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# Direct Shipment of Wine, The Dormant Commerce Clause and the Twenty-first Amendment: A Call for Legislative Reform

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## DIRECT SHIPMENT OF WINE, THE COMMERCE CLAUSE AND THE TWENTY-FIRST AMENDMENT: A CALL FOR LEGISLATIVE REFORM

*Lloyd C. Anderson\**

### I. INTRODUCTION

Many states prohibit out-of-state sellers of wine from shipping their product directly to consumers, but permit in-state wine producers to engage in such direct shipment.<sup>1</sup> Recent lower federal court decisions have cast serious constitutional doubt upon the authority of a state to discriminate in this manner against wine producers and sellers from other states in favor of its own domestic wine industry.<sup>2</sup> This issue appears headed for the Supreme Court of the United States in the near future.<sup>3</sup> The outcome cannot be foreseen with certainty, but it is likely the Court will find this discrimination unconstitutional.<sup>4</sup>

'Twas not always so. Ratification of the Twenty-first Amendment to the U.S. Constitution in 1933 ended the era of nationwide Prohibition of the production, sale and transportation of alcoholic beverages in this

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1. See Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-first Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverage*, 49 DUKE L.J. 1619, 1648-51 (2000) (reviewing the various state laws regulating or prohibiting direct shipment).

2. See *infra* text accompanying notes 143-215.

3. See *infra* text accompanying note 216 for a discussion of why the Supreme Court is likely to grant certiorari to review this issue.

4. See *infra* text accompanying notes 218-225 for a discussion of why discriminatory direct shipment laws are likely to be ruled unconstitutional. See also Douglass, *supra* note 1; Vijay Shanker, Note, *Alcohol Direct Shipment Laws: The Commerce Clause, and the Twenty-first Amendment*, 85 VA. L. REV. 353 (1999); Russ Miller, Note, *The Wine is in the Mail: The Twenty-first Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND. L. REV. 2495 (2001) (arguing that discriminatory direct shipment laws are unconstitutional).

country.<sup>5</sup> It also prohibited the import of alcohol into any state in violation of that state's laws.<sup>6</sup> For several decades after ratification, the U.S. Supreme Court afforded this provision a literal interpretation based upon its text and not subject to limitations imposed upon state authority by other constitutional provisions.<sup>7</sup> Specifically, the Amendment was held to be "not limited by the commerce clause."<sup>8</sup> Under this view, although the Commerce Clause of the Constitution<sup>9</sup> had long been construed as forbidding state discrimination against interstate commerce absent a compelling justification,<sup>10</sup> this Amendment carved out a unique niche for alcohol: states had plenary authority to regulate imports of such products, regardless of the impact such regulation had on interstate commerce.

The era of literalism ended when the Court decided that it was "patently bizarre" to conclude that the Twenty-first Amendment had "repealed" the Commerce Clause; to say that the Amendment was "not limited" by the Commerce Clause would be to say that Congress had lost its authority to regulate interstate commerce in alcohol, at least to the extent that Congress lacked power to regulate such commerce in ways that were inconsistent with state regulation.<sup>11</sup> Instead, the Court adopted a new position that the two constitutional provisions should be read in harmony with each other, not in opposition to each other. In order to reconcile the commands of the Twenty-first Amendment and the Commerce Clause, the Court fashioned a rule: state laws that discriminate against interstate commerce in alcohol are unconstitutional unless they are closely related to one of the powers reserved to the states by the Twenty-first Amendment.<sup>12</sup>

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5. U.S. CONST. amend. XXI. The text of Sections one and two of the Twenty-first Amendment provides:

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.

*Id.* The term "alcohol" will be used in this Article to mean "alcoholic beverages," for sake of brevity. The term "alcohol," as used in this Article, thus does not encompass alcohol produced for non-beverage purposes, such as industrial alcohol.

6. *Id.*

7. See *infra* text accompanying notes 84-96 for a discussion of this era.

8. *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939).

9. U.S. CONST. art. I, § 8, cl. 3.

10. See *infra* text accompanying notes 121-142 for a discussion of this antidiscrimination jurisprudence.

11. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964).

12. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275-6 (1984).

As this legal evolution was occurring, forces of economic change were sweeping the country. After Prohibition ended in 1933, individual states enacted various forms of regulation of commerce in alcohol. 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.<sup>13</sup> In the early years after Prohibition ended, there was explosive growth in the number of wholesalers, resulting in vigorous competition at the wholesale tier. In recent decades, however, there has been massive consolidation in this industry and market power has become concentrated in relatively few firms. By contrast, the number of small, often family-owned wineries has skyrocketed. Individually, the production of these small wineries is small. The large wholesalers tend to lack interest in marketing such wines because they need large-volume sales in order to remain competitive. Some states enacted legislation allowing wine producers within the state to ship their products directly to consumers, in order to encourage a domestic wine industry. Lacking a satisfactory market for their wines in the three-tier system, small wineries turned to direct sales, not only to consumers within their own states, but also to consumers in other states that lacked their own high-quality wine industries. Such sales were facilitated by yet another economic change: the growth in telecommunications, especially the Internet. Now a wine lover in one state could simply pick up the telephone or hop on the Internet and purchase wine produced in another state. The producer could ship the wine directly to the consumer via common carrier. Indeed, retailers in wine-producing states jumped on the bandwagon and also shipped wine directly to consumers in other states.<sup>14</sup>

Vested interests in the three-tiered systems, especially wholesalers, sensed that such direct shipment posed a threat to their market power and demanded that states enforce their laws that prohibited importation of alcohol, including wine, other than through licensed wholesalers.<sup>15</sup> The wine industry reacted to this pressure with litigation seeking to overturn the ban on direct shipment to consumers in those states that prohibit direct shipment of wine by out-of-state producers but permit in-

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13. Douglas, *supra* note 4, at 1619; Shanker, *supra* note 4, at 355; Miller, *supra* note 4, at 2496-97.

14. Dana Nigro, *Tide Turns in Direct Shipping Battle*, WINE SPECTATOR 1 (October 15, 2002), available at [http://www.winespectator.com/Wine/Archives/Show\\_Article/0,1275,3880,00.html](http://www.winespectator.com/Wine/Archives/Show_Article/0,1275,3880,00.html) (last visited November 24, 2003).

15. *Id.*

state wine producers to do so.<sup>16</sup> As of this writing, lower federal courts, including five appellate circuits, have rendered conflicting rulings on the validity of such laws.<sup>17</sup> Since there is already a conflict among the circuit courts of appeal on an important constitutional issue and there is no end in sight to this litigation, the direct shipment issue is a prime candidate for review by the Supreme Court.<sup>18</sup>

The thesis of this Article is that states which presently prohibit direct shipment of wine to consumers from out-of-state sources but permit such direct shipment from in-state sources should now give serious consideration to repealing their bans on direct shipment of wine from out-of-state sources. The resolution of this issue by the Supreme Court cannot be predicted with certainty, but the Court's current Commerce Clause and Twenty-first Amendment jurisprudence weighs heavily in favor of the argument that differential treatment of direct shipments of wine from out-of-state and in-state sources violates the Commerce Clause and is not closely related to powers reserved to the States by the Twenty-first Amendment. Rather than facing the likely prospect of court-imposed remedies, state legislatures should craft reforms best suited to individual states' needs, such as tying repeal of the ban on direct shipment of wine from out-of-state sources to collection of state taxes on the transaction.

Part II of this Article describes the nineteenth century struggle between the Prohibition movement and the alcoholic beverage industry that fostered a complex history of court decisions limiting state authority in this area under the aegis of the Commerce Clause, and congressional attempts to abrogate these decisions. This struggle culminated in the adoption of the Eighteenth Amendment, which established a nationwide regime of Prohibition.<sup>19</sup> Part III discusses the reasons why Prohibition was a failure, thus prompting adoption of the Twenty-first Amendment, and also traces the evolution of the Court's interpretation of that Amendment to the current approach, which seeks to accommodate its principles to the principles of the Commerce Clause. Part IV provides an account of the Court's general treatment of state laws that afford less favorable treatment to interstate commerce than to intrastate commerce. Part V canvasses the current litigation challenging direct shipment laws

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16. *Id.*

17. *See infra* text accompanying notes 143-215.

18. *See* SUP. CT. R. 10(a). A conflict between decisions by federal courts of appeals is one reason that will be considered by the Supreme Court in deciding whether to grant review on writ of certiorari. *Id.*

19. U.S. CONST. amend. XVIII.

in various states, and the judicial decisions in those cases. Part VI provides an analysis of the arguments on both sides of the issue and contends that the Supreme Court is likely to hold such laws unconstitutional. The Article concludes that states with such laws should now begin the process of repealing their laws banning direct shipment of wine from out-of-state sources and replacing them with regulatory schemes that permit direct shipment but assure that applicable taxes are paid and other valid state interests are protected.

## II. THE ROAD TO THE EIGHTEENTH AMENDMENT

### A. *The Prohibition Movement*

During the nineteenth century, many Americans became convinced that consumption of alcohol would undermine the health and moral strength of the nation and that it must be eliminated. In 1869, the Prohibition Party was founded in response to this concern. Four years later, the Women's Christian Temperance Union was organized. Both organizations lobbied for nationwide prohibition of alcoholic beverages. They also lobbied for prohibition on a state-by-state basis, for legislation to give local communities the option to vote for local prohibition, and for restrictions on the transportation and sale of alcoholic beverages. These early efforts achieved limited success. Congress did not enact a nationwide ban. Some, but not all, states did enact legislation prohibiting the production, sale and transportation of alcohol within their own borders. Since other states did not enact prohibition, however, alcohol continued to be produced in non-Prohibition states, as well as in other nations.<sup>20</sup>

The alcohol industry responded to the enactment of prohibition legislation within individual states with litigation challenging the constitutionality of such laws. The first case to reach the U.S. Supreme Court, *Mugler v. Kansas*, involved a state law that prohibited, with limited exceptions, the manufacture and sale of alcohol within the state.<sup>21</sup> The issue was not whether states have the authority to prohibit alcohol production for sale within the states. Instead, the issue was whether states may prohibit production for one's personal use.<sup>22</sup> The

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20. See generally, DONALD BARR CHIDSEY, ON AND OFF THE WAGON 23-56 (Cowles Book Co. 1969); SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 899-900 (Oxford University Press 1965).

21. *Mugler v. Kansas*, 123 U.S. 653, 655 (1887).

