Notre Dame Law Review

Volume 79
Issue 4 *The Changing Laws of War: Do We Need a New Legal Regime after September 11?*

Article 11

7-1-2004

Unmixing a Jurisprudential Cocktail: Reconciling the Twenty-First Amendment, the Dormant Commerce Clause, and Federal Appellate Jurisprudence to Judge the Constitutionality of State Laws Restricting Direct Shipment of Alcohol

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UNMIXING A JURISPRUDENTIAL COCKTAIL: RECONCILING THE TWENTY-FIRST AMENDMENT, THE DORMANT COMMERCE CLAUSE, AND FEDERAL APPELLATE JURISPRUDENCE TO JUDGE THE CONSTITUTIONALITY OF STATE LAWS RESTRICTING DIRECT SHIPMENT OF ALCOHOL

*Justin Lemaire**

INTRODUCTION

The Constitution provides that: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ."[1] This is the Interstate Commerce Clause, which affirmatively grants Congress the power to make all manner of laws regarding matters that touch on commerce. However, the Supreme Court "long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce."[2] This "dormant Commerce Clause" prohibits the states from making regulations that impose serious burdens on the free flow of interstate commerce. Because of the dormant Commerce Clause, a state could not prevent its residents from using the internet to order New England lobsters from Fisherman's Fleet, video games from GameStop, or books from Amazon.com and having those items delivered to their doors.

Alcohol, however, is different. Most states place some type of restriction on the ability of consumers to order liquor and have it

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1 U.S. CONST. art. I, § 8, cl. 3.

2 Healy v. Beer Inst., 491 U.S. 324, 326 n.1 (1989).

shipped to their homes.[3] If states attempted to place such restrictions on commerce in lobsters or video games or virtually any other product, the courts would not hesitate to strike down those restrictions. The issue of state imposed restrictions on commerce is more complicated when commerce in alcoholic beverages is involved. Section 2 of the Twenty-First Amendment to the Constitution 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."[4] Its quirks have been documented,[5] but one thing that the amendment clearly does is set alcohol apart from any other article of commerce. After all, neither the Founders nor any Congress ever found it necessary to enact a constitutional provision forbidding the violation of state regulations over any other item. What is not clear, however, is precisely to what extent the amendment makes alcohol different. Does it authorize the states to forbid the direct shipment of liquor to consumers?

This issue has become important in recent years because of the rapid growth of the American wine industry. There are more than 2000 domestic wineries in the United States, up from just 375 in 1963.[6] The vast majority of those wineries are small, independent ventures that produce premium wines that sell for $15 per bottle and up.[7] Due to their size, such wineries often find it difficult or even impossi-

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3 *See* Susan Lorde Martin, *Wine Wars—Direct Shipment of Wine: The Twenty-First Amendment, the Commerce Clause, and Consumers' Rights*, 38 AM. BUS. L.J. 1, 27–34 (2000) (categorizing and explaining the various types of restrictions that states place on the direct shipment of wine to consumers).

4 U.S. CONST. amend. XXI, § 2.

5 Note that the amendment directly prohibits the conduct it identifies (i.e., importation and transportation of liquors in violation of state laws) rather than merely allowing the states or Congress to prohibit that conduct. As a result, there are now two ways that a private citizen not acting under color of law can violate the Constitution. One is to enslave someone in violation of the Thirteenth Amendment, and the other is to violate state liquor control laws. *See* 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, 218–20 (1995).

6 Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1622 (2000).

7 *See* Andrew J. Kozusko III, Note, *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, 76 (2000); 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, 172–73 (2001); Alix M. Freedman & John R. Emshwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking Its Very Private World*, WALL ST. J., Oct. 4, 1999, at A1.

ble to sell their wares through traditional state distribution channels. The Internet, however, provides a convenient connection between wineries and their potential customers.[8] Unfortunately, state direct-shipment prohibitions often get in the way.

Wineries and wine lovers have challenged state direct-shipment laws in the courts, claiming that such laws restrain commerce to a degree not allowed by the dormant Commerce Clause. The states counter that the Twenty-First Amendment gives them the right to enforce direct-shipment laws. Since 2000, no fewer than five circuit courts of appeals have considered direct-shipment law challenges. The interplay between direct-shipment laws, the Twenty-First Amendment, and the dormant Commerce Clause is an issue that may well be taken up by the Supreme Court in the near future.

This Note attempts to sort out this issue in light of current law. Part I examines how alcohol regulation has developed in the United States, which contributes to an understanding of how state regulation of alcohol has long been considered "different." Part II traces the development of contemporary Supreme Court jurisprudence in the area of alcohol regulation and the Twenty-First Amendment. Part III reviews the five recent circuit court of appeals decisions regarding the validity of state direct-shipment laws. Finally, Part IV takes crucial principles from the Supreme Court and circuit court of appeals decisions and attempts to mold them into a clear understanding about when state direct-shipment laws are valid and when they are not. This Note concludes that nondiscriminatory direct-shipment laws are a valid part of the states' right to structure their own alcohol distribution systems while discriminatory direct-shipment laws are presumed to have an improper, protectionist purpose and are invalid unless the state can affirmatively justify them.

I. THE HISTORY OF ALCOHOL REGULATION IN THE UNITED STATES[9]

Alcohol is unique among articles of commerce in that it is now primarily regulated by the states.[10] This has not always been the case,

8 *See, e.g.*, Kozusko, *supra* note 7, at 76 (noting the use by boutique wineries of both direct mail and the Internet to reach customers across the United States).

9 This Note provides only a general overview of the history of alcohol regulation in the United States. For a much more detailed history, see generally Sidney J. Spaeth, Comment, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accomodating the Federal Interest*, 79 CAL. L. REV. 161, 164–86 (1991) (tracing developments in alcohol regulations across the United States from the early nineteenth century to Prohibition and beyond).

10 *See* 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.

however. Throughout much of U.S. history, the federal government and the states engaged in a game of push-and-shove over alcohol regulation.[11] The outcome of this battle was not determined until the ratification of the Twenty-First Amendment, and the ongoing controversy over direct-shipping laws indicates that there are some aspects of the outcome that remain unsettled.

A. Early Pre-Prohibition Regulation

During the 1800s, alcohol was regulated virtually exclusively at the state and local levels.[12] Early temperance movements were fueled primarily by the unseemly (and probably exaggerated) image of the saloon and the evils that came with it.[13] As pro-temperance forces gained strength, their focus shifted from moral persuasion aimed at the drinker to suppression of the alcohol supply through political means.[14] Eventually, temperance forces succeeded in convincing thirteen out of the thirty-one states to pass laws banning the saloon and prohibiting the manufacture of intoxicating liquors.[15] However, by the time of the Civil War, eight of those thirteen states saw their laws struck down by state courts, and the temperance movement faded while the country turned to confront more pressing concerns.[16]

After the Civil War, the temperance movement returned and once again galvanized support. Powerful temperance societies emerged, led by the Anti-Saloon League.[17] The movement focused primarily on state and local laws. Kansas became the first prohibition state by amending its constitution in 1880 to go completely dry.[18] The Supreme Court upheld this move, finding that the absolute prohibition of the manufacture and sale of alcohol was within the state's police powers.[19] However, the next year, the Court qualified the states'

L. REV. 659, 661 (2000); *see also* RICHARD MCGOWAN, GOVERNMENT REGULATION OF THE ALCOHOL INDUSTRY 4–5, 113 (1997) (describing the structure of state and local agencies that tax and control alcohol in the United States).

11 *See* Foust, *supra* note 10, at 662.

12 Spaeth, *supra* note 9, at 165.

13 Clayton L. Silvernail, Comment, *Smoke, Mirrors and Myopia: How the States Are Able to Pass Unconstitutional Laws Against the Direct Shipping of Wine in Interstate Commerce*, 44 S. TEX. L. REV. 499, 505 (2003); Spaeth, *supra* note 9, at 166–67.

14 *See* Spaeth, *supra* note 9, at 168.

15 Silvernail, *supra* note 13, at 505.

16 Spaeth, *supra* note 9, at 169.

17 *Id.* at 170.

18 Silvernail, *supra* note 13, at 505–06; Spaeth, *supra* note 9, at 171.

19 Mugler v. Kansas, 123 U.S. 623, 661–62 (1887). The police power is the power of a state that "extend[s] to the protection of the lives, health, and property of the citizens, and to the preservation of good order, and the public morals." Beer Co. v.

power to regulate alcohol somewhat, holding that states could not regulate intoxicating spirits until the liquor was physically delivered into the state, because regulation of interstate commerce was within Congress's exclusive domain. Thus, a state could not prevent introduction of liquor by transportation from another state, even though the state could prohibit the sale of the liquor once it arrived.[20]

Two years later, the Court went even further. In *Leisy v. Hardin*,[21] the Court held that liquor remained an article of interstate commerce as long as it stayed in its original package or container.[22] Therefore, the state could not seize such liquor or take any other action to prevent its sale.[23] Strangely, this created a situation where states were forced to discriminate against *in-state* liquor industries, as states could ban internal production, transportation, and sale, but could not stop out-of-state liquor in its original package from being imported and sold.[24] Even prohibition states were thrown open to sales by "agency" stores offering imported liquor in its original package.[25]

B. Congress Secures Regulatory Power for the States

The effect of the Supreme Court's decisions in *Mugler*, *Bowman*, and *Leisy* was to give the states "carte blanche" regulatory power over alcohol produced within the state, but to leave states helpless to keep imported alcohol out or even to prevent the sale of imported liquor so long as it remained in its original package.[26] The states and the temperance groups turned to Congress, and Congress responded quickly, passing the Wilson Act the very same year that the Supreme Court handed down the *Leisy* decision.[27] The Wilson Act states that all liquor transported into any state is subject to the laws of the state to the same extent that it would be if the liquor had been manufactured in the state, regardless of whether the liquor is still in its original pack-

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Massachusetts, 97 U.S. 25, 33 (1877). For a detailed analysis of the police power, *see generally* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004) (exploring the proper extent of the police power and contending that the Constitution contains discernable limits on the extent to which states may exercise the police power).

20 Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465, 499–500 (1888).

21 135 U.S. 100 (1890).

22 *Id.* at 124–25.

23 *See id.*

24 *See* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 852 (7th Cir. 2000); 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, 2506 (2001).

25 *See* Spaeth, *supra* note 9, at 172.

26 *See* Silvernail, *supra* note 13, at 507–08.

27 Foust, *supra* note 10, at 663; Spaeth, *supra* note 9, at 172.

age.[28] The Wilson Act withstood constitutional challenge[29] and the states were able to close down the agencies.[30]

Victory was short lived for the states and the prohibitionists. Soon, alcohol purveyors began circumventing state laws by offering liquor through mail order.[31] The Supreme Court facilitated the mail order liquor business by its rulings in two cases. In *Rhodes v. Iowa*,[32] the Supreme Court held that state prohibition laws did not apply until alcohol carried in interstate commerce was delivered to the consignee.[33] Naturally, this would make it very difficult for a state to enforce its prohibition laws against mail order alcohol unless the state could post agents at its citizens' houses to inspect the packages those citizens received. The Supreme Court went even further in *Vance v. W.A. Vandercook & Co.*,[34] stating that "the right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of the state law."[35] Predictably, the mail order liquor industry flourished.[36]

Once again, the states and the temperance forces had to turn to Congress. And although it took a little bit longer this time, Congress again responded, led by Senator Kenyon of Iowa.[37] The Webb-Kenyon Act prohibits the *transport* of intoxicating liquor into any state for any use that would violate the laws of that state.[38] Thus, Congress effectively restricted the movement of alcohol in interstate commerce and prohibition states were able to keep liquor out. The Supreme Court subsequently upheld the Act's approach.[39] Thus, state power to regulate alcohol was secured—with the help of Congress.

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28 Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified as amended at 27 U.S.C. § 121 (2000)).

29 *See In re* Rahrer, 140 U.S. 545, 562 (1891).

30 *See* Spaeth, *supra* note 9, at 172.

31 Foust, *supra* note 10, at 662–63; Spaeth, *supra* note 9, at 172.

32 170 U.S. 412 (1898).

33 *Id.* at 421–23.

34 170 U.S. 438 (1898).

35 *Id.* at 452–53.

36 Silvernail, *supra* note 13, at 511; Spaeth, *supra* note 9, at 173.

37 *See* Foust, *supra* note 10, at 663; Spaeth, *supra* note 9, at 173.

38 Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. § 122 (2000)).

39 Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 325–32 (1917).

C. *The Return to National Regulation: Prohibition*

Rather than being appeased, the temperance forces were emboldened by Congress's accommodation of their ends. Prohibitionists pushed to expand prohibition nationwide.[40] December of 1917 brought the proposal of national prohibition.[41] By 1919, the states had ratified national prohibition, and Prohibition was enshrined in the Constitution as the Eighteenth Amendment.[42] The amendment banned the "manufacture, sale, or transportation of intoxicating liquors," as well as importation and exportation of liquors, in all territory subject to the jurisdiction of the United States.[43] Congress and the states were given concurrent authority to enact laws implementing Prohibition.[44] Thus, liquor regulation was no longer the exclusive domain of the states.

Prohibition did not work.[45] In 1933, an amendment to repeal Prohibition was introduced to Congress.[46] By the end of that same year, the amendment had been approved by Congress, ratified by the states, and added to the Constitution as the Twenty-First Amendment.[47] Two out of the three sections of the amendment are simple—Section 1 repeals the Eighteenth Amendment,[48] while Section 3 set a seven year time limit for ratification.[49] Section 2, however, is not nearly as clear.

D. *Section Two of The Twenty-First Amendment: Returning Power to the States—But How Much?*

Section 2 of the Twenty-First Amendment reads: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in

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40 Spaeth, *supra* note 9, at 174–75.

41 S.J. Res. 17, 65th Cong., 40 Stat. 1050 (1917).

42 U.S. CONST. amend. XVIII (repealed 1933).

43 *Id.* § 1.

44 *Id.* § 2. Congress enacted a comprehensive statutory regime to implement and enforce prohibition. Primary authority to enforce prohibition was given to the Commissioner of Internal Revenue. *See* National Prohibition Act, ch. 85, 41 Stat. 305 (1919), *amended in part and repealed in part by* Liquor Law Repeal and Enforcement Act, ch. 740, 49 Stat. 872 (1935).

45 *See generally* Spaeth, *supra* note 9, at 176–80 (providing a concise but comprehensive summary of the many failings of Prohibition).

46 S.J. Res. 211, 72d Cong., 76 CONG. REC. 4138 (1933).

47 *See* U.S. CONST. amend. XXI.

48 *See id.* § 1.

49 *See id.* § 3.

violation of the laws thereof, is hereby prohibited."[50] This provision obviously gives some control over liquor regulation to the states, but just how far that control extends has been the subject of intense debate.

There are two main views of how the Twenty-First Amendment should be interpreted.[51] One can be described as the "absolutist" view. Those who adhere to this view believe that Section 2 vests complete, plenary regulatory power over alcoholic beverages in the states.[52] Under this view, state liquor regulations are exempt from any limitations from the federal level. On the other side is the "federalist" view. This view holds that Section 2 only existed to protect those states that chose to remain dry. States that allowed the importation, manufacture, or sale of alcoholic drinks gained no new power vis-à-vis the federal government.[53] Under this view of Section 2, state liquor regulations are subject to federal limitations on state power like the Commerce Clause.

The debate over the meaning of Section 2 is fueled by the Twenty-First Amendment itself, which yields few clues. The text is often cited by absolutists as supporting their view,[54] but federalists can easily point out that the amendment only proscribes transporting or importing alcoholic beverages into a state in violation of its laws. Nothing in the text explicitly *expands* state power to regulate liquor beyond the scope of the authority the states would otherwise have.[55] The text, then, does not settle the dispute over the meaning of Section 2.

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50 *Id.* § 2.

51 A third view that has been expressed is that Section 2 simply constitutionalized the Webb-Kenyon Act. This view is based on the language of Section 2, which more or less mirrors the content of the Act and has been used to support positions that can be characterized as leaning toward absolutism, as well as positions that lean toward federalism. *Compare* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000) ("Section 2 tracks the Webb-Kenyon Act and effectively incorporates its approach into the Constitution. . . . No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation . . . ."), *with* Craig v. Boren, 429 U.S. 190, 205–06 (1976) ("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.").

52 Silvernail, *supra* note 13, at 513; Spaeth, *supra* note 9, at 181. The first use of the terms "absolutist" and "federalist" to describe the conflicting views of the Twenty-First Amendment appears to have been in Michael E. Loomis, Note, *Federal District Court Exempts Interstate Rail Carrier From State Open Saloon Prohibition*, 6 CREIGHTON L. REV. 249, 252–53 (1972).

53 Spaeth, *supra* note 9, at 181.

54 *See* Foust, *supra* note 10, at 679.

55 *See* Douglass, *supra* note 6, at 1630.

