

**A VINTAGE CONFLICT UNCORKED: THE 21ST AMENDMENT,
THE COMMERCE CLAUSE, AND THE FULLY-RIPENED FIGHT
OVER INTERSTATE WINE AND LIQUOR SALES**

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INTRODUCTION

In the seven decades since the United States sounded the death knell of the “Noble Experiment”¹ by ratifying the Twenty-first Amendment to the Constitution, Prohibition’s legacy has remained in statutes and on dockets across the nation. State statutes codifying the powers believed to be granted to the states by the Amendment’s second clause, which has long been interpreted as carving a niche out of the Commerce Clause for state regulation of alcohol, have repeatedly been challenged as unconstitutional by interested parties seeking to unburden the interstate commerce of wine and liquor. A recent spate of such cases has arisen largely due to increasing interest in national wine sales over the Internet. These cases, which have been winding their way through several judicial circuits over the last several years, have created a legal conflict that the Supreme Court must resolve. The Court has heeded the call to clarify the placement of the line dividing permissible state regulation and unconstitutional encroachment on interstate commerce, and it should narrowly construe section two of the Twenty-first Amendment, as has been its trend in recent years, to foster more vigorous interstate commerce, in line with other industries in this age of e-commerce.

Prohibition, though instituted earlier by Congressional mandate, was formally constitutionalized by the ratification of the Eighteenth Amendment on January 16, 1919.² From the beginning, Prohibition was met with wide-scale noncompliance and fostered the development of organized criminal enterprises, which satisfied the public’s

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¹ See *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 856 n.7 (S.D.N.Y. 1985) (“President Herbert Hoover, who had some difficulty in deciding whether he was a Wet or a Dry, coined this expression for National Prohibition.”).

² U.S. CONST. amend. XVIII (repealed 1933).

call for intoxicating liquors.³ The states finally ended this “Noble Experiment”⁴ on a national level with the ratification of the Twenty-first Amendment on December 5, 1933. The Amendment reads:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.⁵

The second section of the Amendment is the focus of this Comment. In the discussion that follows, this Comment will examine both the text and context of the Amendment and its ratification.

The substance of this Comment discusses the conflict between Section 2 of the Twenty-first Amendment, as seen above, and the Commerce Clause, granting Congress the “power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”⁶ Since the Marshall Court’s expansive interpretation in *Gibbons v. Ogden*,⁷ the strength of the Commerce Clause has gradually expanded and contracted depending in part on the proclivities of the sitting Court and other attendant circumstances.⁸ Recent Supreme Court decisions have shown a trend toward shrinking Congress’s permissible sphere of Commerce Clause action, while upholding the federal preemption aspect of the dormant Commerce Clause.⁹

³ See, e.g., JOHN D. HICKS, *REPUBLICAN ASCENDANCY* 178 (1960) (describing the lack of enforcement of Prohibition and the availability of alcohol to whomever was interested).

⁴ See *supra* note 1 and accompanying text.

⁵ U.S. CONST. amend. XXI.

⁶ U.S. CONST. art. I, § 8, cl. 3.

⁷ 22 U.S. (9 Wheat.) 1 (1824) (establishing that state laws may not collide “with an act of Congress, and deprive a citizen of a right to which that act entitles him,” regardless of whether those laws were passed “in virtue of a concurrent power” or “a power to regulate their domestic trade and police”).

⁸ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 5-4 to 5-8, at 305-17 (2d ed. 1988) (describing the changing modes of Supreme Court review of Commerce Clause cases); Joshua A. Klein, Note, *Commerce Clause Questions After Morrison: Some Observations on the New Formalism and the New Realism*, 55 STAN. L. REV. 571, 574-76 (2002) (discussing the Supreme Court’s approach to Commerce Clause litigation from *Gibbons v. Ogden* to the present day).

⁹ Compare *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the federal civil remedy aspect of the Violence Against Women Act as beyond the scope of Congress’s commerce power), and *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990 as exceeding the authority of Congress), with *Amer. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) (striking down California’s Holocaust Victim Insurance Relief Act of 1999 as preempted by federal foreign policy power), and *Crosby v. Nat’l Foreign Trade*

The conflict between the Commerce Clause and Section 2 of the Twenty-first Amendment is not new and has, in fact, been the subject of occasional litigation since shortly after the ratification of the Amendment.¹⁰ Why then is there this renewed and widespread interest in this debate? The development of the Internet into a worldwide commercial medium over the last decade has changed people's expectations with respect to what they should be able to buy and from where they should be able to buy it. The growth of Internet commerce continues to be precipitous, with experts predicting strong growth for the immediate future.¹¹ Furthermore, direct shipment of wine from producer to consumer, skipping the retail middleman, has increased over the same time period, and promises to continue its growth.¹² However, state statutes forged under the power granted by the Section 2 of the Twenty-first Amendment have stifled or halted this growth. These are the statutes that recent and ongoing litigation challenges and this litigation is the subject of this Comment.

This Comment consists of three parts. In Part I, I will provide a history of the problem, with an eye towards the drafting and passage of the Twenty-first Amendment and Supreme Court jurisprudence from ratification through the mid-1990s and the development of the dormant Commerce Clause. In Part II, I will survey the out-of-court facets of this debate and then provide a comprehensive analysis of the

Council, 530 U.S. 363 (2000) (striking down a Massachusetts statute restricting trade with "Burma").

¹⁰ The first such case was *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), discussed below. See *infra* Part I.A.3.

¹¹ As one source reported:

The 200M Americans who now have web access are likely to spend more than \$120 billion online this year. And that is only part of the story. E-commerce has not only grown into a huge thing in its own right, it has done so in a way that will change every kind of business, offline as well as online.

E-Commerce Takes Off, ECONOMIST, May 15, 2004, at 9. See, e.g., Bob Tedeschi, *More Canadians Than Americans Use the Internet, but They Do Far Less of Their Shopping There*, N.Y. TIMES, Jan. 26, 2004, at C5 ("Patti Freeman Evans, an analyst with Jupiter Research, an online consulting firm, released a report last week predicting that annual Internet retail spending would nearly double in the United States from now to 2008, reaching \$117 billion from a projected \$65 billion this year."); Nick Wingfield, *Internet 2.0: E-tailing Comes of Age*, WALL ST. J., Dec. 8, 2003, at B1 ("Consumers are expected to spend \$12.2 billion online this year in the Thanksgiving-to-Christmas period, up 42% from last year, according to Forrester Research of Cambridge, Mass. The growth reflects a steady shift of retail spending to the online world, as consumers grow more comfortable with the Internet . . .").

¹² *E-Commerce: The Case of Online Wine Sales and Direct Shipment: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the House Comm. on Energy and Commerce*, 108th Cong. 13 (2003) (statement of Todd Zywicki, Director, Office of Policy Planning, Federal Trade Commission) ("From 1994-99, consumers doubled the amount of money they spent having wine shipped directly to them to around \$500 million, or about 3% of the total spent on wine. According to some private estimates, online wine sales could account for 5-10% of the market within a few years.") (summarizing 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).

relevant recent and ongoing litigation, identifying issues that the Supreme Court needs to resolve when it hears these cases this term. In Part III, I will propose an approach for the Supreme Court to take in resolving these issues. I also propose a model state law, which will retain state power as envisioned by the Twenty-first Amendment, but allow for greater free trade of alcohol.

I. A HISTORY OF THE PROBLEM

A. *Rise and Fall and Rise of Prohibition*

Under the lens of seventy years' worth of retrospection, Prohibition appears to be the legal and political odd-man-out.¹³ In the history of the republic the arduous mechanism of constitutional amendment had never been used to address matters as mundane as the manufacturing and sale of a single class of products until the passage and ratification of the Eighteenth Amendment. A quick glance at the seventeen amendments preceding Prohibition shows that they concern the structure of government and other issues of fundamental rights, such as the various freedoms and protections of the Bill of Rights and the post-Civil War amendments.¹⁴

1. *Prohibition: Before and During*

Proponents of Prohibition¹⁵ were not sated by the string of federal statutes enacted to empower the states to handle the issue of alcohol importation on their own, many of which were struck down by the Supreme Court. Starting in 1890 with the Wilson Act,¹⁶ Congress

¹³ See, e.g., Michael D. Schaffer, *For Constitution, Change Does Not Come So Easily*, PHILA. INQUIRER, Feb. 25, 2004, at A11 ("Although constitutional amendments have had profound social implications, only once has an amendment taken aim at a specific social issue 'The United States has experimented with social legislation in the Constitution only one time, with Prohibition, and that was widely considered a failure.'") (quoting University of Pennsylvania Professor of Law Nathaniel Persily); John Yoo, *Let States Decide*, WALL ST. J., Feb. 27, 2004, at A8 (comparing the majority of existing amendments whose purpose is to ensure "equal and fair treatment by the government" with the "most notable effort to regulate purely private conduct—the 18th Amendment's establishment of Prohibition" that "failed miserably and led to the rise of organized crime.").

¹⁴ See U.S. CONST. amends. I–XVII.

