Fordham Urban Law Journal

Volume 30 | Number 6 Article 2

2003

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Cover Page Footnote
J.D. candidate, Fordham University School of Law, 2005; MBA, New York University, 1981; B.S. Economics, Wharton School, University of Pennsylvania, 1973. I would like to thank the Editors and Staff of the Fordham Urban Law Journal for the time and dedication they put into editing this Note. I also would like to thank Father Charles Whelan, my faculty advisor. ULJ Editors Kim Smith and Mark D. Shifton were instrumental in editing and encouraging this Note. I dedicate this work to my wife Yoko, the love of my life, and to our daughters Emily, Katy, and Alyssa, who have brought us endless joy and pride with their achievements, intelligence, and humor. I also dedicate this work to my parents and my sister Judy, the first lawyer in the family. Finally, I welcome this opportunity to thank my friend and mentor, Claudia Anelos, Clinical Professor of Law, New York University School of Law, who encouraged and inspired me to study law, and who, by word and deed, has demonstrated that one really can change the world-one person at a time.

OLD WHINE IN A NEW BATTLE: PRAGMATIC APPROACHES TO BALANCING THE TWENTY-FIRST AMENDMENT, THE DORMANT COMMERCE CLAUSE, AND THE DIRECT SHIPPING OF WINE

*Gordon Eng**

INTRODUCTION

There are only two ways an ordinary citizen acting in a private capacity can violate the United States Constitution. One is to enslave someone, violating the Thirteenth Amendment, and the other is to bring a bottle of wine into a state in violation of its alcoholic beverage control laws.[1]

In reaction to what many consider to be senseless and out-of-date prohibitions against the direct shipment of wine from out-of-state wineries to consumers,[2] wine connoisseurs and their legal ad-

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1. Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons From the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 220 (1995).

> [T]here are two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under color of no law, can violate the United States Constitution. One is to enslave somebody, a suitably hellish act. The other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws — an act that might have been thought juvenile, and perhaps even lawless, but unconstitutional?

Id.

2. *See* Andrew J. Kozusko III, Note and Comment: *The Fight to "Free the Grapes" Enters Federal Court: Constitutional Challenges to the Validity of State Prohibitions on the Direct Shipment of Alcohol*, 20 J.L. & COM. 75, 75-76 (2000) (detailing the changes in the wine industry over recent years and the rise of boutique and specialty wines commanding prices in the thousands of dollars per bottle).

vocates have mounted a campaign across the country to overturn direct-shipment laws.[3] According to Tracy Genesen, Legal Director for the Coalition for Free Trade ("CFT"), a winery backed advocacy group, the overall strategy is to "target the states with the most punitive direct-shipping statutes, to get a definitive decision from the Supreme Court to clear up the question of whether the Commerce Clause takes precedence over the Twenty-first Amendment or vice versa."[4] The CFT's strategy is to facilitate a split between at least two circuit courts that will have to be resolved in the nation's highest court.[5] Whether the strategy succeeds in getting the Supreme Court's attention remains to be seen, but one element appears to be working: lawsuits seeking to overturn direct-shipment statutes are generating conflicting opinions in federal district courts across the country and in at least two federal appellate courts.[6]

Although not a party to the lawsuit, the CFT probably joined the celebration on December 10, 2002, when Judge Richard M. Berman of the United States District Court for the Southern District of New York ordered New York State to allow wineries from the rest of the country to ship wine directly to New York consumers.[7] Judge Berman's order followed up on his opinion earlier that year holding New York's direct-shipping laws unconstitutional.[8] Clint Bolick, the attorney for the plaintiffs, called Judge Berman's initial ruling "the crest of a tidal wave that is washing away protectionist barriers to the direct shipment of wine."[9] Marc Violette, a spokesman for New York State Attorney General, Eliot Spitzer, said simply: "We are going to appeal."[10]

If New York does appeal, it will have significant ammunition — despite the trend in recent cases where direct-shipment wine advocates appear to be prevailing. For example, the Seventh Circuit

3. Wine Spectator Online, *Tide Turns in Direct Shipping Battle* (October 21, 2002), *at* http://www.winespectator.com/Wine/Archives/Show_Article/0,1275,3880,00.html (last visited Feb. 23, 2003).

4. *Id.*

5. *Id.*

6. Beskind v. Easley, 325 F.3d 506, 509 (4th Cir. 2003) (upholding lower court finding that North Carolina's direct-shipment law is unconstitutional); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000) (reversing district court's finding Indiana's direct-shipment statute unconstitutional).

7. Howard G. Goldberg, *New York Ordered to Allow Direct Shipments of Wine*, N.Y. TIMES, Dec. 11, 2002, at B5.

8. Swedenburg v. Kelly, 232 F. Supp. 2d 135, 146 (S.D.N.Y. 2002).

9. Goldberg, *supra* note 7, at B5.

10. *Id.*

Court of Appeals recently upheld an Indiana statute with similar prohibitions against out-of-state shipments.[11] Nevertheless, New York will face a difficult legal battle. On April 8, 2003, the Fourth Circuit Court of Appeals handed down its decision, affirming a federal district court decision last year declaring North Carolina's direct-shipment laws unconstitutional.[12] With this clear circuit split, the CFT may well be getting its wish; ultimately, the Supreme Court may have to settle the issue once and for all. The nation's highest court, however, appears willing to let the conflict age a bit longer.[13]

This Note examines the tension between the Twenty-First Amendment to the United States Constitution and the Dormant Commerce Clause, with respect to state regulations governing of out-of-state direct shipment of wine to consumers. When Judge Melinda Harmon, sitting in the Federal District Court, Southern District Texas, considered this issue in a recent case she noted that, "The question of the constitutionality of state bans on direct importation of wine by in-state consumers from out-of-state wineries has become increasingly controversial, yet thus far there is minimal case law dealing with the question."[14] One side of the debate is emobidied in Section Two of the Twenty-First Amendment, which 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." The weight of this provision stems from early Supreme Court cases that gave states wide latitude in exercising this power.[15] The other side of this Constitutional debate is embodied in the Commerce Clause, giving Congress the power "to regulate

11. *Bridenbaugh*, 227 F.3d at 848.

12. Beskind v. Easley, 325 F.3d 506, 509 (4th Cir. 2003) (affirming the holding of the United States District Court for the Western District of North Carolina, finding North Carolina's direct-shipment laws unconstitutional).

13. *Id.*

14. Dickerson v. Bailey, 212 F. Supp. 2d 673, 678 (S.D. Tex. 2002).

15. *See, e.g.*, Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394 (1939) (holding the right to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause); Ziffren, Inc. v. Reeves, 308 U.S. 132, 138 (1939) (finding the "Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause"); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 62 (1936) (upholding a California statute imposing a licensing fee on the import of beer noting that such a fee would be unconstitutional as a "direct burden on interstate commerce" if not for the Twenty-First Amendment).

Commerce with foreign Nations, and among the several states."[16] The strength on this position stems not from what is expressed, but from what is not. The courts have traditionally construed the Commerce Clause as both an express grant to Congress of power to regulate interstate commerce, and a restriction on the authority of the states to regulate interstate trade.[17] The Constitution is not clear about where the boundaries of the Commerce Clause lie when Congress has not explicitly addressed an issue.[18] As Constitutional law professors John Nowak and Ronald Rotunda observe: "When Congress has not spoken clearly, the Court and commentators often refer to this question as the dormant (or negative) Commerce Clause problem."[19] The problem is determining the extent to which states can legislate in a manner that may impinge on interstate commerce when there is no federal law on point.[20] As Nowak and Rotunda explain, courts are "in effect attempting to interpret the meaning of Congressional silence."[21] Although not always a straightforward or uncontested position, the courts have generally interpreted the dormant Commerce Clause to prevent States from promulgating protectionist laws that burden interstate commerce.[22]

In the absence of case law on point, district courts apply precedents dealing with resolving conflicts between the Commerce Clause and Twenty-First Amendment, generally.[23] Although the existing body of law provides a starting point for amelioration, as Judge Harmon noted, "It quickly becomes apparent that this is a gray area of law, without bright lines and clear rules, as well as a constantly evolving one. There is little agreement on what approach should be taken. Court opinions in recent years vary widely . . . ."[24]

Part I of this Note follows leading court opinions and commentators in recognizing the importance of history with respect to the

16. U.S. CONST. art. I, § 8, cl. 3 (providing that "Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

17. Swedenburg v. Kelly, 232 F. Supp. 2d 135, 138 n.4 (S.D.N.Y. 2002).

18. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 8.1 (6th ed. 2000).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Dickerson v. Bailey, 212 F. Supp. 2d 673, 678 (S.D. Tex. 2002) (noting that "district courts facing challenges to such laws must look for guidance to case law addressing more generally the dormant commerce clause and its complex relationship to the Twenty-First Amendment.").

24. *Id.*

Twenty-First Amendment.[25] Part II examines recent court decisions, identifying commonality in these opinions, including four approaches taken by federal courts to address this issue, and distinguishing factors that appear to influence the courts' final holdings. Part III of this Note offers a possible solution to the conflict. Despite the trend toward relaxing alcoholic beverage control laws, the dormant Commerce Clause analysis, being applied by a number of courts against direct-shipment laws, is fundamentally flawed.

I. THE ABCs OF DIRECT-SHIPMENT LAWS

Direct-shipment laws have existed since the repeal of Prohibition, and are often part of a three-tier system embodied in many states' alcoholic beverage control laws ("ABC laws").[26] Typically, ABC laws constrain manufacturers of alcoholic beverages by requiring them to sell only to licensed wholesalers or distributors.[27] The wholesalers themselves are restricted to selling only to licensed retailers.[28] Then, only licensed retailers are permitted to sell directly to consumers.[29] Many states' ABC laws provide that all out-of-state sellers of alcoholic beverages (of which wine is but one product) must pass through that state's three-tier system before reaching the consumer. Typically, however, these states provide an important exception—permitting in-state wineries to ship directly to in-state consumers.[30] In-state wineries can bypass the wholesale

25. *See, e.g,.* Craig v. Boren, 429 U.S. 190, 205-208 (1976) (reviewing the history of state regulations of alcoholic beverages from pre-Eighteenth Amendment to modern times); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 336 (1964) (Black, J., dissenting); Bolick v. Roberts, 199 F. Supp. 2d 397, 439-43 (E.D. Va. 2002) (providing a short historical review of The Wilson Act, The Webb-Kenyon Act, The Federal Alcohol Administration Act, and the Twenty-First Amendment Enforcement Act of 2000); Loretto Winery Ltd. v. Gazzara, 601 F. Supp. 850, 853 (S.D.N.Y. 1985) (providing a review of the history of Prohibition). In addition, a helpful review of the history and background of direct-shipment laws is found in, Vijay Shanker, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 355-59 (1999). A more detailed history of alcoholic beverage regulation is found in, Sidney J. Spaeth, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 162-63 (1991).

26. *See* Shanker, *supra* note 25, at 355.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See, e.g.,* Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002) (identifying the primary issue of the appeal as, "whether the State of Florida may prohibit out-of-state wineries from shipping their products directly to Florida consumers while permitting in-state wineries to do so"); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848,

and retail tiers to reach in-state consumers, while out-of-state wineries are subjected to all three tiers with the concomitant costs and taxes.[31] Direct-shipment opponents identify that disparity as an unconstitutional burden on interstate commerce.[32]

Proponents of direct-shipping bans[33] rest their case primarily on the strength of the Twenty-First Amendment arguing that, although the three-tier system is not perfect, it addresses the core concerns of temperance, tax collection, and the maintenance of orderly markets.[34] Many Americans today find it difficult to relate to

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851 (7th Cir. 2000) (noting that the district court considered the issue that, "Indiana permits local wineries, but not wineries 'in the business of selling in another state or country,' to ship directly to Indiana consumers"); Beskind v. Easley, 197 F. Supp. 2d 464, 466-67 (W.D.N.C. 2002) (reviewing the issue before the court and noting that North Carolina, like many states, regulates the sale of alcoholic beverages through a three-tier system but with a significant exception—in-state wineries can bypass the wholesaler and retailer and ship wine directly to North Carolina consumers, while out-of-state wineries do not benefit from the same access), *aff'd in part, vacated in part,* 325 F.3d 506, 520 (4th Cir. 2003); *Bolick*, 199 F. Supp. 2d at 417 (substantially upholding the report and recommendation of the Magistrate Judge who concluded:

> The case, reduced to its essence, is a constitutional challenge to the Virginia regulatory scheme which prohibits the shipment from outside Virginia of any beer, wine or distilled spirits directly to a consumer inside Virginia (direct shipment) without it passing through a Virginia licensed wholesaler or retailer while at the same time it allows shipment of beer and wine from Virginia producers within the state directly to consumers inside and outside of Virginia).

31. Russ Miller, Note, *The Wine is in the Mail: The Twenty-First Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND. L. REV. 2495, 2497-99 (2001) (explaining the typical three-tier system of alcohol regulation by many states and the additional costs incurred by out-of-state wineries forced to sell through the three-tier system).

32. *See* cases cited *supra* note 30.

33. Although mostly State regulatory authorities and wholesale distributors presumably have an interest in maintaining the status quo, there are many citizen groups who support continued close regulation of alcohol and its availability, particularly with regard to minors. In Swedenburg v. Kelly, 232 F. Supp. 2d 135, 136-37 (S.D.N.Y. 2002), for example, defendants were joined by Dr. Calvin O. Butts as well as a coalition of local university administrators including Fordham University. The primary concerns of the schools were the "devastating consequences" of removing the direct-shipment bans on alcoholic beverages and the increased access of alcohol to minors. *See* Defendants and Intervenor-Defendants' Reply Memorandum of Law in Support of Their Cross-Motion for Summary Judgment, and Reply Memorandum of the State University of New York, The City University of New York, Fordham University, and St. Francis College as Amici Curiae in Suppport of Defendants and Intervenor-Defendants' Cross-Motion for Summary Judgment, *Swedenburg* (No. 00 CV 778) (RMB), *available at* http:// www. coalitionft.org/litigation/newyork NYDefendant CrossSJ.pdf (last visited May 2, 2003).

34. *See, e.g.*, *Swedenburg*, 232 F. Supp. 2d at 139 (explaining that the defendants relied primarily on the Twenty-First Amendment and argued the State had acted within its "core powers" to regulate alcoholic beverages for use within the state). Defendants further contended the New York scheme legitimately advanced interests

the mood in the United States during the time leading up to Prohibition.[35] With the rise of the Internet and the commercial fluidity "e-shopping" provides, many young sophisticates are unable to place the Twenty-First Amendment in proper perspective.[36] When compared to the rise of economics as almost the *sine qua non* subject in a university education and its mantra of "free trade," there is probably an instinctive leaning among lawyers and law students toward the arguments grounded on the dormant Commerce Clause.[37] To fully appreciate the justification for a broad reading of the Twenty-First Amendment, proponents of direct-shipping laws typically combine their legal arguments with a historical review. As one court explained, this is "not solely out of nostalgia or a fascination with our political history . . . but in order to establish the historical background against which, first the Eighteenth and then the Twenty-First Amendments to the Constitution were put in place."[38]

"protected by the Twenty-First Amendment including, promoting temperance, ensuring orderly market conditions, and raising revenue." *Id.*

35. The events leading up to Prohibition began in the mid-nineteenth century. The Eighteenth Amendment was passed in 1920, while the Twenty-First Amendment was passed in 1933.

36. *See* Kozusko, *supra* note 2, at 75-78 (arguing that direct-shipment laws are unconstitutional). The "absurd results of the stringent state laws that prevent consumers in a majority of states from purchasing many of the wines that they desire," as well as "recent dramatic changes in the wine industry and the development of the internet," have motivated frustrated wine consumers to take action. *Id.* at 75; *see also* John Foust, Note, *State Power to Regulate Alcohol Under the Twenty-First Amendment: The Constitutional Implications of the Twenty-First Amendment Enforcement Act*, 41 B.C. L. REV. 659, 659-60 (2000) (arguing that direct-shipment laws are unconstitutional and describing the author's personal experience, before law school, working at a California winery where visitors were frustrated and disappointed to learn of direct-shipment bans emanating from their home states); Miller, *supra* note 31, at 2496 (arguing that out-of-state shipment bans may exist only if states also prohibit in-state direct shipment and noting that despite the Internet revolution, some wine consumers feel frustrated because of their inability to buy wine online and have it shipped to their homes).

37. Shanker, *supra* note 25, at 367 ("Consumers are the most obvious party negatively impacted by direct-shipment laws. In general, consumers are hurt by limited choice and higher prices that result from in-state monopolies. In particular, wine connoisseurs are prevented from obtaining the rare wines that they desire." (citing Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395, 413 (1986) ("[L]aws that protect in-state firms from competition in local markets have the effect of raising prices, so the ultimate burden is borne by local consumers."))).

38. Loretto Winery Ltd. v. Gazzara, 601 F. Supp. 850, 856 (S.D.N.Y. 1985).

A. The Early Years

The tension between the Commerce Clause and state authority to regulate alcoholic beverages dates well into the nineteenth century.[39] The Supreme Court first recognized the authority of the states to regulate alcoholic beverages in the *License Cases*.[40] The Court noted that state authority was "free from implied restrictions under the Commerce Clause."[41] After the Civil War, the temperance movement picked up momentum and states began to amend their constitutions to increase their control over alcohol.[42] Kansas was the first state to go dry in 1880, via constitutional amendment.[43] The Supreme Court, in *Mugler v. Kansas*,[44] upheld the amendment despite constitutional challenges holding that the Kansas amendment was fairly adapted to protect the community from the evils of alcohol.[45] This was followed three years later, however, by *Leisy v. Hardin*,[46] which significantly weakened the holding of the *License Cases*.[47] The facts surrounding the *Leisy* decision attest to the difficulty of closing all the loopholes in state attempts to regulate alcoholic beverages.

1. Leisy v. Hardin

Emboldened by the success of the *Mugler* decision, Kansas and Iowa eagerly asserted states' rights in regulating alcoholic beverages.[48] Iowa promulgated strict regulations on alcohol as soon as it was transported into the state.[49] The Iowa statute only licensed pharmacists to sell liquor "for pharmaceutical and medicinal purposes . . . and wine for sacramental purposes."[50] In addition, to qualify for a local permit to sell intoxicating liquors, one could not be the "keeper of a hotel, eating-house, saloon, restaurant, or place

39. Craig v. Boren, 429 U.S. 190, 205 (1976) (noting "the history of state regulation of alcoholic beverages dates from long before adoption of the Eighteenth Amendment" (citing the License Cases, 46 U.S. 504, 579 (5 How. 1847))).

40. *See id.* (stating that the Court in the *License Cases*, 46 U.S. 504 (1847), "recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders.").

41. *Craig*, 429 U.S. at 205.

42. Spaeth, *supra* note 25, at 171-72.

43. *Id.*

44. *Id.* at n.63 (citing Mugler v. Kansas, 123 U.S. 623 (1887)).

45. *Id.*

46. Leisy v. Hardin, 135 U.S. 100, 124 (1890).

47. *Craig*, 429 U.S. at 205 (noting that *Leisy v. Hardin* "undercut the theoretical underpinnings of the *License Cases*").