The legislative history of the Twenty-First Amendment can also be seen as supporting both the federalist and the absolutist viewpoints. Senator John James Blaine of Wisconsin, the Senate sponsor of the bill, stated that the "purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States."[56] Commentators use this statement and others like it to support the absolutist view.[57] Absolutists also commonly point out that the proposed amendment originally included a fourth section (which was actually proposed as section 3) that would have given Congress concurrent power to regulate liquor.[58] That provision was voted out of the statute, with some Senators expressing concern that such a provision would be contrary to the amendment's purpose "to restore to the States control of their liquor problem."[59] This, absolutists say, further proves that the Twenty-First Amendment was meant to give the states control of liquor regulation free from any federal interference.[60]

The legislative history, however, does not lend unbroken support to the absolutist position. Other elements of the legislative history can be seen as supporting the federalist view. For example, Senator Blaine, while reporting on the amendment for the Senate Judiciary Committee, stated that Section 2 was present "to assure the so-called dry States against the importation of intoxicating liquor into those States."[61] Other Senators made comments that can also be interpreted as making protection for the dry states the central purpose of Section 2.[62] Nevertheless, it is Senator Blaine's statement that commentators most often cite as creating doubt about whether the purpose of Section 2 was to give the states absolute authority to regulate

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56 76 CONG. REC. 4143 (1933) (statement of Sen. Blaine).

57 *See, e.g.*, 324 Liquor Corp. v. Duffy, 479 U.S. 335, 356 (1987) (O'Connor, J., dissenting); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 337–38 (1964) (Black, J., dissenting). Justice Black's review of the legislative history of the Twenty-First Amendment in his *Hostetter* dissent is especially interesting because Justice Black was present during the ratification of the amendment as a Senator, apparently siding with the absolutists. *See* 76 CONG. REC. 4177–78 (1933) (statement of Sen. Black).

58 S.J. Res. 211, 72d Cong., 76 CONG. REC. 4138 (1933).

59 76 CONG. REC. 4145 (1933) (statement of Sen. Wagner).

60 *See, e.g.*, *Hostetter*, 377 U.S. at 337 (Black, J., dissenting).

61 76 CONG. REC. 4141 (1933) (statement of Sen. Blaine).

62 *See, e.g.*, *id.* at 4176 (statement of Sen. Borah) ("[W]e can[not] afford to strip the amendment of all effort to protect the dry States."); *id.* at 4171 (statement of Sen. Robinson) ("[T]he Senate [is not asked] to put itself in the position of denying any measure of protection to dry territory.").

alcohol or whether Section 2 was merely intended to provide protection for the dry states.[63]

E. State Laws After Prohibition—Absolute Regulatory Authority

While there is plenty of material to fuel the debate over the meaning of the Twenty-First Amendment, the states showed little interest in debating. Instead, the states set out to put their post-Prohibition liquor regulations into place. Most states[64] chose to implement a three-tier system, where all liquor must pass from producer to wholesaler to retailer, and only then on to consumers. No owner may own an interest in more than one tier, and the states regulate each tier individually.[65] Direct-shipment laws fit into this system, since a producer who ships alcohol directly to consumers bypasses the regulatory structure. One of the purposes of the three-tier system was to keep the alcoholic beverage industry out of the hands of the organized crime syndicates that controlled the industry during Prohibition.[66] There are other important purposes, however. The detailed regulatory structure, with its checks on vertical and horizontal market integration, allows the states to ensure orderly markets and avoid a return to the saloon.[67] Moreover, the regulatory structure facilitates state collection of tax revenues.[68] With these purposes in mind, the states put their regulatory systems into place.

Of course, states issued regulations that went beyond this bare three-tier structure and direct shipping restrictions. Many states' laws clearly revealed that, in the minds of state legislators, Section 2 of the Twenty-First Amendment gave the states absolute authority to regulate liquor. Early Supreme Court decisions supported that view.[69] In *State Board of Equalization v. Young's Market Co.*,[70] the Supreme Court upheld a California law that required wholesalers who dealt in imported

63 *See, e.g.*, Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 274–75 (1984); Martin, *supra* note 3, at 14; Douglass, *supra* note 6, at 1632.

64 This is not to say that all states chose this general structure. Some states, for example, chose to implement monopolies whereby the state government acts as wholesaler, distributor, and retailer. Foust, *supra* note 10, at 666.

65 *See* Susan Lorde Martin, *Changing the Law: Update from the Wine War*, 17 J.L. & POL. 63, 63–64 (2001); Martin, *supra* note 3, at 27–28; Foust, *supra* note 10, at 666.

66 Martin, *supra* note 65, at 64; Martin, *supra* note 3, at 27; Freedman & Emshwiller, *supra* note 7.

67 *See* Martin, *supra* note 65, at 64; Martin, *supra* note 3, at 28.

68 *See* North Dakota v. United States, 495 U.S. 423, 432 (1990); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000); Max Garrone, *How to Get a Boutique Zinfandel from California to Texas*, LEGAL AFF., Mar.–Apr. 2003, at 65, 65.

69 *See* Silvernail, *supra* note 13, at 515–16.

70 299 U.S. 59 (1936).

beer to obtain a separate importer's permit in addition to the general wholesaler's permit.[71] Reading the text of Section 2 of the Twenty-First Amendment, the Court determined: "The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes."[72] Therefore, the Court interpreted Section 2 essentially as an exception to the Commerce Clause.[73]

The Court continued to adhere to the absolutist position in other Twenty-First Amendment cases following *Young's Market.* In *Mahoney v. Joseph Triner Corp.*,[74] the Court upheld a Minnesota statute that absolutely prohibited wholesalers from importing any brand of liquor that contained more than 25% alcohol and had not been registered with the U.S. Patent Office.[75] Local brands were subject to no such regulation.[76] Although the law obviously discriminated against interstate commerce, the Court held that "discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic."[77] *Mahoney* made it clear that state regulations of alcoholic beverages were not even subject to a reasonableness requirement.

In *Ziffrin, Inc. v. Reeves*,[78] the Court upheld a complex Kentucky statute that touched absolutely every stage of the liquor trade, including manufacture, storage, sale, purchase, transportation (in import or export), and even possession.[79] Participation in any of these phases was only allowed subject to the terms explicitly set out in the statute.[80] The Court reasoned that if the states had the power to completely prohibit all phases of the liquor trade, the states could also choose the less restrictive course of allowing those same activities under statutorily prescribed conditions: "The greater power includes the less."[81]

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71 *Id.* at 62–64. To more fully understand the case, it should be realized that importers were not merely subject to a trivial additional fee; the general wholesaler's permit cost $50. Importers were required to pay an additional $500 for the privilege of importing beer. *Id.* at 60–61.

72 *Id.* at 62.

73 *See* Silvernail, *supra* note 13, at 515; Spaeth, *supra* note 9, at 183.

74 304 U.S. 401 (1938).

75 *Id.* at 402.

76 *Id.* at 403.

77 *Id.*

78 308 U.S. 132 (1939).

79 *Id.* at 134.

80 *Id.*

81 *Id.* at 138.

After *Ziffrin*, it was apparent that the states' absolute power extended to all phases of the traffic in spirituous beverages.[82]

These cases show that in the early post-Prohibition years, there was no question that the Twenty-First Amendment gave the states absolute power to regulate alcohol. State alcohol regulations were not subject to the Commerce Clause or any other restriction from the federal level. The constitutionality of direct-shipment laws would hardly be worth discussing. This would not be the case forever. Soon, cracks began to appear in the foundation of the absolutist interpretation of the Twenty-First Amendment.[83] In 1945, the Supreme Court's view of the interaction between the Commerce Clause and the Twenty-First Amendment began to evolve.

II. THE SUPREME COURT'S EVOLUTION TOWARD ACCOMODATION

Since the early post-Prohibition cases, the Supreme Court's view of the interaction between the Twenty-First Amendment has evolved into what has been described as an "accommodation approach."[84] This approach is best encapsulated by the words of Justice Stewart: "Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."[85] This did not occur quickly, but was truly an evolution. Over the years, the Supreme Court has apparently come to embrace an approach that calls many state liquor regulations, including direct-shipment laws, into doubt.

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82 At least one commentator has cited *Ziffrin* as the first sign of the Supreme Court's move away from the absolutist view of the Twenty-First Amendment, stating that the *Ziffrin* Court appears to apply a reasonableness test to Kentucky's regulatory scheme. Spaeth, *supra* note 9, at 184. While the Court in *Ziffrin* noted that Kentucky's scheme was "not unreasonable and clearly . . . appropriate for effectuating the policy of limiting traffic in order to minimize well-known evils," *Ziffrin*, 308 U.S. at 139, the Court did not indicate that its holding was contingent on this finding. All of the other language in the decision is consistent with the broad view of the Twenty-First Amendment that was characteristic of that time.

83 *See* Silvernail, *supra* note 13, at 519–22.

84 *See* Foust, *supra* note 10, at 681–82; Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 374–75 (1999); Spaeth, *supra* note 9, at 186.

85 Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964).

A. *The Retreat From the Absolutist View to the Accommodation Approach*

United States v. Frankfort Distilleries, Inc.[86] was the first case where the Supreme Court began to back away from the absolutist position.[87] *Frankfort Distilleries* was not a Commerce Clause case, although it did involve a restraint on trade. The respondents were producers, wholesalers, and retailers who were accused of engaging in various activities to perpetrate a price-fixing scheme and compel others to do the same, violating the Sherman Act.[88] Even though the aim of the scheme was only to fix prices local to Colorado, the Court found that the scheme reached beyond the boundaries of Colorado, as the participants sought to compel alcohol producers outside of Colorado to enter into illegal price maintenance contracts.[89] Therefore, the Sherman Act applied to the respondents' price-fixing scheme.

More importantly for present purposes, the respondents tried to argue that the state's power to regulate liquor trafficking within its boundaries rendered the Sherman Act inapplicable.[90] The Court responded that the Twenty-First Amendment "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries."[91] The federal government, then, had the authority to prosecute the respondents, because they were interstate liquor businesses that engaged in trade outside of Colorado and tried to influence the activities of other interstate actors in the liquor trade.[92] Because the Sherman Act was not being enforced in violation of any affirmative law of Colorado, the prosecution could stand.[93] For the first time since the end of Prohibition, the Court recognized that federal authority could reach the alcohol trade.[94]

One should not get carried away with the sweep of the *Frankfort Distilleries* decision. It did not affirmatively limit the states' ability to pass alcohol regulations. All it really stated was that there is no "dormant Twenty-First Amendment" principle that prevents the federal

86 324 U.S. 293 (1945).

87 *See* Silvernail, *supra* note 13, at 517–18; Spaeth, *supra* note 9, at 185.

88 *Frankfort Distilleries*, 324 U.S. at 294–95.

89 *Id.* at 298. This finding was necessary because Congress passed the Sherman Act in exercise of its power under the Commerce Clause. Therefore, the Court had held in previous cases that the Act did not apply to purely local conduct, as purely local conduct does not affect commerce among the states. *Id.* at 297.

90 *Id.*

91 *Id.* at 299.

92 *Id.*

93 *Id.*

94 Silvernail, *supra* note 13, at 518.

government from regulating the activities of those engaged in, or attempting to affect, the interstate liquor trade. In fact, the Court reaffirmed that the states have "full authority to determine the conditions upon which liquor can come into its territory and what will be done with it after it gets there."[95] The closest the Court came to even thinking about affirmatively limiting state power under the Twenty-First Amendment was when it noted that this was not a case where the Sherman Act was applied contrary to the regulatory policy of a state. The Court, however, declined to consider what would happen in such a case.[96] So while *Frankfort Distilleries* was a step towards softening the Court's view of the scope of the Twenty-First Amendment, it was only a baby step.

One year later, in *Nippert v. City of Richmond*,[97] the Supreme Court gave the first real indication that it might be amenable to finding affirmative limits on state power under the Twenty-First Amendment.[98] *Nippert* was a Commerce Clause case, though not a Twenty-First Amendment case. It dealt with the constitutionality of a municipal ordinance that placed a license tax on solicitors.[99] In a footnote to its discussion, the Court stated:

> [E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the states the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic . . . .[100]

Leaving aside the fact that this comment is dicta located in a footnote, and that it cites *Frankfort Distilleries* for a point that the *Frankfort Distilleries* Court specifically declined to discuss,[101] the Supreme Court indicated for the first time that state liquor regulations might be subject to affirmative limits from the federal level. Still, no such limits had yet been applied to an actual state regulation.

Such limits *were* applied in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*[102] As its full name might indicate, Idlewild was in the business of selling wine and liquors to departing passengers (and departing pas-

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95 *Frankfort Distilleries*, 324 U.S. at 299.

96 *Id.*

97 327 U.S. 416 (1946).

98 Silvernail, *supra* note 13, at 518–19; Spaeth, *supra* note 9, at 185.

99 *Nippert*, 327 U.S. at 417.

100 *Id.* at 425 n.15 (citing *Frankfort Distilleries*, 324 U.S. at 293).

101 *See supra* text accompanying note 96.

102 377 U.S. 324 (1964).

sengers only) at New York's John F. Kennedy Airport.[103] The bottles that the passenger ordered were delivered to the plane and given to the passenger only when the passenger arrived at the point of destination.[104] All aspects of Idlewild's business, from wholesale order, to receipt, to retail sale were conducted under the supervision of the Bureau of Customs.[105] A few weeks after Idlewild opened, the New York State Liquor Authority informed Idlewild that its business was illegal under the New York Alcoholic Beverage Control Laws as an unlicensed and unlicensable business. Idlewild challenged those laws as unconstitutional under the Commerce Clause.[106]

The Court framed the issue very narrowly. According to Justice Stewart, who authored the opinion:

> [T]he basic issue we face is whether the Twenty-First Amendment so far obliterates the Commerce Clause as to empower New York to prohibit absolutely the passage of liquor through its territory, under the supervision of the United States Bureau of Customs acting under federal law, for delivery to customers in foreign countries.[107]

After reviewing the early post-Prohibition cases, Justice Stewart made a point that would not be obvious from reading those cases.[108] According to Justice Stewart, to conclude from those cases that the Twenty-First Amendment "repealed" the Commerce Clause with regard to state regulation of alcohol would "be an absurd oversimplification."[109] The idea that Congress would be left with no regulatory power over interstate or foreign liquor commerce struck Justice Stewart and the Court as "patently bizarre" and "demonstrably incorrect."[110]

Even with this said, the Twenty-First Amendment still appears in the Constitution and must be given effect. It is here that Justice Stewart articulated the accommodation approach: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."[111] The opinion, however, says little about the mechanics of this process. The Court emphasized that

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103 *Id.* at 325.
104 *Id.*
105 *Id.* at 325–26.
106 *Id.* at 326–27.
107 *Id.* at 329.
108 *See supra* Part I.E.
109 *Hostetter*, 377 U.S. at 331–32.
110 *Id.* at 332.
111 *Id.*

"ultimate delivery and use is not in New York, but in a foreign country."[112] Nor was New York seeking to regulate or control the passage of alcohol through the state in order to prevent illegal diversion into New York's internal commerce, which the Court assumed the state would still have full power to do.[113] In the eyes of the Court, all New York really did was prevent business from being transacted under a law passed by Congress in exercise of the Commerce Power—which naturally is unconstitutional.[114]

The reasoning behind the Court's decision reveals why the Court framed the issue so narrowly. The basis for the Court's holding was not that New York's Alcoholic Beverage Control Laws unconstitutionally regulated the alcoholic beverage trade within New York. Because the liquor Idlewild sold was not to be delivered or used in New York, it was held to be beyond the reach of New York law, and thus protected by the Commerce Clause. In effect, New York was trying to prevent "the passage of liquor through its territory."[115] Still, *Hostetter* is extremely significant as the first time since Prohibition that the Supreme Court held that the Commerce Clause prevented a state from regulating liquor industry transactions within the state, and as the first time the Court articulated the accommodation test. The states were being put on notice that their alcohol regulations would face limits based on federal authority.

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112 *Id.* at 333. The Court referred to *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938), a case which held that California's liquor control laws did not apply in a national park because delivery and use of any intoxicants was to take place in the park—which was subject to federal sovereignty, as opposed to state sovereignty. *Id.* at 538. Nor could the state interfere with shipments to the park. *Id.* at 539. It is important to keep in mind, however, that the operative fact was that the locus of delivery and sale was a national park. Therefore, *Collins* did not speak to the limits of a state's Twenty-First Amendment powers over transactions within the state.

113 *Hostetter*, 377 U.S. at 333.

114 *Id.* at 334. Idlewild's business plan was explicitly approved by the Bureau of Customs under the Tariff Act of 1930. *Id.* at 326–27.