¹⁵ See ANN-MARIE E. SZYMANSKI, *PATHWAYS TO PROHIBITION 23–64* (2003) (discussing the organizational approach of the anti-liquor movement from the late 1800s up to Prohibition, including the Prohibition Party, Anti-Saloon League, and the Women's Christian Temperance Union, among others).

¹⁶ The Act reads:

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same

granted to the states broadening regulatory powers to restrict the importation of alcoholic beverages that would have otherwise violated the “dormant” powers of the Commerce Clause.¹⁷ Despite Congress’s expressed intent to empower the states, the Court continued to restrict the powers granted to the states in this area, leading to Congress’s passage of the Webb-Kenyon Act of 1913, which contained language similar to the eventual Section 2 of the Twenty-first Amendment:

The shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . or from any foreign country into any State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State . . . is hereby prohibited.¹⁸

This Act was upheld by the Court in *Clark Distilling Co. v. Western Maryland Railway Co.*,¹⁹ just two years before the Eighteenth Amendment decisively nationalized Prohibition.

The constitutionalization of national Prohibition is something of an enigma in American legal and political history. Some see the passage and ratification of the Eighteenth Amendment as one result of the confluence of a broadening sense of national regulatory power and the desperation of wartime.²⁰ Whatever the driving reasons for its passage, the Eighteenth Amendment ran into numerous enforcement problems from its inception.²¹ It was only slightly more difficult

extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Wilson Act, ch. 728, 26 Stat. 313 (1890). The passage of the Wilson Act was Congress’s response to *Leisy v. Hardin*, where the Court held that:

The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted.

135 U.S. 100, 119 (1890).

¹⁷ See Abigail B. Pancoast, Comment, *A Test Case for Re-Evaluation of the Dormant Commerce Clause: The Maine Rx Program*, 4 U. PA. J. CONST. L. 184, 191–92 (2001) (“[I]n areas of interstate commerce that Congress has not expressly regulated, states may not impose laws that facially discriminate against interstate commerce, nor may they impose laws that excessively burden interstate commerce even if they do not facially discriminate.”); see also discussion *infra* Part I.B (describing the development of the dormant Commerce Clause).

¹⁸ 27 U.S.C. § 122 (2002).

¹⁹ 242 U.S. 311 (1917) (holding that Congress, when acting within its powers, may grant power to the states to act in areas otherwise precluded by the federal commerce power).

²⁰ See, e.g., HICKS, *supra* note 3, at 177 (“To a very considerable extent the Eighteenth Amendment was a wartime legacy. It was submitted early in the war when the expansion of national powers was at its peak.”).

²¹ See NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 22 (1931) (“The Census Bu-

to buy liquor under Prohibition than it had been prior to its passage, and many people considered it righteous or fashionable to stand up to this expansion of legal authority.²²

While the benefit of hindsight has accorded us a view of Prohibition as a momentary lapse of reason or a temporary overreaction to the outcry of a particular social or political group, observers at the time saw Prohibition and its tenacious supporters as an undefeatable force and permanent reality of American law and politics.²³ Clearly, this latter view proved false and the trend towards repeal picked up steam toward the end of the 1920s.

2. *Rolling Towards Repeal*

No matter how many people or organizations favored the idea of Prohibition before the Eighteenth Amendment and during the dozen years of its enforcement,²⁴ its implementation was universally acknowledged as a failure.²⁵ This failed extension of federal authority was recognized in the 1932 election, when both parties' platforms called for repeal.²⁶ The Senate quickly went to work to effectuate this mandate, and the Judiciary Committee reported the joint resolution that developed into the Twenty-first Amendment within the first two

reau figures for the year 1929 . . . indicate that after a brief period in the first years of the amendment there has been a steady increase in drinking.”).

²² See HICKS, *supra* note 3, at 178 (“People who wished to drink had no notion of being deprived of their liquor . . . ; indeed, it became the smart thing to drink, and many who had been temperate in their habits before were now moved to imbibe freely as a protest against the legal invasion of their ‘personal liberty.’”).

²³ See, e.g., DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 53–70 (2000) (“The Eighteenth Amendment appeared as impregnable as a medieval stone fortress to a band of ill-equipped foot soldiers, and complaining about its constitutional deficiencies seemed about as effective as kicking the base of the fortress wall.”); HOWARD LEE MCBAIN, PROHIBITION LEGAL AND ILLEGAL 17 (1928) (“Political prophecies are perilous; but it is highly improbable that the eighteenth amendment will ever be ripped from the side of the constitution or even be substantially altered by the constitutionally prescribed method of amendment.”).

²⁴ See EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 147–60 (1996) (illustrating the arguments employed by Prohibition’s supporters during the 1920s); KYVIG, *supra* note 23, at 53–70 (describing the strength of the anti-repeal forces in the late 1920s).

²⁵ See Sidney J. Spaeth, *The Twenty-first Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 176–80 (1991) (“Federal efforts at regulating alcoholic beverages failed during Prohibition. Even when federal efforts were focused on a particular concern . . . the problem persisted.”).

²⁶ 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, 303 (2002) (describing the political situation regarding Prohibition in 1932).

months of the term.²⁷ The proposed amendment initially consisted of four sections.²⁸

Section 2 of Senate Joint Resolution 211²⁹ became Section 2 of the Amendment, and its sponsors saw it as a way to preserve the state authority over alcohol regulation found in the Webb-Kenyon Act. The third section proved the most controversial, calling for concurrent federal power intended to prevent the reappearance of the saloon.³⁰ Recorded Senate debates reveal strong opposition to section 3 based on fears of congressional encroachment on state authority.³¹ These objections led the Senate to remove section 3, allowing the Senate to pass the resolution. Despite the usually slow-moving amendment process, the Twenty-first Amendment was ratified by thirty-six of the forty-eight states before the end of 1933.³²

Different perspectives emerged regarding the purpose of the Amendment. Some scholars have described the two leading views as the “federalist” and “absolutist” perspectives.³³ The clash between these interpretations is at the core of the current debate, even if neither interpretation has been fully embraced. Put succinctly,

²⁷ *Id.* at 303–07 (recounting the Senate debate on sections 2 and 3 of Senate Joint Resolution 211).

²⁸ S.J. Res. 211, 72d Cong. 2d Sess., 76 CONG. REC. 4138, 4139 (1933). The original proposal read:

- Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
- Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
- Sec. 3. Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.
- Sec. 4. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Id.

²⁹ *Id.*

³⁰ See Denning, *supra* note 26, at 303 (“[Resolution] 211 [section 3] . . . allowed for concurrent federal power ‘to regulate or prohibit the sale of intoxicating liquor to be drunk on the premises where sold’—a provision squarely aimed at ensuring that, no matter what, the Nation would be spared the return of the dreaded ‘saloon.’”); 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, 1632–35 (2000) (recounting the congressional history of S.J. Res. 211).

³¹ *Id.*

³² U.S. Gov’t Printing Office, The Constitution of the United States of America: Text of the Amendments, <http://www.gpoaccess.gov/constitution/html/conamt.html> (last visited Sept. 30, 2004).

³³ See Spaeth, *supra* note 25, at 180–83 (crediting the use of these terms to Michael E. Loomis, Note, *Federal District Court Exempts Interstate Rail Carrier from State Open Saloon Prohibition*, 6 CREIGHTON L. REV. 249, 252–53 (1972)).

[t]he “federalist” view was that section two merely protected dry states: that is, states that allowed the importation, manufacture, or sale of intoxicating liquor gained no new powers vis-à-vis the federal government under the amendment. The “absolutists” believed that the section gave states plenary power to regulate the evils associated with intoxicating beverages.³⁴

Recent court decisions have been split as to whether to look to the context of the Amendment and its passage or simply to apply the text itself. In deciding whether or not to invalidate state alcohol statutes, courts have examined the “core concerns” of the Amendment—for example, promoting temperance—in seeking to determine whether the statute in question addresses those concerns narrowly or is impermissibly broad.³⁵

3. *The Early Trend of Interpretation: Total State Control*

Before discussing the recent cases in this area, I will survey the Supreme Court’s interpretations of the scope of the Twenty-first Amendment beginning shortly after ratification and proceeding up through the mid-1990s. While some of these cases differ factually and circumstantially from the current field of Twenty-first Amendment cases, they give context and contour to the legal landscape upon which the current cases are being litigated.

In the first instance of interpretation, a mere three years after ratification, the Supreme Court sided strongly with the states’ rights to regulate the importation of liquor, acknowledging that “[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for [the] privilege [of importing beer].”³⁶ In *State Board of Equalization v. Young’s Market Co.*, the plaintiffs, “domestic corporations and individual citizens of California,” sued to enjoin the state from enforcing a \$500 importer’s license fee, claiming that the fee violated both the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment.³⁷ The Court found both arguments unconvincing and ruled for the defendants, but not before giving some definition to the bounds of the Twenty-first Amendment.

³⁴ *Id.* at 181.

³⁵ *See, e.g.,* Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002) (“But if the State demonstrates that its statutory scheme is closely related to a core concern of the Twenty-first Amendment and not a pretext for mere protectionism, Florida’s statutes can be upheld.”).

³⁶ *State Bd. of Equalization v. Young’s Market Co.*, 299 U.S. 59, 62 (1936).