48. Spaeth, *supra* note 25, at 171-72.

49. *Id.*

50. *Leisy*, 135 U.S. at 105.

of public amusement."[51] A clever entrepreneurial family operating out of Peoria, Illinois, nevertheless saw a loophole in the regulations and moved to exploit it.[52] A member of the firm by the name of John Leisy, received shipments of prohibited beverages from Illinois, and put them up for sale in unbroken kegs and cases.[53] By keeping the liquor in its original and unopened packaging, he stopped short of running an unlawful saloon. By not serving liquor for consumption by his customers at his place of business, John Leisy, in effect, ran an agency business in alcohol.[54] Iowa did not see it that way, however, and seized the shipment. Leisy sued in replevin to recover the confiscated shipment.[55] The United States Supreme Court ruled in Leisy's favor, holding that the liquor remained an article of interstate commerce as long as it remained in its original and unopened packaging, and thus, the seizure constituted an invalid restraint on interstate commerce.[56]

Since few standards existed as to what constituted an original package, the *Leisy* decision opened the way for "original package" saloons.[57] The states countered the new loophole with help from Congress. A year after the Court decided *Leisy*, Congress passed the Wilson Act mandating that all liquor transported into a state be treated the same as liquor manufactured within the state, regardless of whether it remained in its original packaging.[58]

2. Rhodes v. Iowa

No sooner was the original package loophole plugged, than another one appeared in the form of mail order alcohol purchases; the precursor to today's Internet purchases.[59] Iowa challenged the loophole, but the Supreme Court, in *Rhodes v. Iowa,* upheld mail order alcohol purchases.[60] The Court carefully parsed the language

51. *Id.* at 106.

52. *Id.* at 100-02 (describing the operations of Gus. Leisy & Co., whose principal place of business was Peoria, Ill., in shipping sealed cases of beer into Keokuk, Iowa, to be sold and offered for sale in the original and sealed case of the manufacturer by the company's agent, Mr. John Leisy, a resident of Keokuk and agent for Gus. Leisy & Co.).

53. *Id.* at 101 (noting that kegs and cases of intoxicating liquors were left in their original and unopened shipping packages).

54. *Id.*

55. *Id.* at 102.

56. *Id.*

57. Spaeth, *supra* note 25, at 172.

58. *Id.* at n.72. (citing Wilson Act, ch. 728, 26 Stat. 313 (1890) (current version at 27 U.S.C. § 121 (1988))).

59. *Id.* at 172.

60. Rhodes v. Iowa, 170 U.S. 412, 426 (1898).

of the Wilson Act as to the meaning of "upon arrival in such State" and held that this did not mean the actual physical crossing of intoxicating liquors across a state line.[61] Instead, the Court concluded the phrase meant the completion of the transportation by the common carrier to the ultimate consignee of the merchandise within the state.[62] In other words, while in transit within state borders and while under the care of a common carrier, the intoxicating liquor was not subject to Iowa's regulations, despite the Wilson Act. Since the consignee was not in the business of reselling the shipment, there was not much Iowa or any state could do about it.[63]

The *Rhodes* Court held that prohibiting shipment of mail-order liquor constituted an impermissible burden on interstate commerce.[64] The Court pointed out that the burden on interstate commerce in *Rhodes* was even more compelling than in *Leisy*.[65] It reasoned that the right to sell the original packages in *Leisy* was important, but only indirectly, since contracts of sale normally fell under the purview of local legislative authority.[66] In *Rhodes*, on the other hand, the court reasoned:

> The right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state.[67]

After *Rhodes*, the mail order business flourished in Iowa and elsewhere.[68]

3. *The Webb-Kenyon Act*

The prohibitionists' response to *Rhodes,* the Webb-Kenyon Act, took fifteen years to promulgate.[69] Passed over President Taft's veto, the Act extended the reach of the Wilson Act by essentially

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61. *Id.* at 422-23.
62. *Id.*
63. Spaeth, *supra* note 25, at 173.
64. *Rhodes*, 170 U.S. at 424.
65. *Id.*.
66. *Id.*
67. *Id.*
68. Spaeth, *supra* note 25, at 173.
69. Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (current version at 27 U.S.C. §122 (1982)).

stripping liquor of its interstate character.[70] Even the full title and text of the Act made clear its intent: "An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases."[71] The Act did more than simply prohibit the introduction of liquor into a state against the local laws — it went a step further by removing state liquor laws from the protective shield of interstate commerce.[72] The Supreme Court upheld the constitutionality of the Act in *James Clark Distilling Co. v. Western Maryland Railway*.[73]

a. James Clark Distilling Co. v. Western Maryland Railway

Clark Distilling illustrates the states' difficulty controlling the flow of alcohol seeping through the mail order loophole created by *Rhodes*. In *Clark Distilling*, West Virginia had successfully issued preliminary injunctions against Western Maryland Railway, restraining it from shipping liquor into the state ordered by Clark Distilling in violation of West Virginia law.[74] West Virginia charged that very large shipments were taking place contrary to the laws governing solicitation and use of liquor in the state.[75] Clark Distilling sued the railway demanding it take a shipment of liquor that it asserted, disingenuously, was for *personal* use.[76] At trial, the State produced evidence showing that Clark Distilling had systematically solicited purchases, and constantly shipped liquor from Maryland into West Virginia in violation of the prohibition law.[77]

In *Clark Distilling*, the Supreme Court considered, among other things, whether Congress had the power to enact the Webb-Kenyon Law,[78] and if so, did Congress intend for the Law to extend as far as West Virginia's enactment, in prohibiting interstate shipments destined for personal use.[79] As to the first question, the Court concluded unequivocally that Congress had the power to enact the Webb-Kenyon Law, and that its passage was a lawful delegation of the Congressional power to regulate interstate commerce

70. Spaeth, *supra* note 25, at 173.
71. James Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 321 (1917).
72. *Id.* at 324.
73. *Id.* at 330-32 .
74. *Id.* at 317.
75. *Id.*
76. *Id.* at 317-18 (emphasis added). At the time of the injunction West Virginia's law did not prohibit personal consumption of liquor only its manufacture and sale. By the time the case reached the Supreme Court, however, West Virginia had amended its laws to prohibit personal use as well. *Id.*
77. *Id.*
78. *Id.* at 325.
79. *Id.* at 321.

with respect to liquor.[80] As to how far Congress intended Webb-Kenyon to reach, the Court looked to "[t]he antecedents of the Webb-Kenyon Act, that is, its legislative and judicial progenitors,"[81] and concluded there was no doubt the purpose of the Act was to address the "great evil which was asserted to arise from the right to ship liquor into a state through the channels of interstate commerce, and to receive and sell the same in the original package, in violation of state prohibitions."[82] The Court concluded the Webb-Kenyon Act removed the Commerce Clause immunity that had shielded interstate liquor shipments from the reach of local law.[83]

The holding in *Clark Distilling* empowered the prohibitionists, allowing a crescendo of prohibitionist sentiment to build as activist organizations such as the Prohibition Party, the Anti-Saloon League, and the Women's Christian Temperance Union picked up political support.[84] By 1919, these groups proved so successful that over thirty-three states had enacted "dry laws" restricting local liquor traffic.[85] Prohibition was dawning.

B. Prohibition, Repeal, and The Twenty-First Amendment

The "Noble Experiment"[86] born by the passage of the Eighteenth Amendment[87] to the Constitution was, from the beginning, the triumph of hope over reality. The weakness of Prohibition was apparent immediately after the Amendment's ratification.[88] One of the primary weaknesses was that it did not prohibit the consumption or use of alcoholic beverages, nor did it outlaw mere possession.[89] Instead, the Amendment prohibited, "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States." Moreover, the Amendment gave state and federal authorities concurrent enforcement powers.[90] Instead of encouraging

80. *Id.* at 328-29.
81. *Id.* at 323.
82. *Id.*
83. *Id.* at 324.
84. Loretto Winery Ltd. v. Gazzara, 601 F. Supp. 850, 853-54 (S.D.N.Y. 1985) (citing F. DOBYNS, THE AMAZING STORY OF REPEAL, 229-30 (1940)).
85. *Id.* at 854
86. *Id.* at 856 n.7 ("President Herbert Hoover, who had some difficulty in deciding whether he was a Wet or a Dry, coined this expression for National Prohibition.").
87. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.
88. *Loretto Winery Ltd.*, 601 F. Supp. at 854.
89. *Id.*
90. *Id.* at 856.

greater enforcement, it had the opposite effect, by giving the states a convenient excuse to let the federal authorities bear the primary burden of enforcing what was obviously an unpopular law.[91] The federal government, for its part, removed Prohibition enforcement from its regular agencies and assigned special agents who were underpaid and prone to corruption.[92]

At the same time, demand for alcoholic beverages actually increased after Prohibition, partly because of public fascination with something forbidden yet widely available in the flourishing night clubs and speakeasies of the 1920s.[93] One estimate put the number of speakeasies in the United States at 219,000 by 1929, and 32,000 of these were in New York City alone.[94] Even the family doctor became involved in dispensing alcoholic beverages—an exception to the Amendment allowed alcohol for "medicinal purposes."[95] Adding to the loopholes was the exception for sacramental wine. Soon it seemed the United States had become a nation of bootleggers.[96] "Home brew" was widespread, and people began to associate alcohol consumption as a symbol of freedom from senseless government regulation.[97] In contemporary slang, the phrase "Strike a blow for freedom" became a "euphemism for pouring a drink."[98]

With widespread violation and flaunting of the law, the seemingly unending supply of liquor, and the poor prospects for enforcement, the political mood began to swing toward repeal.[99] After thirteen years, the "Noble Experiment" ended on December 5, 1933 with the ratification of the Twenty-First Amendment. The Twenty-First Amendment met with universal celebration, as states welcomed regaining local control of liquor laws and enforce-

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91. *Id.*

92. *Id.*

93. *Id.* at 855.

94. *Id.* (citing F.W. BOARD, JR., *America and the Jazz Age. A History of the 1920's*, 71 (1968)).

95. *Id.*

96. *Id.*; *see also* Nat'l Distrib. Co., Inc. v. Bureau of Alcohol, Tobacco and Firearms, 626 F.2d 997, 999 n.3 (D.C. Cir. 1980).

> When a dealer sells outside of its authorized territory, it is called in industry parlance a 'bootlegger' or 'highjacker.' This is considered unethical business practice. Where the term 'bootlegger' appears in the rest of this opinion . . . it is used in the more ordinary sense to mean a seller of illicit alcohol.

Id. (internal citations omitted).

97. *Loretto Winery Ltd.*, 601 F. Supp. at 855.

98. *Id.*

99. *Id.* at 856.

ment.[100] The Amendment originally had four sections. The first section provided for repeal of the Eighteenth Amendment, and the fourth section dealt with ratification by the states.[101] In contrast to their benign brothers, sections two and three were quite controversial.[102]

The proposed section three gave concurrent power to the federal and state governments to regulate the sale of alcoholic beverages for on-premises consumption.[103] This provision caused concern about preserving a federal role in local law enforcement.[104] Given the recent experience during Prohibition, there was a feeling that this provision defeated the whole point of repeal.[105] Congress ultimately deleted section three in favor of giving the states complete control of alcohol regulation.[106]

The proposed section two was retained. In *Craig v. Boren*, the Supreme Court attempted to interpret the provision: "The wording of § 2 . . . closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes."[107] Clear intentions aside, section two has continued to fuel debate as to what exactly Congress intended, as well as how to reconcile differences in interpretation.[108]

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100. Spaeth, *supra* note 25, at 180.

101. *Id.*

102. *Id.* n.128 (citing S.J. Res. 211, 72d Cong., 2d Sess., 76 CONG REC 4138, 4139 (1933)). The original proposal read:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Sec. 2. 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.
>
> Sec. 3. Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.
>
> Sec. 4. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Id.

103. *Id.*

104. *Id.* at 180.

105. *Id.*

106. *Id.*

107. Craig v. Boren, 429 U.S. 190, 205-06 (1976).

108. Spaeth, *supra* note 25, at 180-81.

C. The Three-Tier System After Prohibition

Many states were eager to regain control of alcoholic beverage regulation after Prohibition. States often responded in one of two ways — state monopoly of the distribution chain or the three-tier system,[109] with most states opting for some form of the three-tier system.[110] The states chose the three-tier system to address problems associated with what were known as "tied houses."[111]

In the early days after prohibition's repeal, there were few laws regulating the alcoholic beverage industry.[112] One of the perceived dangers before Prohibition was vertical integration in the liquor industry by so-called "tied houses."[113] This referred to large manufacturers and distillers able to control the entire distribution process from production down to the neighborhood bar. The direct control of retailers by producers was believed to lead to increased sales, abusive sales practices, and excessive consumption.[114] Before prohibition, distillers and brewers had gained control of large numbers of retailers.[115] Some believed that many of the pre-Prohibition alcohol problems were directly linked to the evils of "tied houses," and that steps should be taken in the new era to prevent this.[116] One example cited in Congressional testimony described a system where retailers controlled by large distillers had a quota to fill of a particular private brand as a condition to being

109. TFWS, Inc. v. Schaefer, 242 F.3d 198, 202 (4th Cir. 2001) (considering an action in which a liquor retailer challenged Maryland's scheme for regulating wholesale liquor in violation of the Sherman Act, noting that, "The Twenty-First Amendment repealed Prohibition in 1933 and gave the states wide latitude to regulate liquor distribution and sales within their borders," and further stating that, "Two methods of regulation have emerged. The first is the operation of a state monopoly on liquor sales with state-run stores. The second is a licensing system that grants licenses to those in the liquor distribution chain, namely, manufacturers, wholesalers, and retailers, who must operate under detailed regulations.").

110. Heald v. Engler, No. 00-CV-71438-DT, 2001 U.S. Dist. LEXIS 24826, at *3 (E.D. Mich. Sept. 28, 2001) (noting that "In one form or another, the three-tier distribution system is in place in most states" (citing Bainbridge v. Bush, 148 F. Supp. 2d 1306, 1308 (M.D. Fla. 2001))); Shanker, *supra* note 25, at 355 ("After Prohibition, most states adopted the 'three-tier system' of alcohol sales, under which alcohol producers must go through wholesalers and distributors, who must in turn go through retailers, who can then sell to consumers.").

111. Nat'l Distrib. Co., Inc. v. Bureau of Alcohol, Tobacco and Firearms, 626 F.2d 997, 1004 (D.C. Cir. 1980).

112. *Id.* at 1005.

113. *Id.* at 1008-10.

114. *Id.* at 1009.

115. *Id.*

116. *Id.*

allowed to retail that particular brand.[117] Retailers were thus encouraged to induce customers to continue drinking when they clearly had enough.[118]

Many states chose the three-tier system to address the perceived dangers of "tied houses" by separating the producers from consumers through a distinct and mandatory distribution system.[119] Today, for the most part, the three-tier system continues to prevail.[120]

D. The Dormant Commerce Clause

Although Commerce Clause jurisprudence dates back even further than the Eighteenth and Twenty-First Amendments, the modern application is relatively recent, widely accepted, and involves a two-tier analysis.[121] This two-tier analysis was articulated by the Supreme Court in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*.[122]

Justice Thurgood Marshal, writing for the Court, spelled out the first tier of the analysis: "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interest; [the Supreme Court has] generally struck down the statute without further inquiry."[123] As the language indicates, this tends to be a strict rule.

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117. *Id.*

118. *Id.*

119. *See, e.g.*, S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm'n, 709 F.2d 291, 293 (5th Cir. 1983) ("[T]o avoid the harmful effects of vertical integration in the intoxicants industry, the state has effectively restricted manufacturers, wholesalers . . . and retailers to one level of activity."); Bolick v. Roberts, 199 F. Supp. 2d 397, 425 (E.D. Va. 2002) (explaining one of the general principles underlying Virginia's ABC laws was to "minimize private profit and discouraging sales and consumption by preventing integration among manufacturers from holding interest in retailers").

120. Bainbridge v. Bush, 148 F. Supp. 2d 1306, 1308 (M.D. Fla. 2001), *vacated by* Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002).

> [L]ike the majority of states, Florida utilizes a three-tiered system of alcohol distribution, with different classes of licenses for manufacturers, distributers, and retailers. In conjunction with this distribution system, it is unlawful for any person in the business of selling alcoholic beverages to knowingly ship alcoholic beverages from an out-of-state location directly to any person in this state who does not hold a valid manufacturer's or wholesaler's license.

121. *See Bolick*, 199 F. Supp. 2d at 424 (explaining the Supreme Court's two-tier approach in analyzing state economic regulation).

122. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

123. *Id.* at 573; *see also* Healy v. Beer Inst., 491 U.S. 324, 337 n.14 (1989) (quoting *Brown-Forman Distillers Corp.*, 476 U.S. at 579, and striking down price affirmation statutes).

The second tier analysis applies a balancing test when there is an indirect interference or burden to interstate commerce, but the regulation is not facially discriminatory, allowing it to survive tier one scrutiny.[124] In such an instance, courts do not strike the regulation out of hand, but instead, attempt to weigh certain factors.[125] There are numerous scholarly interpretations as well as court opinions on this aspect of the Commerce Clause, but the most widely accepted summary[126] of the law comes from the United States Supreme Court in *Pike v. Bruce Church, Inc.*:[127]

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens.[128]

Another broad area of modern Commerce Clause jurisprudence is implicated when a state itself acts as a market participant.[129] In those situations, the state is acting in the capacity of a private market participant, not as a market regulator.[130] A state that owns a business and favors its own citizens is generally free from the restraints of the dormant Commerce Clause.[131] The market participant doctrine, however, is not infinite. Whether a state's use or

124. *Brown-Forman Distillers Corp.*, 476 U.S. at 579 ("When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970))).

125. *Id.*

126. NOWAK & ROTUNDA, *supra* note 18, § 8.7.

127. *Pike*, 397 U.S. at 142.

128. *Id.* (internal citations omitted).