115 *Id.* at 329. Justice Black, joined by Justice Goldberg, objected vigorously to the Court's characterization of the case. Justice Black said that New York had the right to regulate Idlewild's business because the Twenty-First Amendment gave New York exclusive jurisdiction to regulate "all liquor business carried on in New York." *Id.* at 335 (Black, J., dissenting). To Justice Black, this clearly encompassed Idlewild's business, because Idlewild was making sales within New York and was undeniably competing with New York liquor merchants; in short, it was carrying out liquor business in New York. Allowing such a business to go unregulated under New York law amounted to interference with that state's Twenty-First Amendment regulatory power, regardless of whether that business was approved by the Customs Bureau. *Id.* at 339 (Black, J., dissenting).

After *Hostetter*, the Supreme Court applied the accommodation approach to reconcile state liquor regulations against other constitutional provisions besides the Commerce Clause.[116] The Court used the accommodation approach to analyze state liquor statutes that conflicted with the Import-Export Clause[117] and the Equal Protection Clause of the Fourteenth Amendment.[118] It is important to note, however, that there were indications that the Twenty-First Amendment offers state regulations more protection against Commerce Clause limitations than limitations imposed by other constitutional provisions.[119] This makes sense in light of the fact that Section 2 of the Twenty-First Amendment deals with "transportation and importation," which can be described as commerce-type behavior. Even so, in the post-*Hostetter* world, the Twenty-First Amendment was by no means a free pass for state liquor regulations that the Supreme Court would honor against the Commerce Clause in all cases.

B. The Substance of Accommodation: The "Core Purposes" Test

While *Hostetter* called for the Twenty-First Amendment to be considered "in light of" other constitutional provisions,[120] it did not definitively state how such a process would work. Indeed, the *Hostetter* Court appeared to indicate that courts might have to proceed differently in each case, and conduct the inquiry "in the context of the issues and interests at stake in any concrete case."[121] Nonetheless, courts and many commentators have come to recognize the development of what is termed a "core purposes" test, under which courts must inquire whether the state interests served by a challenged liquor regulation are sufficiently similar to the concerns that motivated the Twenty-First Amendment to justify upholding the regulation despite

116 *See* Brannon P. Denning, *Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, the Twenty-First Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENT. 297, 324–25 (2002); Martin, *supra* note 3, at 15 (discussing cases analyzing state liquor regulations in light of the First and Fourteenth Amendments).

117 U.S. CONST. art. I, § 10, cl. 2; *see* Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 344–46 (1964) (holding that a Kentucky tax of ten cents per gallon on imported liquor could not be applied to liquor imported from abroad).

118 U.S. CONST. amend. XIV, § 1, cl. 3; *see* Craig v. Boren, 429 U.S. 190, 204–09 (1976) (striking down an Oklahoma law that allowed the sale of low alcohol content beer to women at age eighteen, but not to men below the age of twenty-one).

119 *See Craig*, 429 U.S. at 206 ("Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful.").

120 *Hostetter*, 377 U.S. at 332.

121 *Id.*

an apparent conflict with the Commerce Clause or another constitutional provision.[122]

The Supreme Court was faced with applying the *Hostetter* accommodation principle in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[123] The Court held that California's liquor resale price maintenance scheme could not be sustained against a challenge under the Sherman Act.[124] To reach that conclusion, the Court first had to reconcile the Twenty-First Amendment with the Sherman Act.[125] The Court did so by balancing the state and federal interests at stake in the case. Citing several cases, the Court determined that "the national policy in favor of competition is both familiar and substantial,"[126] and that the Sherman Act was a vital part of that national policy.[127] On the other side of the balance, the Court basically adopted the California Supreme Court's finding that there was little correlation between the state's purported interests (temperance and orderly market conditions) and the resale price maintenance scheme.[128] The Court concluded that "[t]he unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act."[129] Therefore, the California pricing scheme fell.

Though it can fairly be said that *Midcal* "further eroded whatever state power remained under the Twenty-first Amendment,"[130] there are also aspects of the decision that limit its applicability to state direct-shipment laws. First, the *Midcal* Court was considering "the extent to which Congress can regulate liquor under its interstate

122 *See, e.g.*, Heald v. Engler, 342 F.3d 517, 523 (6th Cir. 2003); Beskind v. Easley, 325 F.3d 506, 513 (4th Cir. 2003); Bainbridge v. Turner, 311 F.3d 1104, 1112 (11th Cir. 2002); Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 203–04 (D.C. Cir. 1996); Douglass, *supra* note 6, at 1642; Kozusko, *supra* note 7, at 93; Shanker, *supra* note 84, at 375.

123 445 U.S. 97 (1980).

124 *Id.* at 114.

125 Although *Hostetter* only stated that the Twenty-First Amendment must be reconciled with other *constitutional* provisions, *Hostetter*, 377 U.S. at 332, the *Midcal* Court nevertheless proceeded to reconcile the Twenty-First Amendment with the Sherman Act, a *statute*. The Court addressed this seeming disconnect by invoking the Commerce Clause, finding that "Congress 'exercis[ed] all the power it possessed' under the Commerce Clause when it approved the Sherman Act." *Midcal*, 445 U.S. at 111 (quoting Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932)). *But see* Denning, *supra* note 116, at 326 (finding the Supreme Court's explanation for balancing the Twenty-First Amendment with a mere statute lacking).

126 *Midcal*, 445 U.S. at 110.

127 *Id.* at 110–11.

128 *Id.* at 112–13.

129 *Id.* at 114.

130 Denning, *supra* note 116, at 325.

commerce power,"[131] because the Sherman Act was passed pursuant to the commerce power. The precise issue in *Midcal*, then, was the extent to which the Twenty-First Amendment took the power to regulate alcohol *away from Congress*, and not the extent to which the Twenty-First Amendment gave regulatory power *to the states* that would otherwise be denied to them under the dormant Commerce Clause. The latter, and not the former, is the issue when considering state direct-shipment laws. More importantly, the *Midcal* Court acknowledged that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."[132] It is only "other liquor regulations . . . [that] may be subject to the federal commerce power in appropriate situations."[133] Thus, to the extent that direct-shipping laws are a regulation of the structure of the state liquor distribution system,[134] they would not be subject to the *Midcal* balancing test but would be under the virtually complete control of the state.

Four years later, in *Capital Cities Cable, Inc. v. Crisp*, the Court used its balancing test to strike down an Oklahoma law prohibiting the broadcast of certain alcoholic beverage advertisements.[135] The Court struck down the law in the face of a conflict with FCC regulations.[136] The constitutional provision that had to be reconciled with the state law in this case was the Supremacy Clause.[137] The Court employed the *Midcal* balancing test to determine "whether the interests implicated by [the] 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."[138] The results of the balancing test were very similar to those in *Midcal*. Even after assuming that restrictions on

131 *Midcal*, 445 U.S. at 108.

132 *Id.* at 110.

133 *Id.* The Court did not define precisely what it meant by "appropriate situations." *See* Molnar, *supra* note 7, at 183. However, the Court is presumably talking about cases where the state interests served by the challenged alcohol regulation outweigh the competing federal interests. This conclusion is supported by the fact that the next sentence in the decision articulates the Court's balancing test: "The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" *Midcal*, 445 U.S. at 110 (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964)).

134 *See infra* Part IV.B.1.

135 Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 715–16 (1984).

136 *Id.* at 708.

137 *Id.* at 712–16.

138 *Id.* at 714.

liquor advertising represented a reasonable means of promoting temperance, the Court noted that Oklahoma's advertising restrictions were directed very narrowly at wine commercials on out-of-state cable stations and did not reach beer solicitations in print or on broadcast stations, nor did they reach *any* liquor advertisement printed outside of Oklahoma.[139] This made it easy for the Court to find that Oklahoma's interests were insubstantial and that the challenged regulation was only indirectly related to the power granted to the states in Section 2 of the Twenty-First Amendment.[140] Thus, the statute was invalidated in light of the conflict with federal laws.

Capital Cities added very little to the Supreme Court's Twenty-First Amendment jurisprudence.[141] Its main contribution was solidifying the *Midcal* balancing approach. The Court made a much more substantive contribution in *Bacchus Imports, Ltd. v. Dias*,[142] which has been characterized as the "most significant decision to date interpreting the interplay between the Twenty-First Amendment and the Dormant Commerce Clause."[143] This is almost certainly correct. Since *Bacchus*, nearly every other case addressing the effect of the Twenty-First Amendment on the dormant Commerce Clause has referenced the *Bacchus* analysis.[144]

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139 *Id.* at 715.

140 *Id.*

141 *Capital Cities* could be cited for its addition of the Supremacy Clause to the list of constitutional provisions with which the Twenty-First Amendment must be reconciled. This means that a state liquor regulation could possibly be struck down if it conflicts with any federal statute, not just a constitutional provision. However, the Court struck down a liquor regulation that conflicted with a statute in *Midcal* as well. While the *Midcal* Court invoked the Commerce Clause, the California law it struck down did not conflict with the Commerce Clause, but with the Sherman Act, a statute passed under the power given to Congress by the Commerce Clause. Thus, it could be said that the Court in *Midcal* was relying on the Supremacy Clause even if it did not say so. Also, it could be said that *Capital Cities* added the inquiry into whether the challenged state liquor law is "closely related to the powers reserved by the Twenty-first Amendment." *Id.* at 714. This, however, is not much different from the *Midcal* Court's recognition that states have virtually complete control over whether to allow the importation or sale of liquor and how to regulate the liquor distribution system (closely related to the powers reserved by the Twenty-First Amendment), but less freedom to pass other types of alcohol regulations (not closely related to the powers reserved by the Twenty-First Amendment). *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980).

142 468 U.S. 263 (1984).

143 Douglass, *supra* note 6, at 1640.

144 *See, e.g.*, North Dakota v. United States, 495 U.S. 423 (1990); cases cited *supra* note 122.

Bacchus addressed a Hawaii liquor tax that included exemptions for Hawaiian-made fruit wines and okolehao, a brandy distilled from the root of shrubs indigenous to Hawaii.[145] The appellants were wholesalers who alleged that the Hawaiian tax was unconstitutional because it violated the Commerce Clause, among other provisions.[146] First, the Court set out to determine whether the Hawaiian tax violated the Commerce Clause. The Court had little difficulty making that determination, restating the principle that where state legislation effects "simple economic protectionism," a strict rule of invalidity is imposed.[147] A finding that state legislation amounts to protectionism, the Court reasoned, can be made on the basis of either discriminatory purpose or discriminatory effect.[148] In this case, the Court did not have to guess at Hawaii's purpose because the state did not dispute that the purpose of the tax exemption was to aid Hawaiian industry.[149] The exemption also had a discriminatory effect, because it applied only to locally produced liquors, although not to *all* locally produced liquors.[150]

Next, the Court addressed Hawaii's argument that the exemption was nonetheless "saved" by the Twenty-First Amendment.[151] Looking back at past Twenty-First Amendment cases, the Court found that, "[i]t is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause."[152] After citing *Midcal*, the Court determined: "The question in this case is thus whether the principles underlying the Twenty-First Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended."[153] The Court thus stated

145 *Bacchus*, 468 U.S. at 265.

146 *Id.*

147 *Id.* at 270.

148 *Id.* (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 352–53 (1977)).

149 *Id.* at 271.

150 *Id.*

151 *Id.* at 274–76.

152 *Id.* at 275.

153 *Id.* The Court's formulation is not altogether different from that used in *Capital Cities*, which was not materially different from that used in *Midcal*. *See supra* note 141. The reason that *Bacchus*, and not *Capital Cities* or *Midcal*, is the case most often cited for this test is probably because *Bacchus* is a dormant Commerce Clause case, and that has been the most common type of Twenty-First Amendment case in recent years. Moreover, *Bacchus* added more substance to its core purposes test than did either *Capital Cities* or *Midcal*.

what has become known as the "core purposes" or "core concerns" test.

The Court then performed the test. One difficulty the Court alluded to was that of determining what it was, exactly, that the Twenty-First Amendment authorized.[154] The Court was able to move past this difficulty, however: "Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition."[155] Therefore, the Court reasoned, state laws that amount to mere protectionism are not entitled to the degree of deference given to laws aimed at fighting the problems associated with unrestrained liquor trafficking.[156] Hawaii did "not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment."[157] The tax fell "because the tax violate[d] a central tenet of the Commerce Clause, but [was] not supported by any clear concern of the Twenty-first Amendment."[158] With this decision, the core purposes test had come into full effect.[159] This is the test the Supreme Court settled on as the way to accommodate two parts of the

154 *See Bacchus*, 468 U.S. at 274–75; *supra* Part I.D.

155 *Bacchus*, 468 U.S. at 276.

156 *Id.*

157 *Id.*

158 *Id.*

159 Justice Stevens, joined by Justices Rehnquist and O'Connor, dissented. Justice Stevens noted that the tax was applied to liquor in the Hawaiian market that would likely be consumed in Hawaii. Thus, he argued, the tax fits within the ambit of Section 2 of the Twenty-First Amendment, which "expressly mentions 'delivery or use therein.'" *Id.* at 280 (Stevens, J., dissenting). Moreover, Justice Stevens characterized the tax as a direct regulation on the sale or use of liquor, and claimed that, as such, the tax was an exercise of the core powers conferred on the states by Section 2. *Id.* at 285 (Stevens, J., dissenting) (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 713 (1984)). Further, Justice Stevens posited that Hawaii would surely be able to ban the importation of all liquor. Justice Stevens also felt that it was clear that Hawaii could do so without banning the sale of local liquors. Because the state would have the power to create a local monopoly, it seemed sensible that the state should be allowed to engage in a lesser form of discrimination by granting a tax exemption for locally produced alcohol. *Id.* at 286 (Stevens, J., dissenting). Additionally, Justice Stevens relied on the early post-Prohibition cases for the point that the Twenty-First Amendment gave the states broad authority to regulate commerce in intoxicating liquors. *Id.* at 281–82 (Stevens, J., dissenting). Finally, Justice Stevens criticized the Court's core concerns approach as "novel," stating that the question is not one of core purposes, but of whether the law in question is an exercise of the power expressly conferred on the states by the Twenty-First Amendment. To Justice Stevens and his fellow dissenters, it plainly was. *Id.* at 286–87 (Stevens, J., dissenting).

same Constitution: the Twenty-First Amendment and the Commerce Clause.[160]

While the core purposes test has certainly become very important, *Bacchus*'s significance goes beyond the articulation of that test alone. *Bacchus* also marked the first time that a state's ability to impose liquor regulations was held to be limited by the dormant Commerce Clause. Moreover, until *Bacchus*, the Court had not limited the ability of the states to set the terms upon which alcohol could be imported from other states.[161] *Bacchus* thus opened the door for the current wave of challenges to state direct-shipment laws.

Since *Bacchus*, the only truly new ground broken by the Supreme Court has been its invalidation of state liquor price affirmation statutes. For example, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[162] the Court invalidated a New York law that required out-of-state producers to charge New York wholesalers prices that were no higher than the lowest price charged to wholesalers in any other state.[163] The Court found that the statute was a direct regulation on interstate commerce, impermissible under the Commerce Clause, because by requiring that New York wholesalers be charged the lowest rate offered, it restricted producers' abilities to lower prices elsewhere. Thus, the New York law effectively regulated the price at which liquor could be sold in other states.[164] Such a regulation could not be saved by the Twenty-First Amendment because it could interfere with other states' abilities to exercise their own Twenty-First Amendment authority.[165] The Court reached virtually the same conclusion in a related price affirmation case, *Healy v. Beer Institute*.[166]

The price affirmation cases do not have much of an implication for direct-shipment laws. The controlling rationale in *Brown-Forman* and *Healy* was that the state laws in question regulated liquor prices in other states as well.[167] This is not a concern with direct-shipment laws. It could also be argued that *Brown-Forman* and *Healy* did not even limit state power. After all, the Court did note that part of the problem with price affirmation statutes is that they interfere with other states' abilities to wield Twenty-First Amendment power.[168] Thus, it is possi-

160 *See* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964).
161 Denning, *supra* note 116, at 328.
162 476 U.S. 573 (1986).
163 *Id.* at 575.
164 *Id.* at 582.
165 *Id.* at 585.
166 491 U.S. 324, 343 (1989).
167 *See* Martin, *supra* note 3, at 19; Kozusko, *supra* note 7, at 95.
168 *Brown-Forman*, 476 U.S. at 585.

ble to frame the price-affirmation cases as promoting state power under the Twenty-First Amendment as opposed to limiting it.

However one views the price affirmation cases, it is apparent that *Bacchus* and its predecessors control the inquiry surrounding state direct-shipment laws. This becomes obvious not only because *Bacchus* was the first case to address the relationship between the Twenty-First Amendment and the dormant Commerce Clause, but from study of the multitude of circuit court of appeals cases that have examined state direct-shipment laws.

III. Recent Circuit Court Cases Dealing With Direct-Shipment Laws

Since 2000, six federal circuit courts of appeals have heard cases challenging state direct-shipment laws. Five of those cases have been decided in the past year and a half. The sheer number of cases, coupled with the existence of a split among the circuits, has led many commentators to suggest that this issue is destined for the Supreme Court.[169] These cases reveal just how prominent a constitutional concern state direct-shipment laws are and may provide clues as to how the Supreme Court could take steps to clarify its Twenty-First Amendment jurisprudence.