22. *Id.* at 657-660 (explaining that it was already well-established that states had the authority

Court held that the Fourteenth Amendment Due Process Clause does not bar this form of prohibition.<sup>23</sup> The Court reasoned that courts must defer to the legislative judgment that allowing the noncommercial production of alcohol “would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors.”<sup>24</sup> The Commerce Clause was not implicated because the case involved noncommercial production. Thus, *Mugler* established only that a state may ban alcohol production within its own borders, whether for commercial or noncommercial use.<sup>25</sup>

### *B. State Prohibition and the Dormant Commerce Clause*

Alcohol continued to be produced in non-Prohibition states, however, and the year after *Mugler* was decided, the issue arose whether a Prohibition state had the authority to prohibit the import of alcohol from non-Prohibition states. In *Bowman v. Chicago & N.W. Railway Co.*, the Court held that this form of prohibition ran afoul of the Commerce Clause.<sup>26</sup> The Court had previously ruled that the Commerce Clause does not bar states from prohibiting the sale of imported alcohol after it had been brought into the state.<sup>27</sup> The *Bowman* Court, however, asserted that the *Thurlow* ruling was premised upon the notion that a person has the antecedent right to import alcohol from another state.<sup>28</sup> More importantly, the Court invoked dormant Commerce Clause jurisprudence: Congress’ failure to regulate a particular area of interstate commerce necessarily implies that Congress intended that area to be free of regulation.<sup>29</sup> In *Bowman*, Congress had not chosen to regulate alcohol imports, thus expressing its intent that such imports be free of regulation.<sup>30</sup> Thus, a state “cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be.”<sup>31</sup> Without this constitutional constraint, the Court asserted that the American economy would descend into anarchy and confusion; every state would be free to restrict the flow of articles

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to prohibit commercial production).

23. *See id.*

24. *Id.* at 662.

25. *See id.*

26. *Bowman v. Chicago & N.W. Railway Co.*, 125 U.S. 465, 492-3 (1888).

27. *Thurlow v. Massachusetts*, 46 U.S. 504 (1847).

28. *Bowman*, 125 U.S. at 479.

29. *Id.* at 479-480.

30. *Id.* at 482-83.

31. *Id.* at 492.

produced in other states and to protect its domestic producers from competition by producers from other states.<sup>32</sup> The law at issue in *Bowman* was not of the latter type because it prohibited all commerce in alcohol, domestic and out-of-state alike.<sup>33</sup> It was, however, of the former type, for it represented an attempt by one state to exercise power over articles within other states by preventing their passage out of those states.<sup>34</sup>

While *Bowman* held that, in the absence of congressional legislation, the Commerce Clause bars one state from prohibiting the import of alcohol from other states, it expressly left open the question whether a state could prohibit its sale once it had been imported.<sup>35</sup> That question arose two years later in *Leisy v. Hardin*.<sup>36</sup> A brewer from Illinois, a non-Prohibition state, imported beer into Iowa, a Prohibition state.<sup>37</sup> Because of the *Bowman* decision, Iowa lacked authority to stop the importation, but it seized the beer before it could be sold.<sup>38</sup> In the brewer's ensuing litigation to recover the beer, the Supreme Court held that the Commerce Clause bars states from prohibiting the sale of imported alcoholic beverages in their original, unbroken packages.<sup>39</sup> As in *Bowman*, the Court relied upon a negative construction of the Commerce Clause.<sup>40</sup> Since it grants exclusive power to Congress to regulate interstate commerce, states have no power to regulate such commerce without the approval of Congress.<sup>41</sup> In particular, a state law that inhibits the disposition of an imported commodity while it is still an article of commerce amounts to a regulation of interstate commerce.<sup>42</sup> Thus, a state has no authority, without congressional permission, to prohibit the sale of alcohol that remains in its original package.<sup>43</sup>

Although the *Mugler* decision appeared to be a great victory for the Prohibition Movement by upholding the authority of a state to ban the production and sale of alcohol, the victory was short-lived. The *Bowman* and *Leisy* decisions deprived Prohibition states of the authority to ban the import or sale of alcohol in its original package from non-

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32. *Id.* at 493-94.

33. *See id.* at 496.

34. *Id.* at 496.

35. *Id.* at 500.

36. *Leisy v. Hardin*, 135 U.S. 100 (1890).

37. *See id.*

38. *Id.*

39. *Id.* at 125.

40. *Id.* at 119.

41. *Id.*

42. *Leisy*, 135 U.S. at 123.

43. *Id.*

Prohibition states.<sup>44</sup> Worse yet for prohibitionists, alcohol producers from non-Prohibition states had no competition from domestic producers in Prohibition states (for there were no legal ones), so erstwhile “dry” states promised to be lucrative markets for imported alcohol.

### C. Congressional Abrogation of Judicial Limits on State Prohibition

The Prohibition Movement quickly reacted to this vexing situation by flexing its increasing political muscle in Congress. In 1890, the same year *Leisy* was decided, Congress passed the Wilson Act.<sup>45</sup> This statute filled the void noted in *Leisy*, by providing that alcohol imported into a state shall be subject to the laws of that state to the same extent as if it had been produced within the state, regardless of whether it remains in its original package.<sup>46</sup> Thus, if a state prohibited the sale of domestically produced alcohol, the Wilson Act also allowed it to prohibit the sale of imports. Congress had, in effect, granted states the very permission to stop commerce in imported alcohol that was lacking in *Leisy*.

The Wilson Act immediately was challenged in court by a person who had been arrested in Kansas for attempting to sell liquor imported from Missouri, in violation of Kansas law.<sup>47</sup> In *Wilkerson v. Rahrer*, the Supreme Court held that Congress had the power under the Commerce Clause to allow states to curb freedom of interstate commerce.<sup>48</sup> The Court reasoned that Congress’ exclusive power over interstate commerce includes the power to divest certain articles of their interstate commercial character, thereby incorporating such articles into the general mass of property within the state and subjecting them to the plenary police power of that state.<sup>49</sup> Thus, the Wilson Act divested original-package imported alcohol of its interstate character, thereby subjecting it to the Kansas prohibition against the sale of alcohol.<sup>50</sup>

While the Wilson Act as construed in *Rahrer* abrogated the *Leisy* decision, it left *Bowman* untouched. Imported alcohol could not be sold in a Prohibition state, but it could still be imported. Industry and consumers soon found the loophole: direct shipment. In *Rhodes v. Iowa*, a resident of Iowa, a Prohibition state, purchased alcohol from a

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44. *Bowman*, 125 U.S. at 465; *Leisy*, 135 U.S. at 100.

45. 26 Stat. 313 (1890) (now codified in 27 U.S.C. § 121).

46. *Id.*

47. *Wilkerson v. Rahrer*, 140 U.S. 545 (1891).

48. *Id.* at 560-1.

49. *Id.*

50. *Id.*

producer in Illinois, a non-Prohibition state.<sup>51</sup> The producer delivered the alcohol in a box to a common carrier in Illinois, for direct shipment to the purchaser in Iowa.<sup>52</sup> When the box arrived in Iowa, it was seized and destroyed. Since the sale had been consummated in Illinois, there was no violation of Iowa's prohibition on the sale of imported alcohol. Iowa attempted to avoid this problem by charging an agent of the carrier with violating Iowa's ban on transporting alcohol.<sup>53</sup> The *Bowman* decision had already established that such a prohibition, when applied to imports, violated the Commerce Clause.<sup>54</sup> Iowa, however, argued that the Wilson Act had also abrogated *Bowman* by divesting commerce in alcohol of its interstate character once it arrives in a state, and subjecting it to state law.<sup>55</sup> The Court acknowledged that one passage in the text of the Wilson Act supported this argument, but asserted that a literal interpretation of this passage would be inconsistent with the Act as a whole.<sup>56</sup> The Court reasoned that a literal interpretation would give states the power to prohibit importation itself and force goods to remain in another state.<sup>57</sup> Nothing in the Act, however, indicated that Congress had intended to give state law such extraterritorial reach, subjecting persons beyond that state's borders to its own law.<sup>58</sup> The Act was instead afforded a less expansive interpretation: imported alcohol was subject to state law "only after consummation of the shipment, but before the sale of the merchandise."<sup>59</sup> The imported alcohol would be free of state restrictions until the shipment was complete; at that point, state law would attach and, in a Prohibition state, it would be illegal to transport or sell the alcohol. Under this interpretation, the common carrier was not subject to Iowa law because the shipment was not yet consummated. Once the box was delivered to the Iowa purchaser, Iowa law would attach, but so long as the purchaser simply wanted to drink the alcohol, he too would not violate the Iowa prohibition on transport or sale.

After *Rhodes*, direct shipment of imported alcohol to consumers loomed as a significant threat to Prohibition, but not for very long. As did *Bowman*, *Rhodes* explicitly left a question open: whether Congress

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51. *Rhodes v. Iowa*, 170 U.S. 412, 13 (1989).

52. *Id.* at 413.

53. *Id.* at 413-14.

54. *Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465, 465 (1888).

55. *Rhodes*, 170 U.S. at 419-20.

56. *Id.* at 420.

57. *Id.*

58. *Id.* at 421-22.

59. *Id.* at 423.

has the authority to submit interstate shipments of alcohol to state control. In 1893, five years before *Rhodes* was decided, a powerful new political force had appeared on the scene: the Anti-Saloon League.<sup>60</sup> The older Prohibition Party and Women's Christian Temperance Union had achieved only limited political success, in large part because their constituencies – primarily rural, small-town and female – were not broad-based. The Anti-Saloon League, by contrast, drew its constituency from broad and diverse sectors of the population – academics, churches, political parties and business people.<sup>61</sup> It played a leading role in persuading more states to enact Prohibition laws. In addition, it helped ensure passage of the Webb-Kenyon Act in 1913.<sup>62</sup> In this Act, like the Wilson Act, Congress filled a void and abrogated a Supreme Court ruling. It provided that alcohol was divested entirely of its interstate commercial character and that the manufacture, sale *or shipment* of alcohol into a state in violation of that state's laws was prohibited.<sup>63</sup>

The authority of Congress to thus subject all commerce in alcohol to state law came under scrutiny in *Clark Distilling Co. v. Western Maryland Railway Co.*<sup>64</sup> West Virginia law prohibited the manufacture or sale of alcohol. Unlike the laws in those states in which the current direct shipping litigation has arisen, West Virginia did not discriminate between out-of-state and domestic alcohol; its prohibition applied to both.<sup>65</sup> A Maryland producer of alcohol sued for injunctive relief to permit it to ship alcohol directly to consumers in West Virginia, as *Rhodes* had given it the right to do.<sup>66</sup> The Webb-Kenyon Act, however, had clearly abrogated *Rhodes* by providing that the state prohibitions were applicable to imports.<sup>67</sup> The sole question, therefore, was whether Congress had the power to do so.<sup>68</sup> The manufacturer contended that Congress lacked such power under the Commerce Clause because state alcohol laws varied widely, so that Webb-Kenyon would disrupt the national uniformity of regulation contemplated by that Clause.<sup>69</sup> The Court countered, however, that Congress has power to prohibit all

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60. MORISON, *supra* note 20, at 900.