129. NOWAK & ROTUNDA, *supra* note 18, § 8.9.

130. *Id.*

131. *Id.* (citing Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (holding that state bounty for scrap automobiles can favor scrap processors with an in-state plant)).

regulation of its own natural or financial resources constitutes a permissible protection of local interests while acting as a "market participant," or is an impermissible favoring of in-state economic interests, is sometimes unclear.[132] The Supreme Court analyzed this distinction in *South-Central Timber Development, Inc. v. Wunnicke.*[133]

In *South-Central Timber*, Alaska had imposed a requirement that state-owned timber sold under contract had to be processed in-state before shipment out of state. The plurality decision concluded that the state could not exercise "downstream regulations" and limit market activity even regarding its own natural resource once the resource was sold.[134] The Court narrowly interpreted the meaning of market participant to encompass only the raw timber business.[135] The next stage of processing, in the Court's opinion, was a totally distinct line of business.[136] Hence, Alaska could not escape Commerce Clause scrutiny.[137] Justices Rehnquist and O'Connor dissented, arguing that the state was acting as a market participant, and the economic reality was that Alaska was offering a lower price for the raw timber to keep processing jobs in-state.[138]

Commerce Clause jurisprudence has experienced a "long and twisted" path on its way to modern application.[139] Although it is widely accepted that the dormant Commerce Clause is meant to prevent the "economic Balkanization of the Union," the role of the Court and what tests it should apply to achieve these goals has not always been clearly scripted.[140] Moreover, as Professors Nowak and Rotunda explain, "Commerce Clause analysis must also explain why Congress can, in effect, overrule a Court decision based on the Commerce Clause, when Congress enacts legislation that discriminates against interstate commerce, or approves of discriminatory state laws."[141]

Finally, where state regulations are found to have either a discriminatory purpose or effect on interstate commerce, in violation

132. *Id.*
133. *Id.* (citing South-Cent. Timber Dev. Inc. v. Wunnicke, 467 U.S. 82 (1984)).
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Wunnicke*, 467 U.S. at 103.
139. NOWAK & ROTUNDA, *supra* note 18, § 8.1.
140. *Id.*
141. *Id.*

of the Commerce Clause or the dormant Commerce Clause, the regulations are subjected to strict judicial scrutiny.[142]

E. Commerce and The Twenty-First Amendment: The Early Supreme Court Cases

1. State Board of Equalization of California v. Young's Market Co.

In the years immediately following Prohibition's repeal, the Supreme Court gave the Twenty-First Amendment a fairly wide berth.[143] An expansive reading of the Twenty-First Amendment was expressed early on in *State Board of Equalization of California v. Young's Market Co.*[144] In *Young's Market*, California had imposed a five hundred dollar license fee for the privilege of importing beer to any place within its borders.[145] The plaintiffs were California wholesalers who imported beer from Missouri and Wisconsin for resale in California.[146] Each refused to apply for the import license, claiming the regulation discriminated against wholesalers of imported beer and violated the dormant Commerce Clause and Equal Protection clause.[147] The Supreme Court made a point to note this was not a case involving the privilege to sell beer, since all plaintiffs possessed a fifty dollar license to sell lawfully possessed beer, whether imported or not.[148] The plaintiffs were complaining about having to pay for the privilege of importing beer.[149]

Justice Brandeis, writing for the Court, grounded his decision squarely on the Twenty-First Amendment and upheld the California import fee against the plaintiffs' constitutional challenges.[150] Justice Brandeis noted that before the passage of the Twenty-First Amendment it would have been unconstitutional for California to have imposed any fee for the privilege of importing alcoholic beverages.[151] Even if California imposed an equal fee for the privilege

142. Kendall-Jackson Winery Ltd., v. Branson, 82 F. Supp. 2d 844, 863 (N.D. Ill. 2000) (citing Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 270 (1984)).

143. *See* NOWAK & ROTUNDA, *supra* note 18, § 8.8; Foust, *supra* note 36, at 677-89; Miller, *supra* note 31, at 2512-23.

144. 299 U.S. 59 (1936).

145. *Id.* at 60.

146. *Id.* at 60-61.

147. *Id.* at 61.

148. *Id.*

149. *Id.* at 62.

150. *Id.*

151. *Id.*

of transporting domestic beer from the place of manufacture to the wholesaler, the law would have been unconstitutional not because of discrimination, but because of an impermissible burden on interstate commerce.[152] Justice Brandeis concluded, however, that the Twenty-First Amendment "abrogated the right to import free, so far as concerns intoxicating liquors."[153] In effect, Justice Brandeis was saying that after the Twenty-First Amendment, the Commerce Clause could no longer constrain the states from freely regulating alcoholic imports.

Finally, in an argument that may resonate with the current debate on direct wine shipments, the Court held that the Twenty-First Amendment empowered the states to forbid all imports that did not comply with state regulations.[154] Extending the argument, Justice Brandeis wrote:

> The plaintiffs ask us to limit this broad command. They request us to construe the amendment as saying, in effect: The state may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its boarders[sic]; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the amendment, but a rewriting of it.[155]

2. Collins v. Yosemite Park & Curry Co.

Although the Court's reading of the Twenty-First Amendment in *Young's Market* was indeed broad, less than two years later, the Court held that those limits, however, were not unbounded in the case of *Collins v. Yosemite Park & Curry Co.*.[156]

In *Yosemite Park*, the defendant contracted with the Secretary of the Interior to operate hotels, camps, and stores within Yosemite National Park.[157] As part of its operations, Yosemite sold liquor, beer, and wine to park visitors for prices approved by the Secretary of the Interior.[158] During the normal course of business, Yosemite

152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 538 (1938) (concluding that the Twenty-First Amendment, while increasing the states' power to deal with liquor regulation, did not increase the states' jurisdiction and therefore the Twenty-First Amendment did not enable California to regulate liquor at Yosemite Park which was under the territorial jurisdiction of the United States).
157. *Id.* at 521.
158. *Id.*

also imported beer, wine, and distilled spirits from outside California, and stored it on premises in anticipation of sale.[159] Fresh from victory in *Young's Market*, California tried to impose its ABC laws on Yosemite by levying liquor import and sale taxes and fees under the threat of civil and criminal penalties.[160] Yosemite sued to enjoin California from acting on its threat.[161]

The Supreme Court held for the plaintiffs and explained, "Though the [Twenty-First] Amendment may have increased the state's power to deal with the problem [of liquor importation] it did not increase its jurisdiction . . . . As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment."[162] This doctrine of extraterritoriality—that a state's power under the Twenty-First Amendment is limited to its jurisdiction—is a recurring theme in related Supreme Court cases.

3. Hostetter v. Idlewild Bon Voyage Liquor Corporation

The broad interpretation of the Twenty-First Amendment seems to have prevailed after *Young's Market* and *Yosemite Park* until 1964, when the Court decided the oft-quoted case of *Hostetter v. Idlewild Bon Voyage Liquor Corporation*.[163] Although *Hostetter* is often cited by commentators to show the pendulum swing from the broad to the narrow reading of the Twenty-First Amendment, the holding, in light of the facts, should not be too surprising or extraordinary. It is simply the east coast version of *Yosemite Park*.

In *Hostetter*, Idlewild was in the business of selling bottled wines and liquors to departing international airline passengers at Idlewild Airport, now New York City's John F. Kennedy Airport.[164] Only travelers were allowed to buy liquor.[165] After a purchase, the liquor was delivered directly to the departing plane with documents approved by United States Customs.[166] The passenger was not given the liquor until arrival overseas.[167] Idlewild bought the liquor from bonded wholesalers located outside New York State,

159. *Id.*
160. *Id.* at 522.
161. *Id.*
162. *Id.* at 538.
163. 377 U.S. 324 (1964).
164. *Id.* at 325.
165. *Id.*
166. *Id.*
167. *Id.*

specializing in tax-free liquors destined for export.[168] The New York State Liquor Authority informed Idlewild that it was in violation of the State's ABC laws because it was unlicensed under New York law.[169] Idlewild sued for injunctive relief to prevent New York from interfering with its business.[170] New York argued that it was within its Twenty-First Amendment powers to regulate this business, and had justifiable concerns about preventing the diversion of alcohol.[171]

The Supreme Court, in a decision written by Justice Stewart, sustained the challenge against New York.[172] The analysis began with the general principle that "the right of a state to prohibit or regulate importation of intoxicating liquor is not limited by the Commerce Clause."[173] After noting a number of cases supporting the expansive reading of the Twenty-First Amendment, Justice Stewart refined the generalization with a reminder that, nevertheless, this power was not unlimited: "To draw a conclusion from this line of decisions that the Twenty-First Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification."[174] The Court stated that both the Twenty-First Amendment and the Commerce Clause were parts of the same Constitution, and "each must be considered in light of the other, and in the context of the issues and interests at stake in any con-

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168. *Id.*

169. *Id.* at 326. The opinion of the New York Attorney General was based on the following provisions of New York law:

> Sale means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto.

N.Y. Alco. Bev. Cont. Law § 3 (McKinney 2003).

> No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefore required by this chapter.

Id. § 100.

> No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for business, trade or industry or on an arcade or subsurface thoroughfare leading to a railroad terminal.

Id. § 105.

170. *Hostetter*, 377 U.S. at 326-27.

171. *Id.* at 328.

172. *Id.* at 334.

173. *Id.* at 330.

174. *Id.* at 331-332.

crete case."[175] In illustrating what was meant by this balancing of dual clauses with facts, Justice Stewart referred to the rationale behind the *Yosemite Park* decision—extraterritoriality.

In addition to finding that New York had reached beyond its jurisdiction, the *Hostetter* Court also found that New York had "neither alleged nor proved the diversion of so much as one bottle of plaintiff's merchandise to users within the state of New York."[176] The ultimate delivery and use was not in New York, but a foreign country. The Court concluded that "the State has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do."[177]

Distilled to its essentials, *Hostetter* is simply a variation of *Yosemite Park*. A state has increased power to regulate liquor, but not increased jurisdiction.[178] Federal laws specifically setting up the duty free shops and the security provisions preventing unlawful diversion into the State created a federal enclave like the national park in *Yosemite Park*, an enclave to which the power of the Twenty-First Amendment did not extend.

On the same day *Hostetter* was decided, the Supreme Court also decided *Department of Revenue v. James B. Beam Distilling*,[179] which further defined the jurisdictional limits of the Twenty-First Amendment. In *Beam Distilling*, the Court considered the relationship between the Export-Import Clause[180] and the Twenty-First Amendment. Consistent with the theme in *Hostetter* that the jurisdictional reach of the Twenty-First Amendment is not unbounded, the Court limited the states' ability to tax liquor imports from abroad "because of the explicit and precise words of the Export-Import Clause of the Constitution."[181] The Court thereby subordi-

175. *Id.* at 332.

176. *Id.* at 328.

177. *Id.* at 333.

178. Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 538 (1938) (finding that "though the [Twenty-First] Amendment may have increased the state's power to deal with the problem; it did not increases its jurisdiction." (internal quotes omitted)).

179. 377 U.S. 341 (1964).

180. U.S. CONST. art. I, § 10, cl. 2 provides that:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

181. *Beam Distilling*, 377 U.S. at 346.

nated the Twenty-First Amendment's power to foreign policy concerns that are present as to imports from abroad as well.[182]

The theme of extraterritoriality and the principle that a state cannot extend the reach of its Twenty-First Amendment powers beyond its jurisdiction is not anchored merely to geography. What the Court began in *Beam Distilling*, it further refined in *Craig v. Boren*[183] by considering the relationship of the Twenty-First Amendment to the Bill of Rights.

4. Craig v. Boren

Craig v. Boren involved an action challenging Oklahoma statutes that "prohibit[ed] the sale of 'nonintoxicating' 3.2% beer to males under age 21 and to females under age 18."[184] The plaintiffs alleged that gender-based discrimination constituted a denial of equal protection under the Fourteenth Amendment.[185] The Court invalidated the Oklahoma statutes, noting:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-First Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: 'Neither the text nor the history of the Twenty-First Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.'[186]

Craig v. Boren articulated what the Court had been saying all along, from *Yosemite Park* to *Hostetter* and *Beam Distilling*; that is, the power of the Twenty-First Amendment falls sharply once its reach extends outside the scope of the Commerce Clause. Although this guidance was helpful, it nevertheless did not address how strong that power was when the issue fell inside the scope of the Commerce Clause. In the next series of cases, the contours of the modern approach to balancing the competing interests of the Twenty-First Amendment and the Commerce Clause were molded.

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182. NOWAK & ROTUNDA, *supra* note 18, § 8.8.

183. 429 U.S. 190 (1976) (Rehnquist, J., dissenting).

184. *Id.* at 192.

185. *Id.* at 191.

186. *Id.* at 206 (quoting P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 258 (1975)).

F. A Pragmatic Approach to Balancing the Federal Interests: More From the Supreme Court

1. California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.

Justice Powell took the opportunity to summarize the history of Twenty-First Amendment jurisprudence in the 1980 case of *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*[187] *Midcal* held that, notwithstanding a state's virtually complete power to control the importation, sale, or distribution of liquor, Congress had the power, under the Commerce Clause, to prohibit resale price maintenance, which violates the Sherman Act.[188] The *Midcal* opinion concluded that the tension between the Twenty-First Amendment and the Commerce Clause would find no easy resolution because "there is no bright line between federal and state powers over liquor."[189] The Court went on to note that while the "States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a concrete case."[190] Essentially, every case is a judgment call involving a balancing act. Moreover, this balancing was to be a "*pragmatic* effort to harmonize state and federal power."[191] Before the *Midcal* decade drew to a close, the Supreme Court demonstrated its pragmatic balancing in a series of cases that laid the foundation for the current debate on direct shipment laws.

2. Capital Cities Cable, Inc. v. Crisp

In *Capital Cities Cable, Inc. v. Crisp*[192] the Supreme Court considered whether Oklahoma could require cable television operators to delete all advertisements for alcoholic beverages contained in the out-of-state signals retransmitted to Oklahoma subscribers.[193] Illustrating the pragmatic approach, the Court held that Oklahoma could not.[194]

187. 445 U.S. 97, 106-110 (1980).
188. NOWAK & ROTUNDA, *supra* note 18, § 8.8.
189. 445 U.S. at 110.
190. *Id.* (internal quotations and citations omitted).
191. *Id.* at 109 (emphasis added).
192. 467 U.S. 691 (1984).
193. *Id.* at 694.
194. *Id.* at 716.

The decision in *Capital Cities* rested on two considerations. First, the Court recognized that the Federal Communications Commision ("FCC") had an interest in the case because it raised questions as to "whether the State's regulation of liquor advertising, as applied to out-of-state broadcast signals, was valid in light of existing federal regulations of cable broadcasting."[195]

The FCC filed an amicus brief in which it contended that the Oklahoma ban on the retransmission of out-of-state signals by cable companies would significantly interfere "with the existing federal regulatory framework established to promote cable broadcasting."[196] Expanding its inquiry, the Court wrote: "Although we do not ordinarily consider questions not specifically passed upon by the lower court, this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts."[197] The Court apparently realized that upholding Oklahoma's ban would significantly disrupt a host of FCC regulations, with consequences well beyond Oklahoma's borders. In addition, the Court noted that the practical implication of such a ban "would be prohibitively burdensome."[198]

The second element was Oklahoma's own narrow interest here — the ban did "not apply to alcoholic beverage advertisements appearing in newspapers, magazines, and other publications printed outside Oklahoma but sold and distributed in the State."[199] In effect, Oklahoma already allowed alcoholic beverage advertisements in nearly all other media entering the state. Hence, banning the retransmission of cable broadcasts alone would address only a single avenue of alcohol advertising, allowing all other forms to continue unfettered. Weighing this narrow state interest along with the significant interests of the FCC, the Court held Oklahoma's prohibition unconstitutional.[200] The Court's decision in *Capital Cities* was unanimous, unlike in the next important case, which one commentator called arguably the most important modern case in Twenty-First Amendment jurisprudence.[201]

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195. *Id.* at 697.
196. *Id.*
197. *Id.*
198. *Id.* at 707.
199. *Id.* at 695.
200. *Id.* at 716 (holding that the application of Oklahoma's alcoholic beverage advertising ban to out-of-state cable operators in that State is pre-empted by federal law and that the Twenty-First Amendment does not save the regulation from preemption).
201. Foust, *supra* note 36, at 682 n.150 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-27, at 1170 (3rd ed. 2000), when calling *Bacchus* perhaps

3. Bacchus Imports, Ltd. v. Dias

In *Bacchus Imports, Ltd. v. Dias*[202] the Supreme Court struck down a Hawaii statute that levied a twenty-percent tax on wholesale liquor sales but exempted certain locally produced liquor.[203] The Hawaiian tax, as originally enacted in 1939, contained no exceptions.[204] But in 1971, the legislature exempted Okolehao, a brandy distilled from the root of an indigenous Hawaiian shrub, in an effort to aid the local liquor industry.[205] A few years later, the State exempted pineapple wine.[206] Other locally produced sake (Japanese rice wine) and fruit liqueurs were not exempted from the tax.[207]

Bacchus is an important decision for opponents of direct-shipping laws, because its reasoning provides much ammunition to use against the states. The Supreme Court began its analysis stating: "A cardinal rule of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business."[208]

Hawaii attempted to minimize the extent of the harm by relying on statistics showing that the sales of okolehao and pineapple wine constituted well under one percent of the total liquor sales in Hawaii.[209] The State further argued that these two types of indigenous wines posed "no competitive threat to other liquors produced elsewhere and consumed in Hawaii."[210]

The Court made short shrift of these arguments by concluding, "Neither the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present 'competitive threat' to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages."[211] The Court noted that it "need not know how une-

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the most important of the contemporary cases on the scope of the Twenty-First Amendment).

202. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

203. *Id.* at 265.

204. *Id.* at 265.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 268.

209. *Id.*

210. *Id.* at 269.

211. *Id.*

qual the Tax is before concluding that it unconstitutionally discriminates."[212]

The Court also foreclosed the argument that *Bacchus* could be distinguished as merely a taxpayer discrimination case thereby not implicating the Commerce Clause. Even if it were only a taxpayer discrimination case the Court said, "Our cases make clear that discrimination between in-state and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state taxpayers."[213]

Hawaii asked the Supreme Court to apply a "more flexible approach, taking into account the practical effect and relative burden on commerce."[214] The State argued that legitimate state objectives were credibly advanced, there was no patent discrimination against interstate trade, and the effect on interstate commerce was incidental.[215] The Court responded that a finding of "economic protectionism may be made on the basis of either discriminatory purpose or discriminatory effect."[216] In light of the obvious and self-admitted protectionist genesis of the tax, the Court found "it had both the purpose and effect of discriminating in favor of local products."[217]

The final part of *Bacchus* addresses the weight given to the Twenty-First Amendment.[218] The analysis demonstrated the Supreme Court's balancing in favor of the dormant Commerce Clause. Citing *Midcal*, the Court admitted that its "recent Twenty-First Amendment cases emphasized federal interests to a greater degree than had earlier cases" while attempting to employ a "pragmatic effort to harmonize state and federal powers."[219]

One reason the majority, after examining all the factors, gave relatively less weight to the Twenty-First Amendment is explained in the *Bacchus* opinion,[220] where the Court noted that "the State expressly disclaimed any reliance upon the Twenty-First Amendment in the court below and did not cite it in its motion to dismiss or affirm."[221] The Court further chided the State that only when

212. *Id.* (citing Maryland v. Louisiana, 451 U.S. 725, 760 (1981)).
213. *Id.* at 269 n.8 (citations omitted).
214. *Id.* at 270.
215. *Id.*
216. *Id.* (internal citations and quotations omitted).
217. *Id.* at 273.
218. *Id.* at 274-76.
219. *Id.* at 275.
220. *Id.* at 274.
221. *Id.*

the State had to prepare for argument before the Supreme Court did it become "clear" that the Twenty-First Amendment saved the challenged tax.[222] It may be that the Court, in its pragmatic approach, simply recognized that the State itself did not rely on the Twenty-First Amendment in justifying the challenged statute.