A. *The Mainstream: Applying* Bacchus *to Direct-Shipment Laws*

Most of the recent circuit court of appeals decisions have applied the framework set down by the Supreme Court in *Bacchus* to determine the constitutionality of direct-shipment laws. All of the circuit courts of appeals using this approach have found the challenged direct-shipment laws to be constitutionally invalid. Despite these apparently consistent results, the courts' application of the *Bacchus* test has not always been perfectly consistent. Therefore, it is worthwhile to examine each of these cases individually.

1. The Eleventh Circuit: *Bainbridge v. Turner*

The first federal court of appeals to apply the *Bacchus* test to a challenged alcohol direct-shipment law was the Eleventh Circuit in *Bainbridge v. Turner*.[170] Florida, like many states, has a three-tier distri-

169 *See, e.g.*, Denning, *supra* note 116, at 329; Timothy Schnabel, Note, *A Circuit-Splitting Headache: The Hangover of the Supreme Court's Twenty-First Amendment Jurisprudence*, 21 Yale L. & Pol'y Rev. 547, 547 (2003).

170 311 F.3d 1104 (11th Cir. 2002).

bution system,[171] but Florida carved out an exception for in-state wineries, allowing them to obtain vendors' permits and ship directly to consumers so long as the winery used vehicles that it owned or leased.[172] Out-of-state wineries, contrariwise, were prohibited from shipping directly to consumers.[173] The court noted that this allowed in-state wineries to avoid the three-tier distribution system and thus the hassles and price mark-ups that come with it. Out-of-state wineries, which could not avoid the three-tier system, were put at a competitive disadvantage.[174]

Just like the Supreme Court did in *Bacchus*, the Eleventh Circuit used a two-step approach. The first step was to determine whether Florida's statute violated the Commerce Clause.[175] For this first step, the court employed the typical dormant Commerce Clause analysis that would be used to analyze a state law regulating any typical article of commerce not covered by the Twenty-First Amendment.[176] Under this analysis, a state law that discriminates against interstate commerce in purpose or in effect is generally struck down without any further inquiry, and can only be upheld if the regulation serves a legitimate local purpose that cannot adequately be served by nondiscriminatory alternatives.[177] If, on the other hand, the state law has only indirect effects on interstate commerce and regulates evenhandedly, courts examine whether the state interest is legitimate and conduct a balancing test to determine whether the burden on interstate commerce clearly exceeds the putative local benefits.[178] If a state liquor regulation can survive this traditional inquiry, there would presumably be no reason to conduct any further Twenty-First Amendment inquiry.

Based on the court's characterization of Florida's direct-shipment law, it should be easy to surmise that the court concluded that Florida's direct-shipment law did not survive traditional dormant Commerce Clause scrutiny. Florida's regulatory regime failed tier one of the dormant Commerce Clause analysis because it was facially discriminatory against out-of-state wineries.[179] The court also agreed with the

171 *Id.* at 1106; *see supra* text accompanying notes 64–68.

172 *Bainbridge*, 311 F.3d at 1106–07.

173 *Id.* at 1107.

174 *Id.*

175 *Id.* at 1108.

176 *See id.* at 1108–09.

177 *Id.* (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977)).

178 *Id.* at 1109 (citing Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)).

179 *Id.*

district court that there were reasonable nondiscriminatory alternatives available to achieve the state's proffered interests in maintaining revenue, avoiding diversion of liquor into its distribution system, and preventing sales to minors.[180]

Because the Florida regulatory regime did not survive dormant Commerce Clause scrutiny, the court moved to step two of its two-step analysis and sought to determine whether the Twenty-First Amendment saved Florida's direct-shipment law. The court started by acknowledging that the amendment "permits states to enact some laws banning the importation of alcoholic beverages even though such laws might, without the Twenty-first Amendment, violate the dormant Commerce Clause."[181] However, the court also recognized that "the Amendment falls short of giving the states free rein in regulating the importation of alcoholic beverages."[182]

The court then opined that the best reading of the Supreme Court cases is that the Commerce Clause remains in full force in all cases unless a core concern of the Twenty-First Amendment is implicated.[183] Notably, not only does this contention arguably go far beyond anything the Supreme Court ever said,[184] it goes beyond anything that the appellants argued.[185] This dicta[186] is the most restrictive view of the Twenty-First Amendment ever stated by a federal appellate court.

Next the court applied *Bacchus*. One of the important lessons of *Bacchus*, the court found, was that "statutes closely intertwined with a purpose 'closely related' to the Twenty-first Amendment can generally withstand an otherwise fatal attack under the Commerce Clause."[187] Another lesson that the court gleaned from *Bacchus* was that statutes are not "closely related" if their primary purpose is merely to protect

180 *Id.* at 1109–10.

181 *Id.* at 1112.

182 *Id.*

183 *Id.*

184 *See infra* Part IV.B.1.

185 *See Bainbridge*, 311 F.3d at 1112. The appellants "impliedly" argued that the Twenty-First Amendment "only" eliminated the principle that a state statute that has indirect effects on interstate commerce and regulates evenhandedly is invalid if the burden on interstate commerce clearly exceeds the legitimate local benefits. *Id.* According to the court, however, even an evenhanded state liquor regulation could possibly be found invalid if it does not implicate a core concern of the Twenty-First Amendment.

186 This part of the holding is dicta because the court had already found that the Florida law was facially discriminatory. *See id.* at 1109.

187 *Id.* at 1113.

local industry.[188] Therefore, the court had to decide whether the Florida statute was closely intertwined with a Twenty-First Amendment purpose, or if it was intended instead merely to protect local industry.

In looking at the purpose of the statute, the court emphasized the requirement that the state present evidence to support the need for its discriminatory alcohol control laws. It is not enough for the state to raise a core concern, but the state must show that its statutory scheme is "genuinely needed to effectuate the proffered core concern."[189] This sounds extremely similar to the typical dormant Commerce Clause analysis. A person reading this part of the opinion in isolation might wonder whether the Twenty-First Amendment has any effect on the Commerce Clause at all. Apparently sensitive to this criticism, the court added in a footnote that "[t]he 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."[190] Nonetheless, the court then subjected the Florida law to an examination that looks very similar to strict scrutiny. The court put each of Florida's three proffered core concerns (preventing sale to minors, ensuring orderly markets, and maintaining revenue) into the crucible, and found two of them lacking.[191] For example, the court found that the state could prevent sale to minors even if the discriminatory direct-shipment statute were stricken down. All the state would have to do would be to subject out-of-state wineries to the same laws as in-state wineries (by allowing them to deliver directly to consumers in their own vehicles or vehicles they lease), and revoke their beverage licenses if they illegally deliver to minors.[192] As for ensuring orderly markets, the court professed not to know what that phrase means, but decided that it surely does not include discrimination against out-of-state firms.[193] Finally, the court remanded the case for further findings on the revenue issue. The court said that it was not enough for Florida to show that taxation is a core concern and that the three-tier distribution system promotes its revenue raising goals. Before Florida could use the Twenty-First Amendment as a test, the court said that "it must show that its statutory scheme is necessary to effectuate the proffered core concern in a way that justifies treating out-of-state firms

188 *Id.*
189 *Id.* at 1114.
190 *Id.* at 1114 n.17.
191 *Id.* at 1114–15.
192 *Id.*
193 *Id.* at 1115.

differently from in-state firms—a fact question."[194] Thus, Florida's direct-shipment law survived pending remand, but had suffered a near fatal wound from the Eleventh Circuit.

While the Eleventh Circuit used what has become the standard approach to direct-shipment laws and applied the Supreme Court's *Bacchus* analysis, it did so in an unusually expansive and somewhat inconsistent way. The court started by framing the issue in a suitably narrow way, saying: "The primary question in this appeal is 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."[195] Deeper into the opinion, however, the court went so far as to draw the validity of Florida's *entire* three-tier distribution system into doubt when it stated that Florida must prove that "the *three-tier distribution scheme*, although discriminatory, promotes its revenue raising goals."[196] The idea that a state's entire alcohol regulatory system might be struck down surely goes beyond anything the Supreme Court has ever suggested.[197] Similarly, the court professed to be true to the Supreme Court's Twenty-First Amendment precedents, and *Bacchus* in particular, but still went on to say that even state liquor statutes that regulate evenhandedly can be struck down under the dormant Commerce Clause if those statutes do not implicate core concerns.[198] However, none of the Supreme Court's Commerce Clause/Twenty-First Amendment cases dealt with a statute that regulated evenhandedly. All of them involved statutes that were either facially discriminatory[199] or regulated extraterritorially.[200] It might be proper for the Eleventh Circuit to extend the Supreme Court's precedents in such a manner if it were necessary to decide a case. In *Bainbridge*, however, there was no such necessity. The court had already determined that Florida's law was facially discriminatory.[201] It is thus extremely unclear why the court engaged in its discussion regarding evenhanded alcohol regulations.

A third problem with *Bainbridge* is that while it continually professes that alcohol is different from any other article of commerce because of the Twenty-First Amendment, it does not really treat it as

194 *Id.*

195 *Id.* at 1106.

196 *Id.* at 1115 (emphasis added).

197 *See infra* Part IV.B.1.

198 *See Bainbridge*, 311 F.3d at 1112.

199 *See* Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 271 (1984).

200 *See* Healy v. Beer Inst., 491 U.S. 324, 343 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582 (1986).

201 *See Bainbridge*, 311 F.3d at 1109.

such. Even after saying that the Twenty-First Amendment allows state justifications based on core concerns to escape strict scrutiny, the court subjected Florida's proffered core concerns to what appears to be strict scrutiny.[202] For example, it is not clear what difference there is, if any, between strict scrutiny and the court's requirement that Florida "show that its statutory scheme *is necessary* to effectuate the proffered core concern . . . ."[203] As these problems illustrate, in finding that Florida's discriminatory direct-shipment law was constitutionally questionable, the *Bainbridge* court went much further than it needed to and much further than is warranted by Supreme Court precedent.

2. The Fourth Circuit: *Beskind v. Easley*

In *Beskind v. Easley*,[204] the Fourth Circuit had its turn to hear a challenge of a state direct-shipment law. The plaintiffs were a California winery and various individual oenophiles who claimed that North Carolina's Alcoholic Beverage Control laws were unconstitutional even in light of the Twenty-First Amendment. Specifically, the plaintiffs challenged the portions of North Carolina's laws that required out-of-state wine to pass through its three-tiered distribution system, but allowed local wineries to sell directly to consumers. These provisions, according to the plaintiffs, violated the dormant Commerce Clause by discriminating against out-of-state commerce in a way that could not be justified under the Twenty-First Amendment.[205]

The Fourth Circuit employed the now familiar two-prong approach of *Bacchus*, looking first at whether the state regulation violated the Commerce Clause without reference to the Twenty-First Amendment.[206] Since North Carolina's laws required out-of-state wineries to distribute their wines through the state's three-tiered system, with its characteristic mark-ups in price, but allowed local wineries to bypass the system by selling directly to consumers, the laws were found to be facially discriminatory in violation of the dormant Commerce Clause.[207] The court was also able to identify at least one reasonable nondiscriminatory alternative, namely requiring in-state wines to pass

202 *Id.* at 1115 & n.17.

203 *Id.* at 1115 (emphasis added); *see also* Schnabel, *supra* note 169, at 553 (arguing that the *Bainbridge* court actually sought proof that there were no reasonable nondiscriminatory alternatives for Florida's law even after stating that no such proof was required).

204 325 F.3d 506 (4th Cir. 2003).

205 *Id.* at 509.

206 *Id.* at 513–14.

207 *Id.* at 515.

through the three-tiered system as well.[208] Therefore, it was necessary for the court to move to step two of the *Bacchus* inquiry.

The Fourth Circuit's analysis of whether North Carolina's direct-shipment laws were saved by the Twenty-First Amendment started by correctly noting that the plaintiffs did not challenge North Carolina's three-tiered system standing alone.[209] This was appropriate, according to the court, because the three-tiered system "is a long-standing regulatory scheme authorized by the Twenty-first Amendment."[210] What the plaintiffs did challenge was whether modifying the three-tiered system to convey special benefits to in-state wineries served a recognizable Twenty-First Amendment purpose.[211] North Carolina failed to appraise the court of any Twenty-First Amendment interest that was served by allowing in-state wineries to sell directly to consumers while prohibiting out-of-state wineries from doing the same thing.[212] Indeed, "North Carolina's authorization of in-state direct-shipment of wine—which has the effect of increasing access to wine produced only in North Carolina—cannot credibly be portrayed as anything other than local economic boosterism in the guise of a law aimed at alcoholic beverage control."[213] Based on the foregoing, the court concluded that the Twenty-First Amendment did not save North Carolina's discriminatory direct-shipment law.

The Fourth Circuit's Twenty-First Amendment analysis in *Beskind* stands in marked contrast to the Eleventh Circuit's analysis in *Bainbridge*. The Fourth Circuit limits itself to the precise challenge before the court, i.e., whether the aspects of North Carolina's liquor regulations that discriminate against out-of-state wineries are valid. The Fourth Circuit does not presume to question whether North Carolina's entire three-tiered distribution system is valid, or to pronounce what the law would be if North Carolina's statute were not facially discriminatory. In fact, the Fourth Circuit reaffirms North Carolina's right to set up a three-tiered system, a position much more in line with the Supreme Court precedents than the Eleventh Circuit's dicta in *Bainbridge*.[214] If anything, the Fourth Circuit calls upon North Carolina to strengthen its regulatory system, admonishing the state that "the authorization for direct in-state sales of wine by in-state wineries reduces the number of licensed entities regulating the distribution of

208 *Id.*
209 *Id.* at 516.
210 *Id.*
211 *Id.* at 517.
212 *Id.*
213 *Id.*
214 *See infra* Part IV.B.2.

wine and therefore has the tendency of surrendering control otherwise authorized by the Twenty-first Amendment."[215] The Fourth Circuit's position, then, is generally friendly toward state alcohol regulatory systems, so long as the state does not baldly discriminate against out-of-state concerns.

Consistent with this position is the court's choice of remedy. Rather than strike down all of North Carolina's direct-shipment laws, the court simply struck the law that exempted in-state wineries.[216] This was appropriate, the court determined, because North Carolina retained the right to regulate its alcohol distribution system under the Twenty-First Amendment, and continued to maintain an interest in doing so.[217] Therefore, the best way for the court to give effect to state policy while still doing what is necessary to enforce the U.S. Constitution would be to strike only the local preference provision and leave the rest of North Carolina's three-tiered regulatory regime in place.[218] The court was able to remedy the constitutional violation while still respecting North Carolina's right to regulate its alcohol distribution system under the Twenty-First Amendment.

3. The Fifth Circuit: *Dickerson v. Bailey*

The Fifth Circuit had its chance to decide a direct-shipment law case in *Dickerson v. Bailey*.[219] The plaintiffs were Houston area wine lovers who were frustrated by Texas laws that prevented them from purchasing from a small Arkansas vintner.[220] Texas prohibited out-of-state wineries from shipping directly to consumers, but allowed in-state vintners to do so. The plaintiffs claimed that Texas's prohibition against direct shipment by out-of-state wineries burdened interstate commerce and prevented Texans from engaging in their "fundamental liberty of interstate commerce."[221]

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215 *Beskind*, 325 F.3d at 517.

216 *Id.* at 519.

217 *Id.*

218 *Id.* This choice of remedy, naturally, disappointed the plaintiffs. The lead plaintiff, Donald H. Beskind, a Duke University law professor and wine collector, was quoted as saying that the court's remedy "wasn't at all what we were looking for." *See* Molly McDonough, *They Will Sell No Wine Before It's Marked Up*, A.B.A. J. E-REP., Apr. 18, 2003. Anticipating this objection, the *Beskind* court countered that the plaintiffs' "right is not to void a law protected by the Twenty-first Amendment but rather to eliminate discrimination in interstate commerce." *Beskind*, 325 F.3d at 520.

219 336 F.3d 388 (5th Cir. 2003).

220 *Id.* at 392.

221 *Id.* at 393.

Predictably, the court applied the two-step *Bacchus* approach, starting with the preliminary inquiry into whether the challenged Texas statutes violated the dormant Commerce Clause.[222] To start this inquiry, the court discussed the Texas regulatory regime in some detail. Texas, like Florida and North Carolina, has a three-tier alcohol distribution system. The statutes at issue contained some of the only exceptions to the three-tier system, allowing in-state wineries, and only in-state wineries, to bypass the system by selling directly to consumers.[223] More specifically, Texas wineries could sell directly to consumers (in person) up to 25,000 gallons of wine per year, with no per customer restrictions. In addition to that, Texas wineries were allowed to ship up to 25,000 gallons per year directly to consumers, again with no per customer limit. By contrast, Texas residents were prohibited from carrying more than three gallons of wine from an out-of-state vintner into the state of Texas. Out-of-state wineries were prohibited from shipping any wine at all directly to customers in Texas.[224] These facts alone would have made it easy enough for the court to find that the Texas law was facially discriminatory and intended for protectionist purposes.[225] This finding was made even easier for the court by the fact that numerous items from the legislative history indicated that the purpose of the special exemptions for in-state wineries was "[t]o promote the sale and consumption of Texas wine over those wines produced in other states."[226] All of this evidence confirmed the fact that the statute was facially discriminatory.