61. *Id.*

62. 37 Stat. 699 (1913) (now codified at 27 U.S.C. § 122 (1994)).

63. *Id.*

64. *James Clark Distilling Co. v. W. Md. Ry.*, 242 U.S. 311 (1917).

65. *Id.*

66. *Id.* at 315-18.

67. 37 Stat. 699 (1913) (now codified at 27 U.S.C. § 122 (1994)).

68. *Id.* at 321-2.

69. *Id.* at 325-26.

shipment of alcohol, and that all-encompassing power includes the lesser power to permit some prohibition, by those states that choose to do so.<sup>70</sup>

By upholding the power of Congress to subject shipments of imported alcohol to plenary state authority, the Court closed the direct shipment loophole created by *Rhodes*. Significantly, however, it remained an open question whether, in exercising that authority, states could discriminate against imported alcohol in favor of domestically-produced alcohol; *Clark Distilling* did not present that issue. It has remained an open issue to this day.

#### *D. The Eighteenth Amendment*

Ironically, the *Clark Distilling* Court also foreshadowed an important factor that ultimately accelerated the downfall of Prohibition. Webb-Kenyon made it federal law, enforceable by federal authorities, that it is illegal to traffic in alcohol in violation of state law. Since state authorities also had power to enforce their own state's laws, Webb-Kenyon was intended "to produce cooperation between the local and national forces of government."<sup>71</sup> Initially, the vision of federal-state cooperation in enforcing Prohibition reached its zenith in 1919, when the Eighteenth Amendment to the U.S. Constitution was ratified.<sup>72</sup> Section one of the Amendment created a nationwide regime of Prohibition, making it unlawful to manufacture, sell, or transport alcohol in the United States, regardless of state law; alcohol was now outlawed even in States that previously had permitted it.<sup>73</sup> Section two conferred concurrent power on Congress and the states to enforce Prohibition.<sup>74</sup> The legal debate was over. The Prohibition movement had achieved unconditional success. As it turned out, however, success contained the seeds of its own destruction.

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70. *Id.* at 326-27.

71. *Id.* at 331.

72. U.S. CONST. amend. XVIII.

73. *Id.*

74. *Id.*

### III. THE DOWNFALL OF PROHIBITION AND THE RISE OF THE TWENTY-FIRST AMENDMENT

#### *A. The Downfall of Prohibition*

The Eighteenth Amendment prohibited only the manufacture, sale and transportation of alcohol. The possession and consumption of alcohol remained legal, and many Americans were eager to obtain it. Others saw a lucrative opportunity to serve this market by robbing, burglarizing and hijacking established stocks of alcohol.<sup>75</sup> Still others created a bootlegging industry, in which alcohol was smuggled from abroad into the United States and sold at great profit.<sup>76</sup> Even physicians became involved in this illegal commerce. Alcohol remained legal when used for medicinal purposes. Many physicians resorted to selling alcohol to their patients for pleasure drinking out of fear they would lose their patients to other physicians if they did not.<sup>77</sup> Many people resorted to producing alcohol in their own homes. Alcohol consumption among some sectors of the population actually increased during national Prohibition.<sup>78</sup>

These evasions of Prohibition might have been prevented if the scheme of concurrent federal and state enforcement had been effective, but it was not. The law was unpopular with many Americans, so state authorities gave priority to enforcing other laws deemed more important by the populace.<sup>79</sup> Established federal authorities such as the F.B.I. had more than enough work already, so special agents were hired to enforce Prohibition. They were poorly paid, so their enforcement efforts were deflected by various forms of bribery.<sup>80</sup>

#### *B. The Rise of the Twenty-first Amendment*

This combination of great demand, ready supply and ineffectual enforcement was the downfall of national Prohibition. Its fate was sealed by ratification of the Twenty-first Amendment.<sup>81</sup> Section one of

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75. CHIDSEY, *supra* note 20, at 79-83; MORISON, *supra* note 20, at 900-01.

76. CHIDSEY, *supra* note 20, at 91-101; MORISON, *supra* note 20, at 900. *See also* FON BOARDMAN, *AMERICA AND THE JAZZ AGE* 69-70 (Henry Z. Walck, Inc. 1968).

77. CHIDSEY, *supra* note 20, at 81-82.

78. BOARDMAN, *supra* note 76, at 74.

79. CHIDSEY, *supra* note 20, at 78-9 and 85-9; MORISON, *supra* note 20, at 902.

80. CHIDSEY, *supra* note 20, at 78-9 and 85-9; MORISON, *supra* note 20, at 902.

81. U.S. CONST. amend. XXI.

that Amendment repealed the Eighteenth Amendment, thus ending national Prohibition and the hapless system of joint federal-state enforcement.<sup>82</sup> Far from opening the door to unrestricted commerce in alcohol, however, Section two of that Amendment provided that the import or transportation of alcohol in violation of state law is prohibited.<sup>83</sup> In effect, Section two of the Twenty-first Amendment constitutionalized the Webb-Kenyon Act. Its literal text suggests that it conferred unfettered constitutional authority upon the states to regulate commerce in alcohol. The text is silent, however, on the relationship between Section two and the rest of the Constitution.

### 1. Early Judicial Interpretation: Unrestricted State Power

Since Section two prohibited the import or transportation of alcohol into a state in violation of that state's law, it clashed with established Commerce Clause jurisprudence, which barred state regulation of interstate commerce, including commerce in alcohol.<sup>84</sup> Early cases resolved this clash in favor of Section two. In *State Board of Equalization v. Young's Market Co.*, a California statute imposed a fee for the privilege of importing beer into the state.<sup>85</sup> An import wholesaler claimed this fee violated the Commerce Clause.<sup>86</sup> The Supreme Court acknowledged that, prior to ratification of the Twenty-first Amendment, the fee would have been unconstitutional "not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce."<sup>87</sup> The Court concluded, however, that the terms of Section two "confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes."<sup>88</sup> In the Court's view, to accept the wholesaler's argument – that imported beer was subject to a fee that domestic beer was not – would require an interpretation of Section two that imports must be allowed to compete on an equal basis with domestic alcohol; such an interpretation, however, "would involve not a construction of the Amendment, but a rewriting of it."<sup>89</sup> The Court went so far as to say that a state may prohibit all imported alcohol to protect its domestic industry and, if so, it may adopt

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82. *Id.*

83. *Id.*

84. *See supra* text accompanying notes 26-70 for a discussion of this jurisprudence.

85. *State Bd. of Equalization v. Young's Market*, 299 U.S. 59, 60 (1936).

86. *Id.*

87. *Id.* at 61-2.

88. *Id.* at 62.

89. *Id.*

a less restrictive regulation such as an import fee.<sup>90</sup> Nevertheless, the Court explicitly left open the question whether Section two confers upon the states, when regulating commerce in alcohol, the power to engage in the type of discrimination prohibited by the Commerce Clause.<sup>91</sup>

Economic warfare between the states is the very evil that the Supreme Court's dormant Commerce Clause jurisprudence was designed to prevent. The very type of law upheld in *Young's Market*, however, provoked just such warfare. Like California, Indiana imposed a fee to import beer into the state. In retaliation, Michigan enacted a statute prohibiting the sale of beer produced in a state that, in Michigan's view, discriminated against Michigan beer. Indiana was named as one such state because of its import fee.<sup>92</sup> In *Indianapolis Brewing Co. v. Liquor Commission*, the Supreme Court rejected the argument that such retaliation violates the Commerce Clause and that the Twenty-first Amendment should not be interpreted to allow one state to punish another for doing what the Amendment permits – imposing a fee on imports.<sup>93</sup> The Court's rationale was of breathtaking scope: "Since the Twenty-first Amendment, as held in the *Young* case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause."<sup>94</sup> *Young's Market*, of course, had said no such thing; the Court in that case explicitly reserved the question whether a state alcohol law that created the sort of discrimination against interstate commerce proscribed by the Commerce Clause was valid under the Twenty-first Amendment.<sup>95</sup> Moreover, in the same year as the *Brewing Co.* decision, the Court had again left open this very question.<sup>96</sup> Thus, the *Brewing Co.* decision broke new ground.

## 2. The Current Interpretation: Accommodation

If the Twenty-first Amendment is "not limited by the Commerce Clause," it would seem to follow that it is not limited by any other provisions of the Constitution. Yet would any competent attorney be willing to argue that a state may permit only white persons to import

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90. *Id.*

91. *Id.* at 62. See also *Zifferin v. Reeves*, 308 U.S. 132, 137-8 (1939) (explaining that the Twenty-first Amendment confers power upon states to permit manufacture and sale of alcohol only under certain conditions; state laws that do not discriminate against interstate commerce but only burden it fall within this power).

92. See *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 392-93 (1939).

93. *Id.* at 392-94.

94. *Id.* at 394.

95. *Young's Market*, 299 U.S. at 64.

96. *Zifferin*, 308 U.S. at 140.

alcohol, unrestrained by the Equal Protection Clause?<sup>97</sup> A quarter century after the *Brewing Co.* decision, the Court disavowed its sweeping dictum. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, alcohol was sold tax-free at a New York airport to travelers departing on international flights.<sup>98</sup> These transactions were regulated by a federal agency acting under the authority of federal law.<sup>99</sup> These sales, however, were considered illegal under New York law, thus presenting a case in which state law clashed with congressional legislation enacted pursuant to the Commerce Clause.<sup>100</sup> The Court rejected the argument that the Twenty-first Amendment had repealed the Commerce Clause: “If the Commerce Clause had been *pro tanto* ‘repealed,’ then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.”<sup>101</sup>

Having rejected a textually literal interpretation of the Amendment, the Court concluded that the prohibition of Section two must be accommodated with the commands of the Commerce Clause: “Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case.”<sup>102</sup> In this case, the Court explained, New York had attempted to prohibit a transaction authorized by congressional legislation enacted pursuant to its express power to regulate interstate and foreign commerce, and “[t]his New York cannot constitutionally do.”<sup>103</sup> While the accommodation standard is quite indefinite, the holding is clear: the Twenty-first Amendment does not empower states to enact alcohol legislation that conflicts with an exercise of Congress’ express power to regulate interstate commerce.