Whether or not Hawaii argued the issue of whether the Twenty-First Amendment shielded the tax from a Commerce Clause challenge, the issue was the focus of the opinion. Although *Bacchus* passed with a 5-3 majority,[223] the dissent by Justice Stevens, joined by Justices Rehnquist and O'Connor, emphatically disagreed with the light weight the majority placed on the Twenty-First Amendment in reaching its decision.[224] Disagreeing with the majority's finding that the Hawaiian tax was unconstitutional, Justice Stevens wrote, "[a]s I read the text of the Amendment, it expressly authorizes this sort of burden."[225] Justice Stevens buttressed his argument by noting that Hawaii clearly had the power under the Twenty-First Amendment to prohibit all imports of liquor into the state or use therein.[226] Thus, he reasoned, if Hawaii had the power to create a local monopoly — thereby creating the most severe form of discrimination on out-of-state interests — it logically had the power to choose a much lesser form of discrimination by providing some degree of special benefits in the form of a subsidy or tax exemption for locally produced liquor.[227]

The struggle to find the proper balance between the Twenty-First Amendment and other federal interests implicating the Commerce Clause was evident in the *Bacchus* opinion. Justice Stevens' dissent clearly identifies the two camps within the Court and sounds what will be a consistent theme throughout the following decade by those Justices who believe the power of the Twenty-First Amendment has been wrongfully mitigated.

4. *Brown Forman Distillers Corp. and Healy*

Toward the end of the 1980s, the Court rounded out its Twenty-First Amendment jurisprudence with *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[228] and *Healy v. The Beer*

222. *Id.*
223. *Id.* at 277 (Brennan, J. not participating in the decision).
224. *Id.* at 278-87.
225. *Id.* at 282.
226. *Id.* at 285.
227. *Id.* at 286.
228. 476 U.S. 573 (1986).

Institute.[229] Both cases stand for the principle that the Twenty-First Amendment cannot withstand a challenge from the Commerce Clause when the practical effect is to regulate liquor sales or transactions in other states.[230] These holdings are not surprising; they echo the principle of extraterritoriality and its role in limiting the reach of the Twenty-First Amendment. In addition, *Brown-Forman Distillers* is noteworthy as a cornerstone case in modern dormant Commerce Clause analysis, as it firmly established the "two-tiered approach" the Supreme Court began to take in analyzing state economic regulation under the Commerce Clause.[231]

Healy was similar to *Brown-Forman* in that it too addressed Connecticut's price affirmation statutes, which operated indirectly, as opposed to the direct effect in *Brown-Forman*. The Supreme Court struck down the Connecticut regulations largely on the same grounds it did in *Brown-Forman*, prohibiting laws that effectively regulated liquor sales in other states.[232] The Court echoed the same theme of extraterritoriality first expressed a half century earlier in *Yosemite Park*.[233]

Finally, in concluding the Supreme Court cases, like *Bacchus*, the *Brown-Forman* and *Healy* decisions are noteworthy for their dissent. Justice Stevens dissented, joined by Justices Rehnquist and White.[234] The dissent was grounded on two points; the first of which was the lack of evidence showing that the challenged statute really had any impact on price competition outside New York's borders.[235] The second point of the dissent echoed the *Bacchus* dissent, arguing that the Twenty-First Amendment empowered New York to totally exclude liquor from its local market if it chose

229. 491 U.S. 324 (1989).

230. *Healy*, 491 U.S. at 342-43 (affirming the holding in *Brown-Forman* that the Twenty-First Amendment does not immunize state laws from invalidation under the Commerce Clause when those laws have the practical effect of regulating liquor sales in other states); *Brown-Forman Distillers Corp.*, 476 U.S. at 585 (holding New York's statute regulated out-of-state transactions in violation of the Commerce Clause, and the statute was not a valid exercise of New York's powers under the Twenty-First Amendment).

231. *Brown-Forman Distillers Corp.*, 476 U.S. at 579 ("This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause."); *see also supra* notes 121-128 and accompanying text.

232. *Healy*, 491 U.S. at 343.

233. *Id.* (striking down Connecticut's price affirmation statutes for "the reasons noted today and in *Brown-Forman*, this extraterritorial effect violates the Commerce Clause"); *see supra note* 162 and accompanying text.

234. *Brown-Forman Distillers Corp.*, 476 U.S. at 586-92.

235. *Id.* at 587.

to do so.[236] Like the dissent in *Bacchus*, Justice Stevens argued that the greater power to limit imports entirely implied a lesser power to regulate imports in this fashion, and that the Twenty-First Amendment should be given a much wider berth.[237]

Healy was decided in 1989, three years after *Brown-Forman*. Once again as in *Bacchus*, *Craig v. Boren*, and *Brown-Forman*, Chief Justice Rehnquist dissented, this time joined by Justices Stevens and O'Connor.[238] The dissent, sounding a familiar theme, contended that the majority paid only "lip service"[239] to the principle that states are given additional authority to regulate alcoholic beverages under the Twenty-First Amendment.[240] Similar to the reasoning in Judge Easterbrook's much-analyzed *Bridenbaugh* decision,[241] Chief Justice Rehnquist commented, "Neglecting to consider that increased authority is especially disturbing here where the perceived proscriptive force of the Commerce Clause does not flow from an affirmative legislative decision and so is at its nadir."[242] The Chief Justice wrote further, "The result reached by the Court in these cases can only be described as perverse. A proper view of the Twenty-First Amendment would require that States have greater latitude under the Commerce Clause to regulate products of alcoholic beverages than they do producers of milk."[243]

G. Whining Wineries: The Connoisseurs Strike Back

The tension between the dormant Commerce Clause and the Twenty-First Amendment has fermented for decades without attracting much attention. Yet, in the past three years, it seems to have resurfaced in the courts with a renewed urgency and sense of

236. *Id.* at 591.

237. *Id.*

238. *Healy*, 491 U.S. at 345-349.

239. *Id.* at 349.

240. *Id.*

241. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849 (7th Cir. 2000) ("This case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not.").

242. *Healy*, 491 U.S. at 349.

243. *Id.*

purpose.[244] Five of the seven cases analyzed in this Note were argued in 2002.[245]

The combination in recent years of the rise of e-commerce, with its promise of convenience and efficiency, changes in the structure of the wholesale liquor industry, and the rise both in number and in quality of wineries throughout the country go a long way in explaining why this issue has become hotly contested. According to one commentator, "The so-called 'wine war' is a very focused example of how people with economic, political, and personal interests can change the law in the United States."[246]

Driving this change has been a shift in American tastes, not only for fine wine, but often hard-to-find wine as well. In response to consumer demand over the past decade, many wineries have converted from mass produced, inexpensive wines, to specialty wines that are not only produced in much smaller quantity but have achieved almost cult status among a new generation of wine lovers willing to pay almost any price.[247] As an example of just how extreme this love can get, one oenophile reportedly paid $500,000 for one large bottle of 1992 Screaming Eagle Cabernet Sauvignon, the highest recorded auction price for a single bottle of wine.[248] Although only a few wines ever achieve the Screaming Eagle kind of following, the number of small, family-owned wineries has grown dramatically over the past decade. By some estimates, while the number of traditional liquor wholesalers has declined over the years, from a high of twenty thousand to fewer than four hundred, the number of wineries has expanded from under four hundred to more than twenty-one hundred.[249] Two thousand of those are

244. Dickerson v. Bailey, 212 F. Supp. 2d 673, 679 n.10 (S.D. Tex. 2002) (citing James Molnar, Comment, *Under the Influence: Why Alcohol Direct Shipment Laws Are a Violation of the Commerce Clause*, 9 U. Miami Bus. L. Rev. 169, 172-74 (2001) and explaining that a number of factors have arisen in recent years to explain the increased challenges to direct-shipment laws, including consolidation of the liquor wholesalers and distributors, the rise of small specialty wineries, the rise of the Internet, and increased demand by wine enthusiasts).

245. Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002); Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y. 2002); Dickerson v. Bailey, 212 F. Supp. 2d 673 (S.D. Tex. 2002); Beskind v. Easley, 197 F. Supp. 2d 464 (W.D.N.C. 2002), *aff'd in part, vacated in part*, 325 F.3d 506, 520 (4th Cir. 2003); Bolick v. Roberts, 199 F. Supp. 2d 397 (E.D.Va. 2002).

246. Susan Lorde Martin, *Changing the Law: Update from the Wine War*, 17 J.L. & Pol. 63, 64-65. (2001).

247. Kozusko, *supra* note 2, at 75-76.

248. *Id.*

249. Lorde Martin, *supra* note 246, at 64.

small, family-owned businesses.[250] About twenty wineries make ninety percent of all the wine produced in this country,[251] so the vast majority of the small wineries account for only about ten percent of production.

These small operations do not have the benefits that economies of scale bring to the small number of large producers. For these wineries, the most profitable way to operate is through mail-order, catalogue, or Internet sales.[252] They do not have the resources of the large producers to distribute their product through the traditional three-tier system.[253] By some estimates, every case of wine sold directly to a consumer is twice as profitable to the winery than if sold through the three-tier system.[254] From the consumers' point of view, direct purchases are convenient. Further, direct purchase is often the only way to obtain the boutique wines a consumer desires, since many small wineries generally cannot find wholesalers to service them.[255]

The alliance of small wineries and wine connoisseurs has found its legal voice in wine-advocacy groups such as the CFT and others who are advancing the cause through concerted court battles.

II. THE BATTLEGROUND

A. Direct Shipment Challenges Across the Country

The United States Supreme Court has yet to hear a case on the issue of direct shipment of wines,[256] the battle is currently being waged at the federal appellate and district court levels across the country. Of the thirty states[257] that prohibit direct shipments of alcoholic beverages from out-of-state, court challenges have been

250. *Id.*

251. *Id.*

252. Foust, *supra* note 36, at 689 (citing *Interstate Alcohol Sales and the Twenty-first Amendment: Hearing Before the Comm. on the Judiciary United States Senate*, 106th Cong. 141, at 20 (1999) (statement of Mike Thompson, Representative for First Congressional District of California)).

253. Lorde Martin, *supra* note 246, at 64.

254. *Id.* at 65.

255. *Id.*

256. Dickerson v. Bailey, 212 F. Supp. 2d 673, 678 (S.D. Tex. 2002) (noting that "[t]he Supreme Court has not specifically addressed state bans on direct importation of wine, and the only appellate court to do so is the Seventh Circuit in *Bridenbaugh*.").

257. Kozusko, *supra* note 2, at 79 (citing Clint Bolick, *Wine Wars: Lift the Ban on Out-of-State Sales*, WALL ST. J., Feb. 7, 2000, at A39).

brought in Florida, Indiana, Michigan, New York, North Carolina, Texas, and Virginia.[258]

So far, the opponents of direct-shipment laws appear to have the upper hand. Only two cases, one in Indiana and the other in Michigan, have come down in favor of sustaining state direct-shipping laws.[259] Judge Easterbrook's decision in the Seventh Circuit Court of Appeals is particularly notable because it was the earliest of these cases and the first federal Court of Appeals to have considered this issue.[260] The Florida case of *Bainbridge v. Turner*[261] resulted with the Eleventh Circuit Court of Appeals vacating and remanding the lower court's decision in favor of direct shipment regulations for further determination as to whether or not Florida's statutes sufficiently implicate core powers of the Twenty-First Amendment to withstand a dormant Commerce Clause challenge.[262] The North Carolina case, initially heard before the federal district court for the Western District of North Carolina in April of 2002, was appealed by the defendants after the court held that North Carolina's ABC laws on direct shipment were unconstitutional.[263] On April 8, 2003, the United States Court of Appeals, Fourth Circuit, affirmed the district court's finding that North Carolina's ABC laws constituted an unconstitutional violation of the Commerce Clause by discriminating between instate and out-of-state wine shipments.[264]

All other district court cases have, in varying degrees, held for the plaintiffs and declared ABC laws regulating direct shipment

258. In addition, a recent case, Mt. Hood Beverage Co. v. Constellation Brands, Inc., 63 P.3d 779, 782 (Wash. 2003), although not involving direct-shipment per se, closely parallels the issues involved. In *Mt. Hood*, the issue was whether local ABC laws governing wholesaler agreements favored in-state interests over out-of-state economic interests. *Id.* at 783. The Supreme Court of Washington, sitting *en banc*, held the local regulation unconstitutional in violation of the Commerce Clause. *Id.* at 786-87.

259. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000) (upholding Indiana statutes prohibiting out-of-state shipments of alcoholic beverages direct to Indiana consumers).

260. *Bridenbaugh*, 227 F.3d at 848.

261. 311 F.3d 1104 (11th Cir. 2002).

262. *Id.* at 1115-16.

263. Beskind v. Easley, 197 F. Supp. 2d 464 (W.D.N.C. 2002), *aff'd in part and vacated in part,* 325 F.3d 506, 520 (4th Cir. 2003).

264. *Beskind*, 325 F.3d at 520 (affirming "the district court's conclusion that North Carolina's ABC laws unconstitutionally discriminate against out-of-state wine manufacturers and sellers and vacating its remedy striking down the core provisions of North Carolina's direct-shipment prohibitions").

unconstitutional, the latest being Judge Berman's, November 2002, decision in the New York case of *Swedenberg v. Kelly*.[265]

B. On Common Ground

With minor variation, these cases have a common fact pattern. They involve states with ABC laws governing alcoholic beverages through a three-tier system. Out-of-state shippers are generally prohibited from shipping directly to in-state consumers, while in-state wineries are exempt from the same restrictions. Although plaintiffs occasionally bring suits grounded on other theories,[266] these cases have all based their primary complaints on violations of the dormant Commerce Clause.[267]

C. Four Pragmatic Approaches

In the seven cases discussed in this Note, four different approaches emerge as individual courts struggle to resolve the constitutionality of direct-shipping laws. While most courts have chosen to exercise some kind of balancing, as in *Brown-Forman*, and *Bruce*

265. Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y. 2002) (holding that New York's direct-shipping ban constituted an impermissible violation of the Commerce Clause).

266. *Id.* at 139 (noting plaintiffs contend direct-shipment bans violate both the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution).

267. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849 (7th Cir. 2000) ("This case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant Commerce Clause,' which does not."); *Swedenburg*, 232 F. Supp. 2d at 136 ("This case is one of a series of recent constitutional challenges to state alcoholic beverage control laws, particularly as they relate to the direct shipment of wine. What the cases all have in common is the relationship (and tension) between the Commerce Clause of the United States Constitution . . . and the Twenty-first Amendment."). Plaintiffs also argued violation of Privileges and Immunities Clause and the Free Speech Clause of the First Amendment. *Turner*, 311 F.3d at 1105-06 ("This case implicates the tension between the 'dormant' aspect of the Commerce Clause and the Twenty-first Amendment." (citations omitted)); *Dickerson v. Bailey*, 212 F. Supp. 2d 673, 675 (S.D. Tex. 2002) ("[T]his Court reached the conclusion[that the] *Texas Alcoholic Beverage Code Ann. § 107.07 (a)* and *(f)*. . . facially violated the Commerce Clause of the federal constitution."); *Beskind*, 197 F. Supp. 2d at 466 ("Plaintiffs challenge several provisions of North Carolina's alcoholic beverage control ('ABC') system as unconstitutional violations of the Commerce Clause, and seek declaratory and injunctive relief."); Bolick v. Roberts, 199 F. Supp. 2d 397, 402 (E.D.Va. 2002) ("In this case, deciding whether one party is entitled to judgment as a matter of law requires the Court to determine . . . whether certain of Virginia's ABC statutes violate the dormant Commerce Clause."); Heald v. Engler, No. 00-CV-71438-DT, 2001 U.S. Dist. LEXIS 24826, at *4 (E.D. Mich. Sept. 28, 2001) *rev'd, remanded,* No. 01-2720, 2003 U.S. App. LEXIS 17965 (6th Cir. Aug. 28, 2003) ("Plaintiffs argue that this statutory scheme discriminates against out-of-state wineries, and interferes with the free flow of commerce, in violation of the dormant Commerce Clause.").

Church,[268] their conclusions vary significantly because of the differing judgments as to the proper weight of the conflicting interests.

1. *The Easterbrook Approach*

The most controversial approach among these cases is that taken by Judge Easterbrook in *Bridenbaugh v. Freeman-Wilson*.[269] Representing one side of the emerging circuit split, this is the only federal Court of Appeals case that has upheld the constitutionality of direct-shipment laws. The other decisions covered in this Note were argued after *Bridenbaugh* — so courts had the benefit that opinion as well as the surrounding commentary — and there was certainly no shortage of surrounding commentary. Judge Melinda Harmon's opinion in *Dickerson v. Bailey*,[270] for example, actually devotes more words and pages to the analysis of Judge Easterbrook's opinion than Judge Easterbrook's opinion itself contained.

Judge Easterbrook's approach is noteworthy in several other respects. The very first sentence of the opinion reveals his direction: "This case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not."[271] This is the essence of Easterbrook's approach: Section Two of the Twenty-First Amendment should be given significant weight because of its explicit expression in the actual text of the Constitution. The states have plenary power to regulate liquor imports, and "[n]o decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause."[272]

The opinion acknowledges *Brown-Forman* and *Bacchus*, but only as citations to support the contention that "the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms."[273] In stark contrast to other approaches, the Easterbrook opinion cites *Brown-Forman* without raising the two-tier Commerce Clause analysis.[274]

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268. *See supra* notes 122-128 and accompanying text (reflecting the commonly accepted two-tier Commerce Clause analysis).

269. *Bridenbaugh*, 227 F.3d at 848 (upholding the constitutionality of Indiana's direct-shipping ban against a dormant Commerce Clause challenge).

270. *Dickerson*, 212 F. Supp. 2d at 679-86.

271. *Bridenbaugh*, 227 F.3d at 849.

272. *Id.* at 853.

273. *Id.*

274. *Id.* (citing Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986), to stand for the principle that "the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms" and for the principle that Section Two of the Twenty-First Amendment authorizes states to

The plaintiffs in *Bridenbaugh* argued the need to explore the "core purposes" of Section Two of the Twenty-First Amendment.[275] The typical line of reasoning in this approach is to argue that certain "core purposes," embodied in Section Two of the Twenty-First Amendment, must be sufficiently implicated before the Twenty-First Amendment can "save" a statute that violates the Commerce Clause.[276] In rejecting this approach, Judge Easterbrook noted somewhat derisively, "Plaintiffs, fortified chiefly by district court cases and a student note, insist that the 'core concern' of the twenty-first amendment is temperance."[277] After reviewing the history of prohibition, Judge Easterbrook noted that a long established pattern of discrimination indeed existed not against out-of-state interests but against in-state interests.[278] The states were continually frustrated by Commerce Clause challenges in the early years in their attempt to close loopholes in alcohol regulation.[279] Referring to *Bowman*[280] and the original package cases in *Leisy* as examples, Judge Easterbrook concluded that Section Two of the Twenty-First Amendment was designed to provide relief to states against interminable challenges by out-of-state interests.[281] It is against this historical interpretation that Judge Easterbrook rejected the "core purposes" approach: "If 'core concerns' spelled the difference, we would follow the Supreme Court rather than district courts and student notes. But our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters."[282] Judge Easterbrook's re-

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eliminate economic discrimination caused by cases such as *Leisy* and *Bowman*, without authorizing discrimination against out-of-state sellers).