The court followed this finding by chastising the administrator of the Texas Alcoholic Beverage Commission for disingenuous trial strategy. Here, the court conveyed a view of the states' Twenty-First Amendment regulatory authority that is very similar to the view the Fourth Circuit panel expressed in *Beskind*. In the Fifth Circuit panel's view, the administrator attempted to distract the court by mischaracterizing the scope of the plaintiffs' challenge.[227] The administrator claimed that the plaintiffs were challenging the legitimacy of Texas's three-tier system in an attempt to establish an unregulated national market in wine. This, according to the court, was untrue; all the plaintiffs sought was equal treatment for out-of-state vintners.[228] The administrator also claimed that Texas required every drop of li-

222 *Id.* at 396.
223 *See id.* at 397.
224 *Id.* at 397–98.
225 *Id.* at 398–99.
226 *Id.* at 399.
227 *See id.* at 400–01.
228 *Id.*

quor sold in the state to pass through its three-tier system. The court pointed out that this assertion was patently false.[229] If, however, Texas did apply its chosen regulatory regime equally to both in-state and out-of-state wineries, it would be perfectly valid.[230] Thus, like the *Beskind* court, the Fifth Circuit panel recognized the power of the states to set up a three-tier liquor distribution system.

The court ended its dormant Commerce Clause analysis by seeking to determine whether the facially discriminatory Texas regulations were necessary to effectuate a compelling state interest that could not be served by reasonable alternative means. While the administrator made conclusory assertions that the challenged provisions regulated alcohol consumption in Texas, he made no effort to show that there were no nondiscriminatory means available.[231] Even if he had, he would almost certainly have been unable to offer a state interest substantial enough to justify preventing the equal competition of out-of-state liquor businesses under traditional dormant Commerce Clause analysis.[232] Therefore, it was necessary for the court to move to phase two of the *Bacchus* analysis and determine whether the Texas regulations could be saved by the Twenty-First Amendment.

Step two of the court's *Bacchus* inquiry was dominated by an attempt to correct the administrator's apparent misunderstanding of the core concerns test. The administrator apparently believed that a state statute survives the core concerns test as long as it controls the *importation* of alcohol and meets a minimal threshold of rationality.[233] The court rejected the administrator's proposition and said that the second level of the Supreme Court's *Bacchus* test requires courts to "scrutinize strictly whether a state's statutes are tailored to the Twenty-First Amendment's 'core concerns.'"[234] Whereas the administrator offered no evidence linking Texas's challenged regulations to a core concern, the plaintiffs managed "to establish the discriminatory intent and effect of the challenged statutes, the availability of alternative means to enforce Texas's core concerns under the Twenty-First Amendment, and the absence of any safe-harbor for the challenged statutes under § 2 of the Twenty-First Amendment."[235] Texas's preferential direct-shipment laws were struck down.

229 *Id.* at 401.

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

231 *Id.* at 401–02.

232 *Id.* at 402.

233 *Id.* at 404.

234 *Id.* at 406.

235 *Id.*

The Fifth Circuit panel's *Bacchus* analysis is a mix of deference to state direct-shipment laws and strict scrutiny of those same regulations, but with the emphasis on the deference. On the deference side, the court limited itself to deciding whether the discriminatory aspects of Texas's system are valid, much like the *Beskind* court did.[236] Moreover, the *Dickerson* court agreed with the *Beskind* court that states are free to structure their own alcoholic beverage regulatory regime as long as the states do not blatantly discriminate against out-of-state producers.[237] Interestingly, the *Dickerson* court reached this conclusion at *both* levels of its *Bacchus* inquiry, making it unclear whether the court based its conclusion on a finding that nondiscriminatory direct-shipment laws do not violate the Commerce Clause, or on a finding that the Twenty-First Amendment authorizes nondiscriminatory direct-shipment regulations. At one point, the court indicated that as long as a state with a three-tier system subjects both domestic and out-of-state liquor producers to the rigors of that system, it would not even violate the dormant Commerce Clause level of the *Bacchus* test.[238] Later, the court adopted the view that Section 2 of the Twenty-First Amendment authorizes states to subject imported liquor to whatever regulations they apply to local liquor, but no more.[239] Presumably, if Texas had applied its three-tier system, including its direct-shipment laws to in-state wineries, its laws would not violate the dormant Commerce Clause *and* those already valid laws would be saved by the Twenty-First Amendment. The *Beskind* court, by contrast, only found that equitably applied three-tier systems are authorized by the Twenty-First Amendment.[240]

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236 *See id.* at 401.

237 *See id.* at 406 ("[Section] 2 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.") (quoting Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000)).

238 *See id.* at 401 (indicating that the Seventh Circuit "rightly held that there was no Commerce Clause violation" in regulatory schemes where there is "no disparity in regulatory compliance" between local and out-of-state producers).

239 *See id.* at 406.

240 Despite its fairly broad view of state power under the Twenty-First Amendment, the *Dickerson* court specifically chose not to apply the same remedy as the *Beskind* court. Instead, the *Dickerson* court chose to strike down the direct-shipment prohibition for out-of-state wineries. However, this is not because the *Dickerson* court questioned Texas's authority to impose nondiscriminatory direct-shipment bans. *See id.* at 408 ("If the Texas legislature wishes to impose burdens [on in-state and out-of-state commerce] equally—as opposed to granting benefits equally—then that is its prerogative . . . ."). Rather, the different choices of remedy had to do with the two courts' differing views about what remedies were appropriate in light of the respective plaintiffs' complaints. *Compare* Beskind v. Easley, 325 F.3d 506, 520 (4th Cir. 2003)

In a one aspect, however, the *Dickerson* decision is more reminiscent of *Bainbridge* than *Beskind.* Late in the decision, the *Dickerson* court said that *Bacchus* "requires us to *scrutinize strictly* whether a state's statutes are tailored to the Twenty-First Amendment's 'core concerns.'"[241] It could be argued that with this statement, *Dickerson* goes even further than *Bainbridge* did, as the *Bainbridge* court at least claimed not to be applying strict scrutiny.[242] For this reason, the *Dickerson* court could be subjected to the same criticism as the *Bainbridge* court: by applying strict scrutiny during step two of *Bacchus*, the court would rob the Twenty-First Amendment of any meaning at all.[243] However, *Dickerson* is not nearly as problematic as *Bainbridge* in actual practice. This is because the *Dickerson* court apparently would not subject state alcohol laws that regulate evenhandedly, with only incidental effects on commerce, to strict scrutiny, while the *Bainbridge* court indicated that it would.[244] The *Dickerson* court, on the other hand, would uphold any state distribution scheme (including direct-shipment laws) that regulates out-of-state firms on the same terms as in-state firms.[245] *Dickerson* is deferential towards the states' right to shape their own alcoholic beverage distribution systems, including direct-shipment laws, as long as the states subject in-state firms to the same regulations as out-of-state firms.

4. The Sixth Circuit: *Heald v. Engler*

The Sixth Circuit heard yet another challenge to a state's direct-shipment laws in *Heald v. Engler.*[246] The plaintiffs were wine fanciers, wine journalists, and a small California winery that shipped its wine to out-of-state customers.[247] Michigan has a three-tier system, although it

("[T]he plaintiffs' . . . right is not to void a law protected by the Twenty-first Amendment but rather to eliminate discrimination in interstate commerce."), *with Dickerson,* 336 F.3d at 407 ("Here, Plaintiffs sued to obtain equal *benefits* under the [Texas Alcoholic Beverages Code], i.e., direct sales and shipments of wine to Texas consumers. This goal—the extension of benefits, not the extension of burdens—is inherent in a claim under the Commerce Clause."). In addition, the *Dickerson* court found that it would be more "surgical" to strike down the ban on direct shipments from out-of-state, since requiring Texas wineries to use the three-tier system would require "the wholesale revision of substantial portions" of Texas's alcoholic beverages laws. *Id.* at 408.

241 *Dickerson,* 336 F.3d at 406 (emphasis added).

242 *See* Bainbridge v. Turner, 311 F.3d 1104, 1114 n.17 (11th Cir. 2002).

243 *See supra* text accompanying notes 202–03.

244 *See Bainbridge,* 311 F.3d at 1112.

245 *See Dickerson,* 336 F.3d at 401, 406.

246 342 F.3d 517 (6th Cir. 2003).

247 *Id.* at 519.

discriminated against out-of-state wineries in favor of in-state wineries by allowing in-state wineries, but not out-of-state wineries, to ship their products directly to Michigan consumers, resulting in a competitive advantage for Michigan wineries.[248]

After giving a brief history of the Supreme Court's post-Prohibition jurisprudence,[249] the court applied the core concerns test. Following a review of *Bacchus* and the cases that led up to it, the court said that a state must prove more than just that its challenged alcohol laws were motivated by core concerns of the Twenty-First Amendment. Instead, "[u]nder a Commerce Clause analysis, facially discriminatory laws are still subject to strict scrutiny, meaning that the state must demonstrate that no reasonable nondiscriminatory alternatives are available to advance the same legitimate goals."[250] The court thereby revealed that under its view, the core purposes prong of the *Bacchus* test requires strict scrutiny. However, it is unclear whether the court meant to apply this rule only to facially discriminatory laws, or to even-handed regulations that incidentally affect commerce as well. Perhaps the court gave some hint when it said it "reject[s] the implication that a state's 'virtually complete control' over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests."[251] Arguably, this could be interpreted to mean that states are only constrained in crafting their liquor regulation systems by the requirement that they not discriminate against out-of-state interests. Under this interpretation, a state would be able to promulgate nondiscriminatory direct-shipment limitations. Supporting this interpretation is the court's next paragraph:

> Given this background, we cannot endorse the district court's characterization of the regulation in this case as a constitutionally benign product of the state's three-tier system and, thus, "a proper exercise of [Michigan's Twenty-first Amendment] authority, despite the fact that such a system places a minor burden in interstate commerce."[252]

This statement could be read as implying that products of the three-tier system are "constitutionally benign," but that Michigan's direct-shipment laws were not a product of the three-tier system because of their discriminatory application.

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248 *Id.* at 520–21.

249 *Id.* at 522–23.

250 *Id.* at 524.

251 *Id.*

252 *Id.* (quoting the district court).

Cutting against this reading, though, is the court's statement that the proper approach is to apply traditional dormant Commerce Clause analysis, and if the provisions are found to be unconstitutional under the Commerce Clause "to determine whether the state has shown that it has no reasonable nondiscriminatory means of advancing the 'core concerns' of the Twenty-first Amendment."[253] This would apparently include the prong of the traditional dormant Commerce Clause analysis that applies to statutes that regulate evenhandedly with incidental effects on interstate commerce, which are subjected to a balancing test.[254] If a state alcohol regulation failed that balancing test, it would seemingly be subjected to strict scrutiny to determine whether the state can show that it has no nondiscriminatory means of advancing its Twenty-First Amendment core concerns.

In any event, the court had no occasion to confirm either reading, because the court found it unmistakable that Michigan's direct-shipment provision was facially discriminatory.[255] The court then proceeded to apply its strict scrutiny version of the core purposes test. Based on an examination of the record, the court said that it was unable to find that Michigan's direct-shipment provision served any core Twenty-First Amendment concern, "much less that no reasonable nondiscriminatory means exists to satisfy these concerns."[256] As a result, Michigan's discriminatory direct-shipment law fell.

The most troubling aspect of the Sixth Circuit panel's *Heald* decision is that it is unclear whether it casts evenhanded three-tier systems into doubt, or only those that facially discriminate against out-of-state concerns. As mentioned above, there is language that indicates that the *Heald* court would consider striking down evenhanded regulations that fail the dormant Commerce Clause balancing test and the *Heald* strict-scrutiny version of the core concerns test. Moreover, the court uses broad language to say that states cannot discriminate against "out-of-state *interests*"[257] instead of the narrower "out-of-state wineries" or "out-of-state producers." This, coupled with the court's possible willingness to consider striking down evenhanded alcohol regulations, can reasonably be seen as supporting the views of some commentators who argue that all direct-shipment laws should be struck down, even

253 *Id.*

254 *Id.* at 524–25; *see supra* text accompanying note 178.

255 *See Heald*, 342 F.3d at 525.

256 *Id.* at 526.

257 *Id.* at 524 (emphasis added).

those that apply equally to in-state producers.[258] In as far as this is the case, the *Heald* court can be criticized for overreaching.[259]

There is also countervailing evidence indicating that the *Heald* court did not overreach. Some of that evidence is contained in the language discussed above supporting an interpretation of *Heald* that only rejects facially discriminatory direct-shipment laws.[260] In addition, the court noted that "[i]t is important to keep in mind that the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes [core concerns] . . . but whether the discriminatory scheme challenged in this case—the direct-shipment ban for out-of-state wineries—does so."[261] The court thus narrowed its holding. It is worth noting that the court cited *Beskind* for this point, perhaps indicating that the Sixth Circuit would support nondiscriminatory direct-shipment laws like the Fourth Circuit did in *Beskind*.[262] Furthermore, the court narrowed its "out-of-state interests" language when it said:

> The district court in this case was correct in finding that the Michigan alcohol distribution system discriminates between in-state and out-of-state interests *to the extent that* in state wineries may obtain licenses to ship wine directly to consumers, but out-of-state wineries may not and are instead required to go through the more costly three-tier system.[263]

The inclusion of the phrase "to the extent that" seems to reveal that the court only meant to address its decision to discrimination in the form of preferences for in-state wineries over out-of-state wineries. Therefore, the proper reading of the *Heald* decision is probably that it frowns upon only the type of facially discriminatory direct-shipment law that was in place in Michigan.

B. The Outliers: Rejecting the Bacchus *Approach*

While each of the four preceding circuit court of appeals decisions were different in several ways, they all used the same basic analytical framework: the dual-level *Bacchus* core purposes approach. Two circuit courts of appeals, the Seventh and Second Circuits, have rejected the *Bacchus* approach; both of those circuits upheld the challenged direct-shipment laws. While the Seventh and Second Circuits reached different conclusions about the direct-shipment laws they ad-

258 *See, e.g.*, Douglass, *supra* note 6; Molnar, *supra* note 7.
259 *See infra* Part IV.C.
260 *See supra* text accompanying notes 251–52.
261 *Heald*, 342 F.3d at 526.
262 *See id.*
263 *Id.* at 527 (emphasis added).

dressed than the other circuits, their conclusions are not necessarily incompatible with the conclusions reached by the other circuits.

1. The Seventh Circuit: *Bridenbaugh v. Freeman-Wilson*

The first circuit court of appeals to reject the two-prong *Bacchus* framework was the Seventh Circuit.[264] It did so in *Bridenbaugh v. Freeman-Wilson*,[265] which was also the first direct-shipment law challenge to be decided by a federal appellate court. In a controversial decision,[266] the Seventh Circuit found that Indiana's direct-shipment law was a valid exercise of the state's Twenty-First Amendment authority and sustained it against a dormant Commerce Clause challenge.

The plaintiffs in the case were Indiana oenophiles.[267] Indiana, predictably, has a three-tier alcohol distribution system with different permits for manufacturers, distributors, and retailers. Local wineries are allowed to obtain a permit to ship directly to Indiana consumers, but the same is not true of wineries "in the business of selling . . . in another state or country."[268] The parties devoted their cases to arguing over whether the challenged statute furthered any of the core concerns of the Twenty-First Amendment. In the eyes of the court, however, this was a waste of time. The court wanted it to be clear that when deciding whether state laws are authorized by the Twenty-First Amendment, "our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters."[269] Text and history would inform the court's interpreta-

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264 The *Bridenbaugh* decision was written by Judge Frank H. Easterbrook. A fascinating historical footnote to the case is the fact that the position of the *Bacchus* appellant, Bacchus Imports, Ltd., was argued by an eminent lawyer named Frank H. Easterbrook. *See* Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 264 (1984).

265 227 F.3d 848 (7th Cir. 2000).

