JUDICIAL RIDDLING OF THE WINE LAWS: DIRECT SHIPMENT CHALLENGES REACH THE CIRCUIT COURTS OF APPEAL

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“there are two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under color of no law, can violate the United States Constitution. One is to enslave somebody, a suitably hellish act. The other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws . . .”

--Laurence H. Tribe

INTRODUCTION

In what seems to have become an annual tradition among the mayors and governors of cities and states fielding teams in the Super Bowl, Florida Governor Jeb Bush and California Governor Gray Davis made a friendly wager on the outcome of Super Bowl XXXVII: should the Tampa Bay Buccaneers win, Bush would treat Davis to a Cuban diner at a Tampa restaurant and send him some Florida citrus and agricultural products; should the Oakland Raiders win, Davis would treat Bush to a fish taco dinner at a San Diego restaurant and send him some California almonds, walnuts, and pistachios, along with a case of Groth 1999 Reserve Cabernet from Napa Valley. As sports fans know, the Buccaneers defeated the Raiders 48-21. Within days, however, Governor Davis hit a legal snag in trying to make good on his bet. Florida is one of the many states that prohibit the direct shipment of wine from out-of-state producers to Florida consumers. Wine—along with other alcoholic beverages—in these states must be imported by state-licensed wholesalers and sold to consumers only by state-licensed retailers. Bypassing these three-tiered liquor distribution systems is a crime—in fact, Florida is one of seven states in which violation of the alcohol shipments laws is a felony. Thus, if Davis were to ship the cabernet to Bush, Davis would not only be subject to criminal prosecution in Florida, but, as Laurence Tribe indicated in the above quote, he would violate the Constitution.

Governor Bush’s difficulty in making good on his bet highlights what one commentator has dubbed the “wine wars”—a struggle pitting wine producers and consumers—seeking repeal or
modification of the direct shipment bans—against liquor wholesalers and state legislatures—respectively seeking to protect their state-sanctioned revenue-generating monopolies and tax-collecting distribution schemes. The fight to remove these barriers to shipment is not simply about oenophiles seeking to import a rare Oregon pinot noir not stocked at their local retail liquor store; rather, the battle is in large part funded by small-scale wine producers seeking to gain access to markets where economics and scale make distribution through the three tiered system all but impossible. Joining states on the other side are licensed liquor wholesalers, claiming the existing liquor control schemes protect state interests and insure orderly markets by preventing illegal trafficking and manipulation, facilitating collection of taxes, and preventing alcohol sales to minors. Potentially, billions of dollars and the feasibility of an e-commerce business model are at stake: annual on-line wine sales are currently estimated to be between $750 million and $1 billion, with the possibility of reaching $3 billion in 2005; therefore many wineries are seeking to establish on-line retail sales. Moreover, liquor wholesalers have an enormous financial incentive to maintain their revenue-generating monopolies over liquor distribution.

This wine war is being waged on two fronts: in the courtroom and in the state legislatures. In the state legislatures, direct shipment advocates seek to modify or repeal decades-old laws, which, in many cases, are holdovers from the years immediately following prohibition. In the courtroom, advocates of direct shipment claim direct shipment bans violate the dormant aspect of the Commerce Clause, while states and wholesalers claim the Twenty-First Amendment shields state alcoholic beverage control schemes from judicial scrutiny.

