer of locally produced wine and spirits, you get out
12 of that restriction."

13 JUSTICE SOUTER: Okay, we've got one difference
14 from Bacchus, because the claim that's being made here,
15 which I gather was not made, or made seriously, in
16 Bacchus, is there really is a need for differential
17 treatment for purposes of enforcement. Go back to the
18 enforcement of the tax law.

19 MS. SULLIVAN: Justice --

20 JUSTICE SOUTER: How are we supposed -- what
21 standard are we supposed to use to judge that argument?
22 And, by that standard, how good is the argument?

23 MS. SULLIVAN: Justice Souter, we believe the
24 standard should be strict scrutiny, though there must be a
25 necessity to serve --

1 JUSTICE SOUTER: Because --

2 MS. SULLIVAN: -- a legitimate --

3 JUSTICE SOUTER: -- it's facial discrimination.

4 MS. SULLIVAN: Because it's facial

5 discrimination. It's absolutely undisputed. Michigan --

6 in fact, Michigan state concedes that they have flatly

7 banned out-of-state wineries from shipping directly to

8 consumers. There's no question that this is facially

9 discriminatory. But even if the standard were a more

10 deferential one in which all the state needed to show was

11 a reasonable need for discrimination, it can't come close

12 to doing that here. Neither Michigan nor New York has

13 shown that the facial discrimination here is necessary to

14 protect minors or to protect the collection of taxes.

15 Let's start with minors. The Michigan claim

16 that it's protecting against under-18 sales is belied by

17 the fact that Michigan is allowing 40 Michigan wineries

18 and, at last count, 7500 Michigan retailers to deliver

19 directly to consumers. The way to protect my -- so just

20 as in Craig v. Boren, the exception for young women to

21 drink 3.2 beer, as opposed to young men, belied the

22 state's interest in temperance. So the pattern of

23 exceptions here that Michigan has created belies any

24 notion that it's protecting under-18-year-olds from

25 drinking. And, of course --

1 JUSTICE SOUTER: But what about audits for
2 revenue --

3 MS. SULLIVAN: On revenue, the nondiscriminatory
4 means that's available to the state that Michigan and New
5 York have not shown any reason to reject -- 26 states have
6 adopted some version of this -- is to require an out-of-
7 state winery to get a permit. And that's a -- Justice
8 Breyer, one thing that's still left of Brandeis. You can
9 require a permit from an out-of-state winery, which would
10 be unusual to acquire from widgets or milk. But you can
11 require a permit, and, as a condition of the permit,
12 Justice Souter. The out-of-state winery has to agree to
13 submit to the state's jurisdiction, to submit to the
14 state's tax jurisdiction.

15 And, Justice Kennedy, whether or not Quill would
16 permit taxation if you were simply sending by common
17 carrier, our clients want to -- want to pay taxes, want to
18 sign up for permits, want to play on a --

19 JUSTICE KENNEDY: Well --

20 MS. SULLIVAN: -- level playing field --

21 JUSTICE KENNEDY: -- well, they do today, I'm
22 sure, but --

23 [Laughter.]

24 MS. SULLIVAN: But, Justice Souter, to -- look
25 at the experience --

1 JUSTICE SOUTER: They -- you say they don't want
2 to go to California to do an audit.

3 MS. SULLIVAN: They certainly don't, Justice
4 Souter, but New Hampshire is a state that has actually --
5 your own state is a state that has on its Web site a set
6 of out-of-state wineries. It requires that they keep and
7 supply sales records on a monthly basis, that they keep
8 those records for three years --

9 JUSTICE SOUTER: Maybe we're getting ripped off.

10 MS. SULLIVAN: I --

11 [Laughter.]

12 MS. SULLIVAN: -- think New Hampshire's done
13 very well collecting taxes from out-of-state producers,
14 Justice Souter. It's a leader --

15 JUSTICE KENNEDY: Ms. Sullivan --

16 MS. SULLIVAN: -- in the field.

17 JUSTICE KENNEDY: -- may I -- may I -- I just
18 want to clarify one point. It was just -- the question
19 Justice Stevens asked. It's your position that if
20 Michigan allows Michigan wines to be sold and possessed
21 and consumed, that it must also allow out-of-state wine to
22 be sold, possessed, and consumed. Would --

23 MS. SULLIVAN: That's correct.

24 JUSTICE KENNEDY: That is your --

25 MS. SULLIVAN: That's correct, Justice Kennedy.

1 But to go back to the physical-presence
2 question, Justice Souter, Michigan is not now -- Michigan
3 officials are not now traipsing up to the upper peninsula
4 and all around the state to inspect wineries. The record
5 is clear on that. What Michigan does is require that
6 wineries in Michigan send samples and records to their
7 offices. And the Internet actually, if anything -- the
8 states say that the Internet increases the danger, but the
9 Internet also increases, in parallel, the power of the
10 states to police out-of-state wineries without an in-state
11 presence. Just as, Justice Stevens, the Internet may make
12 every speaker with a PC a town crier, as you said --

13 JUSTICE SOUTER: Could --

14 MS. SULLIVAN: -- in Reno versus ACLU --

15 JUSTICE SOUTER: -- could a state --

16 MS. SULLIVAN: -- so it makes every interstate
17 --

18 JUSTICE SOUTER: -- could a state require an
19 out-of-state winery to keep its books online, subject to a
20 password, so that, with a password, they could go in and
21 audit the books across the country, by wire?

22 MS. SULLIVAN: Yes, Justice Souter, if it were
23 part of a -- an agreement to a permit that the -- that the
24 out-of-state winery is willing to make, then there's no
25 extraterritorial regulation there, that would be just

1 fine. So, yes, the state can, through Internet, so to
2 speak, -- Internet monitoring, through virtual monitoring
3 -- do all the work it needs to do to make sure that the
4 out-of-state winery is paying taxes.

5 And, by the way, Michigan does not collect
6 taxes, Justice Kennedy, through the distributors.
7 Michigan collects taxes from the wineries, whether they're
8 in-state or whether they're out-of-state wine shippers.
9 So Michigan can give no justification for why out-of-state
10 wineries have to go through the distributors for tax
11 purposes. They're not using the distributors as their
12 tax-collection agents now.