266 *Compare* Heald v. Engler, 342 F.3d 517, 526–27 (6th Cir. 2003) (noting that *Bridenbaugh* had been criticized by many federal courts); Bainbridge v. Turner, 311 F.3d 1104, 1114 n.15 (11th Cir. 2002) (indicating disagreement with the analytical framework used in *Bridenbaugh*); Martin, *supra* note 65, at 68–71 (characterizing the reasoning behind the decision as being "patently silly"), *with* Denning, *supra* note 116, at 332–33 (calling the decision a "welcome corrective" to district court opinions that gave broad readings to the Supreme Court's Twenty-First Amendment cases); Gordon Eng, *Old Whine in a New Battle: Pragmatic Approaches to Balancing the Twenty-First Amendment, the Dormant Commerce Clause, and the Direct Shipping of Wine*, 30 FORDHAM URB. L.J. 1849, 1902–14 (2003) (characterizing the *Bridenbaugh* approach as the most sensible baseline for reconciling the Twenty-First Amendment with the dormant Commerce Clause)

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

268 *Id.* at 851 (quoting IND. CODE § 7.1-5-11-1.5(a) (2000)).

269 *Id.*

tion of the amendment; "suppositions about [the drafters'] mental processes are unilluminating."[270]

After thus revealing its interpretive baseline, the court reviewed the pre-Prohibition history of state direct-shipment regulations. The court took special notice of the fact that the Supreme Court's Commerce Clause decisions consistently thwarted the dry states' efforts to control alcohol by allowing out-of-state sources to bypass state regulations by shipping directly to consumers. As a result, the court found, *in-state* commerce suffered discrimination because out-of-state commerce could escape state regulations. According to the court, this ended with the Webb-Kenyon Act, in which Congress gave teeth to state alcohol-shipment prohibitions by using the federal commerce power to ban the violation of such state laws.[271] Section 2 of the Twenty-First Amendment, the court noted, "tracks the Webb-Kenyon Act and effectively incorporates its approach into the Constitution."[272] In effect, it closed "the loophole" the dormant Commerce Clause created, namely direct shipments to consumers from out-of-state sources that bypass state regulatory systems.[273] Indeed, Section 2 "speaks directly" to interstate shipments because it addresses state "importation" laws.[274]

The court then turned to the Supreme Court's Twenty-First Amendment jurisprudence, asserting that:

> No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause. What the Court *has* held, however, is that the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms.[275]

The *Bridenbaugh* court characterized the Supreme Court cases as applying an unconstitutional-conditions approach to state alcohol regulations, treating Section 2 as ending discrimination against in-state commerce, but not as authorizing discrimination against out-of-state commerce. In sum, Section 2 allows the state to regulate importation of liquor to the same extent as it regulates internal liquor sales, but no more.[276]

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270 *Id.*

271 *See id.* at 851–52; *see also supra* Part I.A–C.

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

273 *Id.* In the court's view, the challenged Indiana statute was a clear example of such a law aimed at preventing circumvention of the state regulatory system. The law "channels . . . sales through Indiana permit-holders, enabling Indiana to collect its excise tax equally from in-state and out-of-state sellers." *Id.* at 854.

274 *Id.* at 853.

275 *Id.*

276 *Id.*

Following its interpretation of the Twenty-First Amendment and the Supreme Court jurisprudence, the court turned to the Indiana direct-shipment law. According to the court's reading of Indiana's law, "Indiana insists that *every* drop of liquor pass through its three-tiered system and be subjected to taxation."[277] Therefore, Indiana's law does not discriminate. While the plaintiffs argued that holders of Indiana wholesale or retail permits could ship directly to Indiana consumers, the court observed that those same permit holders could directly ship *any* wine, whether it was produced in Indiana or elsewhere.[278] The court noted that there are anomolies. For example, an Indiana retail permit holder that is also "in the business of selling alcoholic beverages" in another state is permitted to ship directly to Indiana consumers by one statutory provision, but is prohibited from doing so by another provision.[279] The court left the task of clearing up that discrepancy to Indiana's judiciary.[280] In the end, the *Bridenbaugh* decision turned on the Seventh Circuit's construction of Indiana's direct-shipment law. Because Indiana's statute was nondiscriminatory in the eyes of the court, it was upheld.

One commentator has criticized the *Bridenbaugh* finding that all alcohol must pass through Indiana's three-tier system as being "patently silly."[281] According to the commentator, the court ignored the fact that Indiana wineries are allowed to obtain retail permits and ship directly to consumers, whereas out-of-state vintners are prohibited from doing so, which amounts to clear economic discrimination.[282] However, the court seems to account for this in its decision. The court noted that the "[p]laintiffs do not complain about the statute that apparently limits distribution permits to Indiana's citizens. These plaintiffs are concerned only with direct shipments from out-of-state sellers who lack *and do not want* Indiana permits."[283] This implies that the court's decision might be different if it was faced with a challenge by an out-of-state winery that was denied an Indiana distribution permit.

Obviously, the Seventh Circuit's approach to direct-shipment cases differs from most of the other circuit courts of appeals that have faced the same issue. Notably, the Seventh Circuit upheld the direct-shipment law it was confronted with, while each of the four circuits

277 *Id.*
278 *Id.*
279 *Id.* at 254 (quoting IND. CODE § 7.1-5-11-1.5(a) (2000)).
280 *Id.*
281 Martin, *supra* note 65, at 70.
282 *See id.*
283 *Bridenbaugh*, 227 F.3d at 854.

discussed above rejected direct-shipment laws. In one way, however, the Seventh Circuit's reading of the Twenty-First Amendment is actually narrower than that of the four circuits that applied *Bacchus* to strike down direct-shipment laws.[284] The Seventh Circuit interprets the Twenty-First Amendment and the Supreme Court jurisprudence as implementing a nondiscrimination principle.[285] Thus, it would strike down any facially discriminatory liquor regulation. The same facially discriminatory liquor regulation would have a chance of surviving in the other circuits if the state could show that the regulation implicates core concerns of the Twenty-First Amendment.

On a more basic level, the Seventh Circuit used a completely different analytical framework in addressing the amendment. The Seventh Circuit's view, based on the history and text of the amendment, is that the Twenty-First Amendment is "a positive grant of power to the states, enabling them to forbid the importation of alcohol or regulate it to the same extent as they regulate its domestic sources."[286] The other circuits, on the other hand, eschew the history and text of the Twenty-First Amendment and instead follow the Supreme Court's *Bacchus* test, which they see as binding precedent that must be applied any time a state alcohol regulation is challenged under the Commerce Clause. The Commerce Clause is at the center of this analysis. The reviewing court must first determine whether the state alcohol regulation violates the Commerce Clause; if it does, the state may then use the Twenty-First Amendment as a defense by showing that the challenged regulation implicates a core concern of the Twenty-First Amendment. The difference between the Seventh Circuit's analytical approach and that of the Eleventh, Fourth, Fifth, and Sixth Circuits at its core is affirmative grant of power versus affirmative defense.[287]

The Seventh Circuit's analytical framework is highly suspect. The *Bridenbaugh* court completely ignores the fact that the *Bacchus* test is the method that the Supreme Court chose to accommodate the Twenty-First Amendment with the Commerce Clause. Nothing in *Bacchus* indicates that the Supreme Court did not intend for the test it promulgated to apply in cases where the state law is "limited to the importation of liquor."[288] All indications are that it is to apply to all Commerce Clause/Twenty-First Amendment cases. It is difficult to read *Bacchus* as simply applying an unconstitutional-conditions ap-

284 *See* Schnabel, *supra* note 169, at 554.

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

286 Schnabel, *supra* note 169, at 554.

287 *See id.*

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

proach to the states' use of Section 2 power, as the Seventh Circuit professes to do.[289] If that was truly the Supreme Court's view, then it wasted a lot of ink writing about core purposes.

2. The Second Circuit: *Swedenburg v. Kelly*

The most recent circuit court of appeals to hear a direct-shipment law challenge was the Second Circuit in *Swedenburg v. Kelly*.[290] Eschewing the *Bacchus* inquiry, the Second Circuit upheld New York's challenged direct-shipment ban, finding that the challenged laws were "within the ambit of the Twenty-first Amendment."[291] While the case is too recent to have attracted the same amount of criticism as *Bridenbaugh*, the Second Circuit's characterization of the Twenty-First Amendment is every bit as divergent as the Seventh Circuit's, and will likely prove to be just as controversial.

The plaintiffs in *Swedenburg* were a consortium of out-of-state winery owners and in-state wine consumers.[292] New York has a three-tiered system for alcohol sales and distribution. As part of that system, no person is allowed to "sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefore required by this chapter."[293] Other provisions require that any alcohol shipped into the state be consigned to a person licensed under New York's liquor control laws.[294] New York allows wineries to obtain a state winery license, and in order to do so, a winery must pay a licensing fee.[295] The winery must also maintain a branch factory, office, or storeroom within the state and receive wine consigned to a U.S. government bonded winery, warehouse, or storeroom within New York.[296] One important privilege enjoyed by licensed wineries is their ability to obtain retail licenses, which allow wineries to sell and ship directly to their customers.[297] Out-of-state wineries are eligible for New York licenses as long as they meet all of the state's require-

289 *See id.*

290 358 F.3d 223 (2d Cir. 2004).

291 *Id.* at 227. The court also upheld New York's direct-shipment law against a challenge under the Privileges and Immunities Clause of Article IV. *Id.* That aspect of the decision is beyond the scope of this Note.

292 *Id.* at 229.

293 *Id.* at 228 (quoting N.Y. ALCO. BEV. CONT. LAW § 100(1) (McKinney 2000)).

294 *Id.*

295 *Id.*

296 *Id.*

297 *Id.* at 229.

ments, including the maintenance of a warehouse or other physical presence in the state.[298]

The Second Circuit considered the modes of analysis that the other circuit courts of appeals applied to direct-shipment law cases. Each of the other circuit courts of appeals, according to the Second Circuit, took one of two approaches to direct-shipment law cases.[299] The first approach is the two-step inquiry[300] employed in *Bainbridge*, *Beskind*, *Dickerson*, and *Heald*, where the courts first subject challenged statutes to traditional dormant Commerce Clause analysis. Then, if the statutes are found to violate the dormant Commerce Clause at step one, the courts apply the core purposes test to see if the statutes are "saved" by the Twenty-First Amendment.[301] According to the Second Circuit, "this two-step approach is flawed because it has the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language of section 2."[302]

Far preferable to the court was the second mode of analysis used in direct-shipment law cases, which the court said is characterized by *Bridenbaugh*.[303] This approach considers the Twenty-First Amendment's affirmative grant of authority to the states, and simply seeks to determine whether the challenged statute falls within that authority. If it does, the statute is exempted from the dormant Commerce Clause.[304] To the court, this inquiry allows for a true reconciling of the Twenty-First Amendment with the Commerce Clause, and does "not allow the protective doctrine of the dormant Commerce Clause to subordinate the plain language of the Twenty-first Amendment."[305]

After thus choosing its analytical framework, the court analyzed the legal history behind the Twenty-First Amendment. Like the Seventh Circuit did in *Bridenbaugh*, the Second Circuit noted that early state efforts to restrict the production and consumption of alcohol were frustrated by the Supreme Court's invocation of the dormant Commerce Clause to strike down state liquor regulations.[306] The Wilson and Webb-Kenyon Acts were efforts to help the states make effective their alcoholic beverage control laws by keeping imported liquor

298 *Id.*

299 *Id.* at 230–31.

300 *See supra* Part III.A.

301 *Swedenburg*, 358 F.3d at 230–31

302 *Id.* at 231.

303 *See id.*

304 *Id.*

305 *Id.*

306 *See id.* at 231–32.

out of dry-state markets.[307] After Prohibition, the states wanted to ensure that they would be able to control alcohol abuse, and enacted Section 2 of the Twenty-First Amendment for that purpose.[308] According to the court, Section 2 constitutionalized most state laws regulating importation, transportation, and distribution of alcoholic beverages.[309] Because Section 2 speaks directly to importation of liquor into the states, "[a]llowing dormant Commerce Clause concerns to restrict state regulatory schemes that focus on the importation of liquor would render section 2 a nullity."[310]

Influenced by this summation of the Twenty-First Amendment's historical basis, the court next analyzed the Supreme Court's Twenty-First Amendment cases. The Second Circuit acknowledged "that more recent cases have recognized that the Twenty-first Amendment is not a plenary grant of authority to states to regulate all activity involving alcohol."[311] However, any limits the Supreme Court placed on the scope of Section 2 only apply insofar as the state attempts to regulate the alcohol trade outside of the state or in violation of federal powers other than the commerce power.[312] Never, according to the *Swedenburg* court, has the Supreme Court found that a state law limited to the importation or distribution of alcohol within the state's borders is problematic under the dormant Commerce Clause. Indeed, those are the very types of laws that Section 2 is intended to protect.[313]

The court then applied these principles to the challenged New York statutes. The Second Circuit found that the New York direct-shipment law falls within the protection of Section 2 because it applies only to the importation and distribution of alcohol within New York.[314] The law allows the state to regulate the distribution of alcohol by ensuring that all alcohol is sold through state-licensed entities. Additionally, the court found no evidence that New York's direct-shipment law was enacted for the purposes of mere economic protectionism.[315] All wineries, whether in-state or out-of-state, are allowed to

307 *See id.* at 232.
308 *See id.*
309 *Id.*
310 *Id.* at 233.
311 *Id.* at 234.
312 *Id.* at 236.
313 *Id.* at 236–37.
314 *Id.* at 237.
315 *Id.* The court made sure to include and to justify this finding because, in its review of the Supreme Court's jurisprudence, the Second Circuit had characterized *Bacchus* as standing for the simple principle that a state cannot invoke Section 2 as a pretext for protectionism. *Id.* at 236.

obtain a New York license as long as they meet all of the requirements, including physical presence.[316]

The court recognized that a physical presence requirement would be problematic if applied to sales of most consumer goods. The Supreme Court has found that state statutes requiring business operations to be performed within the home state, which could be performed more efficiently elsewhere, are virtually always invalid.[317] However, the Second Circuit found that valid regulatory concerns override any potential problems in the area of alcohol regulation.[318] Physical presence allows New York to ensure that all who sell alcoholic beverages within the state will be accountable to state authority.[319] Records of sales and compliance must be kept by all licensees, and are subject to inspection by New York officials. Physical presence, presumably, facilitates the inspection process. Also, if all wine is required to pass through a government bonded warehouse in New York, state officials will be sure to have access to the product.[320] New York chose to create an exception to its three-tiered system for licensed wineries, but "it has correlated its relaxation of regulatory scrutiny with a safety net ensuring accountability—presence."[321] The *Swedenburg* court indicated that the fact that some out-of-state wineries might face greater costs in accessing the New York market than other wineries was "not determinative." Unlike Florida, North Carolina, Texas, or Michigan, New York at least gives out-of-state wineries an opportunity to compete on the same terms as in-state wineries.[322] Because the New York direct-shipment law directly relates to importation and distribution, and because it is nondiscriminatory and nonprotectionist, the law was upheld.

Like the Seventh Circuit's analysis in *Bridenbaugh*, the Second Circuit's analysis in *Swedenburg* is suspect in that it does not apply the *Bacchus* test. As will be discussed below, it is entirely possible to find

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There is a compelling argument to be made that parts of New York's licensing regime are facially discriminatory and enacted for purely protectionist purposes. Small New York wineries are able to obtain a "farm winery" license at a lower cost. N.Y. ALCO. BEV. CONT. LAW § 76-a (McKinney 2000). To be eligible for this less costly license, a winery can manufacture no more than 150,000 gallons of wine per year, *id.* § 76-a(7), and may use only New York-grown fruits. *Id.* § 76-a(5). Thus, out-of-state wineries are precluded from obtaining the less costly farm winery licenses.

316 *Swedenburg*, 358 F.3d at 237.

317 *Id.* at 238 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970)).

318 *Id.*

319 *Id.*

320 *See id.*

321 *Id.*

322 *See id.*

that a state has core power to regulate importation and distribution of alcohol while still applying *Bacchus*.[323] As a practical matter, though, the Seventh and Second Circuits would probably reach the same result as the other circuits in many direct-shipment cases. It seems fairly apparent that a direct-shipment law that applied equally to both in-state and out-of-state producers would survive in most, if not all, of the circuits that have spoken so far. What remains to be seen is whether this apparent deference to non-facially discriminatory state liquor distribution systems is the proper approach.

IV. Making Sense of it All

As the recent flurry of circuit court of appeals cases on the subject would indicate, the validity of state direct-shipment laws is a controversial issue struggling for resolution. The fact that the circuit courts of appeals have each had a slightly different take, even when using the same analytical framework, leaves plenty of room for debate as to the best resolution. Material for that debate can be drawn from history, alcohol industry materials, academic literature, and numerous other sources. But since this is a legal controversy, material from the cases deserves special attention.

A. Basic Observations

Perhaps the most basic observation that can be made in connection with this subject is that Section 2 of the Twenty-First Amendment must do *something*. One can discern this easily enough from the simple fact that Section 2 appears in the Constitution. Surely the Seventy-Second Congress would not have included Section 2 just to provide interesting material for debate in academic literature and the courts. That intuition is confirmed by the amount of deliberation Congress gave Section 2.[324] Congress certainly appeared to think it was doing something worth discussing.