The Commerce Clause does not expressly provide that states may not burden or discriminate against interstate commerce. This proposition is a judicial construction of the Clause, inferred from congressional silence in a particular area.<sup>104</sup> *Young’s Market* and *Brewing Co.* did not involve a clash between state law and congressional legislation, so it remained an open question whether states may burden

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97. See *Craig v. Boren*, 429 U.S. 190 (1976) (holding that state alcohol regulation is subject to scrutiny under the Fourteenth Amendment).

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

99. *Id.* at 325-27.

100. *Id.* at 329.

101. *Id.* at 331-32.

102. *Id.* at 332.

103. *Id.* at 333-34.

104. See *supra* text accompanying notes 22-34.

or discriminate against commerce in alcohol in the absence of congressional legislation. That question arose in *Bacchus Imports, Ltd. v. Dias*.<sup>105</sup> Hawaii imposed an excise tax on wholesale liquor sales, but exempted certain liquors produced in Hawaii in order to encourage development of the state's liquor industry.<sup>106</sup> Applying the accommodation principle of *Hostetter*, the Court first held this tax violated the Commerce Clause because it discriminated against interstate commerce by affording a commercial advantage to local business: "[n]o State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business."<sup>107</sup> Either a discriminatory purpose or discriminatory effect runs afoul of the Commerce Clause, and in this case both were present: the avowed purpose of the tax exemption was to protect a local industry against competition and its effect was discriminatory because it only applied to local products.<sup>108</sup> Second, the Court provided the following rule for accommodating the Commerce Clause to the Twenty-first Amendment: the interests promoted by a state alcohol regulation that discriminate against interstate commerce must be so closely related to the powers reserved to the states by the Twenty-first Amendment as to outweigh the evils of economic protectionism that the Commerce Clause was designed to prevent.<sup>109</sup> In this case, the intent of the tax exemption was to favor a local liquor industry at the expense of out-of-state competition, but that was not a central purpose of the Amendment. The Court suggested that promotion of temperance was a central purpose of the Amendment, but Hawaii did not contend the exemption was designed to promote temperance (perhaps wisely, as the exemption would appear to encourage consumption by making local liquor cheaper).<sup>110</sup> The Court acknowledged that there is some doubt as to what the core concerns of the Amendment are, but economic protectionism is not one of them.<sup>111</sup>

The three-justice dissent in *Bacchus* is worth noting at this point because it provides the argumentative framework for the current direct shipping debate. The dissent asserted that the critical point in the case is that, unlike *Hostetter*, the Hawaii tax exemption was not inconsistent

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

106. *Id.* at 265.

107. *Id.* at 268.

108. *Id.* at 265.

109. *Id.* at 275-76.

110. *See id.* at 276.

111. *Id.* at 275-76.

with a congressional regulation of commerce, so there was no clash between two express provisions of the Constitution, as in *Hostetter*.<sup>112</sup> Instead, the tax fell within the express power reserved to states by the Amendment.<sup>113</sup> Since the tax did not purport to divest Congress of power to regulate commerce in alcohol, the Court must give effect to the text of the Amendment and uphold the tax.<sup>114</sup> In the dissent's view, then, the only manner in which the Commerce Clause restricts state alcohol regulation is to prohibit such regulation when it conflicts with legislation enacted by Congress pursuant to the express power conferred by the Commerce Clause.

The Court's interpretation of the Twenty-first Amendment has thus evolved from a literalist approach, in which the Commerce Clause imposes no limitation on state regulation of alcohol, to a two-tiered approach: (1) state alcohol regulation that conflicts with federal regulation is invalid; (2) state alcohol regulation that violates the Commerce Clause, and that is not so closely related to a central concern of the Twenty-first Amendment as to outweigh the harm done to a central value of the Commerce Clause, is invalid. The latter accommodation principle initially requires analysis of whether any particular state regulation violates the Commerce Clause in the absence of congressional legislation on the subject. It is useful, therefore, to discuss the Court's current dormant Commerce Clause jurisprudence.

#### IV. CURRENT COMMERCE CLAUSE JURISPRUDENCE

The Commerce Clause expressly confers power upon Congress to regulate interstate commerce. It does not, however, by its terms limit state authority in any particular area of commerce where such authority does not conflict with congressional legislation. This lack of express limit upon state authority had led some to question the power of the federal judiciary to impose limits upon state authority with respect to interstate commerce.<sup>115</sup> Nevertheless, even those Justices who question the legitimacy of the dormant Commerce Clause concede that this doctrine serves the original purpose of the Commerce Clause – to protect the national economic market.<sup>116</sup> The Court has consistently adhered to

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112. See *Bacchus*, 468 U.S. at 280 (Stevens, J., dissenting).

113. *Id.*

114. *Id.* at 286-87.

115. See, e.g., *Camps Newfound/Owatonna Inc v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (stating, “[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application[.]”).

116. *Id.* at 595-6 (Scalia, J., dissenting).

the position that judicial power to limit state commercial authority is essential to protecting the national market by preventing states from engaging in “the evils of ‘economic isolation’ and ‘protectionism.’”<sup>117</sup> Such judicial power is essential because out-of-state interests that may be adversely affected by state legislation lack effective political representation as a safeguard against protectionist legislation.<sup>118</sup> There appears to be little, if any, prospect that the Court will abandon this central principle in the foreseeable future.

The contours of the dormant Commerce Clause, however, have evolved significantly since the nineteenth century, when the Court in *Bowman* and *Leisy* imposed limits on state authority to prohibit alcohol imports. In that era, the Court hewed to a rule that states may not regulate interstate commerce in areas where the subject matter demands national uniform rules, which Congress has exclusive power to enact; in areas of primarily local concern, on the other hand, states have the power to enact legislation even if it incidentally burdens interstate commerce.<sup>119</sup> Thus, in *Bowman* and *Leisy*, the Court struck down prohibitions against alcohol imports solely on the ground that states may not regulate interstate commerce where uniform national regulation is required, even though the statutes in those cases did not discriminate against imports.<sup>120</sup>

In the twentieth century, however, grave difficulties arose over attempts to distinguish between areas of commerce that require uniform national rules and those that do not. To eliminate these difficulties, the Court adopted a two-tiered approach to state regulation that does not depend on the unworkable national uniformity test. First, a nondiscriminatory state law (i.e., one that treats domestic and interstate commerce equally) that incidentally burdens interstate commerce “will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>121</sup> Second, a state law that discriminates against interstate commerce (i.e., one that favors domestic commerce at the expense of interstate commerce) must serve a legitimate local interest that cannot be served equally well by

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117. *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980); *New Energy Co. v. Limbach*, 486 U.S. 269, 273-4 (1988); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994); *C. & A. Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994).

118. *Maine v. Taylor*, 477 U.S. 131, 139 (1986).

119. *Cooley v. Board of Wardens*, 53 U.S. 299 (1851).

120. See *supra* text accompanying notes 26-44 for a discussion of the *Bowman* and *Leisy* decisions.

121. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

nondiscriminatory alternatives.<sup>122</sup>

The first tier of this approach has not withstood critical analysis as well as the second tier. As to evenhanded state commercial regulation, critics have contended that balancing the burden on interstate commerce against local benefits is not a valid concern of the Commerce Clause. In their view, the core concern of the Commerce Clause is to prevent states from intentionally discriminating against interstate commerce, and in the absence of such economic protectionism, judicial review is unwarranted.<sup>123</sup> These critics further charge that when the Court purports to apply the balancing test and concludes that local benefits are outweighed by burdens on commerce, it is not in fact balancing these interests; instead, the rhetoric of balancing obscures the actual rationale: the state law at issue is a protectionist measure.<sup>124</sup> This view, that the balancing tier of the dormant Commerce Clause should be abandoned, appears to have gained some favor within the Court.<sup>125</sup>

Critics of the balancing test, on the other hand, applaud the strict scrutiny applied to discriminatory state commercial regulation. In their view, state economic protectionism is the very evil the Commerce Clause was designed to eliminate,<sup>126</sup> so it follows that the judiciary should have the power to invalidate such laws. The Court, without dissent, has vigorously enforced the nondiscrimination principle to this day.<sup>127</sup> In this scheme, it is important to distinguish between discriminatory and nondiscriminatory laws. A state law discriminates against interstate commerce when it places out-of-state products at an economic disadvantage against domestic products because of their geographic origin.<sup>128</sup> Even if the burden of a state law falls primarily upon out-of-state competitors, it is not discriminatory so long as the burden is not imposed because of geographic origin.<sup>129</sup> Moreover, the Court has repeatedly rejected the argument that a state law is not

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122. See, e.g., *Taylor*, 477 U.S. at 140.

123. See, e.g., Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092-1100 (1986).

124. *Id.* at 1209-20.

125. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617-20 (1997) (Thomas, J., dissenting).

126. See, e.g., Regan, *supra* note 123, at 1113-18.

127. See *supra* notes 115-118 and accompanying text. See also *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333 (1977); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

128. *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 39 (1980); *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988); *Wyoming*, 502 U.S. at 455; *Camps Newfound*, 520 U.S. at 576-78.