13 JUSTICE KENNEDY: Commerce Clause, in effect,
14 protects consumers in states from entrenched business
15 interests that want to have protectionism, and you're --
16 you object to that and invoke the Commerce Clause to do
17 it. Under that rationale, aren't all the California
18 reciprocity laws invalid, as well?

19 MS. SULLIVAN: Justice Kennedy, reciprocity laws
20 -- yet -- possibly. They may be a necessary requirement
21 now that so many states are closed to states. They may be
22 a necessary mechanism for some states trying to get wines
23 to market in the way that the framers envisaged. It may
24 be a necessary, for now, to get into closed states. In a
25 world that we hope that you create, in which

1 discrimination is not allowed, they would be completely
2 unnecessary and possibly unconstitutional.

3 But to return to the key point here, Michigan
4 and New York may not facially discriminate in favor of
5 their own producers unless they can show that reasonable
6 nondiscriminatory alternatives are unavailable. And here,
7 Justice Souter, on any standard of heightened scrutiny,
8 they have not come close to making that kind of showing,
9 because there are all these other means -- means that have
10 been recognized by the 26 states that don't discriminate,
11 means that have been proven in states from New Hampshire
12 to Virginia, means that are not based on facial
13 discrimination. It's the discrimination that has to be
14 shown to --

15 JUSTICE STEVENS: Let me just --

16 MS. SULLIVAN: -- be necessary here.

17 JUSTICE STEVENS: -- be sure I heard your answer
18 to Justice Kennedy correctly. You'd concede that the
19 reciprocity laws are all unconstitutional?

20 MS. SULLIVAN: Not -- they are subject to
21 heightened scrutiny because they discriminate against out-
22 of-staters in a way that you could not -- for example, in
23 New Energy, you said that you can't have a preference for
24 -- you can't have a discrimination in Ohio in reciprocity
25 for Indiana. Reciprocity laws normally do violate the

1 principle of dormant Commerce Clause invalidation.

2 JUSTICE STEVENS: And you contend that they do
3 -- the liquor reciprocity laws, all of them are
4 unconstitutional.

5 MS. SULLIVAN: Not -- we contend that they would
6 be subject to strict scrutiny, and they could be upheld if
7 the state could show that they are closely tailored in a
8 --

9 JUSTICE STEVENS: They can -- that they can be
10 --

11 MS. SULLIVAN: -- way that these laws are not.

12 JUSTICE STEVENS: -- upheld by making a showing
13 that you say is virtually impossible to make.

14 MS. SULLIVAN: Your Honor, that's not before,
15 and if there were other reasons --

16 JUSTICE STEVENS: No, but I think it is --

17 MS. SULLIVAN: -- the state could --

18 [Laughter.]

19 JUSTICE STEVENS: -- it is an interesting
20 question as to whether that's a -- that's a -- you know,
21 that's a necessary consequence of this decision, in your
22 view.
23 you to reach the question of whether there are other state
24 defenses in other cases. The justifications the states
25 have given here are so terribly weak in relation to their

1 discriminatory laws that you should strike down these
2 laws, you should invalidate them, you should affirm the
3 judgement of the Sixth Circuit and reverse the judgements
4 of the Second Circuit.

5 Thank you very much.

6 JUSTICE STEVENS: Thank you, Ms. Sullivan.

7 Mr. Casey.

8 ORAL ARGUMENT OF THOMAS L. CASEY

9 ON BEHALF OF PETITIONERS IN 03-1116 and 03-1120

10 Mr. Casey: Justice Stevens, and may it please
11 the Court:

12 For more than 70 years, the Twenty-First
13 Amendment has permitted states to restrict the importation
14 and delivery of alcohol by out-of-state vendors. There
15 are substantial differences between licensed in-state
16 vendors of alcohol and out-of-state vendors that are not
17 subject to the full extent of state regulatory and taxing
18 powers. Because of those differences, Michigan requires
19 that sales, including direct shipment of alcohol, be
20 performed only by licensed, strictly regulated, in-state
21 vendors. This importation regulation is a power expressly
22 conferred by the text of the Twenty-First Amendment. It's
23 consistent with the entire history of alcohol regulation
24 in this country, and it's consistent with this Court's
25 jurisprudence interpreting the Twenty-First Amendment --

1 JUSTICE O'CONNOR: Now the Bacchus case cuts
2 against you, to some extent.

3 MR. CASEY: The Bacchus case was a very unique
4 situation that we believe is not in any way controlling in
5 the present case. It was not an importation case; it was
6 an exemption from a state excise tax on wholesalers for
7 alcohol that was already within the state's stream of
8 commerce.

9 JUSTICE KENNEDY: Well, but I think what's
10 fairly implied in Justice O'Connor's question, you have to
11 look at the language of Bacchus, and the language of
12 Bacchus, in effect, restored the anti-discrimination
13 component of the Commerce Clause to liquor control. I
14 think that's a fair and necessary reading of the case.
15 Now --

16 MR. CASEY: I disagree that that is a necessary
17 reading --

18 JUSTICE KENNEDY: And I know it --

19 MR. CASEY: -- of the case.

20 JUSTICE KENNEDY: -- involved pineapple wine and
21 all that. I know that, but --

22 [Laughter.]

23 JUSTICE KENNEDY: -- what we're talking about is
24 the language of the Court in that case.

25 MR. CASEY: Correct, but you're -- you have to

1 understand that language in light of the actual context.
2 There, the state did not even assert a Twenty-First
3 Amendment defense.

4 JUSTICE KENNEDY: Well, then you have to
5 understand Young in the light of its context, where there
6 was no discrimination --

7 MR. CASEY: There was discrimination in Young,
8 Your Honor, and I'd like to get to that. But to focus on
9 Bacchus for a moment, the state never asserted the Twenty-
10 First amendment, and it was undisputed --

11 JUSTICE STEVENS: No, but the question was
12 before the Court, because the dissent certainly raised the
13 question.

14 MR. CASEY: Correct. And we have suggested, in
15 our brief, that the Bacchus case is distinguishable and
16 not controlling here. We have also suggested that Bacchus
17 was incorrectly decided. We can prevail in this case
18 without overruling Bacchus, but we have suggested that --

19 JUSTICE O'CONNOR: Well, why don't you focus on
20 that? Because it's a little hard to plan on overruling
21 that case.