As the history of alcohol regulation in the United States demonstrates, alcohol has traditionally been somehow "different" from other products. States feel the need to regulate alcohol in ways that they do not regulate other products. With the enactment of Section 2, alcohol was officially given a special place in the U.S. legal system. Former White House counsel C. Boyden Gray observed in testimony before the Federal Trade Commission in 2002 that alcohol is the "sole prod-

323 *See infra* Part IV.

324 *See supra* Part I.D.

uct that has its own constitutional provision."[325] The courts, too, have picked up on the fact that Section 2, whatever its precise effect, definitely makes alcohol somehow "different." As the Seventh Circuit noted in *Bridenbaugh*, "§ 2 of the twenty-first amendment empowers Indiana to control alcohol in ways that it cannot control cheese."[326] Even in finding that a New York liquor regulation was unconstitutional as applied to Idlewild Bon Voyage Liquor's airport operation, the Supreme Court observed that the Twenty-First Amendment changed the nature of the inquiry into whether New York had the power to enforce the law, remarking that "if the commodity involved here were not liquor, but grain or lumber, the Commerce Clause would clearly deprive New York of any such power."[327] As all of the foregoing discussion indicates, the ongoing controversy is not over *whether* alcohol is different, but rather over exactly *how* alcohol is different.

B. The Extent of State Power

Grasping the extent of the states' Twenty-First Amendment power, and determining whether it extends to cover state direct-shipment laws, is a difficult exercise because no two cases on the subject are exactly the same. However, it may be possible to piece together principles from the cases to come up with a coherent rule that can be applied in direct-shipment cases. Successfully discerning and announcing such a coherent rule would go far towards clearing up the current confusion over the extent of the states' regulatory power over alcohol.

1. States Can Structure Their Own Regulatory Systems

One basic principle that can be gleaned from the cases is that the states retain the power to structure their own alcohol distribution systems. The Supreme Court has clearly articulated that principle: "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."[328] States are thus empowered to establish regulatory schemes to monitor the production of liquor, to control the movement of liquor through state territory, and to prevent

325 *See* Garrone, *supra* note 68, at 66 (reporting Gray's testimony before the Federal Trade Commission in 2002).

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

327 *See* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329 (1964).

328 Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980).

the diversion of liquor into the flow of commerce without it first being subjected to the state's chosen regulatory safeguards.[329] Thus, the Second Circuit was almost certainly correct when it said that Section 2 effectively "allow[s] states the authority to circumvent dormant Commerce Clause protections, provided that they [are] regulating the intrastate flow of alcohol."[330] To the extent that direct-shipment laws are a part of the states' alcohol distribution system, they would seem to represent a permissible exercise of the states' Twenty-First Amendment authority.

Direct-shipment laws are most commonly used by states that use the three-tier distribution structure. This makes sense because the purpose of the three-tier system is to control the flow of alcohol by ensuring that it passes through the regulatory structure, from producer to wholesaler to retailer, and only then to consumer.[331] If producers were able to ship directly to consumers, however, they would be able to bypass the regulatory structure entirely.[332] To prevent this, states prohibit direct shipments to consumers. It is no accident, then, that all of the circuit court of appeals cases discussed in Part III came from states that have three-tier regulatory structures. Direct-shipment laws are a logical part of such regulatory structures.

It also seems clear that the power to implement a three-tier structure is well within the "virtually complete" control that states have over structuring their liquor distribution systems. There are a number of possible reasons to find the three-tier structure permissible. One reason offered is that Prohibition and other "tumultuous" episodes in the history of liquor regulation have taught that "liquor control has to be local to be effective."[333] Therefore, states should be allowed to set up their own systems, including three-tier systems, free from national interference. Another possible reason is that three-tier systems have been in place for so long. The three-tier system has been in place since the end of Prohibition[334]—seventy years now. There is something that seems manifestly unfair about telling a state that it must abandon a system it has been allowed to use for so long. If nothing else, the long, unbroken practice of allowing states to use the three-

329 Spaeth, *supra* note 9, at 162.

330 Swedenburg v. Kelly, 358 F.3d 223, 237 (2d Cir. 2004).

331 *See* Martin, *supra* note 65, at 63–64; Martin, *supra* note 3, at 27; Foust, *supra* note 10, at 666.

332 *See* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000); Martin, *supra* note 65, at 64.

333 Spaeth, *supra* note 9, at 161.

334 *See* Martin, *supra* note 65, at 63; Martin, *supra* note 3, at 27.

tier system can be said to have given the three-tier system a "gloss" of permissibility and made it a valid method of exercising state power.[335]

Still, the best way to think about the three-tier system is that it is simply among the range of regulatory options that Section 2 of the Twenty-First Amendment gives the states.[336] Courts addressing Twenty-First Amendment cases, including those involving direct-shipment laws, have recognized this point. The Fourth Circuit observed that "[t]he plaintiffs do not challenge North Carolina's three-tiered system standing alone, perhaps due to their recognition that it is a long-standing regulatory scheme authorized by the Twenty-first Amendment."[337] The Fourth Circuit also concluded that a number of valid state interests are served by North Carolina's three-tier structure, including regulating consumption of alcohol, controlling distribution of alcohol, and collecting taxes on alcohol, among several others.[338] A plurality of the Supreme Court, reviewing laws passed in connection with North Dakota's three-tier structure, drew similar conclusions: "In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate."[339] For some courts, the proposition that states are authorized to set up a three-tier system is so uncontroversial that it does not even warrant discussion. For example, the Fifth Circuit noted without discussion that, with the exception of its discriminatory exception in favor in-state wineries, Texas's three-tier system was "otherwise legitimate."[340] It is seemingly clear, then, that three-tier systems, including their constituent direct-shipment laws, are perfectly valid. Why, then, have direct-shipment laws been struck down by four different circuit courts of appeals?

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335 *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (stating that longstanding, unquestioned practice by the executive branch can make such a practice part of the structure of government, even if it is not explicitly authorized by the Constitution).

336 *See* Spaeth, *supra* note 9, at 189.

337 Beskind v. Easley, 325 F.3d 506, 516 (4th Cir. 2003).

338 *Id.*

339 North Dakota v. United States, 495 U.S. 423, 432 (1990) (plurality opinion). Even Justice Scalia, who concurred separately and thereby prevented *North Dakota* from being a majority opinion, recognized the constitutional legitimacy of North Dakota's three-tier structure, saying that "[t]he Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler. Nothing in our Twenty-first Amendment case law forecloses that conclusion." *Id.* at 447 (Scalia, J., concurring).

340 Dickerson v. Bailey, 336 F.3d 388, 410 (5th Cir. 2003).

2. The Qualification: State Regulatory Structures Cannot Facially Discriminate

If it is true that states have "virtually complete" control over how to structure their liquor distribution systems, and direct-shipment laws are a constituent part of a commonly used distribution system, direct-shipment laws seemingly should never be struck down. However, the fact is that the intermediate federal courts have struck down four such statutes. It would seem that either the circuit courts of appeals have gotten it wrong, or the premise that states have the authority to choose their own liquor control structures is incorrect. Actually, neither is true. What is true is that while the states have *virtually* free reign in structuring their alcohol distribution systems, they cannot implement structures that facially discriminate against out-of-state liquor.

That conclusion can be supported by reference to the cases. Despite the fact that its analytical framework was questionable, the Seventh Circuit was correct when it said that Section 2 authorizes Indiana's liquor regulations "unless the state has used its power to impose a discriminatory condition on importation, one that favors Indiana sources of alcoholic beverages over sources in other states . . . ."[341] Most of the other federal appeals courts picked up on this point even while applying the Supreme Court's preferred analytical framework. This led the Fifth Circuit to adopt, word for word, the quote just cited when it handed down its decision in *Dickerson v. Bailey*.[342] While it ultimately invalidated Texas's facially discriminatory direct-shipment law, the *Dickerson* court did indicate that it is Texas's "prerogative" to adopt a direct-shipment law that applies equally to both in-state and out-of-state wineries.[343] Similarly, when analyzing North Carolina's facially discriminatory direct-shipment laws, the Fourth Circuit said that "the question is whether *discriminating* in favor of in-state wineries by vertically integrating its three-tiered regulatory scheme to their economic benefit serves a Twenty-first Amendment interest."[344] After finding that discriminating in favor of in-state wineries with direct-shipment laws did not serve a Twenty-First Amendment purpose, the court struck down those aspects that discriminated in favor of in-state wineries and left the nondiscriminatory aspects of North Carolina's direct-shipment laws in place.[345] The Sixth Circuit felt that "[i]t is

341 Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000).
342 *Dickerson*, 336 F.3d at 401.
343 *Id.* at 408–09.
344 Beskind v. Easley, 325 F.3d 506, 517 (4th Cir. 2003).
345 *Id.* at 519.

important to keep in mind that the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of 'temperance, ensuring an orderly market, and raising revenue,' but whether the discriminatory scheme challenged in this case . . . does so."[346] It is worth noting that every state direct-shipment law struck down by a circuit court of appeals was facially discriminatory. It is also no accident that every state liquor regulation struck down by the Supreme Court on dormant Commerce Clause grounds either facially discriminated against out-of-state beverages,[347] regulated extraterritorially,[348] or did both.[349]

3. The Role of Core Purposes

Noticeably absent from the principles discussed so far are core purposes of the Twenty-First Amendment. It might be objected that a general rule that states are free to structure their own alcohol regulatory systems as long as they do not discriminate against out-of-state liquor leaves no room for a core purposes inquiry. This would be a problem because the Supreme Court has clearly demonstrated that core purposes should be part of the equation. However, such a general rule does account for core purposes, at least insofar as the Supreme Court articulated them.

It has been observed that the substance of the core purposes test is not nearly as clear as many courts and commentators seem to believe.[350] The fact that the test requires courts to determine what constitutes a legitimate purpose for state liquor regulations under the Twenty-First Amendment is extremely problematic. Even in the *Bacchus* decision itself, the Supreme Court took note of the fact that "[n]o clear consensus concerning the meaning" of Section 2 of the Twenty-First Amendment can be discerned from the legislative history of the amendment.[351] Nevertheless, the Court promulgated a test to determine "whether the principles underlying the Twenty-first Amendment are sufficiently implicated" by a state's liquor laws to

346 Heald v. Engler, 342 F.3d 517, 526 (6th Cir. 2003).

347 *See* Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984).

348 *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986).

349 *See* Healy v. Beer Inst., 491 U.S. 324 (1989).

350 *See* Miller, *supra* note 24, at 2543 (pointing out that the substance of the core purposes test can be derived only from "judicial speculation"); Schnabel, *supra* note 169, at 554–55 (discussing *Bridenbaugh* and *Bainbridge* and observing that "the precedential status of the 'core concerns' inquiry is not as clear as either of these two judges seems to believe").

351 *Bacchus*, 468 U.S. at 274.

overcome a Commerce Clause violation.[352] The problem is that, "[i]n the absence of any objective indication as to what constitutes the legitimate purposes of the Twenty-first Amendment, a court can only offer subjective judicial speculation regarding the Amendment's purpose."[353]

Still, "subjective judicial speculation" can be quite persuasive, especially when it comes from the nation's highest court and pertains to a constitutional provision. However, the Supreme Court has been less than unequivocal on this point. The closest that the *Bacchus* Court came to stating what it thought the "principles underlying the Twenty-first Amendment" were was when it said: "Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance *or to carry out any other purpose of the Twenty-first Amendment* . . . ."[354] While the Court made it clear that promoting temperance was one core concern of the Twenty-First Amendment, it also indicated that there are unspecified "other purposes." No indication is given as to what those might be.

Six years later, a plurality of the Court proposed some possibilities. The Court upheld two North Dakota liquor laws against a challenge based on the intergovernmental immunity doctrine and federal statutory law in *North Dakota v. United States*.[355] In explaining its reasons for doing so, the Court said:

> The two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate.[356]

This seems to add "ensuring orderly market conditions" and "raising revenue" to the list of core purposes of the Twenty-First Amendment. Aside from the fact that *North Dakota* is a plurality opinion, there are a couple of problems. One is that the Court never indicated how it came to the conclusion that these were core purposes.[357] It would be far more satisfying if the Court would have at least given the sources of its determination. Also, it is entirely unclear what the Court meant by "ensuring orderly market conditions." Thus, when Florida attempted

352 *Id.* at 275.

353 Miller, *supra* note 24, at 2543.

354 *Bacchus*, 468 U.S. at 276 (emphasis added).

355 495 U.S. 423 (1990) (plurality opinion).

356 *Id.* at 432 (plurality opinion).

357 *See* Miller, *supra* note 24, at 2545.

to justify its discriminatory direct-shipment regulation by citing its interest in "ensuring orderly markets," the Eleventh Circuit expressed confusion about that phrase's meaning.[358] Finally, almost any imaginable liquor regulation could be justified as either "ensuring orderly market conditions" or "raising revenue," including discriminatory direct-shipment laws and Hawaii's discriminatory excise tax.[359] Therefore, it seems that more consideration of the substance of the core purposes test is needed.

The best way to give core purposes more consideration is to return to *Bacchus* and see if the Court made *any* unequivocal statement about the core purposes test. The Court did indeed do so when it explained that "[d]oubts about the scope of the Amendment's authorization notwithstanding, *one thing is certain*: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition."[360] In light of that statement, it seems that the best way to read *Bacchus* is in the negative. The *Bacchus* Court did not tell future courts to look to the core purposes of the Twenty-First Amendment for affirmative justifications for state liquor regulations. What it did require was that courts should not uphold state laws that certainly do not fall under the Twenty-First Amendment's authorization, i.e., those that constitute mere protectionism in favor of local liquor. The *Swedenburg* court noted this, saying: "The Supreme Court has . . . viewed with caution state attempts to invoke section 2 as a pretext for economic protectionism."[361] Thus, the Twenty-First Amendment authorizes states to set up their own liquor distribution systems, but certainly does not authorize them to do so in a way that discriminates against out-of-state liquor in favor of in-state liquor.[362]

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

359 This may have been exactly what was intended. The plurality opinion in *North Dakota* was authored by Justice Stevens. One may recall that Justice Stevens also wrote a dissenting opinion in *Bacchus* to express a very broad view of the states' power to regulate alcohol. *See Bacchus*, 468 U.S. at 278–87 (Stevens, J., dissenting); *supra* note 159.

360 *Bacchus*, 468 U.S. at 276 (emphasis added).

361 Swedenburg v. Kelly, 358 F.3d 223, 236 (2d Cir. 2004).

362 And one could just as easily conclude that, two years later, the Court added another type of measure that the Twenty-First Amendment certainly did not authorize: those state laws that have the effect of regulating liquor in other states. This is exceedingly rational, as it would be hard to believe that the Twenty-First Amendment would authorize states to intrude upon other states' Twenty-First Amendment authority. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 585 (1986).

This reading meshes well with the principles discussed above. The Twenty-First Amendment authorizes states to structure their own liquor regulation systems. In essence, structuring state liquor control systems is a core purpose of the amendment.[363] Measures that are an integral part of the state's chosen structure, like direct-shipment laws, should be presumed valid. However, direct-shipment laws that facially discriminate against out-of-state liquor are struck down. The reason: The Twenty-First Amendment did not empower the states to enact protectionist measures that favor local liquor. The fact that a direct-shipment law is facially discriminatory can be seen as leading to a rebuttable presumption that the state regulatory structure is tailored for protectionist, and thus improper, purposes.[364] This presumption could be rebutted by the state if it proves that the challenged discriminatory law was enacted for core Twenty-First Amendment purposes. For example, in *Swedenburg*, the court acknowledged that New York's physical presence requirement might work a hardship on out-of-state wineries, but was able to conclude that the law was not enacted with a protectionist purpose because the physical presence requirement was in place only to ensure the integrity of New York's regulatory system.[365] Notably, the circuit courts of appeals, in all of the cases with the exception of *Bridenbaugh*, have applied the core purposes test after finding the state law to be facially discriminatory. Otherwise, a state's chosen regulatory scheme should be presumed valid, as per the discussion above.[366]

This reading would be consistent with everything the circuit courts of appeals have done. When the Eleventh Circuit says "[a]s for

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363 This is probably what Justice Stevens meant when he identified "ensuring orderly market conditions" as a core concern. *See* North Dakota v. United States, 495 U.S. 423, 432 (1990) (plurality opinion).

364 The Fourth Circuit Court of Appeals seemed to adopt a similar view:

> Against the backdrop of its general prohibition of direct shipment of alcoholic beverages, North Carolina's authorization of in-state direct shipment of wine—which has the effect of increasing access to wine produced only in North Carolina—cannot credibly be portrayed as anything other than local economic boosterism in the guise of a law aimed at alcoholic beverage control.

Beskind v. Easley, 325 F.3d 506, 517 (4th Cir. 2003).