275. *Id.* at 851.

276. *See* Shanker, *supra* note 25, at 374-77 (describing an "accommodation test" in balancing Twenty-First Amendment and Commerce Clause interests whereby the court seeks initially to determine whether the challenged statute discriminates against out-of-state interests; and then to determine whether the Twenty-First Amendment can save a law that violates the Commerce Clause, focusing on core Twenty-First Amendment powers).

277. *Bridenbaugh*, 227 F.3d at 851 (citation omitted).

278. *Id.*

279. *Id.*

280. Spaeth, *supra* note 25, at 171 (citing Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465, 499 (1888), and explaining "that a state could not regulate intoxicating liquor under its police power until the liquor had been physically delivered into the state even though the state could ban the liquor entirely once it arrived.").

281. *Bridenbaugh*, 227 F.3d at 853.

282. *Id.* at 851.

verse discrimination argument echoes Justice Brandeis' argument in *Young's Market*.[283]

Justice Easterbrook never addresses the balancing that characterizes modern dormant Commerce Clause analyses.[284] Perhaps he believes it to be fruitless and illogical.[285] According to his analysis, the whole point of Section Two was to shield state regulatory power from Commerce Clause loopholes that historically allowed "out-of-state sellers to consumers [to] bypass state regulatory (and tax) systems."[286] He continues: "*Every* use of § 2 could be called 'discriminatory' in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected."[287] Presumably this leaves plaintiffs at an automatic advantage to out-of-state interests. "If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter."[288]

Bridenbaugh did not directly address the potential discriminatory effect of allowing in-state shipments direct to consumers while prohibiting out-of-state shipments. The opinion evades the issue of discrimination by concluding, "Indiana insists *every* drop of liquor pass through its three-tiered system and be subjected to taxation. Wine originating in California, France, Australia, or Indiana passes through the same three tiers and is subjected to the same taxes. Where's the functional discrimination?"[289] This, however, is an expansive interpretation. The only way to reconcile that "Indiana permits local wineries, but not wineries . . . in another state . . . to ship directly to Indiana consumers"[290] is to ignore the fact that in-state shippers only have a single tier to traverse, while out-of-state shippers have three. The logic appears to conclude that as long as they all participate in the same three-tier system overall, there is no discrimination.

283. State Bd. of Equalization of California v. Young's Market Co., 299 U.S. 59, 62 (1936); *see also supra* notes 154-155 and accompanying text.

284. *See, e.g.*, Bolick v Roberts, 199 F. Supp. 2d 397, 430 (E.D.Va. 2002) (criticizing the Easterbrook decision because it "refused to apply the analysis established by the Supreme Court," referring to the two-tier dormant Commerce Clause analysis).

285. *Id.* at 434 (offering another conjecture as to why Judge Easterbrook did not balance dormant Commerce Clause concerns: "It may be that the *Bridenbaugh* court simply deemed the dormant Commerce Clause inapplicable because it started from the premise that there was a lack of functional discrimination which diverted the traditional analysis.").

286. *Bridenbaugh*, 227 F.3d at 853.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 851.

Although highly controversial and not widely followed, the Easterbrook approach is nevertheless deeply pragmatic in its own way. It recognizes the historical difficulty in preserving states' rights against Commerce Clause challenges. This approach avoids the subjective and often unpredictable outcomes that result from the highly individual judgments required when conducting a balancing test or "core powers" analysis. The variety of outcomes in the approaches taken by other courts, to some degree, evidences the disparate views that similar fact patterns generate when pressed through typical Commerce Clause balancing.

It is unfortunate, however, that the decision in *Bridenbaugh* did not address more fully the arguments in *Bacchus* that opponents of direct-shipping bans often rely on. By simply concluding there was no discrimination between the out-of-state interests and in-state interests, because both are subject to the three-tier system, the opinion devoted little attention to reconciling the main issue. In at least one respect, Judge Easterbrook was in a unique position to evaluate the holding in *Bacchus* in light of the current debate — the attorney who successfully argued the cause for Bacchus Imports was none other than Judge Easterbrook himself. Having successfully argued the landmark case that has provided the foundation for many direct-shipping ban challenges, it would have been interesting to see how Judge Easterbrook would have reconciled the *Bacchus* opinion with his holding in *Bridenbaugh.*

2. *The Bolick Approach.*

The analytical approach that *Bridenbaugh* avoided was embraced by the United States District Court for the Eastern District of Virginia in *Bolick v. Roberts.*[291] This approach applied the two-tier dormant Commerce Clause analysis as prescribed in *Brown-Forman.*[292] It found a tier-one violation, and concluded that the challenged statute did not sufficiently implicate the Twenty-First Amendment core powers to save it.[293] New York,[294] Texas,[295] and

291. 199 F. Supp. 2d 397, 447 (E.D.Va. 2002) (holding Virginia's alcoholic beverage regulation with respect to out-of-state direct shipping ban unconstitutional).

292. *See* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578-79 (1986) (noting the Supreme Court "has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause"); *see also supra* notes 122-128 and accompanying text.

293. *Bolick*, 199 F. Supp. 2d at 444 (finding that, "While promotion of temperance through strict control is a legitimate state interest, Virginia's professed interest in this core concern, as justification for the subject statutory scheme, is fraught with contradictions that lead the Court to conclude its means are not justified by its temperance policy.").

North Carolina[296] followed the Virginia court's approach as well. The *Bolick* approach conducts a more extensive inquiry as to whether the Twenty-First Amendment should have more or less weight depending on how much the "core powers" of the Twenty-First Amendment are judged relevant.[297]

The *Bolick* case was decided before the New York, Texas, and North Carolina cases. In *Bolick*,[298] the court addressed whether certain sections of Virginia's ABC law violated the dormant Commerce Clause.[299] The section in question prohibited out-of-state shipments of beer, wine, or distilled spirits directly to Virginia consumers while allowing such shipments from in-state producers.[300]

The *Bolick* court explicitly rejected the decision in *Bridenbaugh* and Judge Easterbrook's "novel approach,"[301] stating that the Seventh Circuit decision was "improperly decided," because it did not follow the "established dormant Commerce Clause analysis."[302] From there, the analysis applied the traditional dormant Commerce Clause analysis[303] and found the challenged statute facially discriminated against out-of-state interests in violation of the Com-

294. Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y 2002) (holding the that state's ban on direct shipments violated the Commerce Clause).

295. Dickerson v. Bailey, 212 F. Supp. 2d 673, 675 (S.D. Tex. 2002) (holding Texas's prohibition against direct out-of-state wine sales to consumers violates the dormant Commerce Clause).

296. Beskind v. Easley, 325 F.3d 506, 513-14 (4th Cir. 2003) ("[W]e determine first whether the purported State regulation violates the Commerce Clause without consideration of the Twenty-first Amendment [and then] determine whether the principles underlying the Twenty-first Amendment are sufficiently implicated to . . . out outweigh the Commerce Clause principles that would otherwise be offended." (internal quotations omitted)); *see also*, Beskind v. Easley, 197 F. Supp. 2d 464 (W.D.N.C. 2002) (finding certain parts of North Carolina's alcoholic beverage control laws discriminated against out-of-state wine manufacturers while favoring in-state interests, and concluding the Twenty-First Amendment did not empower the state to erect barriers to interstate competition), *aff'd in part, vacated in part,* 325 F.3d 506, 520 (4th Cir. 2003).

297. *See* Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002) (explaining that "if the State demonstrates that its statutory scheme is closely related to a core concern of the Twenty-first Amendment and not a pretext for mere protectionism, Florida's statutes can be upheld"); *see also Bolick*, 199 F. Supp. 2d at 438 (noting that "there is no bright line between federal interests and state powers over liquor . . . the competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a concrete case" (internal citations and quotations omitted)).

298. *Bolick*, 199 F. Supp. 2d 397.

299. *Id.* at 402.

300. *Id.* at 417.

301. *Id.* at 430.

302. *Id.* at 408.

303. *Id.* at 410.

merce Clause.[304] It then proceeded to balance whether or not the core powers of the Twenty-First Amendment were sufficiently implicated so as to save the statute.[305] The *Bolick* court found the Twenty-First Amendment factors unsatisfactory.[306] By placing much greater weight on the Commerce Clause violations, the court declared the challenged statute unconstitutional.[307] Although the decision is being appealed,[308] the approach in *Bolick* provided the roadmap for the district courts in North Carolina, Texas, and New York.

A week after *Bolick* was decided, the federal district court for the Western District of North Carolina weighed in with *Beskind v. Easley*.[309] The facts and issue in *Beskind* paralleled those of the others. North Carolina had a three-tier system of regulation, prohibiting direct shipment of wine from out-of-state, while exempting in-state interests.[310] As stated by the court, "The keystone issue is whether the three-tier system can be selectively applied to most wineries (including all out-of-state wineries) but suspended for in-state wineries."[311]

The court immediately addressed the issue of economic protectionism by inquiring about the motives and purposes of the state legislators in exempting local wineries from the direct shipment ban.[312] The *Beskind* court applied the *Brown-Forman* two-tier analysis,[313] and quickly concluded that "the North Carolina ABC laws present a relatively cut and dry example of direct discrimination against interstate commerce."[314] The *Beskind* court then inquired as to whether the state statutes sufficiently implicated

304. *Id.* at 447 (concluding the "in-state preference for the Virginia wine and beer industry therefore is impermissible as violative of the dormant Commerce Clause").

305. *Id.* at 410.

306. *Id.* at 444 (concluding that, "While promotion of temperance through strict control is a legitimate state interest, Virginia's professed interest in this core concern as justification for the subject statutory scheme is fraught with contradictions that lead the Court to conclude its means are not justified by its temperance policy.").

307. *Id.* at 450.

308. Dana Nigro, *Virginia Poised to Allow Direct Shipments of Wine to Consumers*, Wine Spectator Online, (Feb. 6, 2003) ("Although the state is appealing the case . . . ."), *at* http://www.winespectator.com/Wine/Daily/News/0,1145,1966,00.html (last visited Apr. 9, 2003).

309. Beskind v. Easley, 197 F. Supp. 2d 464 (W.D.N.C. 2002), *aff'd in part, vacated in part*, 325 F.3d 506, 520 (4th Cir. 2003).

310. *Id.* at 466-67.

311. *Id.* at 469.

312. *Id.*

313. *Id.* at 471.

314. *Id.*

Twenty-First Amendment powers to save the regulation.[315] Although the court acknowledged "numerous legitimate reasons" for the ABC laws generally, it did not find sufficient justification for the in-state wine seller exemptions.[316] Hence, the court found North Carolina's regulation unconstitutional.[317]

Even if the court found a reason for the exemptions, it would have needed to be extremely compelling. The *Beskind* court believed that, "[n]o equilibrium can be achieved when economic protectionism is placed on one side of the scale, and the Commerce Clause's need to preserve the respect of the several states for each other is placed on the opposite side."[318]

This court also rejected the Easterbrook approach outright, but did so in a different manner than in *Bolick*.[319] Unlike the *Bolick* court, the *Beskind* court did not conclude *Bridenbaugh* was improperly decided. The court accepted Judge Easterbrook's formulation that the Indiana case did not involve discrimination because "every drop of liquor" passed through Indiana's three-tier system.[320] Therefore, the court reasoned, the *Bacchus* case, not *Bridenbaugh*, was analogous.[321] In applying *Bacchus*, the court noted that "as long as there is some competition between the locally produced exempt products and non-exempt products from outside the State, there is a discriminatory effect."[322]

The *Beskind* court's approach is analogous to *Bolick*, but in one sense it may have been more extreme. The combination of the *Beskind* court's reliance on the issue of economic protectionism and its application of the *Bacchus* case virtually guaranteed a per se violation of the Commerce Clause.[323] Under this analysis it is

315. *Id.* at 472.

316. *Id.*

317. *Id.* at 466 (noting that, "after a thorough review of the record, the Court finds that the challenged provisions are unconstitutional").

318. *Id.* at 472-73.

319. *Id.* at 474.

320. *Id.* at 475.

321. *Id.* ("The Seventh Circuit clearly distinguishes the situation in which legislation is applied unilaterally from one in which unconstitutional niches for in-state businesses are carved into an otherwise permissible general scheme. The instant case is analogous to *Bacchus*, not *Bridenbaugh*.").

322. *Id.* at 473 (quoting Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984)).

323. *Id.* at 473. Citing *Bacchus*, the *Beskind* court noted that "economic protectionism" can be found "on the basis of either discriminatory purpose . . . or discriminatory effect." *Id.* Citing *Bacchus* again, the court noted, "as long as there is some [read no matter how little] competition between locally produced exempt products and non-exempt products from outside the State, there is a discriminatory effect." *Id.* The *Beskind* court then concluded that there was competition between North Caro-

difficult to imagine any reading that would allow North Carolina's direct-shipment ban to survive this kind of scrutiny. In the end, the district court in *Beskind* held the North Carolina direct-shipment ban to be unconstitutional and enjoined the state from enforcing its prohibition against out-of-state wine shipments.[324]

When the Fourth Circuit Court of Appeals considered the case on appeal, Judge Niemeyer affirmed the conclusion that the offending statute was unconstitutional but vacated the remedy ordered by the lower court.[325] In *Easley*, Judge Niemeyer began his analysis in essentially the same manner as the lower court, by conducting a conventional Commerce Clause analysis.[326] The *Easley* court concluded that the offending statute was facially discriminatory and therefore an impermissible violation of the Commerce Clause.[327] North Carolina offered a number of reasons justifying the direct-shipping statutes[328] but the *Easley* court concluded that "North Carolina failed to identify any Twenty-First Amendment interest that is served by authorizing in-state wineries to sell and ship directly to consumers while simultaneously prohibiting out-of-state direct shipment."[329]

Although the Fourth Circuit's opinion of April 8, 2003, was a defeat for direct-shipping ban statutes, it will likely prove a Pyrrhic victory for the direct-shipping ban opponents. While Judge Niemeyer affirmed the holding on constitutionality, he vacated the remedy ordered by the lower court in *Beskind*.[330] The *Easley* court reasoned that a ban on out-of-state direct-shipping per se did not violate the Commerce Clause;[331] nor would a ban on instate direct shipping per se violate the Commerce Clause.[332] It was the co-existence of both that the court reasoned was violative of the Commerce Clause.[333] North Carolina had argued, on appeal, that even

lina wines and wines from other states and hence a discriminatory effect existed. *Id.* The Court consequently found the North Carolina statute violated the Commerce Clause because of economic protectionism. *Id.*

324. *Id.* at 476.

325. Beskind v. Easley, 325 F.3d 506, 520 (4th Cir. 2003).

326. *Id.* at 512-13.

327. *Id.* at 514.

328. *Id.* at 515 (arguing that physical inspection of out-of-state wineries would be more difficult, as would tax collection and that the franchise risk for out-of-state shippers was much less than for those with a physical presence in the state thereby offering less incentive to abide by North Carolina laws).

329. *Id.* at 517.

330. *Id.* at 517-18.

331. *Id.* at 518.

332. *Id.*

333. *Id.*

if the offending statute was unconstitutional, the state had the right to remedy the situation by simply prohibiting in-state wineries from shipping directly to consumers while maintaining its regulatory prohibitions over out-of-state shippers.[334] When given the choice between affirming the lower court's holding striking out-of-state shipping bans or siding with the State's desire to only strike the preference for in-state wineries, the *Easley* court found no reason to deny North Carolina's preferred remedy.[335]

The significance of North Carolina's choice to shutdown in-state preferences in order to maintain its out-of-state prohibitions was not lost on the *Easley* court: "Although we recognize the plaintiffs' interest as oenophiles in promoting the direct shipment of out-of-state wine and therefore their interest in having the direct-shipment prohibition stricken, their arguments have not established the illegality of the prohibition itself."[336]

While the Fourth Circuit Court of Appeals decision may have been disappointing to the oenophiles from a practical point of view, it nevertheless was a victory on the issue of the constitutionality of discriminatory shipping bans. Both the Court of Appeals of the Fourth Circuit and the District Court in *Beskind v. Easley*, conducted their analysis along similar lines as in *Bolick*, and arrived at similar conclusions as far as the issue of the constitutionality of the shipping bans were concerned. From that point of view, the latest opinion from the Fourth Circuit highlights the attraction of the *Bolick* approach for those courts that have decided to consider the direct shipping ban issue from within the framework of a conventional Commerce Clause analysis.

Continuing the *Bolick* line of cases, in July of 2002, Judge Melinda Harmon issued her second opinion on Texas's direct-shipment ban in *Dickerson v. Bailey*.[337] The first opinion, issued on February 10, 2000, held that Texas's direct-shipment law "violated the Commerce Clause of the federal constitution [and] that the statute was not saved by the twenty-first amendment because its purpose was economic protection of the state's in-state [interests] at the expense of out-of-state wine sellers, while the statute failed to serve the legitimate goal of temperance."[338]

334. *Id.*
335. *Id.*
336. *Id.*
337. Dickerson v. Bailey, 212 F. Supp. 2d 673 (S.D. Tex. 2002).
338. *Id.* at 675.

Judge Harmon granted a motion for reconsideration of her first opinion to allow the parties to address the impact of Judge Easterbrook's opinion.[339] After considering the Seventh Circuit opinion, Judge Harmon adhered to her original conclusions.[340] The *Dickerson* court expressly followed the district court opinions in *Bolick* and *Beskind*.[341] It applied the two-tier Commerce Clause analysis, conducted a weighing of offsetting factors, and concluded similarly to *Bolick* and *Beskind*.[342]

Aside from the extensive critique of Judge Easterbrook's opinion,[343] the *Dickerson* opinion recognized recent Supreme Court cases that reigned in the Commerce Clause, particularly in noneconomic cases.[344] The opinion also noted dissents by current Supreme Court Justices in several cases pertinent to the issue, particularly in the *Bacchus* case.[345] Nevertheless, the court stated it was bound by stare decisis to follow the current majority opinions on existing law,[346] and accordingly followed "the Supreme Court precedent of the past thirty-five years, the Fifth Circuit's approach to the tensions between § 2 and the twenty-first amendment in *McBeath*, and the district court opinions in *Bolick* and *Beskind*."[347]

The 2002, New York case of *Swedenburg v. Kelly*[348] completes the quartet of cases in this category. The United States District Court for the Southern District of New York considered "whether the principles underlying Twenty-First Amendment" were sufficient to withstand a Commerce Clause challenge to New York's ABC law that exempted in-state wineries from the State's direct-shipment ban.[349] Like the other cases in this line, it follows the Commerce Clause two-tier analysis.[350] Finding New York's ABC law facially discriminatory, the court considered the purpose of the

339. *See* Swedenburg v. Kelly, 232 F. Supp. 2d 135, 141 (S.D.N.Y. 2002) (reviewing the procedural history of *Dickerson*).

340. *Dickerson*, 212 F. Supp. 2d at 695.

341. *Id.* at 695.

342. *Id.* at 695 (holding the Texas statute facially unconstitutional).

343. *Id.* at 679-86.