22 [Laughter.]

23 MR. CASEY: Well --

24 JUSTICE O'CONNOR: So why don't you at least
25 address how you would distinguish Bacchus? Because there

1 is a lot of language in there that cuts against your
2 position.

3 MR. CASEY: The only justification for the
4 statute in Bacchus was what the Court characterized as
5 "mere protectionism." That's not the situation with the
6 Michigan statute. Again, the Michigan statute involves
7 the paradigm -- or the quintessential Twenty-First
8 Amendment power of regulating importation; it's not an --
9 attacks on alcohol that's already an exemption from a tax
10 for two particular products.

11 JUSTICE SCALIA: Well, no -- I mean, that --

12 MR. CASEY: Do you --

13 JUSTICE SCALIA: -- that rather lengthy
14 statement you made earlier, that the Bacchus case didn't
15 involve the importation of alcohol. But it did. I mean,
16 the only reason that the in-state exemption was held to be
17 unconstitutional was because you were treating out-of-
18 state sellers differently. How can you possibly say that
19 --

20 MR. CASEY: It was treating --

21 JUSTICE SCALIA: -- the case didn't involve it?

22 MR. CASEY: -- it was treating two particular
23 items of in-state production differently than all other
24 in-state items and out-of-state items; but it was a
25 taxation issue, not an importation issue. And as the

1 Court said in Bacchus and in Capital Cities, the correct
2 analysis in the -- in evaluating this kind of case is to
3 determine, first, whether the activity of the regulation
4 at issue is an exercise of a power conferred by the
5 Twenty-First Amendment --

6 JUSTICE GINSBURG: Well, why don't we focus on
7 the Court's rationale, which was stated very concisely by
8 Justice White. He said, "Hawaii's discriminatory tax
9 cannot stand." And then he said, "Whatever you can say
10 about the Twenty-First Amendment, one thing is certain,
11 the central purpose was not to empower the states to favor
12 local liquor industries by erecting barriers to
13 competition." That was this Court's explanation for
14 ruling the way it did, even though there was this infant
15 industry of pineapple whatever.

16 MR. CASEY: That was the first stage of the
17 Court's analysis. The Court went on to say it was not
18 supported by any clear concern of the Twenty-First
19 Amendment in combating the evils of an unrestricted
20 traffic in liquor --

21 JUSTICE SOUTER: Well, your opponents have said
22 that there isn't any clear countervailing interest here.
23 They're saying you can't claim you're protecting kids,
24 because you're selling to the kids at home; there's no
25 serious audit-collection problem; and the other regulatory

1 interests -- they didn't say this, but are, sort of, gauzy
2 the way they're stated. I mean, they're saying that, by a
3 process of elimination, what you get down to is nothing
4 but discrimination and protectionism. What is -- what is
5 your answer to that? Where is --

6 MR. CASEY: We --

7 JUSTICE SOUTER: -- the substantial interest?

8 MR. CASEY: -- we disagree wholeheartedly with
9 that. The Michigan --

10 JUSTICE SOUTER: I know, but --

11 MR. CASEY: -- the Michigan regulations do
12 promote the state's interest in temperance. They do give
13 the state a better --

14 JUSTICE SOUTER: Well, you -- I mean, you say
15 that, but how? The very activity that you don't want them
16 to engage in, you're engaging in, or your local wineries
17 are engaging in, for example.

18 MR. CASEY: But the key is, with an in-state
19 licensee, the state has the ability to enforce against
20 that licensee, to inspect, to punish the licensee --

21 JUSTICE SOUTER: Do we --

22 MR. CASEY: -- to hold them accountable.

23 JUSTICE SOUTER: -- do we have a record of what
24 the state is doing with respect to its in-state licensees,
25 indicating what it could not do effectively to out-of-

1 staters? What do we have in the record?

2 MR. CASEY: The record in this case consisted of
3 a small number of affidavits, answers to interrogatories,
4 some surveys that were submitted as exhibits to motions
5 for summary judgement. Both sides submitted that type of
6 evidence. The District Court decided this was a question
7 of law, and specifically said that he did not consider any
8 of the factual evidence. So the record --

9 JUSTICE SOUTER: Well, should --

10 MR. CASEY: -- was not fully developed.

11 JUSTICE SOUTER: -- should we send it back for
12 -- if we disagree with the rationale, should one or the
13 other of these cases go back for evidence on what, in
14 fact, the state is doing in relation to its in-state
15 licensees and evidence that it could not effectively do
16 the same with respect to out-of-staters?

17 MR. CASEY: Yes, if --

18 JUSTICE SOUTER: And what would you show? What
19 do you, in effect -- make an offer of proof.

20 MR. CASEY: We would show that the Michigan
21 requirement limiting sales and direct shipping to in-state
22 licensees is required because the state only has effective
23 enforcement authority over in-state licensees. But --

24 JUSTICE O'CONNOR: Well, but wait a minute. You
25 -- it was suggested that the state could require a license

1 of an out-of-state supplier, and that that license could
2 be conditioned upon submission to Michigan's jurisdiction
3 in all respects. Is that not feasible?

4 MR. CASEY: Michigan does have a current license
5 for out-state seller of wine. You know, these players --

6 JUSTICE O'CONNOR: But could you not require
7 submission to --

8 MR. CASEY: We --

9 JUSTICE O'CONNOR: -- Michigan's jurisdiction
10 for all purposes of enforcement?

11 MR. CASEY: Certainly, we could pass a law to
12 that effect. The problem is --

13 JUSTICE SOUTER: And if you -- if you did that,
14 could you require, as I suggested of Counsel on the other
15 side, that you -- that, as a condition of the licensing,
16 that the business records of these companies be placed in
17 some secure online fashion, that, with a password, you
18 could get into and do an audit across the continent just
19 as readily as you could do an audit next door? Could
20 Michigan not do that?