Thus, the Fourth Circuit created a dichotomy between alcoholic beverage control laws (presumably proper under the Twenty-First Amendment) and laws aimed at economic protectionism (presumably improper under the Twenty-First Amendment, even when they affect alcoholic beverages).

365 *Swedenburg*, 358 F.3d at 238. Note, however, that the *Swedenburg* court did not explicitly find that the New York statute was facially discriminatory.

366 *See supra* Part IV.B.1.

'ensuring orderly markets,' we are not sure what that phrase means, but it certainly does not mean discrimination in a way that effectively forecloses out-of-state firms from the Florida market," it seems to hint at the proposed reading.[367] So does the Fourth Circuit, when it lists six valid reasons for North Carolina's three-tier structure, including its direct-shipment laws, but still strikes down the discriminatory portions of the law because "*discriminating* in favor of in-state wineries by vertically integrating its three-tiered regulatory scheme to their economic benefit" does not serve a Twenty-First Amendment interest.[368] In sum, this interpretation is consistent with the holdings in all of the Supreme Court's Commerce Clause/Twenty-First Amendment cases and in all of the circuit court cases to date.

To return to a point raised earlier, there seems to be some confusion, at least among the Fourth and Fifth Circuits, as to whether nonfacially discriminatory direct-shipment laws are valid because they do not violate the Commerce Clause, or rather because they are authorized by the Twenty-First Amendment.[369] The better view seems to be that they are authorized by the Twenty-First Amendment, as part of the state's right to structure its own liquor distribution system, so long as it does not structure that system in a way that constitutes mere protectionism. This is so because there is at least a colorable claim that even nondiscriminatory state laws could violate the Commerce Clause.[370] The reason they should survive is that they are a valid exercise of the states' Twenty-First Amendment power.

To summarize: All states are entitled to set up their own alcohol distribution structure. Some states choose to enact direct-shipment laws to protect the integrity of their chosen structures. As long as those laws do not discriminate against out-of-state producers, they are a valid part of the states' core Twenty-First Amendment authority. If those laws do discriminate, however, they are presumed to be enacted for an improper protectionist purpose, and can only be saved if the state can demonstrate that the law serves a core purpose of the Twenty-First Amendment.

C. Objections and Answers

Although direct-shipment laws have long been part of state regulatory systems (especially the prevalent three-tier distribution system), there are many commentators who argue that all direct-shipment laws

367 *See* Bainbridge v. Turner, 311 F.3d 1104, 1115 (11th Cir. 2002).

368 *Beskind*, 325 F.3d at 516–17.

369 *See supra* text accompanying notes 237–40.

370 *See infra* Part IV.C.

are invalid. These commentators generally focus on traditional Commerce Clause principles and on the nature of the contemporary alcoholic beverages industry to support positions that would severely limit the states' power to manage their alcohol distribution systems.

The basic premise behind the case against direct-shipment laws is the contention that *all* direct-shipping laws place impermissible restraints on interstate commerce. Direct-shipment laws are said to be "per se violations of the Commerce Clause in that they directly regulate interstate commerce and demonstrate a purpose to favor in-state economic interests over out-of-state interests."[371] By enforcing the three-tiered system and prohibiting direct shipments from out-of-state producers, it is argued, states exclude family wineries and other small liquor producers who cannot find wholesalers in certain states' markets.[372] This increases the market share controlled by local industry, because all alcoholic beverage sales must be channeled through "established local distributors."[373]

This argument, however, completely ignores the fact that the Twenty-First Amendment does *something* to make alcohol different. Taking away the states' ability to pass evenhanded direct-shipment laws takes a major step toward robbing the Twenty-First Amendment of all meaning. If states had to justify even nondiscriminatory regulations, one would be hard pressed to identify any way that alcohol is different from any other article of commerce. Moreover, this argument does not account for the fact that the Supreme Court has affirmed the states' right to structure their own liquor distribution systems. Striking down evenhanded direct-shipment laws would leave the structures chosen by many states extremely vulnerable to circumvention. Therefore, it almost certainly cannot be true that all direct-shipment laws are unconstitutional.

The general anti-direct-shipment law view is supported by several more specific arguments. One of the most prevalent is the argument that direct-shipment laws are imposed on the rest of society by special interests—namely wholesalers and distributors eager to maintain control of the liquor market. Opponents of direct-shipment laws point out that most states do not have many wineries, microbreweries, or

371 Shanker, *supra* note 84, at 379; *see also* Molnar, *supra* note 7, at 186 (characterizing direct shipment laws as placing "substantial burdens on interstate commerce that are inimical to established constitutional principles").

372 Douglass, *supra* note 6, at 1622.

373 Molnar, *supra* note 7, at 187; *see also* Douglass, *supra* note 6, at 1625–27 (comparing three-tiered systems to *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), a Supreme Court case rejecting non-facially discriminatory state laws that have the effect of channeling transactions through local businesses).

other types of small producers that would substantially benefit from the ability to ship directly to consumers. The vast majority of those states *do* have wholesalers who would like to hold on to their shares of the market.[374] It is undeniable that wholesalers are the biggest losers when direct-shipment laws are struck down. The typical wholesaler's share of the price of a bottle of wine is eighteen to twenty-five percent. This is more than double the cut of distributors in the food industry.[375] Direct-shipment law opponents point out that wholesalers have well funded and well connected lobbies that are able to convince legislators to push for strict enforcement of direct-shipment laws.[376] It has been noted with some suspicion that these lobbying efforts coincided with the rise of e-commerce, with the Internet threatening to provide a convenient connection between consumers and liquor producers.[377] The clear implication of this aspect of the anti-direct-shipment law position is that direct-shipment laws have an unworthy or improper purpose, and should therefore be struck down.[378]

The other major force behind direct-shipment prohibitions, it is argued, is the states themselves. Many states see direct shipment of alcoholic beverages as a threat to revenue. States collect substantial revenue from excise taxes on alcohol, with collections in the tens and even hundreds of millions of dollars.[379] States fear that if producers were able to avoid three-tier systems by shipping directly to consumers, it would become much more difficult for them to collect taxes. Therefore, opponents argue, direct-shipment bans are a self-serving way for states to preserve their revenues.[380]

Opponents of direct-shipment laws also argue that such laws disproportionately victimize certain groups of people. The most commonly cited victims are small, family wineries and wine enthusiasts. As the number of small-scale domestic producers has risen, many of them have found that they are unable to sell their products in some states. Wholesalers prefer to work with larger producers so that they can enjoy economies of scale.[381] In 1999, 37% of all vintners reported

374 *See* Silvernail, *supra* note 13, at 546–47; Garrone, *supra* note 68, at 65–66.

375 *See* Martin, *supra* note 3, at 5; Freedman & Emshwiller, *supra* note 7.

376 *See* Martin, *supra* note 3, at 5–6.

377 *See* Silvernail, *supra* note 13, at 546.

378 For the most detailed explication of this position, see generally Shanker, *supra* note 84, at 361–69 (conducting a public choice theory analysis of state direct-shipment bans and concluding that the analysis reveals that direct-shipment laws have an improper protectionist purpose).

379 *See* Molnar, *supra* note 7, at 180.

380 *See* Molnar, *supra* note 7, at 180; Silvernail, *supra* note 13, at 546–47.

381 *See* Martin, *supra* note 65, at 68–69; Garrone, *supra* note 68, at 64.

that they were unable to sell their products in at least some states because they were unable to interest a wholesaler in distributing their wines.[382] Direct- shipment provides a way for these vintners to reach customers they might not otherwise be able to reach. They obviously cannot do so in states with direct-shipment laws. Connoisseurs are the other commonly cited victim of direct-shipment laws. If certain wineries cannot reach particular states, the flipside is that consumers in those states often cannot find the wines they desire.[383] This particularly affects oenophiles, since the average consumer is content with the wines that are distributed through the states' three-tier systems.[384] The basic argument here is that the law needs to recognize the reality these victims face, and direct-shipment laws should consequently be struck down across the board.

The improper beneficiaries and improper purposes arguments can be countered on several fronts. First, in many states, three-tier systems and direct-shipment laws date all the way back to the end of Prohibition. These laws were enacted to keep the liquor industry out of the hands of the Mafia or any other large business that might create a "liquor empire" like those present during Prohibition. They were also intended to forestall aggressive marketing and price cutting measures by keeping liquor businesses from controlling all major stages of the distribution process (production, wholesale, and retail). This, it was hoped, would keep liquor consumption under control.[385] There can be no argument that these are compelling state interests. Excise taxes are also important to the states. Alcohol is among the consumer items that brings in the most taxes for states, and it is therefore very important to the states that they be able to collect the taxes on alcohol.[386] Direct-shipment bans facilitate tax collection by channeling liquor through the state regulatory system. Yearly losses to the states from direct-shipment of alcohol have been estimated as being from anywhere in the tens of millions of dollars all the way up to $600 million.[387] The Fourth Circuit Court of Appeals offered the following list of valid justifications: "regulating the consumption of alcoholic beverages, channeling the distribution of alcoholic beverages, enforcing a minimum age for the purchase and consumption of such beverages, limiting the location from where they are sold, controlling the con-

382 Freedman & Emshwiller, *supra* note 7.

383 *See* Douglass, *supra* note 6, at 1622; Kozusko, *supra* note 7, at 101.

384 *See* Martin, *supra* note 65, at 69.

385 Martin, *supra* note 65, at 63–64; Martin, *supra* note 3, at 27–28.

386 *See* Garrone, *supra* note 68, at 65.

387 *See* Martin, *supra* note 3, at 8.

tents of such beverages, and collecting taxes in connection with their sale and distribution."[388]

All of these justifications make it difficult to argue that direct-shipment laws solely exist as a way to advantage wholesalers and state governments. As one commentator on this subject has pointed out, it is difficult to say what prompts a legislature to vote a certain way. While one legislator might be motivated by a desire to help wholesalers, another might feel that direct shipments make it easier for minors to access alcohol (whether that is true or not). One legislator may even have multiple reasons for supporting a law. Because the legislature is made up of many different people with many different motivations, any effort to point to one reason why the legislature passed a certain law is folly.[389] It is not folly to try to determine what the law is, however, and in this case the law allows nondiscriminatory direct-shipment laws. If the Twenty-First Amendment authorizes nondiscriminatory direct-shipment laws, it does not matter who the beneficiaries are; the fact is that the states have the power and have chosen to use it.

Then there is the implied charge that states are only enforcing their direct-shipment laws more stringently now because they fear that the Internet will lead to a rise in direct shipping. First of all, the fact that an innovation increases the risk that a law will be violated is a perfectly legitimate reason for a state to heighten its enforcement efforts. Second, it may actually be direct-shipment law opponents who expect things to change because of the Internet. There seems to be a certain amount of sentiment that the Internet has changed things, and that the old rules do not apply.[390] However, there is no reason why everything that is capable of being sold over the Internet should therefore be unrestricted. The old rules still do apply, and states remain just as free to enforce their alcohol regulatory systems as they were before the advent of the Internet.[391]

As for the argument that certain groups are disproportionately victimized, it too says nothing about the legal status of direct shipping laws. As the Second Circuit argued: "Changes in marketing techniques or national consumer demand for a product do not alter the meaning of a constitutional amendment."[392] The argument is also

388 Beskind v. Easley, 325 F.3d 506, 516 (4th Cir. 2003).

389 *See, e.g.*, Miller, *supra* note 24, at 2547–48.

390 Denning, *supra* note 116, at 336.

391 *See id.*; *see also* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 823–25 (2001) (explaining that the fact that the communication before a sale took place over the Internet does not change the nature of the legal inquiry into whether the state may regulate that sale).

392 Swedenburg v. Kelly, 358 F.3d 223, 239 (2d Cir. 2004).

somewhat disingenuous. While it is true that wholesaler groups can wield great influence in many states, wineries and other small producers are hardly helpless. Wineries have their own industry groups, such as the American Vintners Association and the Wine Institute, which are active in lobbying and in litigation efforts.[393] They have also been supported by e-commerce groups like the Association for Interactive Media, which has a list of members including the *New York Times*, the *Chicago Tribune*, Intel, and Yahoo!. These groups fear that if states are allowed to limit online wine sales, it will be easier for states to place limits on other types of e-commerce.[394] Finally, the purpose of government is not to try to create the mix of laws that best accommodates small wineries and wine connoisseurs. The purpose is to create laws that benefit society as a whole, and the U.S. government decided seventy years ago that local control of alcohol regulation works best.[395] If wineries and oenophiles suffer harms as a result, it is unfortunate, but it does not change the law.

Another prevalent argument invoked against direct-shipment laws is that they do not serve the core purposes of the Twenty-First Amendment and should therefore be invalidated in all cases. Opponents generally characterize the states as offering two main justifications for direct-shipment laws: raising revenue and preventing underage drinking. Opponents attempt to prove that direct-shipment laws do not promote those goals. As to the first justification, revenue, opponents argue that state losses from direct shipments are minimal, as most liquor is still sold through the three-tier system and alcohol taxes account for only a small percentage of state incomes in the first place.[396] Moreover, some argue, states face difficulty collecting taxes on out-of-state purchases of other goods, and there is no logical reason why states have any more right to collect taxes on alcohol than on any other good.[397] The argument is also made that states are currently working on efforts to find ways to tax Internet and mail order transactions, and that whatever solutions the states find could then be

393 *See* Garrone, *supra* note 68, at 67.

394 *See* Martin, *supra* note 3, at 8.

395 *See, e.g.*, Spaeth, *supra* note 9, at 203 ("As this country learned through the temperance embroilments of the 1880s and Prohibition, liquor is like nothing else. For no other item is state and local control so necessary, and for no other item does the United States Constitution expressly provide for state control.").

396 *See* Douglass, *supra* note 6, at 1652; Martin, *supra* note 65, at 95; Molnar, *supra* note 7, at 180.

397 *See* Foust, *supra* note 10, at 691; Molnar, *supra* note 7, at 180; Shanker, *supra* note 84, at 358.

applied to direct shipments of liquor.[398] According to direct-shipment law opponents, all of this proves that direct-shipment laws are either ineffective at, or unnecessary to, raising state revenue.

Opponents also say that the justification of preventing underage access to alcohol is equally unavailing. They point out that it would be much easier for a teen to obtain false identification and go to a liquor store. This is so because Internet wine purchases generally take several days before the product arrives. Also, wine purchased online is generally more expensive boutique and gift-type wine that is beyond the liquor budgets of most teens.[399] Moreover, it is argued, the goal of preventing access to minors can be achieved by less restrictive means—one solution would be for carriers to require identification and adult signatures upon delivery.[400] Indeed, some common carriers have already put into place special safeguards for delivery of alcoholic beverages.[401]

Once again, these arguments can be answered by reference to the list of proper purposes mentioned above. However, the most important point is that these arguments focus on proving that the state's regulatory efforts are unnecessary or ineffective, when the real point is whether the state is authorized to use those measures. The fact is that the states have the right to set up their own liquor regulatory systems. That right does not hinge on the effectiveness or the necessity of a state's chosen regulatory system. It might make a difference if a state's chosen regulatory system was facially discriminatory, but that is not the argument here. Just because direct-shipment law opponents can raise doubts about two common justifications for direct-shipment laws does not change the fact that the Twenty-First Amendment gives states the right to enact non-facially discriminatory direct-shipment laws.

While many objections are raised over nondiscriminatory direct-shipment laws, the Twenty-First Amendment authorizes the states to set up their own liquor regulatory structure. It may be true that small wineries are the unfortunate victims of such laws, but that does not change the extent of the states' Twenty-First Amendment power. As long as state direct-shipment laws are not facially discriminatory and thus clearly protectionist, they are a valid part of the states' regulatory regimes, and should be upheld.

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398 *See* Martin, *supra* note 65, at 95–96; Douglass, *supra* note 6, at 1652.

399 *See* Martin, *supra* note 65, at 93–94; Foust, *supra* note 10, at 690; Molnar, *supra* note 7, at 179–80.

400 *See* Douglass, *supra* note 6, at 1652; Foust, *supra* note 10, at 691.

401 *See* Martin, *supra* note 3, at 7.

CONCLUSION

While wineries and oenophiles have had some success in having discriminatory direct-shipment laws struck down, the fight has only just begun. If recent history is any indication, more states will find themselves in court defending their direct-shipment laws. Moreover, even nondiscriminatory direct-shipment laws may soon be subject to challenge, since they are as harmful to out-of-state wineries as discriminatory laws.

If, however, recent cases and Supreme Court precedent are to be reconciled, courts must reach different results in cases where direct-shipment laws discriminate and cases where the laws do not discriminate. By doing so, courts will be mindful of the states' Twenty-First Amendment right to structure their own alcohol regulatory systems. They will also be mindful of the fact that the Twenty-First Amendment does not exist to excuse bald protectionism. While small wineries and wine collectors may not like it, that is the law, forged by history, interpreted by the Supreme Court, and hopefully to be applied by the courts in the future.