³⁷ *Id.* at 60–61. The Court rejected the discrimination prong of the Commerce Clause argument, finding that the Commerce Clause analysis rested not on disparate treatment between in-state and out-of-state corporations or individuals, but rather on the effect that any licensing scheme had on interstate commerce. *Id.* at 62.

The extent of permissible state power under the Amendment becomes clear from Justice Brandeis's rejection of plaintiff's argument: "The amendment . . . abrogated the right to import free, so far as concerns intoxicating liquors. 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."³⁸ Brandeis goes on to comment that the plaintiffs' request that the Court require equal treatment of in-state manufacturers and sellers and out-of-state importers, "would involve not a construction of the amendment, but a rewriting of it."³⁹ The Court's opinion, as expressed by Justice Brandeis, was that Section 2 of the Twenty-first Amendment rendered inactive with respect to alcohol the Commerce Clause's proscription of discriminatory treatment between in-state and out-of-state parties.

Young's Market established the framework for early Supreme Court interpretation of the Twenty-first Amendment and the foundation for these initial expressions of state plenary power.⁴⁰ In *Mahoney v. Joseph Triner Corp.*, the Court ruled that states had a wide sphere of permissible action to regulate liquor traffic under the Twenty-first Amendment.⁴¹ The decision upheld a Minnesota statute which the plaintiff corporation alleged violated the Equal Protection Clause of the Fourteenth Amendment because it required that brands of imported liquor containing more than twenty-five percent alcohol must be registered with the Patent Office.⁴² The Court, in line with its *Young's Market* framework, agreed with the defendant state officials who argued that, "since the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor."⁴³ These decisions echo the above-mentioned congressional discussion about preserving and strengthening state control over alcohol regulation.

In a pair of decisions handed down on the same day, the Supreme Court took a strong stance on the question as to whether the Twenty-first Amendment is in conflict with or wholly supercedes the Commerce Clause in the area of policing the liquor trade.⁴⁴ *Indianapolis*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Justice Brandeis authored a number of these opinions that protect a large sphere of state regulatory authority with respect to alcohol. See *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939) (holding that states' rights to regulate the importation of intoxicating liquors are not limited by the Commerce Clause); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939) (same); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (holding that "the Equal Protection Clause is not applicable to imported intoxicating liquor").

⁴¹ 304 U.S. at 403.

⁴² *Id.* at 402-03.

⁴³ *Id.* at 403.

⁴⁴ See *Finch & Co.*, 305 U.S. 395; *Indianapolis Brewing Co.*, 305 U.S. 391.

*Brewing Co. v. Liquor Control Commission*⁴⁵ challenged, on Commerce Clause and Equal Protection Clause grounds, the Michigan Liquor Control Act, which prohibited Michigan dealers from selling beer manufactured in any state, which by its law, discriminated against Michigan beer. *Joseph S. Finch & Co. v. McKittrick*⁴⁶ challenged a similar Missouri statute on these same grounds. Citing *Young's Market* and *Mahoney*, the Court stated clearly in both opinions, in effectively identical passages, that “[s]ince the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause.”⁴⁷

In an equally strong opinion later that year, the Court affirmed the application of a Kentucky statute prohibiting a contract carrier from transporting whiskey from Kentucky distillers to Chicago purchasers without a license and held that denial of such a license was not contrary to the Commerce, Due Process, or Equal Protection Clauses of the Constitution.⁴⁸ In disposing of this matter concisely, the Court reiterated its rule that “although regulation by the state might impose some burden on interstate commerce this was permissible when ‘an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.’”⁴⁹ In the Court’s eyes, the Twenty-first Amendment created such a situation.

These five cases marked a clear pronouncement of the Court’s initial approach toward interpreting the Twenty-first Amendment; namely, that the states had and would have broad license to regulate liquor traffic.

4. *Chipping Away at State Control*

Despite these broad pronouncements of the totality of state authority, the Court did slowly recognize areas where the powers granted by the Twenty-first Amendment had to be curtailed. In the midst of early interpretations of the Amendment, the Court decided *Collins v. Yosemite Park & Curry Co.*,⁵⁰ holding that state authority did not apply in areas under the jurisdiction of the federal government,

⁴⁵ 305 U.S. 391.

⁴⁶ 305 U.S. 395. This was actually a combined decision, addressing four other suits against McKittrick, attorney general of Missouri. The other plaintiffs were Ben Burk, Joseph E. Seagram & Sons, Hinrichs Distilled Products, and Arrow Distilleries.

⁴⁷ *Indianapolis Brewing Co.*, 305 U.S. at 394.

⁴⁸ *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939).

⁴⁹ *Id.* at 141 (quoting *S.C. Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938)).

⁵⁰ 304 U.S. 518 (1938).

such as parks⁵¹ and federal military reservations,⁵² even when these areas were within the territorial borders of that state.

In *Collins*, California attempted to apply its Beverage Control Act to a corporation operating hotels, camps, and stores within Yosemite National Park. The park had been ceded to the federal government in 1919, with the state reserving “the right to tax persons and corporations, their franchises and property on the lands included in said parks.”⁵³ The Court held that in the absence of a specific contract reserving such rights, “such regulatory provisions as are found in the California Beverage Control Act are unenforceable in the Park.”⁵⁴ In so concluding, the Court clearly stated, “[w]here exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable.”⁵⁵ This was the first statement of the Court in any way limiting the scope of state authority granted by the Twenty-first Amendment.

Though not constituting direct assaults on state power arising from the Amendment, *Jameson & Co. v. Morgenthau*⁵⁶ and *United States v. Frankfort Distilleries, Inc.*⁵⁷ established that the federal government is not without the authority to regulate interstate commerce in liquor, thus allowing these Sherman Act prosecutions to stand.⁵⁸ One year after *Frankfort Distilleries*, this concept was reiterated in a footnote of an opinion where the Court noted that “even the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the

⁵¹ *Id.* at 530.

⁵² See *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383 (1944) (ordering the State of Oklahoma to return 225 cases of wine it had confiscated that were destined for a federal military reservation).

⁵³ 304 U.S. at 525 (quoting 1919 Cal. Stat. 51).

⁵⁴ *Id.* at 530.

⁵⁵ *Id.* at 538.

⁵⁶ 307 U.S. 171 (1939).

⁵⁷ 324 U.S. 293 (1945).

⁵⁸ In *Frankfort Distilleries*, the Court stated:

[g]ranting the state’s 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, it does not follow from that fact that the United States is wholly without power to regulate the conduct of those who engage in interstate trade outside the jurisdiction of [a particular state].

Id. at 299. The Court had previously recognized the co-existence of some congressional authority with the state power granted by the Amendment to regulate interstate commerce in alcoholic beverage:

[T]he Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the Commerce Clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States. We see no substance in this contention.

Jameson & Co., 307 U.S. at 172–73.

States the highest degree of control, is not altogether beyond the reach of the federal commerce power.”⁵⁹

5. *The Tide Begins to Turn Against the Twenty-first*

After nearly two decades of dormancy, the Court repeated, in a pair of same-day decisions written by Justice Stewart, the principle it had articulated in *Collins*: there exist both geographical and substantive legal areas where states cannot exercise their Twenty-first Amendment powers.⁶⁰ The first of these cases, *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,⁶¹ addressed New York’s attempt to prevent duty-free liquor sales in John F. Kennedy International Airport, where the products sold were transported directly out of the country under the supervision of the United States Bureau of Customs. Analogizing to *Collins*, the Court held that New York may not “prevent completely the transportation of liquor across [its] territory for delivery and use in a federal enclave within it.”⁶² *Hostetter* represents the first judicial invalidation of a state alcohol regulation since the years leading up to Prohibition.

In his dissent, Justice Black argues that the Twenty-first Amendment saves the New York statute from the type of federal conflict which causes the majority to invalidate it.⁶³ Black goes on to give a brief history of the above-mentioned Senate debates, concluding that “[t]he invalidation of New York’s regulation . . . makes inroads upon the powers given the States by the Twenty-first Amendment. Ironically, it was against just this kind of judicial encroachment that Senators were complaining when they agreed to [Senate Joint Resolution] 211 and paved the way for the Amendment’s adoption.”⁶⁴

In the next breath after *Hostetter*, the Court invalidated the application of a Kentucky tax levied against a foreign whisky importer.⁶⁵ In contrast to the current docket of cases on this issue which rely on the Commerce Clause, *Department of Revenue v. James B. Beam Distilling Co.* rested on the Court’s ruling that the Twenty-first Amendment did not abrogate the Constitution’s absolute ban on “imposts or duties on

⁵⁹ *Nippert v. City of Richmond*, 327 U.S. 416, 425 n.15 (1946) (invalidating a municipal ordinance requiring solicitors to pay license fee because of the likelihood of exclusion or discrimination against interstate commerce, in favor of local businesses).

⁶⁰ For a strong criticism of Justice Stewart’s opinions in these cases, see Denning, *supra* note 26, at 316–24.

⁶¹ 377 U.S. 324 (1964).

⁶² *Id.* at 333.

⁶³ *Id.* at 335 (Black, J., dissenting).

⁶⁴ *Id.* at 340.