21 MR. CASEY: But there is no guarantee that such
22 an audit would be just the same as an audit of an in-state
23 --

24 JUSTICE KENNEDY: Well, let me ask, once we
25 accept the proposition -- I think this is the necessary

1 reading of Bacchus -- that the Commerce Clause applies to
2 liquor and prevents discrimination, it seems to me it's
3 just like any other commodity -- food, milk, et cetera --
4 and, in this case, you have a very substantial burden to
5 show that this discriminatory treatment is justified --
6 maybe strict scrutiny, maybe heightened scrutiny. And
7 this trial has occurred. You have had that opportunity.
8 I don't see why you have a right to go back.

9 MR. CASEY: Despite the lack of evidence in the
10 record and the fact that District Court did not consider
11 that evidence, the Sixth Circuit dismissed all of those
12 claims of the state and remanded for entry of judgement on
13 the Plaintiffs without giving us an opportunity to develop
14 that record. I also want to say --

15 JUSTICE SCALIA: See, I don't -- I don't
16 understand. Didn't you have an opportunity to develop the
17 record? I mean, this was --

18 MR. CASEY: There was --

19 JUSTICE SCALIA: -- a discriminatory matter. It
20 was your burden to show that whatever discrimination
21 existed -- assuming that we find the law the way Bacchus
22 seemed to say it is -- it was your burden to show that
23 there was some justification for that discrimination.

24 MR. CASEY: There --

25 JUSTICE SCALIA: You had your chance to show it.

1 MR. CASEY: -- there was evidence in the record.
2 There were affidavits from Michigan enforcement officials
3 about stings, about problem with enforcing --
4 JUSTICE SCALIA: All right, well --
5 MR. CASEY: -- against Internet --
6 JUSTICE SCALIA: -- tell us what those -- what
7 that material is, and if we find that material sustains
8 your burden, that's fine, you win; and if it doesn't, you
9 lose. I don't know why we have to let you go back and --
10 [Laughter.]
11 JUSTICE SCALIA: -- and retry the case.
12 MR. CASEY: Our key position is that before you
13 get to that kind of evidentiary burden, the legal question
14 --
15 JUSTICE SCALIA: That's what I'm interested in.
16 You win, either way. If it -- maybe if the Commerce
17 Clause -- dormant Commerce Clause discrimination principle
18 applies, you win, if we scrutinize strictly and say you
19 have a good justification. Whether you do or not, I guess
20 I'll find out from reading the record, but I'm more
21 interested in the first half, which is -- doesn't apply at
22 all.
23 Now, your opponent said, in response to my
24 pointing to Brandeis on this, that to support you, as to
25 precedent, Bacchus. Young's Market isn't any good

1 anymore. As to concept, you can divide the dormant
2 Commerce Clause into a -- you have to favor out-of-state
3 principle, which was the original package doctrine, which
4 has long since disappeared, and the anti-discrimination
5 principle, which hasn't disappeared. And her third part,
6 implicit, is, historically, this whole Section 2 was aimed
7 at the original package part; there is not a word in any
8 brief I saw that suggests any motive in Section 2 to get
9 rid of the anti-discrimination principle. I haven't found
10 a word in support on your side on that. So she says, "Put
11 those three things together, and we win." That's her
12 point. Now, what's your response?

13 MR. CASEY: We disagree with that entire
14 position. The text --

15 JUSTICE BREYER: I know you do.

16 [Laughter.]

17 MR. CASEY: -- the text of the Twenty-First
18 Amendment -- the text of the Twenty-First Amendment gives
19 states the right to control imports. The history of the
20 Twenty-First Amendment in the Webb-Kenyon Act clearly
21 demonstrate -- the purpose of the Webb-Kenyon Act was to
22 eliminate alcohol shipments from --

23 JUSTICE KENNEDY: Do you think --

24 MR. CASEY: -- the Commerce Clause.

25 JUSTICE KENNEDY: -- that Michigan can prohibit

1 the importation of any wine, but still allow its own wine
2 to be produced, sold, and consumed?

3 MR. CASEY: Yes. That's precisely what
4 situation was with --

5 JUSTICE BREYER: I know you do, but the
6 principle of Webb-Kenyon, which was enacted when the
7 Wilson Act was already there -- very clear -- is to stop
8 the original package doctrine, stop favoritism of the out-
9 of-state liquor shipment, which meant, in a dry state, you
10 had to sell less. I mean, that's what it's there for. I
11 didn't find a word, in other words, contrary to what I've
12 just said; and if there are such words, now is the time to
13 point them to me -- to point them out.

14 MR. CASEY: The title of the Webb-Kenyon Act is,
15 "It is in -- an act divesting intoxicating liquors of
16 their interstate character in certain cases. The clear
17 intent of the Webb-Kenyon Act was to remove alcohol from
18 the Commerce Clause. The Constitution -- the Twenty-First
19 Amendment constitutionalized that Commerce Clause
20 framework." That's what this Court said in Craig v.
21 Boren. Craig v. Boren also said, "The Twenty-First
22 Amendment creates an exception to the operation of -- the
23 normal operation of the dormant Commerce Clause."

24 JUSTICE GINSBURG: Well, then you are asking us,
25 I guess, not only to reject Bacchus, but who was the first

1 one that said that the Commerce Clause remains alive and
2 well? Was it Justice Stewart? And I forgot which case it
3 was. It was --

4 MR. CASEY: That may be. The Commerce Clause
5 remains alive and well, but the Commerce Clause --

6 JUSTICE GINSBURG: In the context of alcoholic
7 beverages.

8 MR. CASEY: In the context of powers expressly
9 conferred upon the states by the Twenty-First Amendment,
10 that's an exception to the operation -- the normal
11 operation of the dormant Commerce Clause. Commerce Clause
12 has to be read in light of the Twenty-First Amendment,
13 just as the Twenty-First Amendment has to be read in light
14 of the Commerce Clause and other provisions of the
15 Constitution.

16 JUSTICE GINSBURG: But that's a different
17 argument than the one you made before, which seems to be
18 saying the Twenty-First Amendment trumps, not that the two
19 have to be harmonized.