129. See, e.g., *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 125-6 (1978); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-2 (1981).

discriminatory where it does not prohibit imports outright, but only imposes conditions upon the import or sale of out-of-state products; where such conditions provide an economic advantage to domestic products, they are discriminatory.<sup>130</sup> The Court has also rejected the argument that where two laws are valid in and of themselves, conjoining them in a single program is also valid despite any resulting discrimination; economic protectionism is just as great an evil when produced by the conjunction of two otherwise valid laws as when produced by a single discriminatory law.<sup>131</sup>

Strict scrutiny of discriminatory state commercial regulation has proved strict indeed. In some cases, the Court has held that such discrimination is invalid, regardless of whatever local interest it might serve.<sup>132</sup> In other cases, where states have proffered a legitimate local interest as the justification for discriminatory regulation, in each case but one the Court has concluded that justification did not survive strict scrutiny. The Court has concluded either that the proffered local interest was insufficient in and of itself to justify the discrimination,<sup>133</sup> or that the discriminatory regulation failed adequately to further the local interest.<sup>134</sup>

The one exception, *Maine v. Taylor*,<sup>135</sup> provides some elaboration of strict scrutiny analysis. A Maine statute prohibited the import of live baitfish, the most direct form of discrimination imaginable.<sup>136</sup> The only issue was whether the statute served a legitimate local purpose that could not be served equally well by available nondiscriminatory measures.<sup>137</sup> The proffered local interest was to protect domestic baitfish from invasion of their habitat by parasites and nonnative species.<sup>138</sup> The District Court made two findings of fact: that imported baitfish would indeed threaten domestic baitfish in this manner, and that no other means were available to prevent this threat because there were no procedures to test for the presence of parasites.<sup>139</sup> The Court held: "Although the

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130. See, e.g., *Hunt*, 432 U.S. at 350-52; *New Energy Co.*, 486 U.S. at 275.

131. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199-200 (1994).

132. *Philadelphia*, 437 U.S. at 624, 626-27; *Lewis*, 447 U.S. at 36; *New Energy Co.*, 486 U.S. at 273; *West Lynn Creamery, Inc.*, 512 U.S. at 193; *Camps Newfound*, 520 U.S. at 581. See also *Wyoming*, 502 U.S. at 456-58 (rejecting argument that Congress has conferred power upon states to enact discriminatory laws).

133. See, e.g., *C. & A. Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 393-94 (1994).

134. See, e.g., *Hunt*, 432 U.S. at 353.

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

136. *Id.* at 137-38.

137. *Id.* at 140.

138. *Id.* at 133.

139. *Id.* at 142-43.

proffered justification for any local discrimination against interstate commerce must be subjected to ‘the strictest scrutiny,’ the empirical component of that scrutiny, like any other form of factfinding, ‘is the basic responsibility of district courts, rather than appellate courts’<sup>140</sup>; appellate courts may not reverse such findings merely because they disagree with them, but only where they are clearly erroneous.<sup>141</sup> Thus, there are both legal and factual inquiries to be made in determining whether discriminatory state regulation survives strict scrutiny. The legal component is whether a proffered local interest is legitimate. The factual components are whether the regulation adequately serves that interest and whether the local interest can be served equally well by an available nondiscriminatory measure. A district court’s findings as to the factual components will be afforded wide deference, and so long as it makes permissible inferences from the evidence, an appellate court may not disturb its findings.<sup>142</sup>

This evolution of Commerce Clause jurisprudence reveals that state laws which place out-of-state products at an economic disadvantage, due to their geographical origin, are far more vulnerable to constitutional challenge than evenhanded state laws which incidentally burden interstate commerce. The former must actually serve a legitimate local interest that cannot be served by available nondiscriminatory means, whereas the local benefits of a nondiscriminatory law need only outweigh its burden on commerce. It is precisely for this reason that recent litigation over state alcohol regulation has focused on states which ban out-of-state wine producers from shipping their products directly to consumers within the state, while permitting domestic wine producers to do so.

## V. THE DIRECT SHIPMENT LITIGATION

Litigation concerning the direct shipment controversy has yielded judicial decisions in six states. A state-by-state analysis will assist in revealing the competing arguments over the proper way to accommodate the nondiscrimination principle of the Commerce Clause with the scope of state power under the Twenty-first Amendment.

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140. *Id.* at 144-45.

141. *Taylor*, 477 U.S. at 145. FED. R. CIV. P. 52(a) provides: “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . .”

142. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

A. *Indiana (Seventh Circuit)*

Indiana law provides that it is unlawful for persons who sell alcoholic beverages in other states to ship such beverages directly to consumers in Indiana, while Indiana sellers may do so.<sup>143</sup> Indiana consumers brought suit, claiming that such differential treatment was unconstitutional.<sup>144</sup> The district court held that this law violated the dormant Commerce Clause, but the court of appeals reversed.<sup>145</sup> The court began its analysis by appearing to concede that permitting local sellers but not sellers in other states to ship directly to Indiana consumers discriminates against interstate commerce in violation of the Commerce Clause.<sup>146</sup> The parties framed the issue as whether such discrimination furthers a core purpose of the Twentieth-first Amendment, apparently believing that the Supreme Court's admonition to harmonize the Commerce Clause and the Twenty-first Amendment applied to this case.<sup>147</sup>

The court of appeals, however, took a different tack, at least in part: "our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters."<sup>148</sup> The panel reviewed the nineteenth century history of some states' efforts to prohibit commerce in alcohol and judicial decisions limiting such efforts, resulting in a deadlock: states could prohibit sales of alcohol within their own borders but lacked power to prohibit out-of-state sellers from shipping directly to consumers.<sup>149</sup> The Webb-Kenyon Act and the Eighteenth Amendment broke the deadlock and gave states authority to bar direct shipment; in the panel's view, although Section one of the Twenty-first Amendment repealed the Eighteenth Amendment, Section two raised the Webb-Kenyon Act to constitutional status and gave states authority to ban direct shipments. The panel acknowledged that the Supreme Court has held states may not use their power under Section two to discriminate against out-of-state sellers in favor of in-state sellers. Even though Indiana allowed direct shipment only by in-state sellers and the panel initially appeared to concede this was discriminatory, it appeared to contradict itself by concluding this was not discriminatory: all alcohol, wherever produced, must pass through the three-tiered

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143. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000).

144. *See id.*

145. *Id.* at 849, 854.

146. *See id.* at 851.

147. *Id.*

148. *Id.* at 851.

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

system and be taxed.<sup>150</sup> Thus, direct shipments from Indiana sellers to consumers are taxed, and the prohibition on direct shipment from out-of-state requires that imports pass through the three-tiered system so as to enable collection of the same taxes.<sup>151</sup> The court never explained how shipments directly from Indiana wineries to consumers somehow passed through the three-tiered system.<sup>152</sup> Indeed, the opposite would appear to be the case, since direct shipment by definition bypasses wholesalers and retailers (and the attendant price mark-ups).

*B. Florida (Eleventh Circuit)*

The Seventh Circuit panel noted that the plaintiffs in that case were consumers whose complaint was that they could not receive direct shipments of imported alcohol.<sup>153</sup> Thus, the case did not involve an out-of-state seller complaining of an inability to ship directly to consumers. Such a complaint arose in Florida.<sup>154</sup> Florida law prohibited any person from shipping alcohol from out-of-state directly to consumers, but allowed Florida wineries to do so.<sup>155</sup> The district court followed the analytical framework established by the Supreme Court.<sup>156</sup> It concluded that this law discriminates against out-of-state wineries by prohibiting them from shipping directly to consumers while permitting licensed in-state wineries to do so, and that Florida's legitimate interests "can be adequately served by reasonable nondiscriminatory alternatives."<sup>157</sup> In particular, Florida's interest in collecting taxes on imported alcohol can be satisfied by requiring out-of-state wineries to collect Florida taxes.<sup>158</sup> The district court also concluded, however, that the expressed purposes of Florida's ban on direct shipments – to protect public welfare, revenue collection and the economy – fell within the core concerns of Section two of the Twenty-first Amendment.<sup>159</sup> Oddly, the district court asserted that invalidating the ban would undermine Florida's ability to collect taxes even though it previously found that out-of-state wineries could

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150. *Id.* at 853-54.

151. *Id.*

152. *See id.*

153. *See id.* at 849.

154. *Bainbridge v. Bush*, 148 F. Supp. 2d 1306, 1311 (M.D. Fla. 2001).

155. *Bridenbaugh*, 277 F3d. at 854.

156. *See supra* text accompanying notes 71-84 for a discussion of the Court's analytical framework for accommodating the dormant Commerce Clause to Section two of the Twenty-first Amendment.

157. *Bainbridge*, 148 F. Supp. 2d. at 1311.

158. *Id.* at 1312.

159. *Id.*

collect the taxes.<sup>160</sup> The court also noted the decision of the Seventh Circuit, in upholding an identical law, rejected core concerns analysis and relied upon the text and history of the Twenty-first Amendment.<sup>161</sup> This case, however, concerned out-of-state retailers' complaints rather than consumers, so core concerns analysis was appropriate.<sup>162</sup>

The court of appeals applied the same analysis as the district court but concluded the record did not clearly demonstrate that the ban on direct shipment was closely related to a core concern of the Twenty-first Amendment, and remanded for findings of fact on that issue.<sup>163</sup> Like the district court, the panel found the Florida law discriminatory on its face because in-state wine producers can ship directly to consumers but out-of-state producers cannot.<sup>164</sup> It failed to survive strict scrutiny under the Commerce Clause because Florida's legitimate interest in generating revenue could be served by a nondiscriminatory alternative - licensing out-of-state wineries who intend to ship to consumers and requiring them to collect state taxes.<sup>165</sup>

The appellate panel then addressed the question whether Florida's law implicates a core concern of the Twenty-first Amendment and, if so, whether the State "demonstrates that it genuinely needs the law to effectuate its proffered core concern."<sup>166</sup> Thus, the panel read Supreme Court precedent as requiring not only that the state must identify a core concern of the Amendment that a discriminatory law was designed to serve, but also must prove that the law "is genuinely needed to effectuate the proffered core concern."<sup>167</sup> While the Supreme Court has been rather vague in identifying the core concerns of the Amendment, one plurality opinion has asserted that temperance, ensuring orderly market conditions, and raising revenue are core concerns.<sup>168</sup> Florida asserted that protecting minors (one form of temperance, presumably) was a goal

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160. *Id.* at 1313. The district court also noted that direct shipment would facilitate sales to minors, thus undermining the state's power to promote temperance. *Id.*

161. *Id.*

162. *Id.* at 1313-14.

163. *Bainbridge v. Turner*, 311 F.3d 1104, 1106, 1115 (11th Cir. 2002).

164. *Id.* at 1109. The panel noted that, under Florida's law, domestic producers must ship by their own or by leased vehicles and cannot use common carriers. *Id.* Thus, even if Florida's law is unconstitutional, out-of-state producers could not ship by common carrier such as Federal Express. It would seem impractical for distant producers to ship to Florida via their own or leased vehicles, so this may be a hollow victory for consumers.

165. *Id.* at 1110. The panel also noted that the state's concern to prevent sales to minors can be achieved by imposing labeling requirements and enforcing criminal penalties. *Id.*

166. *Id.* at 1112.