⁶⁵ *Dep’t of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964) (affirming the Kentucky court’s holding that Kentucky’s tax was impermissible).

imports or exports”⁶⁶ found in the Export-Import Clause.⁶⁷ The Court distinguished the Export-Import Clause from the Commerce Clause on the grounds that the power vested in the Commerce Clause is generalized, while the Export-Import Clause contains a specific, flat prohibition.⁶⁸

While neither *Hostetter* nor *Beam Distilling Co.* provide clear answers for the questions raised in the ongoing Twenty-first Amendment litigation, they stand as a collective turning point in judicial thinking about the Amendment. Looking beyond these cases, there is no longer the presumption of the Amendment’s omnipotence in the face of other constitutional or federal law that existed after *Young’s Market* and the other late 1930s cases.

6. State Power Continues to Shrink

In the tradition of *Hostetter* and *Beam Distilling Co.*, a series of cases in the 1970s and early 1980s further tore down the presumption that state alcohol statutes were invulnerable to conflicts with federal law. In 1971, the Court struck down a Wisconsin statute allowing a range of local officials to post public notices declaring that a given individual, who, by excessive drinking, has “expose[d] himself or family to want” or endangered himself or the public, is prohibited from buying or receiving gifts of liquor.⁶⁹ After noting that the Twenty-first Amendment gives broad authority to the states, the Court held that this labeling statute violated procedural due process and that the Twenty-first Amendment did not save that statute.⁷⁰

A few years later, the Court held that state statutes enacted under the broad powers of the Twenty-first Amendment could not survive a collision with the Fourteenth Amendment’s Equal Protection Clause. Oklahoma had enacted a statute prohibiting the sale of low-alcohol beer to males under the age of twenty-one and to women under the age of eighteen. The Court was very clear in its ruling that “[the] Twenty-first Amendment does not save the invidious gender-based

⁶⁶ U.S. CONST. art. I, § 10, cl. 2. The clause reads in relevant part:

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

Id.

⁶⁷ 377 U.S. at 343 (“The tax here in question is clearly of a kind prohibited by the Export-Import Clause”).

⁶⁸ *Id.* at 344.

⁶⁹ *Wisconsin v. Constantineau*, 400 U.S. 433, 434 n.2 (1971).

⁷⁰ *Id.* at 436.

discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment.⁷¹

The Court's discussion of the scope of the Twenty-first Amendment is particularly interesting, given the current litigation and debate:

[T]he Amendment primarily created an exception to the normal operation of the Commerce Clause. Even here, however, the Twenty-first Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision "be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."⁷²

This is the type of language that those in favor of minimal state regulation would have cheered at the time, but they were soon to receive stronger precedential tools.

In another Sherman Act case, the Court further diluted the strength of state statutes when coming in conflict with federal power.⁷³ In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, the Court's pronouncements that "there is no bright line between federal and state powers over liquor,"⁷⁴ and that "[state] controls may be subject to the federal commerce power in appropriate situations . . . [which] can be reconciled only after careful scrutiny of those concerns in a 'concrete case,'"⁷⁵ bolstered the trend of the Supreme Court's Twenty-first Amendment jurisprudence towards limiting state power in this area, which had started in the mid-1960s. This ruling would be supported in a later antitrust case, further challenging the imperviousness of state alcohol regulations.⁷⁶ This trend was in clear contradiction to those Supreme Court rulings that came shortly after ratification of the Amendment⁷⁷ and this trend would continue.

If *Midcal* blurred the line between federal and state authority over alcohol regulation, then *Bacchus Imports, Ltd. v. Dias*⁷⁸ simply erased and redrew it, shrinking the state sphere of action. The plaintiffs in *Bacchus* challenged the constitutionality of Hawaii's liquor tax, which called for a twenty percent excise tax imposed on sales of liquor at

⁷¹ *Craig v. Boren*, 429 U.S. 190, 204–05 (1976).

⁷² *Id.* at 206 (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)).

⁷³ *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

⁷⁴ *Id.* at 110.

⁷⁵ *Id.* (quoting *Hostetter*, 377 U.S. at 332).

⁷⁶ See *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (applying the *Midcal* standard to invalidate a New York liquor pricing system as violating § 1 of the Sherman Act).

⁷⁷ See *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938) ("[S]ince the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor."); *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59, 62 (1936) ("The Amendment . . . abrogated the right to import free, so far as concerns intoxicating liquors.");

⁷⁸ 468 U.S. 263 (1984).

wholesale, and the exemption scheme for specific locally produced alcoholic beverages.⁷⁹ Finding that the Hawaiian legislature enacted the tax exemptions for the purpose of “aid[ing] Hawaiian industry,”⁸⁰ and thus that the exemptions constituted mere economic protectionism with a discriminatory purpose, the Court delved into its assault on the scope of the Twenty-first Amendment.

Acknowledging and then dismissing the “broad language”⁸¹ of early cases such as *Young’s Market* and *Joseph Triner Corp.*, the Court looked to the more modern interpretations found in *Midcal* and *Hostetter* to couch its reading of the Twenty-first Amendment. Setting the stage for current Commerce Clause challenges to state alcohol laws, the *Bacchus* Court stated plainly, but dramatically, 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.”⁸² After quoting *Hostetter* and citing *Midcal*, the Court articulated the proper standard as a balancing test to determine “whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the [laws in question] to outweigh the Commerce Clause principles that would otherwise be offended.”⁸³ The Court examined Hawaii’s taxing scheme under this test and found it constitutionally lacking.

Justice White, writing for the majority, delivered this forward-looking pronouncement on the true meaning of both the Amendment and the Commerce Clause:

[O]ne thing is certain: The *central purpose* of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.⁸⁴

Bacchus stands as the last major Supreme Court ruling on this issue and it is under the shadow of *Bacchus* that the present litigation has run its course thus far.⁸⁵

⁷⁹ *Id.* at 265. It is interesting to note that Frank H. Easterbrook, now a federal Court of Appeals judge for the Seventh Circuit and the author of one of the recent opinions on this issue, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), argued plaintiffs’ case.

⁸⁰ 468 U.S. at 271.

⁸¹ *Id.* at 274.

⁸² *Id.* at 275.

⁸³ *Id.*

⁸⁴ *Id.* at 276 (citations omitted) (emphasis added).

⁸⁵ *Bacchus* has been cited thirty-two times by the Supreme Court, but none of these subsequent cases modifies the law or interpretation of this area of law to the extent that *Bacchus* did. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, the Court reiterated the narrow ambit of state power following *Bacchus*:

B. The Creation and Development of the Dormant Commerce Clause

As noted above, the origins of the dormant Commerce Clause are traced back to Chief Justice Marshall's opinion in *Gibbons v. Ogden*.⁸⁶ In *Gibbons*, a steamboat operator sought to enjoin a competing steamboat operator from navigating between New York and New Jersey on the basis of a grant by the New York legislature of exclusive navigation rights. Rather than directly speaking to the issue of whether the states may act in ways that affect interstate commerce in areas where Congress has not spoken, the Chief Justice "flirted with the concept," as Professor Redish put it.⁸⁷ Marshall did, however, lay the foundation for the delineation between the state and federal spheres of power: "when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."⁸⁸

Marshall built on this foundation five years later in *Willson v. Black Bird Creek Marsh Co.*⁸⁹ *Willson* involved a challenge to Delaware's authorization of the construction of a dam across a navigable creek. The Court rejected the challenge, but the Chief Justice used the term "dormant" in the Commerce Clause context, setting up the development of the doctrine in later years:

We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.⁹⁰

While neither *Gibbons* nor *Willson* illustrated that the Court anticipated the expansive development of the dormant Commerce Clause in later years, they serve as early markers of the direction that the

Section 2 of the Twenty-first Amendment, however, speaks only to state regulation of the "transportation or importation into any State . . . for delivery or use therein" of alcoholic beverages. That Amendment, therefore, gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States. The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country or another State.

Id. at 585.

⁸⁶ 22 U.S. (9 Wheat.) 1 (1824).

⁸⁷ Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 575 (1987) (describing Chief Justice Marshall's approach in drafting the *Gibbons* decision).

⁸⁸ *Gibbons*, 22 U.S. at 199–200. Cf. Peter C. Felmlly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 468, 471–72 (2003) ("Specifically, Marshall opined that states may enact laws so long as such laws do not contradict or interfere with a validly enacted [c]ongressional statute.").

⁸⁹ 27 U.S. (2 Pet.) 245 (1929).

⁹⁰ *Id.* at 252.

Court would take in broadening the sphere of the nascent federal government's power.

Mid-nineteenth century development of the dormant Commerce Clause further defined areas in which the states are *permitted* to regulate, perhaps turning on its head the prevailing wisdom of state supremacy in the federal system.⁹¹ The Court established a dichotomy between areas of local and areas of national concern in the antebellum case of *Cooley v. Board of Wardens*.⁹² *Cooley* involved a challenge to a Pennsylvania statute requiring ships entering the Port of Philadelphia to hire a local pilot. The Court rejected Cooley's argument that Pennsylvania could not enact a valid restriction in the face of federal statutes and constitutional provisions regulating commerce and navigation. In a ruling that could have conclusively halted the development of the dormant Commerce Clause, the Court held that

the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations.⁹³

⁹¹ Seventy years after *Willson*, the Supreme Court again articulated the complementary character of the balance between federal plenary power and state sovereignty, both granted by the Constitution itself.

"Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design."

Alden v. Maine, 527 U.S. 706, 713–27 (1999). See also THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and a Response*, 80 N.C. L. REV. 773, 782 (2002) ("A theory of state supremacy was extensively developed in the antebellum period, but has found few adherents since the Civil War.")

⁹² 53 U.S. (12 How.) 299 (1851).

⁹³ *Id.* at 319. The Court expressed the local versus national dichotomy, and found that the state interest in ensuring safe passage to ships accessing the Port of Philadelphia, similar to pilotage laws regarding other ports, was sufficient to protect the pilotage requirement. Safe access to a particular port is a local concern deserving of local regulation, as opposed to those issues of national commerce for which national legislative attention would be appropriate:

Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

. . . .
 . . . The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regula-

However, the Court specifically limited its holding to the facts before it, allowing for future development of the concept of dormancy in the Commerce Clause.⁹⁴ Some view this qualifier as effecting a compromise to avoid an explosion of antebellum tensions with states' rights advocates.⁹⁵

Following the Civil War, the Court took the opportunity to clearly and unambiguously enunciate the basis of what we understand today to be the dormant Commerce Clause. In *Welton v. Missouri*,⁹⁶ the Court struck down a protectionist Missouri statute that required a license of those who sold goods manufactured outside of Missouri, but waived the license requirement for those selling goods produced within the state.⁹⁷ Though not citing to the *Cooley* decision, the Court used the local-national dichotomy to ground its decision, holding that "where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority."⁹⁸ The protectionist legislation before the Court in this instance confirmed their fears, and those of some of the Framers, that without some limit to state sovereignty, the republic would devolve into independent commercial entities, battling one another with hostile legislation. Invoking Congress as the peacemaker and superior authority, the Court declared that "the fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject . . . is equivalent to a declaration that inter-State commerce shall be free and untrammelled."⁹⁹

As the nation entered the twentieth century, the test employed by the Court to evaluate dormant Commerce Clause arguments shifted from the "local-national scheme" to a "formalistic approach designed

tions, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

Id.

⁹⁴ To avoid an expansive interpretation of its holding in *Cooley*, the Court stated:

To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the States upon the same subject.

Id. at 320.

⁹⁵ See, e.g., Redish & Nugent, *supra* note 87, at 579 ("[Marshall's] approach simultaneously avoided confrontation with states' rights advocates, yet reserved for the Court the ability to invalidate objectionable state legislation under a theory of *partial* exclusivity.") (emphasis in original).

⁹⁶ 91 U.S. 275 (1875).

⁹⁷ *Id.* at 277–78.

⁹⁸ *Id.* at 280.

⁹⁹ *Id.* at 282.

to take into account the effects of regulation on interstate commerce.”¹⁰⁰ The Court struck state legislation that it found to have a direct burden on interstate commerce,¹⁰¹ but upheld those statutes where it found the burden to be merely indirect or not sufficiently direct.¹⁰² But this scheme proved to be lacking, as had its predecessor. The Court moved away from these formulaic approaches around mid-century, adopting instead a “two-tiered approach that classified state regulations according to whether they directly discriminated against out-of-state interests or regulated evenhandedly, but with indirect effects on interstate commerce.”¹⁰³ The trajectory of this discrimination analysis, though wavering along the way, leads directly to the modern conflict between the Commerce Clause, dormant and otherwise, the Twenty-first Amendment, and state regulations restricting the interstate commerce of wine and liquor.

II. THE TWENTY-FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY

Twenty-first Amendment jurisprudence in the Twenty-first century has created a tightrope for states to walk when drafting legislation to exercise their liquor control authority. Vagueness in courts’ descriptions of this narrow path of acceptable action has required the Supreme Court to step in to establish a clear standard, which should build up from the foundation laid down in *Bacchus* and trend towards greater permissiveness in the interstate trafficking of alcoholic beverages.

A. *The Grassroots Campaign*

Before examining the in-court developments in this area, it will be helpful to briefly survey the out-of-court, grassroots campaign that has arisen in response to this issue. Even the parties to some of the cur-

¹⁰⁰ Felmy, *supra* note 88, at 473. “This new test analyzed individual cases in terms of whether a regulation’s effect either directly or indirectly impeded the flow of interstate commerce.” *Id.* See also Redish & Nugent, *supra* note 87, at 580 (“In *Southern Pacific Co. v. Arizona ex rel. Sullivan*, [325 U.S. 761 (1945),] the Court noted that the states could neither impede the ‘free flow’ of commerce nor regulate elements of interstate commerce requiring national uniformity.”).

¹⁰¹ See *Di Santo v. Pennsylvania*, 273 U.S. 34, 37 (1927) (striking down a Pennsylvania statute imposing certain requirements on sellers of passenger steamship tickets as constituting a “direct burden” on foreign commerce).

¹⁰² See *Atchison, Topeka & Santa Fe Ry. Co. v. R.R. Comm’n*, 283 U.S. 380, 397 (1931) (upholding a California statute requiring interstate railroad companies “to remove certain grade crossings and to build a union terminal within a defined area known as the Plaza site in Los Angeles” as a measure that did “not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business”); *Southern Ry. Co. v. King*, 217 U.S. 524, 536–37 (1910) (upholding a Georgia statute requiring railroad engineers to blow their locomotives’ whistles as they approached a public road).

¹⁰³ Felmy, *supra* note 88, at 475.

rent cases exude a certain grassroots flair. Juanita Swedenburg, the septuagenarian Virginia vineyard owner and plaintiff in one of the ongoing cases, was the subject of a July 2003 *People* magazine article and closed the article with a dramatically populist turn of phrase: "Someone from Maine who would like to buy a wine from Virginia should be able to get it. That's what makes America America."¹⁰⁴

The two camps in this debate are well-organized and based in relevant trade associations. The California based Wine Institute is one of the strong voices in favor of unburdened direct shipment.¹⁰⁵ Also on the side of direct shipment is the "Free the Grapes" campaign, a "501c(6) non-profit California trade association whose operations are funded exclusively by contributions from wine consumers and winemakers."¹⁰⁶ Besides an amusing graphic of an angry, shackled grape on its website, Free the Grapes! serves as a clearing-house for information on this topic and a facilitation point for grassroots lobbying. The group's website lists those states, about half of those in the nation, that continue to prohibit direct shipment of wine, four of which consider violations of these laws to be felonies, and provides links by which interested people can contact their state legislators.¹⁰⁷

Beyond these outposts in California wine country, the direct shipment movement has national representation in Washington, D.C. under the auspices of WineAmerica: The National Association of American Wineries. This group represents wineries nationally, including many small, family-owned vineyards, and lobbies the government on a number of industry-related issues.¹⁰⁸

The restrictive state laws also have their supporters; namely, the wholesale wine industry, much of which is represented by Wine & Spirits Wholesalers of America, Inc. ("WSWA"). WSWA, which recently moved from Washington, D.C. to New York City, represents

¹⁰⁴ *Crushing Victory*, PEOPLE, July 14, 2003, at 112.

¹⁰⁵ See Wine Institute: The Voice for California Wine, at <http://www.wineinstitute.org> (last visited Sept. 22, 2004). The Institute's "Who We Are" page includes this description: "Wine Institute is the public policy advocacy association of California wineries. Wine Institute brings together the resources of 782 wineries and affiliated businesses to support legislative and regulatory advocacy, international market development, media relations, scientific research, and education programs that benefit the entire California wine industry." Wine Institute, About Us, at <http://www.wineinstitute.org/who.htm> (last visited Sept. 30, 2004).

¹⁰⁶ Free the Grapes!, About Us, at http://www.freethegrapes.org/about_us.html (last visited Sept. 22, 2004).

¹⁰⁷ Free the Grapes!, Wine Lovers, at http://www.freethegrapes.org/wine_lovers.html (last visited Sept. 22, 2004).

¹⁰⁸ WineAmerica: The Nat'l Ass'n for Am. Wineries, Mission ("With more than 700 members from 48 states WineAmerica is the only wine trade association with national membership. This provides a formidable grass roots lobbying strength used to benefit the entire industry."), at <http://www.americanwineries.org/whoware/mission.htm> (last visited Sept. 30, 2004).

and advocates on behalf of a large segment of the alcohol wholesalers in the United States.¹⁰⁹ While obviously interested in promoting the growth and success of the wine and liquor industry, wholesalers, as a collective, fear that they have much to lose from the expanding legislative trend of allowing direct shipment. Their's is a middleman position and direct shipment from vineyard to consumer obviates the need for that position.