344. *Id.* at 694 (citing Printz v. United States, 521 U.S. 898 (1997), and United States v.Lopez, 514 U.S. 549 (1995)).

345. *Id.*

346. *Id.*

347. *Id.* at 695.

348. Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y. 2002).

349. *Id.* at 148.

350. *Id.* at 144 ("The Supreme Court has established a two-step approach to determine whether a state or municipal law violates the dormant Commerce Clause.").

regulation.[351] The court concluded the purpose was not grounded in temperance but in economic protectionism, noting, "At oral argument, the Attorney General acknowledged that economic protectionism was the core purpose of the exceptions."[352] Even without the admitted intent to provide a benefit to local farmers, the *Swedenburg* court found the *Bolick*, *Beskind*, and *Dickerson* line of cases highly persuasive.[353] Toward the final part of his Commerce Clause analysis, Judge Berman wrote, "Most courts that have addressed a statutory structure similar to New York's—i.e. a three-tier system which includes a general ban on the direct shipment of out-of-state wine but also contains 'loopholes' in the form of exceptions for in-state wineries—have found the schemes to be per se violations of the Commerce Clause."[354] Having found economic protectionism as a reason for the exception, the court concluded that the New York ban on the direct shipment of out-of-state wine was unconstitutional.[355]

3. *The Florida Approach*

The third approach begins with the analysis of the lower court in *Bainbridge v. Bush*.[356] Although in *Bainbridge v. Turner*,[357] the Court of Appeals for the Eleventh Circuit vacated and remanded the lower court's decision, a comparison of their approaches illustrates how both courts utilized similar lines of analysis to render different results.

In *Bainbridge v. Bush*, the lower court set the tone, observing that under the Twenty-First Amendment, "[a] State has 'virtually complete control' over the importation and sale of liquor and the structure of its liquor distribution system."[358] The court elaborated that this "is particularly true in the context of the Commerce

351. *Id.* at 148 ("[W]hether the interest implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." (citing Bacchus Imports, Ltd. V. Dias, 468 U.S. 263, 275-76 (1984))).

352. *Id.* at 146 (quoting the Attorney General at oral argument: "Your Honor, I believe that the legislative history of that provision [the farm winery exemption] indicates that there was an effort to provide an economic benefit to the local farmers.").

353. *Id.* at 146-47.

354. *Id.* at 146.

355. *Id.* at 136.

356. Bainbridge v. Bush, 148 F. Supp. 2d 1306 (M.D. Fla. 2001), *vacated by* 311 F.3d 1104 (11th Cir. 2002).

357. Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002).

358. *Bush*, 148 F. Supp. 2d at 1310 (citing North Dakota v. United States, 495 U.S. 423 (1990) (plurality opinion)).

Clause, given that the Amendment reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid."[359] This power, however, is not unlimited, and the court goes on to say that the Twenty-First Amendment should not be construed to have "repealed" the Commerce Clause when the issue involves regulation of alcohol.[360]

The analytical framework in *Bainbridge v. Bush* essentially paralleled the *Bolick* approach.[361] District Judge Whittemore spelled out the balancing that must be done, by acknowledging the broad power of the Twenty-First Amendment while recognizing the Supreme Court's direction that other parts of the Constitution should not be ignored.[362] Judge Whittemore concluded that, "Accordingly, it must first be determined whether the challenged statutory scheme violates the Commerce Clause. If [it does], it must then be determined whether it is saved by the Twenty-First Amendment."[363]

The court found that the Florida statute directly discriminated against out-of-state interests because it expressly prohibited out-of-state wineries from shipping directly to customers in Florida, but had not prohibited in-state interests from doing the same.[364] The next step inquired whether any legitimate local purpose was advanced, and if so, whether nondiscriminatory alternatives were available.[365] Because nondiscriminatory alternatives existed that would serve legitimate state interests, the court concluded the statute was a per se violation of the Commerce Clause.[366]

Having completed a tier-one analysis, the lower court moved to the next step — inquiring whether or not the statute is "saved" by the Twenty-First Amendment.[367] Judge Whittemore recognized that, "Even if the challenged statutory scheme violates the Com-

359. *Id.* (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)).

360. *Id.*

361. *Id.* at 1310 ("In analyzing cases under the dormant Commerce Clause, the Supreme Court has utilized a two-tiered approach."). This is the same starting point used in the Magistrate Judge's opinion in *Bolick v. Roberts*, 199 F. Supp. 2d 397, 424 (E.D. Va. 2002) (noting, "[t]he Supreme Court has adopted a two-tiered approach in analyzing state economic regulation").

362. *Id.*

363. *Id.* (citing Dickerson v. Bailey, 87 F. Supp. 2d 691, 693 n.2 (S.D. Tex. 2000)).

364. *Id.* at 1311.

365. *Id.* at 1312 (concluding that the offending statute "can be upheld under the dormant commerce clause only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives").

366. *Id.* at 1312.

367. *Id.*

merce Clause, the Twenty-First Amendment may validate an otherwise discriminatory statute."[368] The court reasoned that because the Supreme Court had recognized a three-tier[369] distribution system as "unquestionably legitimate,"[370] the only issue was "whether the Twenty-First Amendment authorizes the discriminatory impact occasioned by Florida's statutory scheme."[371]

The answer to this question was dispositve for the lower court, and was determined by considering "whether the interests implicated by a state's regulation are so closely related to the core powers reserved by the Amendment that the regulation may prevail, notwithstanding"[372] the per se violation of the Commerce Clause.

If the state's interests are closely related, the regulation generally withstands a Commerce Clause challenge unless it also violates the holding in *Bacchus* (mere protectionism) or in the *Brown-Forman*, *Healy*, and *Hostetter* line of cases, where the challenged statute implicated the extraterritoriality principle by affecting commerce outside the state.[373] Barring these exceptions, Judge Whittemore reasoned, the statute will survive even if it is a per se violation of the Commerce Clause[374] — thus echoing the holding in *Bainbridge v. Bush*.[375]

The approach was similar to *Bolick*, in that it applied the two-tier dormant Commerce Clause analysis, and found a dormant Commerce Clause violation.[376] This approach also examined temperance, revenue collection, and orderly markets core powers, but

368. *Id.*

369. This "three-tier" system refers to the general regulatory scheme adopted by states in regulating alcoholic beverages and is not to be confused with the "two-tier" analysis the Supreme Court has prescribed for analyzing possible violations of the dormant Commerce Clause. *See supra* notes 109-112 and accompanying text (discussing the "three-tier" system); *supra* note 292 and accompanying text (discussing the "two-tier" analysis).

370. *Bainbridge v. Bush*, 148 F. Supp. 2d at 1312 (citing North Dakota v. United States, 495 U.S. 423, 432 (1990)).

371. *Id.*

372. *Id.* at 1313.

373. *Id.* at 1315.

374. *Id.* (distinguishing the exceptions in *Healy*, *Brown-Forman*, and *Bacchus*).

375. *Id.* (upholding the Florida statute despite the per se Commerce Clause violation because sufficient Twenty-First Amendment core concerns were sufficiently implicated to save the offending statute).

376. *Id.* at 1312 ("Florida's regulatory scheme constitutes a per se violation of the commerce clause.").

found the Twenty-First Amendment, consistent with its view, heavy enough to overcome the dormant Commerce Clause violations.[377]

The holding and analysis in *Bainbridge v. Bush* allow for regulations that have "mixed motives."[378] In other words, state regulations that have a degree of protectionism can nevertheless survive Commerce Clause challenge if they are sufficiently mingled with legitimate state interests.[379] Hence, a protectionist motive is not considered dispositive.

The lower court in *Bainbridge v. Bush* expressly contrasted its holding with Judge Harmon's initial opinion in *Dickerson v. Bailey*, and with the denial of a motion to dismiss in *Swedenburg v. Kelly*.[380] While both those opinions have been superceded by more recent decisions, the comments are still relevant since the more recent *Dickerson* opinion tracks its first opinion, and the final holding in *Swedenburg* was consistent with the denial of motion to dismiss. The courts in *Dickerson* and *Swedenburg* used the same basic framework but did not find sufficient Twenty-First Amendment "core concerns" to save the statutes. The lower court in *Bainbridge*, however, concluded "these cases [were] of limited persuasive value as they fail[ed] to consider the definition of 'core concerns' applied by the Supreme Court in *North Dakota*."[381]

The struggle to find the correct balance in the Florida approach is evidenced by the Eleventh Circuit decision in *Bainbridge v. Turner*,[382] vacating the lower court decision and remanding to determine whether sufficient evidence existed to invoke Twenty-First Amendment protection.[383] Circuit Judge Tjoflat began the analysis

377. *Id.* at 1315 (holding that, "although Florida's statutory scheme violates the dormant Commerce Clause, it represents a permissible regulation under the Twenty-First Amendment").

378. *Id.* at 1313 (citing Milton S. Kronheim & Co., Inc. v. District of Columbia, 91 F.3d 193 (D.C. Cir. 1996)).

379. *Id.* (citing and referring to the holding in *Milton S. Kronheim & Co.* that despite a violation of the dormant Commerce Clause, a regulation was saved by the Twenty-First Amendment because it was enacted to serve legitimate state interests and that administrative and enforcement concerns were sufficient to justify Twenty-First Amendment protection).

380. *Id.* at 1314 (citing Dickerson v. Bailey, 87 F. Supp. 2d 691, 710 (S.D. Tex.2000), and Swedenburg v. Kelly, No. 00-Civ-0778, 2000 WL 1264285, at* 13 (S.D.N.Y. Sept. 5, 2000) (decision denying a Rule 12(b)(6) motion to dismiss)).

381. *Id.* at 1314 n.14.

382. 311 F.3d 1104 (11th Cir. 2002).

383. *Id.* at 1106 (concluding that, "if the State demonstrates that its statutory scheme is closely related to a core concern of the Twenty-First Amendment and not a pretext for mere protectionism, Florida's statutes can be upheld," but finding, "the factual record is too incomplete to uphold a judgment as a matter of law for the State").

in identical fashion as the lower court, conducting a conventional two-tier Commerce Clause scrutiny.[384] Judge Tjoflat concluded that "Florida's regulatory scheme cannot withstand tier-one scrutiny."[385] Like the lower court, the Appellate Court concluded that alternative nondiscriminatory means did exist.[386] After briefly citing a few nondiscriminatory alternatives, the court found that, "Because the Florida statutes discriminate against out-of-state retailers and nondiscriminatory alternatives are available to serve the State's interests, Florida's regulatory scheme violates the Commerce Clause."[387] To that point, the Appellate Court's analysis was almost identical to the lower court's approach in *Bainbridge v. Bush*.[388]

While the lower court in *Bainbridge* proceeded to the next step by inquiring if a core concern of the Twenty-First Amendment was implicated, the Appellate Court in *Bainbridge* conducted this analysis with an additional requirement: "When such a concern is implicated, the Amendment removes the constitutional cloud from the challenged law so long as the state demonstrates that it genuinely needs the law to effectuate its proffered core concern."[389] Consistent with the lower court, the Appellate Court added the proviso that "in no event can the law regulate extraterritoriality, nor can a law ever be motivated by mere economic protectionism."[390]

This additional layer of proof distinguishes the Eleventh Circuit's approach from that of the District Court. The Appellate Court concluded that the state had to show a genuine need for the challenged law in order to achieve the core concerns.[391] The Appellate Court was not convinced, noting, "In short, the State has not shown as a matter of law that its regulatory scheme is so closely related to the core concern of raising revenue as to escape Commerce Clause scrutiny."[392] Reasoning that because a material issue of fact was undetermined, the Eleventh Circuit vacated the

384. *Turner*, 311 F.3d at 1108.

385. *Id.* at 1109.

386. *Id.* at 1110.

387. *Id.*

388. *Id.* (stating agreement "with the holding below that there are, in fact, nondiscriminatory alternatives").

389. *Id.* at 1112.

390. *Id.* at 1112 (citing Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989), and Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984)).

391. *Id.* at 1115 n.16.

392. *Id.* at 1115.

district court judgment and remanded for further consideration as to whether there was sufficient proof of genuine need.[393]

4. *The Michigan Hybrid Approach.*

The fourth approach, adopted by the United States District Court for the Eastern District of Michigan in *Heald v. Engler*,[394] is a hybrid approach grounded in three cases — *Bridenbaugh v. Freeman-Wilson*, Florida's lower court approach in *Bainbridge v. Bush*, and an older New York case, *House of York, Ltd. v. Ring*.[395]

The plaintiffs in *Heald v. Engler* sought summary judgment and declaratory and injunctive relief because they believed the Michigan liquor laws, prohibiting out-of-state wineries from shipping directly to Michigan consumers, were unconstitutional.[396] In comparing this case to the case of *Bainbridge v. Bush*, District Court Judge Bernard A. Friedman noted that, "In all relevant respects, the statutory scheme at issue in *Bainbridge* is identical to Michigan's."[397]

The *Heald* court noted that, "[W]hile the case law concerning direct-shipment laws is sparse, the more persuasive decisions have found such laws to be constitutional."[398] In choosing these three cases to support its holding, the *Heald* court relied on their respective conclusions rather than their corresponding analytical approaches. Although the conclusions are similar, the analytical approaches in *Bridenbaugh* and *Bainbridge* are quite different. *Bridenbaugh* avoided the two-tier dormant Commerce Clause analysis while the lower court in *Bainbridge* embraced the two-tier analysis.[399] The approach in *House of York* more closely resembles the Easterbrook approach. *House of York*, however, was decided well before the modern Commerce Clause cases, and before some of the more influential Twenty-First Amendment cases.

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393. *Id.* at 1115-16.

394. Heald v. Engler, Civ. No. 00-CV-71438-DT, 2001 U.S. Dist. LEXIS 24826, at *15 (E.D. Mich. Sept. 28, 2001), *rev'd, remanded,* No. 01-2720, 2003 U.S. App. LEXIS 17965 (6th Cir. Aug. 28, 2003).

395. House of York, Ltd. v. Ring, 322 F. Supp. 530 (S.D.N.Y. 1970).

396. *Heald*, 2001 U.S. Dist. LEXIS 24826, at *4, *18.

397. *Heald*, 2001 U.S. Dist. LEXIS 24826, at *10.

398. *Id.* at *9 (citing *House of York Ltd.*, 322 F. Supp. at 536-37 (upholding a New York statute prohibiting the direct shipment of alcoholic beverages to New York residents)).

399. *See supra* notes 269-290 and accompanying text (discussing Easterbrook's approach); *supra* notes 356-393 and accompanying text (discussing the *Bainbridge* approach).

The court in *Heald* simply believed these three cases were correctly decided, and that direct-shipment laws are a permissible exercise of Section Two of the Twenty-First Amendment.[400] Judge Friedman centered his analysis with the premise that the Twenty-First Amendment gives states wide latitude to regulate alcohol coming into the state. Elaborating on this premise, Judge Friedman noted that, "A series of decisions by the Supreme Court rendered shortly after the ratification of the 21st Amendment made it abundantly clear that the states were considered to have acquired plenary authority to deal with intoxicating beverages after importation."[401] While Judge Friedman recognized that the power of the Twenty-First Amendment was not unlimited and did not eliminate Commerce Clause considerations, he devoted relatively little attention to Commerce Clause analysis.[402] Instead, Judge Friedman's opinion briefly reviewed *Bridenbaugh v. Freeman-Wilson*, *Bainbridge v. Bush*, and *House of York*, agreeing with their conclusions.[403] This approach did not concede a violation of the dormant Commerce Clause, but agreed with the lower court in *Bainbridge v. Bush* that even if there were such a violation, the Twenty-First Amendment would provide enough protection to tilt the scales in favor of the state regulation.

The court recognized the core concerns by noting, "the Michigan legislature has chosen this path [referring to the out-of-state direct-shipment ban] to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors. The 21st Amendment gives it the power to do so."[404] Unlike the appellate court in *Bainbridge v. Turner*, this court did not ask for more evidence from the state to prove the genuine need for the different treatment of out-of-state sellers in order to achieve any of the core concerns.[405]

400. *Heald*, 2001 U.S. Dist. LEXIS 24826, at *15.

401. *Id.* at *9.

402. *Id.* at *10-16.

403. *Id.* at *10-15 ("The court believes that the decisions in *House of York*, *Bridenbaugh* and *Bainbridge* correctly concluded that direct shipment laws are a permissible exercise of state power under §2 of the 21st Amendment.").

404. *Id.* at *18.

405. *Id.* at *17-18 ("Michigan's direct shipment law is a permitted exercise of state power under §2 of the 21st Amendment [and] the measure cannot be characterized as 'mere economic protectionism.'").

III. THE 80 PROOF SOLUTION

A. Guilty Until Proven Innocent

The majority of the courts faced with the issue begin by applying a conventional dormant Commerce Clause analysis.[406] Those who choose this line of analysis begin with a tier-one inquiry as to whether the challenged statute violates the dormant Commerce Clause. The five states that applied this approach (New York, Texas, Florida, North Carolina, and Virginia) all concluded the direct-shipment laws under consideration were facially discriminatory in favoring in-state economic interests over out-of-state interests.[407] This conclusion then triggers a balancing test with varying degrees of inquiry as to whether the Twenty-First Amendment can save the offending statute.

This approach, despite its comforting use of a tried-and-true methodology, is fundamentally flawed for two reasons. First, because of how the issue is framed, the states will always bear the burden of proof from the outset. The Magistrate Judge's analysis in *Bolick v. Roberts* is representative of the shifting in the burden of proof:

> [If the] statutes are per se invalid because they impose barriers to free trade among the states, the burden shifts to Defendants . . . to establish that they nevertheless address a legitimate state interest so as to support the conclusion that the discriminatory law is demonstrably justified by a valid factor unrelated to economic protectionism and that there are no other nondiscriminatory means of addressing the problem.[408]

Second, these cases misapply the strict scrutiny standard when evaluating the degree to which the state regulation implicates the core concerns of the Twenty-First Amendment.

The nature of this direct-shipping issue, when analyzed under conventional dormant Commerce Clause methodology, renders the states guilty until proven innocent. Moreover, should these cases

406. *See* Bainbridge v. Turner, 311 F.3d 1104, 1109 (11th Cir. 2002); Bainbridge v. Bush, 148 F. Supp. 2d 1306 (M.D. Fla. 2001), *vacated by* 311 F.3d 1104 (11th Cir. 2002); Swedenburg v. Kelly, 232 F. Supp. 2d 135, 147 (S.D.N.Y. 2002); Dickerson v. Bailey, 212 F. Supp. 2d 673, 695 (S.D. Tex. 2002); Beskind v. Easley, 197 F. Supp. 2d 464, 471 (W.D.N.C. 2002), *aff'd in part, vacated in part*, 325 F.3d 506, 520 (4th Cir. 2003).

407. *Turner*, 311 F.3d at 1109; *Swedenburg*, 232 F. Supp. 2d at 147; *Dickerson*, 212 F. Supp. 2d at 695; *Beskind*, 197 F. Supp. 2d at 471.