167. *Id.* at 1114.

168. *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion).

of the ban on direct out-of-state shipment, but the ban was not needed to effectuate that purpose because it could be achieved by licensing out-of-state vendors and threatening sanctions against those who ship to minors.<sup>169</sup> The panel was not sure what “ensuring orderly market conditions” means, but it clearly does not mean shutting out-of-state firms out of a state’s markets.<sup>170</sup> As to raising revenue, assuming that it is a core concern, the panel repeated that the State must prove that the discrimination is needed in order to raise revenue.<sup>171</sup> On that point, there remained an issue of fact to be decided by the district court: whether the State is unable to impose its taxes directly on out-of-state firms, just as it does on in-state firms.<sup>172</sup>

The Eleventh Circuit panel made two other important points. First, it strongly disagreed with the analytical framework employed by the Seventh Circuit, which relied solely on the text and history of the Twenty-first Amendment in determining whether a discriminatory state alcohol regulation is authorized.<sup>173</sup> In the Eleventh Circuit’s view, the Supreme Court has ruled that such discrimination is authorized only if it closely related to a core concern of the Amendment. Second, the Eleventh Circuit criticized the Seventh Circuit’s finding that there was no discrimination, since out-of-state vendors were clearly disadvantaged because they could not ship directly to consumers, whereas their in-state competitors could.<sup>174</sup>

### C. *Texas (Fifth Circuit)*

Texas, like Indiana and Florida, prohibits out-of-state firms from shipping alcohol directly to consumers, while allowing Texas wineries to do so. In litigation challenging the constitutionality of the ban on direct shipment of out-of-state wine, the district court initially held that the Texas law violated the Commerce Clause and was not saved by the Twenty-first Amendment because it failed to serve the core concern of temperance.<sup>175</sup> The Seventh Circuit then upheld Indiana’s ban, so the district court in Texas reconsidered its decision.<sup>176</sup>

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169. *Bainbridge*, 311 F.3d at 1114-15.

170. *Id.* at 1115.

171. *Id.*

172. *Id.*

173. *Id.* at 1114, n. 15.

174. *Id.*

175. *Dickerson v. Bailey*, 87 F. Supp. 2d 691 (S.D. Tex. 2000), *aff’d*, 212 F. Supp. 2d 673, 675 (S.D. Tex. 2002).

176. *Id.* at 675-77.

The court was critical of the Seventh Circuit decision in several respects. First, the Seventh Circuit's reliance upon the text and history of the Amendment was shaky because text and history were open to three different interpretations.<sup>177</sup> Second, it failed to follow Supreme Court precedent which requires that discriminatory state regulation of alcohol must be closely related to a core concern of the Amendment.<sup>178</sup> Third, it found the ban on out-of-state direct shipment nondiscriminatory despite the fact that in-state sellers could ship directly to consumers, thereby gaining an economic advantage.<sup>179</sup> The district court also noted, however, that recent Supreme Court decisions, though not directly applicable to the direct shipment issue, have expanded state authority at the expense of federal power under the Commerce Clause.<sup>180</sup> In addition, some current Justices have written dissents in cases involving the Commerce Clause and Twenty-first Amendment; these dissents express dissatisfaction with the harmonizing principle of the past forty years and call for a return to the original literal interpretation of the Amendment, in which state power to regulate alcohol is not limited by the dormant Commerce Clause.<sup>181</sup> Nevertheless, the district court concluded that the harmonizing principle remains binding precedent.<sup>182</sup> It therefore reaffirmed its decision that the Texas ban on direct shipment from out-of-state is discriminatory in violation of the Commerce Clause. The State had failed to show either how the economic advantage conferred upon in-state procedures served the core concerns of promoting temperance, revenue collection and orderly market conditions, or that those concerns could not be satisfied by nondiscriminatory alternatives.<sup>183</sup> Finally, it granted an injunction against enforcing the ban on direct shipment from out of state, and deferred "to action by the legislature to repair the Alcoholic Beverage Code."<sup>184</sup> On appeal, the Fifth Circuit followed the District Court's analysis and affirmed its decision in all respects.<sup>185</sup>

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177. *Id.* at 680-82.

178. *Id.* at 682-94.

179. *Id.* at 685-86.

180. *Id.*

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

182. *Id.*

183. *Id.* at 694-95.

184. *Id.* at 696.

185. *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003). Much of the panel's opinion is devoted to deriding the state's arguments, for example: "This is not even a close call . . . . The only complications in the adjudication arise from the Administrator's mischaracterization of almost every relevant point – from the proper constitutional test to the nature of the case law to the gravamen of Plaintiffs' legal position." *Id.* at 409.

*D. North Carolina (Fourth Circuit)*

North Carolina is another state that prohibits direct shipment to consumers from out-of-state vendors while permitting in-state wineries to do so. In ensuing litigation, a federal district court followed the established analytical framework.<sup>186</sup> It found that North Carolina's law discriminates against out-of-state producers by allowing in-state wineries to ship directly to consumers while prohibiting out-of-state wineries from doing so.<sup>187</sup> Rather than applying strict scrutiny to the proffered justifications for this discrimination, however, the court concluded this was direct discrimination against interstate commerce and there should be no inquiry into the State's legitimate interests.<sup>188</sup> The court then applied the established Twenty-first Amendment core concern analysis. It stated that North Carolina had not proffered any reason at all for the favorable treatment afforded in-state wineries and thus concluded that North Carolina's law is unconstitutional.<sup>189</sup>

Like the district court in Texas, this court addressed the Seventh Circuit's ruling to the contrary. Rather than criticizing that ruling, however, the court distinguished the Indiana case on the facts.<sup>190</sup> The Seventh Circuit found that Indiana's law was not discriminatory because, although it prohibited direct shipment from out-of-state sources, it applied equally to in-state sources: all alcohol must pass through Indiana's three-tiered system.<sup>191</sup> The North Carolina law, on the other hand, favored in-state sources over out-of-state sources by allowing the former to ship directly, but not the latter.<sup>192</sup> The district court enjoined the State from enforcing its ban on out-of-state direct shipment.<sup>193</sup>

On appeal, the Fourth Circuit followed the analytical framework

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186. *Beskind v. Easley*, 197 F. Supp. 2d 464 (W.D. N.C. 2002) *aff'd in part, vacated in part*, 325 F.3d 506 (4th Cir. 2003) (holding that the district court's conclusion that North Carolina's ABC laws unconstitutionally discriminated against interstate commerce, but vacated its judgment insofar as it declared five statutes unconstitutional and enjoined their enforcement).

187. *Id.*

188. *Id.* at 471. The district court noted that, in theory, the law permitted consumers to purchase wine directly from out-of-state producers, but the process for doing so was so cumbersome that it had a "chilling effect" on such purchases and thereby placed a "greater burden on goods produced out-of-state than on goods produced in-state." *Id.*

189. *Id.* at 472-74.

190. *See id.* at 474.

191. *Id.* at 474.

192. *Beskind*, 197 F. Supp. 2d at 474-75. Oddly, the district court noted that "this case pits the Supreme Court . . . against the Seventh Circuit." *Id.* at n. 12. This suggests, not that *Bridenbaugh* is distinguishable, but that it applied the wrong legal standards.

193. *Id.* at 475.

established by the Supreme Court, rather than the “text and history” approach of the Seventh Circuit.<sup>194</sup> It agreed with the district court that North Carolina’s law violates the dormant Commerce Clause because it discriminates against out-of-state wineries by subjecting their products to price mark-ups in the three-tiered system, while directly shipped domestic wine is free of such mark-ups.<sup>195</sup> Moreover, two nondiscriminatory alternatives are available: terminate in-state direct shipment of wine, or permit direct shipment from out-of-state to a particular location to ensure tax collection.<sup>196</sup> In addition, the appellate panel concluded that North Carolina’s decision to allow domestic wineries to bypass the three-tiered system and ship directly to consumers served no central concern of the Twenty-first Amendment and was simply “economic boosterism.”<sup>197</sup>

With respect to the appropriate remedy, however, the panel held that the appropriate remedy was not to enjoin the ban on out-of-state direct shipment, but rather to enjoin in-state direct shipment.<sup>198</sup> It reasoned that either remedy would end the discrimination and that the latter remedy would do less damage to the State’s legitimate Twenty-first Amendment interest in maintaining the viability of its three-tiered regulatory system.<sup>199</sup> It would do less damage, the panel asserted, because direct shipment of wine from out-of-state would pose a threat to the entire three-tiered system, whereas ending the exception for in-state direct shipment would pose no threat at all.<sup>200</sup>

#### *E. Michigan (Sixth Circuit)*

Michigan is yet another state that prohibits out-of-state wineries from shipping directly to consumers in Michigan, but allows Michigan wineries to do so with minimal regulatory oversight. In an unreported decision, the federal district court held that, regardless of the discrimination against out-of-state wineries, Michigan’s scheme ensured the collection of taxes from out-of-state producers (through the three-tiered system) and discouraged sales to minors.<sup>201</sup>

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194. *Beskind v. Easley*, 325 F.3d 506, 513-14 (4th Cir. 2003).

195. *Id.*

196. *Id.* at 515-16.

197. *Id.* at 516-17.

198. *Id.* at 418-19.

199. *Id.* at 419.

200. *Beskind*, 325 F.3d at 517-20.

201. *Heald v. Engler*, 2001 U.S. Dist. LEXIS 24826, No. 00-CV-71438-DT (E.D. Mich 2001) (unreported), *rev’d*, 342 F.3d 517 (6th Cir. 2003).