Outside of these trade associations, other experts and interested parties have also weighed in on these issues. Not surprisingly, nor without good reason, those in the wine business—rather than the beverage wholesale industry—have sided with the wineries and oenophiles. Notably, “wine guru” Robert M. Parker, Jr., editor and publisher of *Wine Advocate*, predicts “the total collapse of the convoluted three-tiered system of wine distribution in the United States” within ten years.¹¹⁰ Further, the government has begun to analyze this issue from a policy perspective. Recently, the Federal Trade Commission conducted a study¹¹¹ of online wine sales and concluded that, “consumers could reap significant benefits if they had the option of purchasing wine online from out-of-state sources and having it shipped directly to them.”¹¹² In proposing an approach for future jurisprudence of this issue below, I will echo the FTC’s recommendations that “[states] may have less restrictive alternatives that would allow online competition and, ultimately, provide the greatest benefit to consumers. . . . [T]he FTC has strongly encouraged policymakers to adopt pro-competitive rules in many different industries, including contact lens sales, casket sales, and real estate and legal services.”¹¹³ Under the status quo, states feel entitled to adopt restrictive statutes that stifle the interstate traffic of alcohol.

¹⁰⁹ According to its Web site:

The [WSWA] is the national trade organization representing the wholesale branch of the wine and spirits industry. It is dedicated to advancing the interest and independence of wholesale distributors of wine and/or spirits Our members distribute more than 90% of all wines and spirits sold at wholesale in the United States.

Wine & Spirits Wholesalers of Am., Inc., About Us, at <http://www.wswa.org/public/about/who.html> (last visited Sept. 22, 2004).

¹¹⁰ See Robert M. Parker, Jr., *Parker Predicts the Future*, FOOD & WINE, Oct. 2004, at 120 (“The current process, a legacy of Prohibition, . . . is an absurdly inefficient system that costs the consumer big bucks.”).

¹¹¹ FED. TRADE COMM’N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (July 2003) [hereinafter FTC REPORT], available at <http://www.ftc.gov/os/2003/07/winereport2.pdf> (last visited Sept. 30, 2004).

¹¹² *E-Commerce: The Case of Online Wine Sales and Direct Shipment: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the House Comm. on Energy and Commerce*, 108th Cong. 16 (2003) (statement of Todd Zywicki, Director, Office of Policy Planning, Federal Trade Commission).

¹¹³ *E-Commerce Study Shows Consumer Benefits of Online Wine Ordering*, THE COMPUTER & INTERNET LAW., Jan., 2004, at 22.

If ultimately successful, these grassroots campaigns or government-directed policy initiatives may render the conflict discussed herein effectively moot by removing any constitutionally-defective statutes. However, this cannot be fully accomplished before the Court rules on this issue in the next year. A growing number of states have allowed direct shipping in recent years and that number is likely to increase in the near future, regardless of the outcome of the litigation discussed below. Nonetheless, when the Court takes up the issue this term for the first time since *Bacchus*, it must firmly establish a clear standard for determining the scope of state laws enacted pursuant to Twenty-first Amendment powers when they come into conflict with federal constitutional law or statutes to avoid such conflicts in the future.

B. *The Last Bastion of State Power*

In a textbook example of judicial hairsplitting, Judge Easterbrook, the *Bacchus* plaintiffs' attorney, penned the opinion in *Bridenbaugh v. Freeman-Wilson*,¹¹⁴ in which the Seventh Circuit held that regulation of the mere importation of alcohol was, after *Bacchus*, the final stronghold of state power under the Twenty-first Amendment. Judge Easterbrook distinguished the invalidated Hawaiian taxation scheme of *Bacchus* from the Indiana direct shipment prohibition in *Bridenbaugh*. Indiana law prohibits "direct shipments from out of state to Indiana consumers by any 'person in the business of selling alcoholic beverages in another state or country,'" and several Indiana citizens who were interested in receiving such direct shipments brought suit.¹¹⁵

In rejecting the parties' arguments that the "core concerns" of the Twenty-first Amendment should govern, Judge Easterbrook declared that "our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters. Objective indicators supply the context for Section 2; suppositions about mental processes are unilluminating."¹¹⁶ After conducting a brief historical survey of the topic, Judge Easterbrook employed a logical formulation to determine that states must be able to prohibit the types of transactions that the Indiana statute in question prohibits, else "[Section] 2 would be a dead letter."¹¹⁷

¹¹⁴ 227 F.3d 848 (7th Cir. 2000), *cert. denied sub nom.* Bridenbaugh v. Carter, 532 U.S. 1002 (2001).

¹¹⁵ *Id.* at 849. In an elaboration not directly relevant to the subject of my analysis, the court concluded that the plaintiffs, who were not themselves out-of-state shippers, had standing to bring suit. *Id.* at 849–51.

¹¹⁶ *Id.* at 851.

¹¹⁷ *Id.* at 853. This logical exercise goes as follows:

Though the court here upheld the Indiana law, and the Supreme Court denied certiorari, *Bridenbaugh* still appears to limit the set of state powers under the Twenty-first Amendment to those that promote core concerns and disallow discriminatory schemes. The decision in *Bridenbaugh* construes the Indiana statute as narrowly as possible to avoid conflict with Supreme Court precedent, an option not open to the Court in the cases it will hear this term. That said, the small realm of constitutionally permissible state alcohol restrictions that remain—excluding those directed solely at effecting temperance—still come in conflict with the Commerce Clause and the Federal Trade Commission’s aforementioned recommendations.¹¹⁸

The Fourth Circuit adopted similar reasoning when it invalidated a discriminatory portion of North Carolina’s Alcoholic Beverage Control (“ABC”) laws.¹¹⁹ In a suit brought by both in-state oenophiles and out-of-state sellers, the court affirmed the North Carolina District Court’s finding that the ABC laws’ preference for local wineries unlawfully discriminated against interstate commerce.¹²⁰ However, rather than throwing the baby out with the bathwater, the court narrowly tailored its opinion, vacating and remanding the case insofar as the non-discriminatory ABC laws were concerned so that the constitutional defect could be remedied.¹²¹

C. *New Direction*

True believers in the *Young’s Market* interpretation of Twenty-first Amendment jurisprudence would likely be horrified at the positions taken in the recent cases discussed above that preserved the states’ rights merely to regulate liquor traffic. One can only imagine how they would respond to the more blatant assaults on state regulatory

No longer may the dormant Commerce Clause be read to protect interstate shipments of liquor from regulation; § 2 speaks directly to these shipments. Indeed, all ‘importation’ involves shipments from another state or nation. Every use of § 2 could be called ‘discriminatory’ in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, *then § 2 would be a dead letter.*

Id. (emphasis added).

¹¹⁸ As the FTC explained:

State bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine. By allowing interstate direct shipping, states would give consumers the opportunity to save money on their wine purchases, and would let consumers choose from a much greater variety of wines.

FTC REPORT, *supra* note 111, at 40.

¹¹⁹ *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003).

¹²⁰ *Id.* at 519 (“With the elimination of the local preference statute, no interest of the Twenty-first Amendment is implicated, yet the discrimination violating the Commerce Clause is eliminated.”).

¹²¹ *Id.*

power evinced in the growing line of cases that emphasize the protection of the Commerce Clause over and in direct conflict with states' Twenty-first Amendment powers.

In its unchallenged decision striking a Kansas statute barring non-residents from obtaining alcohol distribution licenses, the Kansas District Court cast the twentieth century's Supreme Court jurisprudence on this issue in a light seemingly quite different from that cast by the Fourth and Seventh Circuits.¹²² The district court saw the development of the Supreme Court's interpretation of the Amendment as leaving Section 2 essentially bereft of any power: "the Supreme Court . . . ultimately recognized that the Twenty-first Amendment did not confer virtually complete control to the states in structuring their liquor distribution system."¹²³

Further, with a nod to the *Bacchus* "core concerns" approach, the court boldly declared that, "in order to be 'saved' by the Twenty-first Amendment, the state's exercise of reserved powers must be genuinely directed to the goals of temperance and avoidance of the evils of unregulated trafficking in liquor."¹²⁴ Should this standard be endorsed by the Supreme Court, it will likely eradicate virtually all existing instances where state liquor laws conflict with the Commerce Clause, as temperance and "avoidance of evils" have fallen by the legislative wayside in favor of economic protectionism and collection of tax revenue.¹²⁵

Heralded upon its decision in November 2002 as the catalyst and standard-bearer for national change by direct shipment supporters, such as the Free the Grapes! group, *Swedenburg v. Kelly* invalidated New York's complete ban on out-of-state direct shipment, while preserving the state's regulatory regime that allowed in-state wineries to freely ship their products directly to consumers.¹²⁶ New York's alcohol control regulations required wineries that wanted to sell directly to consumers to have licenses and these licenses could only be obtained if the winery "has and maintains a branch factory, office or storeroom within the state of New York and receives wine in this state

¹²² *Glazer's Wholesale Drug Co. v. State*, 145 F. Supp. 2d 1234 (D. Kan. 2001).

¹²³ *Id.* at 1245.

¹²⁴ *Id.* at 1246.

¹²⁵ While several states have statutes or other codifications allowing counties or other intra-state governmental units to determine whether they would like to be "wet" or "dry"—*e.g.*, ALA. CODE § 11-47-112 (2003); IDAHO CODE § 23-901 (Michie 2003); and N.Y. ALCO. BEV. CONT. LAW § 2 (2003)—most state liquor control laws merely detail the costs and conditions for industry participants.