408. Bolick v. Roberts, 199 F. Supp. 2d 397, 424 (E.D.Va. 2002).

reach the current Supreme Court, it is likely the direct-shipment laws will survive the Commerce Clause challenge.

B. Full Circle: From Brandeis to *Bridenbaugh*

1. *Bridenbaugh Looks To History*

Easterbrook's approach in *Bridenbaugh* bypasses the entire morass of Commerce Clause analysis and goes directly to Twenty-First Amendment considerations.[409] Based on the history and background of Prohibition and its repeal, it construes the power of the states liberally.[410] The opinion largely avoids determining whether or not the state's regulation sufficiently implicates the core concerns of the Twenty-First Amendment.[411] The Easterbrook approach assumes the states have a plenary right to regulate alcohol imports that come into the state and that are destined for use within its borders.[412] That is, the control that states can exercise over liquor imports is as great as the control that can be exercised over internal sales. Since states unquestionably have great freedom to regulate internal sales, this plenary right to regulate import should be given wide latitude. The only limitation on this latitude is a naked exercise of protectionism as represented by the *Bacchus* holding,[413] or any regulation that violates the well established principle of extraterritoriality.

This Note suggests that *Bridenbaugh* stands for the proposition that courts who look too deeply into whether or not core concerns are sufficiently implicated by state statutes are missing the point.[414] One view of Judge Easterbrook's opinion is that the core concern of the Twenty-First Amendment is very simply to allow the states as much freedom as possible to regulate alcohol within their own

409. *See Bush*, 148 F. Supp. 2d at 1314, *vacated by* 311 F.3d 1104 (11th Cir. 2002) (analyzing Judge Easterbrook's opinion and noting that:

> The Seventh Circuit rejected the 'core concerns' inquiry and instead focused on the text and history of the Twenty-First Amendment . . . [and] held that section two of the Twenty-First Amendment 'enables a state to do to importation of liquor— including direct deliveries to consumers in original packages—what it chooses to do to internal sales of liquor, but nothing more.'

(citing Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851, 853 (7th Cir. 2000)).

410. *Id.*

411. *Id; see also Turner*, 311 F.3d at 1114 (commenting that the *Bridenbaugh* court "jettisoned the 'core concerns' analysis").

412. *Bridenbaugh*, 227 F.3d at 853 (concluding that, "§2 [of the Twenty-First Amendment] enables a state to do to importation of liquor . . . what it chooses to do to internal sales of liquor, but nothing more").

413. *See Beskind*, 325 F.3d at 514.

414. This author's own interpretation.

borders.[415] Conducting a seemingly endless inquiry as to the components of that core purpose, whether it be temperance, tax collection, or maintaining orderly markets, risks missing the forest for the trees. By avoiding a conventional commerce clause analysis altogether, *Bridenbaugh* implies that applying strict scrutiny is a flawed approach to examining state justifications as to whether regulations sufficiently advance the specific goals of the Twenty-First Amendment.[416]

Judge Easterbrook's opinion was the only one that emphasized the logical trap in this controversy when he advanced his "reverse discrimination" argument.[417] The *Bridenbaugh* opinion recalled the frustrations of the states in regulating intoxicating liquors against the loopholes opened by the *Leisy* and *Rhodes* courts in the early years before Prohibition.[418] *Bridenbaugh* argued that "[e]very use of § 2 could be called discriminatory."[419] If the test is whether or not in-state interests are equally burdened by import regulations, then it is an impossible test to pass because "every statute limiting importation leaves intrastate commerce unaffected."[420] If this is the proper construction of the Twenty-First Amendment, it appears "§ 2 would be a dead letter."[421] Whether or not a state regulates imports, the in-state interests will almost always have some competitive advantage, no matter how small. Recall that the *Beskind* court applied *Bacchus*, and noted that as long as there was some competition — read, any competition at all — between in-state exempt interests and out-of-state, non-exempt, interests, there was a discriminatory effect.[422] Framed this way, this is a relatively low threshold of proof.

415. *Bridenbaugh*, 227 F.3d at 853 (reviewing the history of the Eighteenth and Twenty-First Amendments and concluding that §2 of the Twenty-First Amendment gave the states the power to close the loopholes left by the dormant Commerce Clause including direct shipments from out-of-state sellers to consumers that, absent the Twenty-First Amendment, were able to bypass state regulatory and tax systems).

416. *Id.* at 851 ("If 'core concerns' spelled the difference, we would follow the Supreme Court rather than district courts and student notes. But our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters.").

417. *Id.* at 852-54.

418. *Id.* at 852.

419. *Id.* at 853.

420. *Id.*

421. *Id.*

422. *See supra* note 322 and accompanying text.

2. Young's Market *Revisited*

In *Young's Market*, California was able to levy a five hundred dollar tax on imports.[423] The importers contended this unfair discrimination violated the Commerce Clause.[424] Justice Brandeis' opinion upholding the California statute clearly stated that the Twenty-First Amendment "abrogated the right to import free, so far as concerns intoxicating liquors."[425] These words appear to support the Easterbrook approach. The Brandeis opinion also addressed the same logical fallacy contained in *Bridenbaugh*.

Justice Brandeis highlighted the Hobson's choice facing the states if the plaintiffs in *Young's Market* had their way. A state could prohibit import of liquor, but only if it also prohibited liquor manufacture within its borders. If, on the other hand, the state allowed domestic production, it could do so only by allowing all imported liquor into the state on equal terms. Justice Brandeis wrote: "To say that, would involve not a construction of the amendment, but a rewriting of it."[426] This is analogous to the argument in *Bridenbaugh*.[427] At the same time the very argument that Judges Brandeis and Easterbrook are rebutting appears strikingly similar to the reasoning of the Fourth Circuit Court of Appeals in *Easley*.[428] Substituting the key words of the current direct-shipping ban controversy into Justice Brandeis' argument would render the following: A state could prohibit direct consumer shipments of wine by importers, but only if it also prohibited direct wine shipments within its borders. If, on the other hand, the state allowed domestic, direct wine shipments, it could do so only by allowing all imported wineries to ship directly to consumers on equal terms. If Judge Brandeis were writing today, it would not be difficult to imagine him criticizing the recent Fourth Circuit opinion for "rewriting," instead of construing the Twenty-First Amendment.

Young's Market is still good law, but the *Bolick* line of cases makes no attempt to deal with its logic. The *Dickerson* court cites *Young's Market*[429] in passing, making no attempt to reconcile its

423. State Bd. of Equalization of California v. Young's Market Co., 299 U.S. 59, 60 (1936).

424. *Id.* at 61.

425. *Id.* at 62.

426. *Id.*

427. *See supra* note 407 and accompanying text.

428. *See supra* notes 331-335 and accompanying text.

429. Dickerson v. Bailey, 212 F. Supp. 2d 673, 681 (S.D. Tex. 2002) (citing State *Bd. of Equalization*, 299 U.S. at 62, for the proposition that the Court in the early years "construed the [Twenty-First] amendment as authorizing the states to regulate com-

logic. *Bolick*, *Beskind*, *Easley*, and *Swedenburg* also do not address this argument. Although its logic is timeless, *Young's Market* was decided in 1936 and it is likely these courts simply preferred to ground their analysis on more recent case law.

The virtues of the Easterbrook approach are also its shortcomings. In bypassing the Commerce Clause analysis, particularly the two-tier inquiry, the Easterbrook approach is vulnerable to criticism as being incomplete, or, as the *Bolick* court characterized it, "improperly decided."[430] Moreover, in concluding that Indiana's three-tier system did not discriminate against out-of-state wineries since they, along with in-state wineries, were all subject to the same three-tier system, the *Bridenbaugh* opinion did not provide a convincing argument. One commentator who disagreed with that conclusion wrote, "As a practical matter, that declaration is patently silly."[431]

The Easterbrook approach, for all its strengths and weaknesses has not garnered much of a following. Most courts that have considered the issue of direct-shipment bans have chosen different paths of analysis, often criticizing *Bridenbaugh* along the way. Even when arriving at a similar conclusion affirming a direct-shipping ban, such as the lower court in *Bainbridge v. Bush*, these courts have felt compelled to acknowledge recent case law by incorporating an explicit Commerce Clause framework into their opinions.

C. Accommodating The Commerce Clause Framework

With important cases such as *Brown-Forman*, *Healy*, *Bacchus*, and *North Dakota* all dealing with reconciling interests of the Commerce Clause and the Twenty-First Amendment, it is not unreasonable to incorporate these decisions into the analytic framework. Such is the strength of the line of cases using the *Bolick* and Florida approaches. There is compelling logic in synthesizing modern Commerce Clause analysis into the framework. The approach would take into consideration current thinking and avail itself of more case law, even if not exactly on point.

The problem with this analysis is that it always begins with the finding that the state statutes are per se violations of the Commerce Clause, shifting the burden of proof to the defendants. Ef-

merce in alcoholic beverages unfettered by the limitations of the dormant commerce clause").

430. *See supra* text accompanying note 302.

431. Lorde Martin, *supra* note 246, at 70.

fectively, however, the burden never shifts because plaintiffs have the inside track from the beginning. Because it is virtually certain these statutes will not survive tier-one analysis, the states will always bear the burden of proof to justify the next step in the Commerce Clause chain of reasoning.

The *Heald* court avoids this initial finding, developing a hybrid approach where it accepted the conclusion, not the analysis of the lower court in *Bainbridge v. Bush*, and buttressed its reasoning with *Bridenbaugh* and *York*, two cases that did not use the two-tier Commerce Clause inquiry. The *Heald* approach is weakened somewhat since the appellate court in *Bainbridge* vacated the lower court decision and remanded it for further consideration. The *York* case, decided in 1970, predating the more important cases, is a Second Circuit decision contradicting somewhat the *Swedenburg* court. That leaves *Heald* with only one leg of support, the Easterbrook decision.

One way around this obstacle would be to offset this initial handicap with a reasonable standard of proof at the subsequent stage of the inquiry. During this stage, the analysis focuses on the extent to which state regulations implicate core concerns of the Twenty-First Amendment. Often the analysis here turns murky because so many subjective elements come into play. There is even some disagreement among the courts as to which core concerns are legitimate. For example, Judge Berman in *Swedenburg*, posited, "As a threshold matter, it is not entirely clear that the collection of taxes is, in and of itself, a core concern of the Twenty-first Amendment."[432] Judge Whittemore, on the other hand, in *Bainbridge v. Bush*, writes, "Recent case law has recognized that there are various 'core concerns' of the twenty-first amendment, including temperance, raising revenue and 'ensuring orderly market conditions.' This expanded understanding of what constitutes a 'core concern' . . . must be applied to the constitutional analysis in this case."[433] Yet another perspective, evidencing the subjectivity of opinions, is contained in Circuit Judge Roney's dissent in *Bainbridge v. Turner*. Judge Roney would have affirmed the decision in *Bainbridge v. Bush* based on the reasoning of the district court.[434] Judge Roney writes in his dissent:

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432. Swedenburg v. Kelly, 232 F. Supp. 2d 135, 149 (S.D.N.Y. 2002).

433. Bainbridge v. Bush, 148 F. Supp. 2d 1306, 1313 (M.D. Fla. 2001), *vacated by* 311 F.3d 1104 (11th Cir. 2002).

434. Bainbridge v. Turner, 311 F.3d 1104, 1116 (11th Cir. 2002).

> In these credit card days of easy purchase by telephone and internet, this statute reflects the 'core' concerns of the 21st Amendment that alcoholic beverages not be sold to underage consumers and not be sold effectively unregulated and untaxed. This court improperly treats as equal the prospective loss of a beverage license to an in-state firm and the loss of a Florida beverage license of an out-of-state firm, if one is required at all. One would put the firm out of business, the other would simply restrict the market by a state.[435]

This concept of "franchise risk" that Judge Roney brings out has a commonsense appeal, although it is largely ignored or downplayed by the courts in New York, Texas, North Carolina, and Virginia. The very same arguments echoing Judge Roney's dissent were actually made by North Carolina in *Easley*,[436] but without effect. Perhaps the problem of such disparate opinions stems from the fact that the analysis begins with a per se violation of the Commerce Clause, triggering strict scrutiny.

D. Strict Scrutiny Scrutinized

Typically, a violation of the Commerce Clause triggers a strict scrutiny analysis,[437] demanding nearly one hundred percent proof that the violation is justifiable under the circumstances.[438] The lower court in *Bainbridge v. Bush* expressly cited the strict scrutiny

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435. *Id.*

436. Beskind v. Easley, 325 F.3d 506, 514 (4th Cir. 2003); *see supra* note 328 and accompanying text.

437. Bolick v. Roberts, 199 F. Supp. 2d 397, 424 (E.D. Va. 2002) (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 624-27 (1978) when noting that the Court must apply strict scrutiny in evaluating dormant Commerce Clause claims); Dickerson v. Bailey, 212 F. Supp. 2d 673, 682 (S.D. Tex. 2002). In support of its reasoning the court noted:

> [T]he Supreme Court has consistently indicated that a court must apply strict scrutiny when examining claims under the dormant Commerce Clause, requiring the state to demonstrate that its regulations are closely related to its powers reserved by the Twenty-First amendment and that the statutes promote core concerns of that amendment.

Id. at 682 (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 624-27 (1978) and Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984)); *see also* Bainbridge v. Bush, 148 F. Supp. 2d 1306, 1311 (M.D. Fla. 2001) (noting "[T]he Supreme Court employs strict scrutiny and will uphold the statute only where the challenged statute advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.") *vacated by* 311 F.3d 1104 (11th Cir. 2002).

438. "In order for a law to survive such scrutiny, the state must prove that the discriminatory law is demonstrably justified by a valid factor unrelated to economic protectionism, and that there are no nondiscriminatory alternatives adequate to preserve the local interests at stake . . . ." *Bolick*, 199 F. Supp. 2d at 424 (quoting Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 333 (4th Cir. 2001)).

standard in its opinion.[439] After finding a per se violation of the Commerce Clause, however, it nevertheless upheld the Florida statute against the constitutional challenge.[440] The appellate court in *Bainbridge*, on the other hand, vacated and remanded the decision for lack of proof.[441]

The Fourth Circuit Court of Appeals in *Easley* applied strict scrutiny when it inquired into nondiscriminatory alternatives to North Carolina's ABC laws, after Judge Niemeyer had concluded the offending statutes were facially discriminatory.[442] The *Dickerson* and *Bolick* courts also cited the strict scrutiny standard, and declared the disputed statutes unconstitutional.[443] The conclusions rest on *where* in the chain of logic strict scrutiny is applied.

Determining the proper degree of scrutiny and at what point to apply it is the key to reconciling the different approaches. The Florida companion cases of *Bainbridge v. Bush* and *Bainbridge v. Turner* illustrate this point. Both use the same Commerce Clause framework, but arrive at different answers.[444]

The approach in *Turner* was essentially the same as that of the lower court in *Bush*. Both began with a determination that the challenged statute was facially discriminatory.[445] Both courts made this determination for the same reasons, namely, the Florida statute discriminated against out-of-state economic interests in violation of the Commerce Clause.[446] Conventional Commerce Clause

439. *Bush*, 148 F. Supp. 2d at 1311.

440. *Id.* at 1315 (finding that despite violating the dormant commerce clause, the Florida statute is a valid exercise of Florida's power even as applied to out-of-state wineries because the scheme implicates the "core concerns" of the Twenty-First Amendment).

441. *Turner*, 311 F.3d at 1106 (explaining that if the State can demonstrate that its statutory scheme is closely related to a core concern of the Twenty-First Amendment and not a pretext for mere protectionism, Florida's statute can be upheld but concluding the factual record was too incomplete to uphold a judgment as a matter of law for the State and thereby vacating and remanding the lower court decision).

442. Beskind v. Easley, 325 F.3d 506, 515 (4th Cir. 2003).

443. *See* Dickerson v. Bailey, 212 F. Supp. 2d 673, 694 (S.D. Tex. 2002); *Bolick*, 199 F. Supp. 2d at 397.

444. *See supra* Part III.C.3.

445. *Turner*, 311 F.3d at 1109 (expressing agreement "with the district court that the statute discriminates on its face").

446. *Id.* at 1110 ("Because the Florida statutes discriminate against out-of-state retailers and nondiscriminatory alternatives are available to serve the State's interests, Florida's regulatory scheme violates the Commerce Clause."); *see also* Bainbridge v. Bush, 148 F. Supp. 2d 1306, 1312 (M.D. Fla. 2001) ("[B]ecause the Florida regulatory scheme discriminates against out-of-state retailers and nondiscriminatory alternatives are available to serve the legitimate state interests, Florida's regulatory scheme constitutes a per se violation of the Commerce Clause.").

reasoning suggests it is at this point, where the court evaluates the least restrictive means of accomplishing the state's interests, that strict scrutiny is applied.[447] That part of the strict scrutiny analysis involves an inquiry into available alternatives. As explained by the court in *Bainbridge v. Bush*: "In those cases, the Supreme Court employs strict scrutiny and will uphold the statute only where the challenged statute advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[448] At this point in the analysis, both the district and appellate courts concluded the Florida statute could not survive tier-one scrutiny.[449] As the Eleventh Circuit expressed in *Bainbridge v. Turner*: "If the scheme directly regulates or discriminates against interstate commerce or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."[450]

Most courts applying the conventional Commerce Clause analysis arrive at this point.[451] The problem they then face is determining how the Twenty-First Amendment impacts this methodology. The courts frame the problem in the following manner: once the challenged regulation violates the Commerce Clause, it will be struck down unless it can be saved by the Twenty-First Amendment. The only way it can be saved is by an inquiry into the motives or purposes of the challenged regulation.[452] If the inquiry reveals motives or purposes that further the core concerns of the Twenty-First Amendment, the statute survives. All courts agree that a regulation that attempts to affect commerce outside its jurisdiction[453] or is merely protectionist in purpose[454] will be struck down.

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447. *See* Maine v. Taylor, 477 U.S. 131 (1986).

448. *Bush*, 148 F. Supp. 2d at 1311 (citing New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988)).

449. *Turner*, 311 F.3d at 1109 (concluding that "Florida's regulatory scheme cannot withstand tier-one scrutiny."); *Bush*, 148 F. Supp. 2d at 1312 (concluding "Florida's regulatory scheme constitutes a per se violation of the Commerce Clause").

450. *Turner*, 311 F.3d at 1109 (quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578-79 (1986)).

451. The courts discussed in this note under the *Bolick* Approach and the Florida Approach all utilize conventional dormant Commerce Clause analysis and during the tier-one inquiry they all concluded the direct shipping statutes to be per se violations of the dormant Commerce Clause.

452. *See* Swedenburg v. Kelly, 232 F. Supp. 2d 135, 141-44 (S.D.N.Y. 2002) (reviewing recent related litigation and discussing the conclusions in *Dickerson*, *Bainbridge*, *Bolick*, *Beskind* and *Easley*).