The Sixth Circuit, however, concluded both that the discrimination violated the dormant Commerce Clause and that it failed to advance core state powers reserved by the Twenty-first Amendment.<sup>202</sup> The discrimination lay in the facts that Michigan wineries could avoid price mark-ups of wholesalers and retailers whereas out-of-state wineries could not, licenses for out-of-state wineries to sell to wholesalers were far more expensive than licenses for Michigan wineries, and Michigan wineries had greater access to the Michigan market via direct shipment.<sup>203</sup> The court further found no evidence that this discrimination actually promoted collection of taxes from out-of-state producers or prevented sales to minors in ways that cannot be accomplished by nondiscriminatory methods.<sup>204</sup>

#### *F. New York*

A federal district court in New York has ruled that New York's prohibition against direct shipment from out-of-state alcohol discriminates against interstate commerce because in-state wineries are allowed to do so, thus requiring all out-of-state wines to pass through New York's three-tier system while direct shipment of in-state wine bypasses most, if not all, of the three-tier system.<sup>205</sup> Turning to the issue whether such discrimination is nevertheless saved by the Twenty-first Amendment, the court found that the express purpose of allowing in-state wineries to ship directly to consumers was to confer an economic benefit on them, which is not a central concern of the Amendment.<sup>206</sup> As to the central concern of temperance (specifically, prohibiting sales to minors), this concern can be protected by nondiscriminatory alternatives such as licensing and regulating out-of-state wineries.<sup>207</sup> New York also contended that the ban on direct shipping from out-of-state was needed to prevent tax evasion, but the court found that the State had failed to prove that taxes on out-of-state sales could not be collected by nondiscriminatory means.<sup>208</sup> The court simply ignored the Seventh Circuit ruling, other than to mention it.<sup>209</sup>

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202. *Heald v. Engler*, 342 F.3d 517, 519-20 (6th Cir. 2003), *reh'd denied*, 2003 U.S. App. LEXIS 23001 (6th Cir. Nov. 4, 2003).

203. *Id.* at 6-7, 19.

204. *Id.* at 26.

205. *Swedenburg v. Kelly*, 232 F. Supp. 2d 135, 144-47 (S.D. N.Y. 2002).

206. *Id.* at 148.

207. *Id.* at 148-9.

208. *Id.* at 145-50. The court also expressed doubt that raising revenue was a central concern of the Twenty-first Amendment. *Id.*

209. *Id.* at 141.

As to the appropriate remedy, the State urged that the court should enjoin in-state direct shipment and plaintiffs contended the ban on out-of-state direct shipment should be lifted. The court indicated the latter was likely the more appropriate remedy because the legislature had shown some preference for direct shipment and banning in-state direct shipment would harm New York wineries.<sup>210</sup>

### *G. Virginia*

Virginia is another state that, until now, has permitted in-state direct shipment of wine while prohibiting direct shipment from out-of-state. A federal district court concluded Virginia's law is "the very definition of a facially discriminatory law."<sup>211</sup> It also ruled that the State had failed to prove that there are "no other nondiscriminatory means of enforcing their legitimate interests."<sup>212</sup>

This court sharply criticized the ruling of the Seventh Circuit as "improperly decided because it does not rely upon the established dormant Commerce Clause analysis."<sup>213</sup> As to remedy, the court declined to enjoin the provision permitting Virginia producers to ship directly to consumers, and instead lifted the ban on direct shipping from out-of-state.<sup>214</sup> This decision was appealed, but the appeal is moot. New Virginia legislation now permits out-of-state wineries and retailers to ship directly to consumers in Virginia, subject to Virginia taxes and regulation.<sup>215</sup>

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210. *Id.* at 152-3.

211. *Bolick v. Roberts*, 199 F. Supp. 2d 397, 407 (E.D. Va. 2002) (adopting the Report and Recommendations of Magistrate Judge).

212. *Id.* at 409.

213. *Id.* at 408. The district court also asserted, contrary to the Seventh Circuit, that the text of the Twenty-first Amendment does not unambiguously afford States unfettered control over importation of alcohol. *Id.* at 410.

214. *Id.* at 449-50.

215. Lynn Alley & Dana Nigro, *Appeals Court Rules North Carolina Must Change Unconstitutional Wine-Shipping Laws*, WINE SPECTATOR (April 15, 2003), available at <http://www.winespectator.com/Wine/Daily/News/0,1145,2038,00.html>.

## VI. A CRITICAL ANALYSIS OF THE DIRECT SHIPMENT CONSTITUTIONAL CONTROVERSY

The above review of the direct shipment litigation reveals that the issue presented is a strong candidate for review by the Supreme Court.<sup>216</sup> First, there is a conflict of opinion, particularly between the Seventh, Eleventh, Fifth, Fourth, and Sixth Circuits, over this question: what is the proper analytical framework for resolving clashes between the dormant Commerce Clause and the Twenty-first Amendment? Second, this is an important issue that transcends the immediate direct-shipment controversy because the Court has, for seventy years in various contexts, struggled to define the proper relationship between the dormant Commerce Clause and the Twenty-first Amendment. Third, if the Court were to reaffirm its established principle that these two provisions must be harmonized, resolution of the direct shipment issue will provide the Court with an opportunity to clarify two unanswered questions: (1) what are the core powers reserved to the states by the Twenty-first Amendment; (2) what is the nature of a state's burden to show that a law is closely related to such a reserved power? If the Court were to grant review, it cannot be predicted with certainty how the Court would rule, but careful analysis of these issues indicates that the Court would likely rule that discriminatory direct shipment laws are unconstitutional.

### *A. The Proper Analytical Framework for Resolving Clashes between the Dormant Commerce Clause and the Twenty-first Amendment*

For the past forty years, the Supreme Court has hewed to the principle that the Twenty-first Amendment did not repeal the Commerce Clause and, when the two are in conflict, they should be harmonized. With respect to the express provisions of the Commerce Clause, conferring upon Congress the power to regulate interstate commerce, this is an attractive proposition because nothing in the text or history of the Amendment suggests that it was intended to eliminate congressional authority to regulate interstate commerce in alcohol. The literal text of Section two might support such an interpretation, for it elevates state alcohol regulation to the level of constitutional requirement, unchangeable by Congress, by providing that any act in violation of state

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216. See SUP. CT. R. 10(a). Supreme Court rules specify that one consideration to be considered in deciding to grant a writ of certiorari is: "When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . ." *Id.* (listing the proper considerations governing review on writ of certiorari).

law is prohibited.<sup>217</sup> The text does not, however, state explicitly that the preexisting congressional authority over all forms of interstate commerce is repealed in the area of alcohol. If that were so, the entire vast body of federal alcohol regulation is unconstitutional, a “patently bizarre” notion, as the Court put it.<sup>218</sup>

The harmonization principle is somewhat less attractive, however, with respect to the dormant Commerce Clause. The Commerce Clause does not expressly provide that state laws which discriminate against out-of-state products or that unreasonably burden interstate commerce are unconstitutional. Thus, there is some force to the argument that when the express terms of Section two collide with non-textual, judicially-created rules designed to preserve the intent of the Commerce Clause, the express terms must prevail because they have greater legitimacy. The counter to this argument is that the Court throughout our constitutional history has insisted, and rightly so, that there must be a judicial safeguard, independent of the will of any particular majority, against the sort of economic warfare experienced under the Articles of Confederation. The danger of such warfare is no less present in the area of alcohol than in any other commercial area. In any event, the Court has already abandoned the notion that Section two abrogated judicial authority to interpret and enforce the Commerce Clause, so an abrupt return to that notion seems highly unlikely.

A more limited form of the argument that Section two abrogated the dormant Commerce Clause is that it did so with respect to the specific commercial activity at which Section two was aimed: alcohol imports. This appears to be the view of the Seventh Circuit, and its analysis warrants close attention. That panel asserted, not only does the plain language of Section two prohibit any act in violation of state law concerning “importation;” it also is aimed at precisely the problem direct shipping laws were designed to eliminate: reverse discrimination. As the history prior to adoption of the Eighteenth Amendment demonstrates, Supreme Court rulings left states with the authority to regulate domestic alcohol commerce but not to regulate importation of alcohol in its original package. This created reverse discrimination in which a state’s domestic industry was at an economic disadvantage because it was regulated as the state saw fit, but imports were not. In the Seventh Circuit’s view, Section two was meant to remedy this precise problem by abrogating the judicial decisions that had created this

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217. See *supra* note 5 and accompanying text.

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

disparity and giving states power to level the playing field by subjecting imported alcohol to state regulation.

Other courts have criticized the Seventh Circuit's finding that Indiana's direct shipment law is not discriminatory. At first glance, this criticism seems warranted because that law plainly allowed Indiana sellers to ship directly to consumers, but prohibited out-of-state sellers from doing so. This criticism, however, misses the Seventh Circuit's point: laws prohibiting direct shipment of imports are not discriminatory in light of the history that animated Section two, which is that it was needed to eliminate discrimination against a state's own alcohol industry. To this point, the Seventh Circuit's analysis is on the mark.

The flaw in the Seventh Circuit's analysis, however, is that the current direct shipment controversy does not involve the reverse discrimination at which Section two was aimed. Indeed, the state laws that are at issue in the current litigation are precisely the opposite. They are laws that confer an economic advantage on a state's domestic wine industry by allowing it to direct-ship and banning direct shipment by out-of-state competitors. It seems highly unlikely, therefore, that the Supreme Court will accept even this limited form of a "text and history" analysis, because such analysis is inapplicable to these cases. If that is so, no good reason appears why the Court should depart from its established precedent: when a state law discriminates against out-of-state products because of their geographical origin, it violates the Commerce Clause unless it is closely related to one of the powers reserved to the states by Section two of the Twenty-first Amendment.

*B. Powers Reserved to the States by Section Two of the Twenty-first Amendment*

The Supreme Court has not yet made clear what powers are reserved to the states by Section two of the Twenty-first Amendment, although it has made clear that conferring economic advantage upon domestic industry by discouraging competition from outside a state is not one of them.<sup>219</sup> Section two tracks the text of the Webb-Kenyon Act, so it is likely the Court would look to the purposes of that Act for guidance in defining the central concerns of Section two. Above all, it was the Prohibition Movement that won passage of that Act, so promotion of temperance would seem to be a central concern of Section two. In this context, temperance would be defined as moderation in

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219. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

consumption of alcohol, or total abstinence.

A plurality opinion of the Court has suggested that, in addition to temperance, the core of state power under Section two includes “ensuring orderly market conditions, and raising revenue.”<sup>220</sup> This plurality opinion stated that “ensuring orderly market conditions” includes “the power to control shipments of liquor during their passage through their territory and to take steps to prevent unlawful diversion of alcohol into a State’s market.”<sup>221</sup> Raising revenue means collecting taxes on alcohol. Whether or not a majority of the Court will ultimately agree with this position, both these powers are strong candidates for being viewed as central concerns of Section two.

The historical context in which Section two was ratified suggests another central concern. In *Rhodes v. Iowa*, the Supreme Court held that Prohibition states had no power to prohibit producers in other states from shipping alcohol directly to consumers.<sup>222</sup> The Webb-Kenyon Act abrogated that decision by providing that importation of alcohol into a state in violation of state law is prohibited.<sup>223</sup> Since Section two tracks the language of that Act, the Court might well conclude that preventing direct shipment from out-of-state vendors to consumers in violation of state law is a central concern of section 2.