¹²⁶ *Swedenburg v. Kelly*, 232 F. Supp. 2d 135 (S.D.N.Y. 2002), *rev'd*, 358 F.3d 223 (2d Cir. 2004).

consigned to a United States government bonded winery, warehouse or storeroom located within the state.”¹²⁷

Rejecting all of defendant’s contentions, the District Court for the Southern District of New York, in language that was echoed in the recent FTC report,¹²⁸ held:

The [c]ourt believes that the important goals of temperance and prohibiting the sale of wine to minors can be addressed (in a nondiscriminatory manner) for out-of-state as well as for in-state wineries (which are currently able to sell their products over the Internet and to ship directly to homes in New York State).¹²⁹

With a wink and a nod to the oft-repeated tacit affirmation of state power under Section 2 of the Amendment,¹³⁰ the court found that the state’s ban on out-of-state direct shipment “is not evenhanded and constitutes a per se violation of the Commerce Clause.”¹³¹

This decision was reversed, in relevant part, by the Court of Appeals for the Second Circuit in February 2004.¹³² The court adopted the same analytical approach as used by Judge Easterbrook in *Bridenbaugh*, acknowledging that only one other circuit court had employed it in a similar case.¹³³ The court rested its ruling partly on its acceptance of the notion that “presence ensures accountability,” meaning that New York’s statutory requirement that licensees must maintain some physical presence in the state was, in the eyes of the court, reasonable and sufficient for the Twenty-first Amendment to save the regulatory scheme from dormant Commerce Clause scrutiny.¹³⁴

Despite this presence requirement, the court “[found] no indication . . . that the regulatory scheme is intended to favor local interests over out-of-state interests.”¹³⁵ Clearly, alcohol is different than other classes of products merely because of the existence of the Twenty-first Amendment, but modern Supreme Court jurisprudence and courts in several other circuits have looked at similar facts and have ruled that these statutes are unconstitutional.

¹²⁷ N.Y. ALCO. BEV. CONT. LAW § 3(37) (2003).

¹²⁸ FTC REPORT, *supra* note 111, at 26–27.

¹²⁹ *Swedenburg*, 232 F. Supp. 2d at 149.

¹³⁰ *Id.* at 146 n.25 (“Again, this is not to say that the entire New York three-tier system is unconstitutional or that the State does not ‘enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within [its] borders.’”) (quoting *Capital Cities Cable v. Crisp*, 467 U.S. 691, 714 (1984)).

¹³¹ *Id.* at 147.

¹³² *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004).

¹³³ *Id.* at 231.

¹³⁴ *Id.* at 237.

¹³⁵ *Id.* This seems somewhat contrary to logic when the court then stated that “the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol.” *Id.* at 238.

Recent developments suggest that direct shipment in New York will not be just a matter of case law, but statutory law as well. Governor George Pataki included a direct shipment proposal in his 2004 budget, which “[i]f passed by the Legislature . . . would allow New York’s more than 160 wineries to ship their wines to consumers in the 13 other states that have reciprocal wine-shipping laws.”¹³⁶ Legislative initiatives such as this one fully embrace the economic and legal realities of the present-day wine and liquor industry, which has outgrown local boundaries, and respect producers, and consumers, while honoring the “core concerns” of the Twenty-first Amendment. With the Supreme Court’s grant of certiorari in *Swedenburg*,¹³⁷ it appears that the legislature and Court will race to decide the fate of direct shipping of wine in New York. Regardless of when and how the New York state legislature acts, the Supreme Court should reverse the Second Circuit’s decision and reinstate the ruling by the Southern District of New York that struck the importation ban.

Advocates of less restricted interstate commerce saw the ball start rolling in their favor with the *Swedenburg* decision at the district court level, and others followed soon after. In 2003, there were two major circuit decisions in favor of less burdensome direct shipment laws. In the Fifth Circuit, *Dickerson v. Bailey*¹³⁸ struck down Texas’s restrictions that allowed in-state sellers to ship directly to consumers, in avoidance of the three-tier distribution system, while requiring that out-of-state direct shippers subject themselves to that system. Holding that “Texas’s economically discriminatory regulations against out-of-state wineries clearly violate the ‘substantial equality’ in fundamental rights that is secured, under the Constitution, to all citizens of different states,” the Court of Appeals for the Fifth Circuit, like the Southern District of New York, paved the way for the invalidation of any state statute that treated more harshly alcohol importers shipping to consumers than it did domestic direct-shippers.¹³⁹

Two months after the Fifth Circuit’s Texas ruling, the Sixth Circuit, relying on *Dickerson* and criticizing *Bridenbaugh*, reversed the district court and invalidated Michigan’s prohibition on out-of-state di-

¹³⁶ Alan J. Wax, *State Foresees \$3M Yearly in Wine Bill*, NEWSDAY (New York), Jan. 23, 2004, at A47.

¹³⁷ 358 F.3d 223 (2d Cir. 2004), cert. granted, 72 U.S.L.W. 3725 (U.S. May 24, 2004) (No. 03-1274, consolidated with Nos. 03-116 and 03-1120).

¹³⁸ 336 F.3d 388 (5th Cir. 2003).

¹³⁹ *Id.* at 403 n.67 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). The court also discussed the conflict between economic protectionism of the sort employed by the Texas statutes and the Privileges and Immunities Clause of the Constitution, U.S. CONST. art. IV, § 2, cl. 1, holding that the Privileges and Immunities Clause and the Commerce Clause act together “to place the citizens of each State upon the same footing as citizens of other States.” 336 F.3d at 403 n.67 (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978)).

rect shipment.¹⁴⁰ The Michigan law was virtually identical to the Texas statute struck down in *Dickerson* and invalidated in *Beskind v. Easley*,¹⁴¹ helping to cement one of the common threads in these decisions—in order to survive a Commerce Clause challenge, a state alcohol regulation must “fall[] within the core of the State’s power under the Twenty-first Amendment, having been enacted ‘in the interest of promoting temperance, ensuring orderly market conditions, and raising revenue,’ and . . . these interests ‘cannot be adequately served by reasonable nondiscriminatory alternatives.’”¹⁴² This standard, crafted from earlier Supreme Court decisions, will serve as a powerful tool by those seeking to invalidate other states’ direct shipment prohibitions.

III. WHERE DO WE GO FROM HERE?

A. Action in the Court

After failing to secure a rehearing before the Sixth Circuit,¹⁴³ Michigan, and its Beer and Wine Wholesalers Association, each petitioned the Supreme Court in January 2004 to hear its appeal.¹⁴⁴ Additionally, the *Swedenburg* plaintiffs petitioned the Court to overturn the Second Circuit’s decision, which conflicts with the Sixth Circuit’s decision in *Heald*.¹⁴⁵ The Supreme Court granted certiorari and consolidated these cases on May 24, 2004. Parties to the consolidated

¹⁴⁰ The court stated:

Bridenbaugh is the sole federal court of appeals decision to find that analogous direct shipment laws are constitutional under the Twenty-first Amendment. However, *Bridenbaugh* is distinguishable on its facts, and it has been criticized by several federal courts for its failure to engage in the requisite dormant Commerce Clause analysis.

Heald v. Engler, 342 F.3d 517, 526 (6th Cir. 2003), *cert. granted*, 72 U.S.L.W. 3725 (U.S. May 24, 2004) (No. 03-1116, consolidated with Nos. 03-1120 and 03-1274).

¹⁴¹ 325 F.3d 506 (4th Cir. 2003).

¹⁴² *Heald*, 342 F.3d at 525–26 (citations omitted).

¹⁴³ *Heald v. Engler*, No. 01-2720, 2003 U.S. App. LEXIS 23001, at *2 (6th Cir. Nov. 4, 2003) (concluding “that the issues raised in the petitions were fully considered” in the original case).

¹⁴⁴ *Granholt v. Heald*, 72 U.S.L.W. 3507 (U.S. Jan. 30, 2004) (No. 03-1116) (emphasizing the “substantial conflict among the federal circuits in [interpreting] state rights to regulate the importation of alcoholic beverages under the 21st Amendment” in the face of Commerce Clause challenges); *Michigan Beer & Wine Wholesalers Ass’n v. Heald*, 72 U.S.L.W. 3507 (U.S. Feb. 2, 2004) (No. 03-1120) (challenging the Sixth Circuit’s invalidation of Michigan’s prohibition on importation statute).