20 MR. CASEY: When you read the two in light of
21 each other, the purposes of each, it is clear that the
22 purpose of the Twenty-First Amendment was to remove
23 alcohol from interstate commerce as a constitutional
24 matter, to prevent Congress from tampering with it in the
25 future, to give the judgement to the states as to --

1 JUSTICE KENNEDY: Well, you --

2 MR. CASEY: -- the necessity for --

3 JUSTICE KENNEDY: -- you say further than that;

4 you say the purpose was to allow that the states

5 discriminate in favor of home industry, if it chooses.

6 MR. CASEY: That is one of the purposes, yes.

7 In that -- in the case that was decided immediately after

8 the Young's Market, Mahoney, and Indianapolis Brewing, the

9 Court said, "Discrimination is permissible in this narrow

10 context, where the state is acting pursuant to its Twenty-

11 First Amendment powers and regulating importation of

12 alcohol."

13 JUSTICE O'CONNOR: But that gets us back to

14 Bacchus and what to make of that.

15 MR. CASEY: I -- as I indicated, I don't believe

16 Bacchus overrules those cases; it didn't even cite most of

17 those cases. But --

18 JUSTICE O'CONNOR: Well, the dissent seemed to

19 think so --

20 [Laughter.]

21 JUSTICE O'CONNOR: -- didn't it?

22 MR. CASEY: That's correct. But, as I said, we

23 believe Bacchus is distinguishable, because that was mere

24 protectionism, the state does have other justifications

25 here --

1 JUSTICE KENNEDY: Well, we've also said that
2 mere protectionism is permitted.

3 MR. CASEY: Mere protectionism is permitted. In
4 this case, if we have to present other justifications, we
5 have, and there are other justifications, unlike the
6 situation in Bacchus. So even if the Bacchus rationale is
7 good law, we still prevail on that.

8 Thank you, Your Honor.

9 JUSTICE STEVENS: Ms. Halligan?

10 ORAL ARGUMENT OF CAITLIN HALLIGAN

11 ON BEHALF OF RESPONDENTS IN 03-1274

12 MS. HALLIGAN: Justice Stevens, and may it
13 please the Court:

14 In answer to your question first, Justice
15 Breyer, the Twenty-First Amendment does not propose a
16 nondiscriminatory ban. The Court rejected that position,
17 not just in Young's Market and Mahoney in Indianapolis,
18 but also in Clark Distilling, the case in which the Court
19 upheld the constitutionality of the Webb-Kenyon Act,
20 itself. It held that the Webb-Kenyon Act operated to
21 remove any immunity that had been conferred by the dormant
22 Commerce Clause. Bacchus is not to the contrary. In
23 North Dakota, which follows Bacchus, the Court relied
24 again on Young's Market to say that the states could
25 impose different rules on out-of-state vendors where they

1 JUSTICE KENNEDY: -- what your theory is. And
2 so you are in agreement with your colleague that this
3 could be done, if New York chose. You can only drink New-
4 York-grown wines in -- sell and consume -- in the state of
5 New York.

6 MS. HALLIGAN: It could be done, but that
7 question really isn't presented here, because --

8 JUSTICE BREYER: But could Congress pass a law
9 forbidding it?

10 MS. HALLIGAN: That's a difficult question,
11 because --

12 JUSTICE BREYER: Yeah. All right. But I need
13 an answer to it.

14 [Laughter.]

15 JUSTICE BREYER: Because, you see, what's going
16 to come next is, if you say yes, I'm going to say, "Well,
17 didn't it pass that law with the Wilson Act?"

18 MS. HALLIGAN: Let me answer both of those
19 questions, if I can, Your Honor. Certainly, this Court
20 has held, repeatedly, that the Twenty-First Amendment did
21 not, in any substantial way, completely repeal Congress'
22 affirmative power under the Commerce Clause. It said that
23 in *Midcal* and *Capital Cities*. But we would argue that if
24 Congress acted in a way which completely removed state
25 authority to determine whether or not alcohol could be

1 sold and the terms under which it could be sold -- for
2 example, if Congress said all states must be dry -- then
3 we would argue that the Twenty-First Amendment wouldn't
4 allow that, because that would completely eviscerate any
5 state authority.

6 JUSTICE SCALIA: How can that be? I mean, if
7 this is a constitutional elimination of the Commerce
8 Clause, how can Congress bring it back in simply by
9 enacting a statute?

10 MS. HALLIGAN: The legislative history makes
11 clear that the Twenty-First Amendment was intended to
12 eliminate the impediments posed by the dormant Commerce
13 Clause and authorize states to regulate it.

14 JUSTICE SCALIA: But you -- you want us to read
15 it by its terms. It doesn't say anything about the
16 dormant Commerce Clause. If we read it absolutely the way
17 one of your arguments wants us to do, surely it excludes
18 Congress.

19 MS. HALLIGAN: By terms of our --

20 JUSTICE SCALIA: So you don't want us to read it
21 absolutely.

22 MS. HALLIGAN: Your Honor, I don't think that --
23 again, I don't think that you need to decide those
24 questions in this case. This case goes to what's at the
25 very core of the Twenty-First Amendment, whether states

1 can decide who can sell liquor to their citizens and
2 whether or not states --

3 JUSTICE KENNEDY: But it also goes to the very
4 core of the Commerce Clause. And there are really two
5 classifications of dormant Commerce Clause cases. One is
6 -- and I think it's an improper use of the term "dormant
7 clause" -- is where there's discrimination. Only the
8 Congress can allow discrimination against out-of-state
9 products. That's one whole classification. And that's
10 what's -- and that's what's involved here.

11 MS. HALLIGAN: North Dakota indicates otherwise,
12 I believe, Your Honor. In North Dakota, this Court said
13 that, because, when alcohol flows across the border, it
14 poses unique risks to the regulatory regime, because the
15 state can't bring the alcohol within the full extent of
16 its regulatory and supervisory powers, that it may be
17 appropriate and necessary for states to impose unique
18 rules on out-of-state vendors. In North Dakota, the Court
19 did not say --

20 JUSTICE SCALIA: Well, but that's fine. And the
21 other side isn't denying that here, that if, you know,
22 they're -- discrimination means treating out-of-state
23 people differently without good reason.