*C. A State’s Burden to Show that a Prohibition is Closely Related to a Power Reserved to the States by the Twenty-first Amendment*

The above analysis suggests four plausible central concerns of Section two: promoting temperance, ensuring orderly market conditions, raising revenue, and preventing direct shipment to consumers. When the Court held that a discriminatory state law must be “closely related” to a central concern of Section two, it did not define what it meant by “closely related” because it concluded the state’s proffered concern was not a central concern of Section two to begin with.<sup>224</sup> Thus, the nature of a state’s burden to show that discriminatory alcohol regulation is “closely related” to a central concern of the Twenty-first Amendment remains an open question.

It is highly unlikely the Court would rule that a state need only assert that such a law is closely related to a central concern and that such

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220. *North Dakota v. United States*, 495 U.S. 423, 431-32 (1986).

221. *Id.*

222. *See Rhodes v. Iowa*, 170 U.S. 412, 13 (1989); *see also supra* notes 51-59 and accompanying text.

223. *See supra* notes 45-70 and accompanying text.

224. *Hostetter*, 377 U.S. at 322.

an assertion must be accepted at face value by a court, for that would provide no meaningful judicial review of a state's proffered central concern. In order to have meaningful judicial review, a state must at least prove that its discriminatory law actually promotes its proffered central concern. A closer question is whether a State must also prove that its concern cannot be met by available nondiscriminatory means. If it must, then a discriminatory state law that violates the Commerce Clause because nondiscriminatory alternatives are available is *a fortiori* not closely related to a central concern of Section two. For this reason, the Court might be reluctant to impose this burden on a state; it might be impossible to prove that a discriminatory state law is closely related to a central concern of Section two, thus arguably vitiating the shelter afforded States by section 2. On the other hand, a discriminatory state law that violates the Commerce Clause amounts to economic protectionism by definition; and economic protectionism is not a power reserved to the states by Section two. Thus, the Court likely will conclude that a State must also prove that no nondiscriminatory methods are available. Alternatively, since negatives are extremely difficult to prove, the Court might conclude the burden is on the plaintiff to prove that a nondiscriminatory method is available.

*D. The Direct Shipment Issue*

1. Does the Ban on Direct Shipment from Out-of-State Violate the Dormant Commerce Clause?

Assuming that the Court abides by its settled precedent, as is likely, then the first issue it will consider in a direct shipment case is whether a state law that permits in-state producers to ship wine directly to consumers but prohibits out-of-state vendors from doing so discriminates against interstate commerce in violation of the dormant Commerce Clause. The recent Commerce Clause jurisprudence discussed in Part IV makes clear that only state laws that place out-of-state products at an economic disadvantage due to their geographic origin entail the sort of discrimination that is subject to strict scrutiny. These state laws almost certainly meet that description; they prohibit direct shipment only of wine that would come from out-of-state. The counter argument is that such laws merely ensure that all wine, whether produced in or out of state, passes through a state's three-tiered regulatory scheme. This argument, however, ignores a crucial fact: direct shipment from an in-state winery does not pass through the three-

tiered system. It bypasses both the wholesale and retail tiers, avoiding price markups at both those levels. Out-of-state wine, on the other hand, must pass through both levels, subjecting it to the economic disadvantage of price markups.

If these laws place out-of-state wine producers at an economic disadvantage because of the geographical origin of their product, the Court would face the question whether the state's proffered justifications are legitimate state interests. The promotion of a state's domestic industry by affording it a means of trade prohibited to out-of-state interests is not legitimate because that is economic protectionism. Other proffered justifications are legitimate: promoting temperance by preventing minors from purchasing alcohol, and raising revenue by collecting taxes on alcohol.

The next question is whether direct shipment laws serve either of these interests. This is an empirical (factual) inquiry. As to purchase of wine by minors, the ban on direct shipment from out-of-state serves this interest because minors must attempt to purchase through licensed retailers, who can document their ages and refuse to sell, or be sanctioned for failing to do so. This same interest, however, can be served by nondiscriminatory alternatives, as demonstrated by in-state direct shipment. Just as in-state direct shippers can be licensed and be required to obtain an adult signature before products are delivered, so can a state license out-of-state vendors as a condition of direct shipment sales and require an adult signature before delivery.

Concerning collection of taxes to raise revenue, the ban on out-of-state direct shipment serves this interest by requiring producers to sell to licensed wholesalers who must collect and remit state taxes, and who in turn sell to retailers, who must also collect and remit state taxes. The next issue is whether this interest can be adequately served by nondiscriminatory means. One nondiscriminatory method is, as with preventing purchase by minors, licensing out-of-state vendors as a condition of direct shipping; such vendors could, as an additional condition, be required to collect and remit state taxes now collected by wholesalers and retailers. States will have an uphill battle to prove that this nondiscriminatory method of raising revenue is not an adequate alternative to the current discriminatory system.<sup>225</sup>

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225. See, e.g., *Bainbridge v. Turner*, 311 F.3d 1104, 1115 (11th Cir. 2002). There the court stated, "[a]fter all, in-state wineries are taxed directly, and this alternative therefore appears to be a viable substitute to the three-tier taxation scheme. So why can't out-of-state firms be taxed directly, just like in-state wineries?" *Id.*

2. Is the Ban on Direct Shipment from Out-of-State Closely Related to Powers Reserved to the States by the Twenty-first Amendment?

If the Court were to conclude, as seems likely, that state laws banning direct shipment of alcohol from out-of-state while permitting in-state direct shipment of wine violate the dormant Commerce Clause, the next issue would be whether such laws are closely related to powers reserved to the states by Section two of the Twenty-first Amendment. One such power, or central concern, certainly would be promoting temperance, particularly preventing minors from purchasing alcohol. It is a plausible argument that the ban on direct shipment meets this concern because it prevents minors from purchasing alcohol over the Internet or by calling a toll-free number. The court is likely to conclude, however, that the state's burden is greater than this: it must also prove that this concern will not be adequately served by available nondiscriminatory methods, lest the Twenty-first Amendment become a shield for economic protectionism. As discussed above, a nondiscriminatory method of satisfying this concern is available: States can license out-of-state sellers for direct shipment and require an adult signature upon arrival. Thus, the ban on direct shipment is probably not closely related to preventing sales to minors.

Another possible central concern of Section two is ensuring orderly markets, defined as controlling the shipment of alcohol within a state and to prevent unlawful diversion of alcohol into a state's market. As with temperance, the ban on direct shipment meets this concern by channeling all imports through the tightly regulated three-tier system. A nondiscriminatory method for meeting this concern is available, however. A state can license out-of-state vendors as a condition of being permitted to engage in direct shipment. Requiring them to submit reports and to collect and remit taxes will provide the means to monitor direct shipments. This point leads directly to a third possible central concern: raising revenue. Here the analysis of whether the ban on direct shipment is closely related to raising revenue is indistinguishable from the analysis of whether such a ban survives strict scrutiny under the Commerce Clause: it must actually serve this interest and there must be no available nondiscriminatory alternatives. As discussed above, although the ban serves this interest, a nondiscriminatory alternative is available: require licensed out-of-state wineries to collect and remit taxes.

A final central concern of Section two, supported by its historical

context, is to end the reverse discrimination that occurred when states, although they had the power to prohibit the sale or transportation of domestically-produced alcohol, had no power to prohibit the direct shipment of alcohol produced out-of-state. If a state chose to prohibit direct shipment from in-state sources, then a ban on direct shipment from out-of-state would be closely related to this concern because it would prevent reverse discrimination against the state's own industry and it would be the only way to do so. In states that permit in-state direct shipment, however, the ban on direct shipment from out-of-state is not closely related to this concern because the concern is not present at all. There is no reverse discrimination against the state's own industry. Instead, the state is discriminating against out-of-state interests.

This analysis indicates that, if the Supreme Court grants review in a direct shipment case, it will probably adhere to its established precedent concerning the relationship between the dormant Commerce Clause and Section two of the Twenty-first Amendment. In so doing, it is likely to conclude that state laws banning direct shipment of alcohol from out-of-state while permitting in-state direct shipment of wine are unconstitutional. They discriminate against interstate commerce in violation of the Commerce Clause, and they are not closely related to any of the powers reserved to the states by the Twenty-first Amendment.

## VII. CONCLUSION

What should a legislature do when faced with the prospect that one of its laws is probably unconstitutional? One option is to do nothing in the hope that nothing will happen. This approach will almost certainly fail with respect to direct shipment laws, because the litigation is burgeoning and unlikely to stop until the Supreme Court hands down a definitive ruling. A second option is to wait until the state is sued and hope its law is held to be valid. That outcome is certainly possible because the issue is in some respects a close issue. The more likely result, however, is that the law will be held invalid, and then a federal court will impose a remedy. Such a remedy will be a blunt instrument: the court will either enjoin in-state direct shipment of wine or, as is more likely, enjoin the ban on direct shipment of wine from out-of-state. If the former occurs, it will frustrate the state's policy of encouraging its domestic industry. If the latter occurs, imports would flow into the state free of state regulation. The state would have no system in place to assure, for example, that applicable taxes are collected and remitted. Thus, it would either have to tolerate this situation or scramble to enact

legislation in a hasty manner that might result in poor legislation.

A final alternative available to states that have discriminatory direct shipping laws is to repeal the ban on direct shipment of wine from out-of-state sources and enact legislation to regulate such direct shipment. Such a solution will serve several legitimate state interests. First, it will continue to permit in-state direct shipment of wine so as to encourage a state's domestic wine industry. Second, it would prevent minors from using direct shipment to make illegal purchases. Such legislation could require out-of-state vendors to obtain a license for a modest fee to ship limited amounts of wine directly to consumers, to collect and remit applicable state taxes, and to submit reports of such shipments. It could also provide that a carrier that delivers such a shipment must obtain the signature of an adult when the product is delivered. The system should be designed in such a way that it is not so cumbersome that out-of-state vendors are discouraged from applying for a license. Third, it would create a new market in which states could gain additional revenue. Finally, this approach will allow these states to craft legislative solutions that are responsive to their own local interests without having reform imposed upon them by a court. Thus, states that have discriminatory direct shipment laws should give serious consideration to enacting such legislation.