453. Following the *Yosemite Park* and *Healy* line of cases.

454. Following *Bacchus*.

Because the direct-shipping bans, however, do not fall into either of the two categories, the courts must determine if the motive or purposes sufficiently implicate the core concerns of the Twenty-First Amendment. The lower court in *Bainbridge v. Bush* conducted this inquiry at less than strict scrutiny, opening the door to statutes with mixed motives.[455] The appellate court conducted this inquiry with a higher degree of scrutiny, and vacated and remanded the decision for further fact finding consistent with its opinion. Interestingly, in a footnote, the appellate court noted: "This evidentiary standard is far less than the strict scrutiny required under a traditional tier-one analysis of discriminatory laws. For example, the State need not show that there are no nondiscriminatory alternatives available."[456]

The Eleventh Circuit in *Bainbridge* indicated it was following the methodology in *Bacchus* and in a case from the D.C. Circuit, *Milton S. Kronheim & Co. v. District of Columbia*.[457] It is noteworthy that the *Kronheim* court also applied less than strict scrutiny in its opinion at this point of its analysis. In *Kronheim*, the D.C. Circuit decided a case challenging a D.C. liquor warehousing law.[458] The *Kronheim* court accepted a "mixed motive" by the District where legitimate reasons coincided with clearly protectionist motives but upheld the local statute because of Twenty-First Amendment considerations.[459] The *Kronheim* approach appears consistent with a rational relationship level of scrutiny in which any plausible reason will suffice.

As the Eleventh Circuit Court of Appeals in *Bainbridge* pointed out, strict scrutiny is characterized not only by a heightened standard of inquiry, but also by an inquiry into alternative, nondiscriminatory means.[460] The courts in *Bolick v. Roberts*, *Dickerson v. Bailey*, and *Swedenburg v. Kelly* applied this standard in their final

455. *See supra* text accompanying notes 378 - 379.

456. Bainbridge v. Turner, 311 F.3d 1104, 1115 n.17 (11th Cir. 2002).

457. *Id.* at 1108 (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) and Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193 (D.C. Cir. 1996)); *see also* Bolick v. Roberts, 199 F. Supp.2d 397, 436-37 (E.D.Va. 2002).

458. *Kronheim*, 91 F.3d at 195.

459. Bainbridge v. Bush, 148 F. Supp. 2d 1306, 1313 (M.D.Fla. 2001), *vacated by* 311 F.3d 1104 (11th Cir. 2002) (reviewing the facts and holding in *Kronheim*).

460. *Turner*, 311 F.3d at 1115 n.17 ("This evidentiary standard is far less than the strict scrutiny required under a traditional tier-one analysis of discriminatory laws. For example, the State need not show that there are no nondiscriminatory alternatives available.").

deliberations.[461] The district court in *Beskind v. Easley* sidestepped this issue by inferring that the state, while justifying the broad ABC laws, had not given any specific evidence for the differing treatment of out-of-state winery shipment. The court, therefore, was left with no alternative but to surmise that the North Carolina statute was supported by mere protectionist motivations that were impermissible under *Bacchus*.[462] The Fourth Circuit Court of Appeals, on the other hand, in affirming the district court's finding as to the constitutionality of the direct-shipping bans, applied a straight-forward strict scrutiny analysis in arriving at its conclusion.[463]

Finally, in *Bainbridge v. Turner*, although the court expressly noted that it was using a "far less than the strict scrutiny required under a traditional tier-one analysis,"[464] it went on to raise questions in its holding that sound suspiciously consistent with a strict scrutiny analysis. For example, on the issue of taxes:

> What is so unique about the geographic location of out-of-state wineries that makes taxing them so difficult that they are forced (unlike their in-state counterparts) into the three-tier distribution system? After all, in-state wineries are taxed directly, and this alternative therefore appears to be a viable substitute to the three-tier taxation scheme.[465]

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461. *Bolick*, 199 F. Supp. 2d at 443 (explaining the state must "demonstrate that there are no other nondiscriminatory means of accomplishing the same legitimate goals."); Dickerson v. Bailey, 212 F. Supp. 2d 673, 695 (S.D.Tex. 2002) (holding the State had not shown that its core interests in taxation and orderly market conditions "could not be effected by alternative, nondiscriminatory options."); Swedenburg v. Kelly, 232 F. Supp. 2d 135, 150 (S.D.N.Y. 2002) (explaining the "Court does not discern that the statutes advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." (internal quotations omitted)).

462. Beskind v. Easley, 197 F. Supp. 2d 464, 472 (W.D.N.C. 2002) *aff'd in part, vacated in part,* 325 F.3d 506, 520 (4th Cir. 2003)).

463. Beskind v. Easley, 325 F.3d 506, 520 (4th Cir. 2003).

464. *Turner*, 311 F.3d at 1115 n.17. Although beyond the scope of this Note, the decision of the Eleventh Circuit Court of Appeals in *Bainbridge v. Turner*, in remanding the case for fact finding reasons, may itself raise an interesting issue in light of the Supreme Court's opinion in *Maine v. Taylor*, 477 U.S. 131, 145-146 (1986), wherein the Court criticized the appellate court for reviewing the lower court's fact finding. "Although the proffered justification for any local discrimination against interstate commerce must be subjected to the strictest scrutiny, the empirical component of that scrutiny, like any other form of factfinding, is the basic responsibility of district courts, rather than appellate courts." *Id.* (internal quotations omitted).

465. *Turner*, 311 F.3d at 1115.

E. Reconciling the Approaches

The courts that have approached the issue of out-of-state wine shipments with a conventional Commerce Clause framework differ in their conclusions, depending on what level of scrutiny is applied at the final point of analysis.[466] This is the point where they typically inquire as to whether the motives or purposes behind the challenged regulation sufficiently advance the core concerns of the Twenty-First Amendment to justify a per se violation of the Commerce Clause. The Easterbrook approach avoids this line of reasoning altogether by essentially taking the position that the core concern of the Twenty-First Amendment is not the detailed minutiae of temperance, tax collection, or orderly market conditions, but the overall plenary right of the states to regulate alcohol within their borders. Nevertheless, even Easterbrook acknowledged that "the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms."[467]

The criticism of Easterbrook's opinion rests mainly on the fact it did not include the conventional Commerce Clause two-tier framework.[468] On the other hand, courts following the Easterbrook approach would likely criticize the *Bolick* approach for misapplying the dormant Commerce Clause analysis by not giving full weight to the power implied by the Twenty-First Amendment. They would extend the critique by reminding the followers of the *Bolick* approach that the dormant Commerce Clause framework was born out of a need to address a constitutional issue that exists only in the minds of the courts and not in the text of the Constitution itself. Since the Twenty–First Amendment is, after all, an express part of the Constitution, its modification of a conventional dormant Commerce Clause analysis should be much greater than what the courts permitted in Virginia, North Carolina, Texas, and New York. Those in the Easterbrook camp who believe the history of the Twenty-First Amendment has been largely forgotten and that the plenary power the Amendment gives the states has been wrongfully mitigated, echo the sentiment of the dissent in *Brown-Forman* where Justice Stevens noted: "[F]or some of us who were 'present at the creation' of the Twenty-First Amendment, there is an aura of

466. The *Bolick*, *Beskind*, *Dickerson*, and *Swedenburg* courts struck down the statutes while the lower court in *Bainbridge* upheld the statute. The appellate court in *Bainbridge v. Turner* concluded insufficient evidence to render a final judgment and vacated and remanded the lower court's decision. *Id.* at 115-16.

467. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000).

468. *See* Dickerson v. Bailey, 212 F. Supp. 2d 673, 682 (S.D. Tex. 2002).

unreality in [the] assumption that we must examine the validity of New York's Alcoholic Beverage Control Law just as we would examine the constitutionality of a state statute governing the sale of gasoline."[469]

Florida hinted at reconciliation in the Eleventh Circuit opinion in *Turner* by explicitly recognizing that a standard somewhat less than strict scrutiny should be applied at the tail end of the analysis. The Eleventh Circuit's failure to reverse the lower court's decision opens the door to compromise.

The Easterbrook approach would probably apply rational basis scrutiny. This appears to be what the *Kronheim* court chose when it held that "mixed motives" could survive a Commerce Clause challenge.[470] This allows even somewhat protectionist motives to coexist with legitimate motives in a state regulation concerning alcohol.

The *Bolick* approach would argue for maintaining strict scrutiny when evaluating whether a challenged regulation implicated the Twenty-First Amendment sufficiently to justify a per se violation of the Commerce Clause. This is in fact the approach Virginia, North Carolina, Texas, and New York used. With strict scrutiny, any protectionist legislation could not survive if alternative, nondiscriminatory means existed.

Both approaches can be reconciled within the two-tier framework if the courts apply an intermediate level of scrutiny. The two-tier framework would acknowledge the Supreme Court decisions of the past thirty years and give proper weight to the dormant Commerce Clause, while less than strict scrutiny would acknowledge the "text and history of the Constitution."[471] The suggested level of intermediate scrutiny gives a slight edge to the strict scrutiny camp because current Supreme Court cases such as *Bacchus*, although not directly on point, are more in the strict scrutiny camp. Most district courts appear to argue that, in the absence of a Supreme Court decision on the issue, they are governed by the precedents in their circuits.[472]

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469. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 590 (1986) (Stevens, J., dissenting) (quoting Judge Friendly, Battipaglia v. New York Liquor Auth., 745 F.2d 166, 168 (2d Cir. 1984)).

470. *See supra* text accompanying notes 457 - 459.

471. *Bridenbaugh*, 227 F.3d at 851.

472. *See* Dickerson v. Bailey, 212 F. Supp. 2d 673, 694 (S.D.Tex. 2002) (noting that, "this Court must follow the rulings of the Fifth circuit" and the majority opinions of the Supreme Court); Bolick v. Roberts, 199 F. Supp. 2d 397, 408 (E.D.Va. 2002) (agreeing with the Magistrate's analysis that *Bridenbaugh* was improperly decided be-

This less-than-strict-scrutiny approach is essentially the solution suggested by the Eleventh Circuit Court of Appeals in *Bainbridge v. Turner* when it remanded the case back to the district court. Although this suggested reconciliation would incorporate the concerns represented by the Easterbrook and the *Bolick* approaches, it does not answer the question of how the Supreme Court would likely decide if it granted certiorari.

F. If The Supreme Court Granted Certiorari

Judge Melinda Harmon alluded to this question in her thoughtful opinion in *Dickerson v. Bailey*, where she noted the recent trend in recent Supreme Court decisions strengthening states' rights at the expense of federal powers under the Commerce Clause.[473] Further, Judge Harmon stated:

> More specifically this Court recognizes that in dissents to some of the key cases involving the relationship between the Commerce Clause and the twenty-first amendment, cited and relied upon by this Court, some of the current members of the high court have individually indicated that the focus of such analysis should not be legislative motivation, core purposes or legitimate goals, have suggested that the implied dormant Commerce Clause should not have the limiting power over the commerce of alcohol that the majority opinion of the Supreme Court has given it and that it does have in regulation of other interstate goods, and have broadly defined the power given to the states under the twenty-first amendment to regulate importation and sale of out-of-state liquor in a manner similar to the position of Judge Easterbrook.[474]

Notably, the three members of the Supreme Court dissenting in *Bacchus* were Chief Justice Rehnquist, and Justices Stevens and O'Connor.[475] *Bacchus* was decided in 1984,[476] when the makeup of the Court was less conservative than it is now. These three Justices again joined together to dissent in *Healy v. Beer Institute*.[477] In his dissent, Chief Justice Rehnquist wrote:

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cause it did not rely upon established dormant Commerce Clause analysis by which the court is bound).

473. *Dickerson*, 212 F. Supp. 2d at 694.

474. *Id.*

475. *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 278 (1984) (dissenting opinion by Justice Stevens, joined by Justices Rehnquist and O'Connor).

476. *Id.*

477. Healy v. Beer Inst., Inc., 491 U.S. 324, 345 (1989) (dissenting opinion by Chief Justice Rehnquist, joined by Justices Stevens and O'Connor).

> The Court in the present cases barely pays lipservice to the additional authority of the States to regulate commerce and alcoholic beverages granted by the Twenty-first Amendment. Neglecting to consider that increased authority is especially disturbing here where the perceived proscriptive force of the Commerce Clause does not flow from an affirmative legislative decision and so is at its nadir.[478]

The dissent again echoes Easterbrook's concerns. Since *Bacchus* and *Healy*, the current Supreme Court — with the addition of Justice Thomas — has a more conservative leaning, particularly regarding states rights.

In the cases referred to by Judge Harmon, *Printz v. United States*[479] and *United States v. Lopez*,[480] Justices Stevens, Souter, Ginsburg, and Breyer dissented. These same four dissented in another case widely interpreted as operating to limit the Commerce Clause, *United States v. Morrison*.[481] These cases, however, dealt more with the issue of Commerce Clause powers in noneconomic fact patterns. As a result, it is unclear how Justices Breyer, Ginsburg, and Souter would reason on the direct-shipment issue, even though their dissents in these cases put them in the camp of expanded commerce powers. This is particularly uncertain because Justice Stevens joined them in dissent, while also joining the dissent in *Healy*, and authoring the dissent in *Bacchus*.

Based on the dissenting opinions in *Bacchus* and *Healy*, it would seem more likely than not that Chief Justice Rehnquist,[482] and Justices Stevens and O'Connor would retain their views regarding the approach to the Twenty-First Amendment. Justices Scalia and Thomas would probably lean toward the Rehnquist, Stevens, and O'Connor approach. Since the direct shipment of wine is an economic issue, it is unclear how the more liberal, pro-Commerce Clause members of the bench would vote; especially bearing in mind Justice Stevens, while joining with them in *Printz*, *Lopez*, and

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478. *Id.* at 349.

479. United States v. Printz, 521 U.S. 898, 933 (1997) (limiting the power of the federal government to compel local law enforcement officers to conduct background checks on prospective handgun purchasers).

480. United States v. Lopez, 514 U.S. 549, 552 (1995) (affirming a district court's reversal of the conviction of a high school student for gun possession in violation of the Gun-Free School Zone Act of 1990 ruling the law was beyond the reach of the commerce power).

481. United States v. Morrison, 529 U.S. 598, 602 (2000) (striking down a federal law creating a federal civil remedy for victims of gender-motivated violence).

482. Recall Chief Justice Rehnquist also dissented in *Craig v. Boren*, 429 U.S. 190, 217-18 (1976).

Morrison, would probably vote to strengthen state powers under the Twenty-First Amendment. On balance, it appears that the Twenty-First Amendment would likely play a larger role with the current Court. If the Supreme Court granted certiorari on a direct-shipment case, the state regulations would more than likely survive a Commerce Clause challenge.

CONCLUSION

This Note has addressed the recent series of cases challenging state regulations that prohibit out-of-state direct wine shipments to consumers while exempting in-state wineries from the same restraints. Opponents of the direct-shipment laws have challenged these statutes based on a theory of interstate discrimination in violation of the dormant Commerce Clause.[483] States have contended that the Twenty-First Amendment permits them the freedom to enact these statutes.[484]

While analyzing the different approaches various courts have taken in considering the issue, this Note has identified two major doctrinal camps. In one camp, represented by Judge Frank Easterbrook's opinion in *Bridenbaugh v. Freeman-Wilson*, the Twenty-First Amendment plays almost a solo role in deciding the issue. This approach, in reviewing the history and text of the Amendment, recognizes that the primary concern of the Amendment is in giving the states a plenary right to regulate alcohol within their borders. The Easterbrook camp interprets this plenary right with the history of Prohibition firmly in mind, particularly with respect to the many frustrations the states experienced in the mid-nineteenth and early twentieth centuries where Commerce Clause challenges continuously and successfully blocked state attempts to regulate alcohol.

The Easterbrook camp puts significant weight on the fact that this tension was ultimately resolved by a Constitutional amendment manifestly favoring state power. This trump card can win in nearly all balancing tests against the dormant Commerce Clause, except for regulations that exist solely for protectionist motivations, and regulations that violate the principle of extraterritoriality by affecting commerce outside its jurisdiction. But in applying these principles, the Easterbrook approach appears liberal in giving the Twenty-First Amendment wide latitude. With respect to

483. *See supra* text accompanying note 267.

484. *See supra* notes 269-290 & 356-388 and accompanying text.

the issue of direct-shipment bans, this camp believes the power to regulate alcoholic imports for use within a state's borders should be equal to or very nearly equal to the power to regulate alcohol within its borders.

The other major doctrinal camp[485] believes the Supreme Court has consciously moved away from the expansive reading of the Twenty-First Amendment as expressed in the Court's early opinions in the 1930s. The modern approach generally incorporates federal interests over those of the states and, as such, explicitly deals with the dormant Commerce Clause. This approach operates to limit state power even in the absence of explicit federal legislation when the resulting statutes materially burden interstate commerce, or openly discriminate against out-of-state economic interests in favor of in-state interests. The modern approach applies a strict scrutiny analysis to per se violations of the Commerce Clause and hence, will look very carefully for the existence of alternative nondiscriminatory means to effect state interests. Per se violations will generally be struck down if any nondiscriminatory alternatives exist. This is a high standard and in practice very few offending statutes survive a strict scrutiny analysis. For those who apply the dormant Commerce Clause analysis, the very nature of the direct-shipping bans trigger per se violations of the dormant Commerce Clause because, on their face, they openly discriminate against out-of-state wineries in favor of in-state wineries. This camp then shifts the burden of proof to the states who must provide satisfactory, non-protectionist motivations in order to save the offending statutes by resorting to the Twenty-First Amendment. For the modern dormant Commerce Clause camp, the Twenty-First Amendment plays a supporting role in this drama. At best it can co-star, but in no event will it ever play the solo role scripted by the Easterbrook camp.

In reconciling these different approaches, this Note has suggested a pragmatic analytical approach, incorporating the modern dormant Commerce Clause framework, but substituting an intermediate level of scrutiny for the conventional strict scrutiny that most courts have applied. The compromise properly respects both parts of the Constitution—the Twenty-First Amendment and the dormant Commerce Clause.

The likely outcome in applying this approach is that most direct-shipment bans would probably survive constitutional challenges.

485. *See supra* notes 291-353 and accompanying text.

Although this result will disappoint the legions of wine connoisseurs and perhaps force them to look to the state legislatures for relief, this Note further argued that the result of this modified Commerce Clause analysis would not be too far from what the current Supreme Court would actually decide if certiorari were granted in a direct-shipment case.

While no direct-shipment case has been granted certiorari by the Supreme Court, this Note concludes that if such a case were to be heard by the current Justices, the direct-shipment laws would more than likely survive a dormant Commerce Clause challenge. This is based largely on the record of dissent by Chief Justice Rehnquist, joined by Justices Stevens and O'Connor, in several important cases in recent history. These Justices have argued against what they have perceived to be wrongful mitigation of states' rights under the Twenty-First Amendment. Moreover, the conservative tendency of the current Court, as reflected in several recent noneconomic cases widely understood to further restrain federal powers under the Commerce Clause, would likely enhance the probability that greater Twenty-First Amendment power would emerge from any case heard by the current bench.

This Note began with an observation that certain wine connoisseurs and their legal advocates have consciously tried to get the Supreme Court to decide on the legality of direct-shipping bans as it pertains to wine. This Note ends with the observation that these oenophiles may indeed get what they wish for but the result, like a vintage bottle of rare wine, may not be to everyone's taste.