24 MS. HALLIGAN: But there is good reason --

25 JUSTICE SCALIA: Now, if you're willing to --

1 okay, if you're willing to acknowledge that, then we're
2 halfway there and we're just arguing about whether there
3 is good reason here or not.

4 MS. HALLIGAN: There is good reason here, Your
5 Honor. What's critical about New York's law, as well as
6 Michigan's law, is that it requires that any alcohol
7 vendor have a physical presence in the state. And that's
8 important for a couple of reasons. The state can't
9 meaningfully oversee traffic in alcohol with an out-of-
10 state entity. Petitioner suggested --

11 JUSTICE SOUTER: What is it doing with the in-
12 state entities? I mean, one of the claims is that nobody
13 is posting officers outside the in-state wineries, no
14 one's making substantial physical audits of in-state
15 wineries. Is that wrong?

16 MS. HALLIGAN: It is wrong, Your Honor. It's
17 certainly not the case that we have an SLA inspector
18 outside every entity that sells liquor. That would not be
19 possible. But it is true that the state liquor authority
20 can, and does, physically inspect the premises. They do
21 so to determine whether --

22 JUSTICE SOUTER: What do they inspect them for?
23 Their books, I suppose.

24 MS. HALLIGAN: Well, more than that, and this is
25 why the physical presence is important and why the

1 Internet hypothetical that Your Honor raised would not --
2 would not satisfy the state's concerns. What the state
3 can do is, it can go onto a premises, and it can count
4 whether the bottles on the shelves of that premises match
5 the records. That's the best way to detect whether or not
6 there is evasion. Because if you have --

7 JUSTICE SOUTER: And is there a record that the
8 state is doing that?

9 MS. HALLIGAN: There is not clear evidence in
10 the record with respect to that -- to that level of
11 detail, but that --

12 JUSTICE SOUTER: Well, isn't that the end of
13 that issue, then? I mean, it is your burden, isn't it?

14 MS. HALLIGAN: Your Honor, there is material in
15 the McKeon affidavit, which is in the Joint Appendix --
16 Mr. McKeon is the Chair of the state liquor authority --
17 but it's also the case that to suggest that because there
18 is some option out there -- and there's no firm evidence
19 that a less prescriptive rule would, in fact, satisfy the
20 state's concerns in preventing diversion and tax evasion -
21 -- but the possibility that's there's some rule out there,
22 because other states have adopted more lax rules, is to
23 treat alcohol like any other product. And the Twenty-
24 First Amendment reflects a consensus by this nation that
25 alcohol is unique, that it should not be open to --

1 JUSTICE SOUTER: Well, the Twenty-First
2 Amendment at least recognizes that alcohol can be treated
3 as unique, and the issue here is whether you're really
4 doing that in a way that supports your claim of interest.

5 MS. HALLIGAN: Yes --

6 JUSTICE SOUTER: And, so far, the one specific
7 thing I've heard from you is that state inspectors do go
8 on winery premises, and they count bottles, and they see
9 if they match what's on the written record.

10 MS. HALLIGAN: They also draw on the assistance
11 of local law enforcement. And this is also --

12 JUSTICE GINSBURG: But if that's --

13 MS. HALLIGAN: -- set forth --

14 JUSTICE GINSBURG: -- if that's really what New
15 York's concern is, then why does New York say, "Ah, but
16 out-of-staters, if only you establish an office here --
17 not a winery; an office -- you can operate, and you can
18 make the direct sales from that office, and even in" -- I
19 think your brief told us that, well, these small wineries,
20 out-of-state wineries, haven't got all that much to worry
21 about, because, after all, they could join together -- a
22 group of them could open an office. Now, that office,
23 owned by a group of out-of-state vintners is not going to
24 have bottles on the shelf, is it?

25 MS. HALLIGAN: Yes, Your Honor, it would.

1 That's -- the state laws requires that any licensed winery
2 have a government-bonded storehouse or ware-room --
3 storehouse -- storeroom or warehouse, pardon me --

4 JUSTICE GINSBURG: Well, isn't the --

5 MS. HALLIGAN: The reason for that is because
6 physical products --

7 JUSTICE GINSBURG: How do you envision this
8 combination of small wineries? You said that in-state
9 establishments might be jointly maintained by out-of-state
10 wineries.

11 MS. HALLIGAN: Yes, Your Honor. The state
12 liquor authority has not issued any regulations on this,
13 but presumably what they would say is, you could share a
14 space, provided that the physical property of each winery,
15 the bottles, is segregated so that the states can come in
16 and check whether or not each winery's products conform
17 with their records.

18 There are other reasons why a physical presence
19 is important, as well. First of all, the state draws on
20 local law enforcement extensively to identify illegal
21 activities, and that would not be possible with any entity
22 located out-of-state. Additionally --

23 JUSTICE SOUTER: What illegal -- I'm sorry --
24 you've got to be specific. What illegal activities?
25 Selling to minors?

1 MS. HALLIGAN: It could be selling to minors,
2 but it could also simply be sale out of an unlicensed
3 premises, where you are selling outside the proper hours
4 of sale, or sale outside of the three-tier system --

5 JUSTICE SOUTER: Yeah, but if licensed premises
6 don't serve a state interest, then you can't require a
7 licensed premises, so that argument doesn't get too far.