¹⁴⁵ See Jerry Hirsch, *Ruling Hits State Wine Shippers*, L.A. TIMES, Feb. 13, 2004, at C2 (“However, the ruling was in conflict with other appeals court decisions in similar suits in other states, setting up a battle that legal experts say could be decided by the U.S. Supreme Court.”); Anthony Lin, *Panel Upholds Ban on Direct Wine Shipment*, N.Y. L. J., Feb. 17, 2004, at 1 (“A ruling by the U.S. Court of Appeals for the Second Circuit upholding a New York state ban on the direct shipment of out-of-state wines to residents has ‘teed up the issue for the U.S. Supreme Court,’ according to the lawyer leading the charge against such bans.”).

cases will present oral arguments on this single question: “Does a State’s regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of [Section] 2 of the 21st Amendment?”¹⁴⁶

The most recent articulation of a standard, the Sixth Circuit’s above-quoted reasoning in *Heald*,¹⁴⁷ is a proper starting point for the Court to use when drafting its opinion. It is grounded on previous Supreme Court decisions and, in application, minimizes the negative effects that many state ABC laws have had on free trade. As stated in the introduction to this Comment, the Court should survey the present landscape of commerce, acknowledging the important role that the Internet plays and will continue to play in promoting competition in ways that were not previously feasible.¹⁴⁸ When crafting its clear standard, the Court should look in the direction of its own precedent and that suggested by the FTC,¹⁴⁹ state governments,¹⁵⁰ and public opinion,¹⁵¹ as well as several courts of appeals.¹⁵² While it would be in-

¹⁴⁶ 72 U.S.L.W. 3725 (U.S. May 24, 2004).

¹⁴⁷ *Heald*, 342 F.3d at 525–26. The state alcohol regulations must, “fall[] within the core of the State’s power under the Twenty-first Amendment,’ having been enacted ‘in the interest of promoting temperance, ensuring orderly market conditions, and raising revenue,’ and because these interests ‘cannot be adequately served by reasonable nondiscriminatory alternatives.’” *Id.* (citations omitted).

¹⁴⁸ This is not to say that the Internet renders all existing law moot, but rather that in certain areas, such as nationwide or international commerce, the ubiquity of the Internet has changed the playing field in ways that must not be ignored.

¹⁴⁹ See FTC REPORT, *supra* note 111 (advocating that states revise their laws to promote greater free trade in alcohol via e-commerce).

¹⁵⁰ More than half of the states in the union now allow direct shipping. Free the Grapes!, Wine Lovers, *supra* note 107.

¹⁵¹ See, e.g., *Interstate Wine Sales*, N.Y. TIMES, June 2, 2004, at A18 (“These laws violate the Constitution by discriminating against interstate commerce. They also hurt consumers by keeping prices artificially high and limiting their choices. The [C]ourt should rule for the retailers and the consumers challenging these laws.”); Kate Riley, *Courts Shouldn’t Bottle Up Washington’s Wines*, SEATTLE TIMES, May 31, 2004, at B6 (“The Supreme Court should lift this ridiculous limitation on free trade among the states.”); David Shaw, *The Wine Shipping News*, L.A. TIMES, June 9, 2004, at F6 (“I hope the [C]ourt throws all those states’ laws out the window. I hope the [J]ustices rule that wineries in California and elsewhere can ship their wines directly to consumers in every one of the 50 states.”); *Widen Wine Sales*, NEWSDAY (New York), June 5, 2004, at A19 (“The shipment bans are protectionism at the expense of consumers and small vineyards, and the [C]ourt should not permit that.”). But see Steven Chapman, *Weighing a Case of Wine*, CHI. TRIB., June 1, 2004, at 11 (“The [C]ourt may be tempted to decide that, in our modern economy, the freedom of buyers and sellers to transact business across state lines ought to trump other concerns. But it should resist the urge.”).

¹⁵² See *Dickerson v. Bailey*, 336 F.3d 388, 403 (5th Cir. 2003) (“Texas’s economically discriminatory regulations against out-of-state wineries clearly violate the ‘substantial equality’ in fundamental rights that is secured, under the Constitution, to all citizens of different states.”); *Heald v. Engler*, 342 F.3d 517, 523 (6th Cir. 2003), *cert. granted*, 72 U.S.L.W. 3725 (U.S. May 24, 2004) (No. 03-1116, consolidated with Nos. 03-1120 and 03-1274) (“The central purpose of the 21st Amendment is not to empower states to favor local liquor industries by erecting barriers to

correct to say that interpretation of the law should simply accede to public opinion, in this case the Court would merely be clarifying and reaffirming its previous statements on this issue, which happen to align with the popular and political trends. In crafting its decision, the Court must step in to remedy the deficiency it noted in *Midcal*: “there is no bright line between federal and state powers over liquor.”¹⁵³ Consumers and winery owners, particularly low-volume producers, will continue to be harmed by discriminatory restrictive statutes until the Court clearly settles the issue of where that line lies.

B. How the States Can React

After the Supreme Court speaks decisively on this issue, many states will need to revise their laws, some to conform with the greater sphere of free trade that the Court should allow and some to recapture basic state powers given under the Twenty-first Amendment that have subsequently been lost or diminished. To that end, I recommend that all states statutorily allow direct shipment of wine and liquor from out-of-state distributors. Clearly, those states who seek to promote temperance within their borders are free to legislate accordingly, as this is a core concern of and basic right granted them by Section 2 of the Twenty-first Amendment. States can continue to prohibit the sale or production of alcohol in areas of or throughout their entire state, as some do now.¹⁵⁴

Further, the states need some way to maintain orderly market conditions and raise revenue, the other core concerns. To establish a system to do this that neither burdens interstate commerce nor harms the interests of consumers, states should charge their Liquor Control Boards, or equivalent agencies, with supervising the traffic of *all* alcoholic beverages shipped directly to their residents. By employing a single access point for all directly-shipped alcohol, states would be able to tax these products equally without impermissibly discriminating against out-of-state producers. This scheme could perhaps account and adjust in some way for existing taxes on domestic producers so that they are not unfairly burdened, but, of course, all producers would be taxed by their home states so this adjustment would likely be minimal to avoid disparate treatment. In addition to

competition.”) (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984)); *Beskind v. Easley*, 325 F.3d 506, 517 (4th Cir. 2003) (“North Carolina’s regulatory preference of in-state wine manufacturers . . . discriminates against out-of-state wine manufacturers and sellers, in violation of the dormant Commerce Clause, and . . . the preference is ‘not supported by any clear concern of the Twenty-first Amendment,’ and therefore is not saved by the Twenty-first Amendment.”) (citing *Bacchus*, 468 U.S. 263 at 276).

¹⁵³ *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

¹⁵⁴ See state statutes cited *supra* note 125.

avoiding unconstitutionally discriminatory distribution systems, this single access point model would allow states to police against the traffic of alcohol to minors, which the FTC reported has been successfully accomplished in states currently allowing direct shipment.¹⁵⁵ This system would also provide for the type of accountability highlighted in the Second Circuit's decision in *Swedenburg*,¹⁵⁶ without the onerous physical presence requirement that New York and other states currently mandate.

While states may argue that this model closely resembles the existing scheme of three-tiered wholesale distribution,¹⁵⁷ the greater freedom of direct shipment envisioned herein would prevent the development of the economic forces that keep smaller producers off the shelves of most wholesalers.¹⁵⁸ Wholesalers are not as interested in stocking high-end wine from boutique vineyards because wholesalers do not operate on single bottle or single case economies. Direct shipping can and the single access point model recommended here would allow these small producers to ship their products to interested consumers, while still allowing states to properly satisfy their legitimate interests, as would be expressed in the ideal Supreme Court opinion on this issue.

CONCLUSION

As some states continue to battle the Commerce Clause in federal court with the sword provided to them by Section 2 of the Twenty-first Amendment, the Supreme Court must establish a clear standard, unambiguously drawing the line between these competing interests. There exists language in the Court's own decisions, as well as those of the Courts of Appeals that can provide a strong foundation for the

¹⁵⁵ See FTC REPORT, *supra* note 111, at 26–27 (“In practice, many states have decided that they can prevent direct shipping to minors through less restrictive means than a complete ban, such as by requiring an adult signature at the point of delivery. These states generally report few, if any, problems with direct shipping to minors.”).

¹⁵⁶ See *Swedenburg v. Kelly*, 358 F.3d 223, 237–38 (2d Cir. 2004) (holding that “[p]resence ensures accountability” and providing some examples of how this may be true).

¹⁵⁷ “The most common form of regulation is the ‘three-tiered’ system, in which producers of alcohol cannot sell their products directly to consumers. They must sell their products to licensed wholesalers, which in turn must sell to licensed retailers, which sell to the consumer.” Lloyd C. Anderson, *Direct Shipment of Wine, the Commerce Clause and the Twenty-first Amendment: A Call for Legislative Reform*, 37 AKRON L. REV. 1, 3 (2004). For more background on the three-tiered system, see Douglass, *supra* note 30, at 1621–22 (“States justified the three-tiered distribution system as a way to prevent organized crime—which had run illegal liquor empires during Prohibition—from dominating the legalized liquor industry.”).

¹⁵⁸ I do not discuss the effect that this debate and its outcome may have on retailers because they have not played a major part in this litigation and they are less likely to be affected by the possible outcomes because they are not a mandated component of current regulatory schemes and direct shipping would only constitute a small minority of total sales.

standard to be enunciated. Accounting for the current realities of interstate commerce, the Court should endorse the limited reading of state power under the Twenty-first Amendment found in *Dickerson* and *Heald*, limiting legitimate state statutes to the realm of the core concerns: temperance, maintenance of orderly market conditions, and raising revenue.

States should embrace the model set out above, which would address many of their expressed concerns and embodies the legitimate motivations behind the statutes that have been or will be invalidated. Consumers and alcoholic beverage producers will also benefit from increased competition and accessibility, while staying within the intended bounds of the law.