8 MS. HALLIGAN: But, Your Honor, the principle
9 that having entities that sell liquor be licensed, is one
10 that is at the heart, not just at the --

11 JUSTICE SCALIA: How does -- how does requiring
12 them to have an in-state office somehow prevent them from
13 shipping to minors from out of state --

14 MS. HALLIGAN: It --

15 JUSTICE SCALIA: -- or from shipping to
16 consumers from out of state without paying you their tax?

17 MS. HALLIGAN: It --

18 JUSTICE SCALIA: How does the opening of an --

19 MS. HALLIGAN: Right.

20 JUSTICE SCALIA: -- an office in New York State
21 at all prevent that?

22 MS. HALLIGAN: It can't prevent it a hundred
23 percent, but no --

24 JUSTICE SCALIA: It can't prevent it at all.

25 MS. HALLIGAN: Your Honor, it can deter it, and

1 it can deter it significantly, because, first of all,
2 there is a much more significant opportunity to identify
3 the illegal activities; and, secondly, if a retailer or a
4 wholesaler or a manufacturer knows that, that operates as
5 a powerful deterrent --

6 JUSTICE BREYER: What did --

7 JUSTICE SOUTER: We seem to be talking -- may I
8 just ask one -- we seem to be talking about two different
9 things. Justice Scalia was assuming that, if you have the
10 license and some in-state warehouse, you can ship from
11 outside. And I -- is that the assumption? Or is your
12 argument that New York can require -- does require the in-
13 state warehouse, and you can ship into -- in New York, you
14 can ship only from that warehouse?

15 MS. HALLIGAN: To be clear, the state has not
16 issued regulations that specifically address that point,
17 because --

18 JUSTICE SOUTER: So the -- we don't know yet.

19 MS. HALLIGAN: We don't know. But in talking
20 with the state liquor authority, they have made it clear
21 that their intent would be to require that the liquor come
22 first to the in-state premises --

23 JUSTICE SCALIA: Well, even if -- I'm willing to
24 assume that. How does that guarantee that the out-of-
25 state winery will not, in violation of New York State law,

1 ship directly to minors or ship directly to consumers,
2 just simply bypassing its cache of wine in New York?

3 MS. HALLIGAN: There is no guarantee, Your
4 Honor, but there is never any guarantee --

5 JUSTICE SCALIA: There's no guarantee.

6 MS. HALLIGAN: -- that people won't --

7 JUSTICE SCALIA: It doesn't -- it doesn't enable
8 you to enforce your law any more rigorously than without
9 having a requirement for a local office.

10 MS. HALLIGAN: That, I would respectfully
11 disagree with. It does operate as a powerful deterrent
12 and --

13 JUSTICE SOUTER: Well, your argument there is
14 that --

15 MS. HALLIGAN: -- as an investigative aid.

16 JUSTICE SOUTER: -- if they break the law, you
17 can shut down the warehouse; whereas, you can't
18 effectively do that if the warehouse is in California.
19 Isn't that your point?

20 MS. HALLIGAN: That's one of the points, but
21 also that we're much more likely to be able to identify
22 the illegal activities in the first place. The suggestion
23 that we would send inspectors to California or any other
24 place to look at books and count bottles is completely
25 infeasible. And the Twenty-First Amendment was intended

1 to allow states to deal with the regulatory challenges
2 that are posed when liquor comes across the border. If we
3 had to demonstrate that there was a hundred-percent
4 compliance, then we couldn't have any regulation at all.
5 That's not, I would submit, a --

6 JUSTICE GINSBURG: Well, to what --

7 MS. HALLIGAN: -- reasonable measure.

8 JUSTICE GINSBURG: -- to what extent does New
9 York take account of, say, the rigorous regulation in the
10 states from which this wine is coming? You say we must do
11 this to police for all kinds of things. But don't other
12 states -- California, Virginia -- don't they have laws
13 that their local wineries must meet?

14 MS. HALLIGAN: They --

15 JUSTICE GINSBURG: And is New York just saying,
16 "We're going to treat this thing as though it's totally
17 unregulated, anyway"?

18 MS. HALLIGAN: We're not suggesting that, Your
19 Honor. What we are suggesting is that relying on other
20 states to enforce law violations in New York State is not
21 a very feasible alternative. Additionally, there are 33
22 states that have agreed with New York, a number of whom
23 are states that have either reciprocal or unrestricted
24 shipping statutes, and said to this Court, "Please do not
25 prohibit the kinds of laws that are at issue in New York

1 and Michigan." So it's obviously important to the
2 regulators in those states, as well.

3 JUSTICE SCALIA: What about the states that do a
4 allow shipment from out of state? They don't care about
5 their --

6 MS. HALLIGAN: I can't --

7 JUSTICE SCALIA: How many are there that allow
8 shipment from out-of-state wineries?

9 MS. HALLIGAN: I believe that the current number
10 is 26 states. I certainly can't speak to the regulatory
11 motivations of each of those states, or the reasons why
12 those laws might have been passed.

13 JUSTICE SCALIA: It certainly suggests that what
14 -- that what you're arguing is not essential to the
15 state's enforcement of its alcohol laws.

16 MS. HALLIGAN: Well, a number of those states
17 have, in fact, joined New York and Michigan in asking the
18 Court not to --

19 JUSTICE SCALIA: States don't like federal
20 regulation --

21 MS. HALLIGAN: -- restrict that.

22 JUSTICE SCALIA: -- of any sort, of course. I
23 know that.

24 [Laughter.]

25 MS. HALLIGAN: Your Honor, I think that all the

1 Twenty-First Amendment requires the states to demonstrate
2 is that the regulatory regime that they have chosen has
3 some relationship to their goals of protecting the
4 integrity of the state's system. And that's certainly
5 what the Court suggested in North Dakota.

6 JUSTICE SCALIA: Well, I'm not sure. When you
7 have facial discrimination against out-of-state products,
8 I think you're -- the bar is a little higher than that.

9 MS. HALLIGAN: Well, that was the case in North
10 Dakota, as well. In North Dakota, the state imposed
11 regulations on out-of-state vendors that were extremely
12 onerous, so onerous that some vendors said they wouldn't
13 ship products at all. That was alcohol that was not even
14 destined for consumption within the state; but on a
15 federal enclave. And the mere risk of diversion into
16 unregulated and unlawful channels was enough to allow the
17 state to impose those discriminatory rules. The same is
18 true here.

19 Justice O'Connor, you also asked about Bacchus,
20 as well, and I would like to take a moment to address
21 that.

22 Bacchus is distinguishable in several ways.
23 First of all, Bacchus was a tax. And while we would argue
24 that taxes could be used to further states' interest in
25 suppressing consumption, for example, it is certainly not

1 at the heart of the -- of the Twenty-First Amendment in
2 the way that the direct regulation of alcohol across the
3 border is.

4 JUSTICE STEVENS: No, but if you can't grant a
5 tax exemption -- and it seems to me, a fortiori -- you
6 can't grant a prohibition about importing at all.

7 MS. HALLIGAN: I, respectfully, would disagree
8 with that, Your Honor. If you can't address the alcohol
9 that flows across the border, which was precisely why the
10 Twenty-First Amendment was enacted, as well as Webb-
11 Kenyon, because the --

12 JUSTICE STEVENS: No, I'm suggesting a tax on
13 imports is less restrictive than a prohibition on imports.

14 MS. HALLIGAN: Well, we would certainly, you
15 know, welcome the authority to do both, but importation is
16 what is at the heart of the Twenty-First Amendment.
17 Bacchus is also different, because, there, the state made
18 no effort whatsoever to defend the statute with reference
19 to any concerns related to the Twenty-First Amendment.
20 And Bacchus --

21 JUSTICE GINSBURG: And according to the District
22 Court, in this very case, the State Attorney General
23 conceded that New York's measure allowing direct sales by
24 in-state wineries was designed to benefit local farmers.

25 MS. HALLIGAN: That was an off-the-cuff remark

1 by a single attorney, Your Honor, and that can't be taken
2 as dispositive, given the state's vigorous defense of this
3 statute. It also was regarding a provision that is not
4 even directly before the Court right now which confers no
5 different shipment privileges than are conferred on any
6 winery, whether in-state or out-of-state, that would
7 obtain a license to sell in New York.

8 JUSTICE STEVENS: Thank you, Ms. Halligan.

9 MS. HALLIGAN: Thank you, Your Honor.

10 JUSTICE STEVENS: Mr. Bolick, you have, let's
11 see, about four minutes left.

12 REBUTTAL ARGUMENT OF CLINT BOLICK

13 ON BEHALF OF PETITIONERS IN 03-1274

14 MR. BOLICK: Thank you, Justice Stevens. Three
15 very brief points.

16 There his a panoply of tools available to states
17 to police out-of-state wineries in direct shipping, as the
18 Federal Trade Commission has recognized. They can, if
19 they issue a permit, revoke that permit. And New York has
20 authority to issue such permits under Section 105-9. The
21 Twenty-First Amendment Enforcement Act, for which the
22 liquor distributors and states lobbied very hard, gives
23 injunction authority in the home federal courts. And, of
24 course, the federal agency, the Tax and Trade Bureau, can
25 revoke a permit if state law is violated. In the --

1 JUSTICE SCALIA: Who's going to count the
2 bottles?

3 [Laughter.]

4 MR. BOLICK: Your Honor, the state -- the
5 Federal Government is able to count those, but the
6 evidence is that they don't. And that goes back to a
7 question, I believe, Justice Souter asked. In the
8 Michigan case, a question was posed in an interrogatory,
9 "What enforcement by -- is done of in-state wineries." In
10 that regard, the answer was, "None."

11 JUSTICE BREYER: How do you count bottles? I
12 would have thought the consumers have all the bottles.

13 [Laughter.]

14 MR. BOLICK: That's exactly right. And,
15 certainly in the directly shipping context in-state, that
16 is emphatically the case.

17 JUSTICE SCALIA: I think they were referring to
18 full bottles. I guess --

19 [Laughter.]

20 MR. BOLICK: With direct shipping --

21 JUSTICE STEVENS: They've all been drinking --

22 [Laughter.]

23 JUSTICE STEVENS: -- to arbitrators.

24 MR. BOLICK: With direct shipping, Justice
25 Scalia, we can personalize things.

1 In terms of the Bacchus case, as Justice
2 Ginsburg pointed out, New York, like Hawaii, conceded
3 protectionism. It is very rife in the legislative record
4 in 1970, when the direct shipping was extinguished. In
5 1995, when Governor Pataki vetoed a bill that would have
6 solved this problem, he said, and I quote -- and this is
7 in the record, the Joint -- the Second Circuit Joint
8 Appendix, at 442 -- he said, and I quote, "Since the vast
9 majority of this country's wines are produced in
10 California, I believe that this bill would inevitably lead
11 to a significant increase in mail-order wines from that
12 state into New York. This increase could, in turn, lead
13 to a decrease in sales for New York liquor stores and
14 their distributors, and shrink New York wineries' market
15 share. That is protectionism."

16 And, finally, the notion that small winemakers
17 could go to all 50 states and open offices in order to do
18 this -- if you could drive out to Middleburg and visit
19 Juanita Swedenburg's winery -- and she invites you to do
20 so --

21 [Laughter.]

22 MR. BOLICK: -- you will find Mrs. Swedenburg
23 selling wine, harvesting grapes, and bottling. This is a
24 ban on -- this is market foreclosure, sure and simple --
25 fewer than 600 wineries are represented on the stores of

1 New York's shelves, out of over 3,000 wineries --

2 JUSTICE STEVENS: The question --

3 MR. BOLICK: -- in the United States.

4 JUSTICE STEVENS: -- really is whether the plain
5 language of the Twenty-First Amendment allows that very
6 protectionism.

7 MR. BOLICK: And I would refer you, in my brief
8 time remaining, to the brief, the Carter-Phillips brief
9 for the Napa Valley Vintners Association, the DKT Liberty
10 brief, which go into the history of the Twenty-First
11 Amendment, which was intended to restore the police power,
12 which did not include the power to discriminate. Our
13 clients cannot compete with the liquor distributors in the
14 political marketplace in their -- in their -- in their
15 home states. They can, however, compete in the economic
16 marketplace. The Commerce Clause protects that right,
17 that level playing field. The Twenty-First Amendment was
18 never intended to take it away.

19 We ask this Court, respectfully, to honor 124
20 years of precedent in the National Economic Union.

21 If there are no further questions, thank you.

22 JUSTICE STEVENS: Thank you, Mr. Bolick. The
23 case is submitted.

24 (Whereupon, at 11:08 a.m., the case in the
25 above-entitled matter was submitted.)