The courtroom front of the wine war has gained considerable momentum in the last few years, with both sides recording significant victories. Since the year 2000, direct shipment statutes in Michigan and Indiana have been upheld in district court and by the Seventh Circuit respectively, while statutes in North Carolina, Texas, New York, and Virginia have been struck down at the district court level or, in the case of North Carolina, by the Fourth Circuit. The constitutionality of Florida’s direct shipment ban, first upheld at the district court level, is still
in question, as the Eleventh Circuit vacated the judgment of the district court and remanded the issue for further fact-finding.\[17]\n
While the district court decisions are indeed victories for one side or the other, it is the opinions of the Fourth, Seventh, and Eleventh Circuits that are of the most interest and, perhaps, importance. For these opinions will surely influence future opinions in the lower courts and will likely help shape jurisprudence at the next level, as the direct shipment controversy appears to be “a tailor-made U.S. Supreme Court issue.”\[18]\n
Part I of this Comment will present a brief history alcoholic beverage regulation in the United States, beginning with the temperance\[19] movement that led to passage of the Eighteenth Amendment and ending with the passage of the Twenty First Amendment and subsequent state “tied house” statutes at issue in this dispute. This Part will also discuss the economic impacts of such statutes and the approaches taken by wineries to overcome the limitations on direct shipments. Part II of this Comment will review the Supreme Court’s Twenty First Amendment jurisprudence and discern the Court’s current interpretation as to how the amendment interrelates to the dormant Commerce Clause. Part III of this Comment will focus on the opinions of the Fourth, Seventh, and Eleventh Circuits that directly addressed the constitutionality of direct shipment bans. This Comment will conclude that no circuit applied the correct Twenty-First Amendment test. While the Eleventh Circuit came close, it perhaps when too far, with the potential of erroneously limiting state rights. Part III will propose a test that correctly balances the dormant Commerce Clause with the state rights granted by the Twenty-First Amendment. Part IV of this Comment will apply this proposed test to existing statutory schemes to demonstrate that states can protect their interests in raising revenue and preventing sales to minors while not running afoul of the dormant Commerce Clause.

I. FEDERAL AND STATE REGULATION OF ALCOHOLIC BEVERAGES

Constitutional attacks on state attempts to control production, sale, and consumption of alcoholic beverages are not of a recent vintage. Rather, such challenges date back to the late nineteenth century, when the temperance movement was in full force in the United
States. This section will first discuss the temperance movement that shaped the laws and judicial decisions of the pre-prohibition era and then discuss the state regulatory schemes that arose after the end of prohibition.

A. Temperance in America: There and Back Again

In late nineteenth and early twentieth centuries, concern over the growth of the liquor industry—along with its corresponding influence in state and federal politics—sparked a nationwide temperance movement that sought to curb—or eliminate—alcohol consumption. As the movement gained political steam, many state legislatures responded by passing laws limiting or prohibiting the manufacture, importation, sale, or consumption of alcohol. While the Supreme Court held that state laws banning the production and consumption of alcohol within the state were constitutional, the Court showed little tolerance for state laws that attempted to prevent the importation of alcohol, twice striking down such attempts by Iowa as impermissible burdens on interstate commerce. In Bowman v. Chicago & Northwestern Railway, the Court struck down an Iowa statute that required an importer to obtain a state license to import alcoholic beverages into the state. Iowa immediately responded to this decision by passing a law banning all sales of alcoholic beverages within the state, whether imported or not. However, the Supreme Court struck once again, finding this attempt unconstitutional under the “original package doctrine.” Under the doctrine, imported alcoholic beverages, as long as they were in their original packages, were articles of interstate commerce, thus a state has no power, absent a grant of congressional authority, to regulate the sale of such articles.

The Mugler, Bowman, and Leisy opinions created the very strange situation in which a state could prohibit the in-state production of alcoholic beverages but could not stop an out-of-stater from importing, or even selling, alcoholic beverages to state residents. In other words, with respect to alcoholic beverages, the Court’s Commerce Clause jurisprudence discriminated against in-state producers. Congress first attempted to close this loophole with Wilson Act and then put an end to the loophole with the Webb-Kenyon Act. While the
Wilson Act overturned *Leisy* and allowed states to regulate all sales of alcohol, the Webb-Kenyon Act purported to actually *divest* alcoholic beverages of their interstate character. While the Supreme Court had historically struck down such congressional attempts to delegate Commerce Clause power to the states, the Court upheld the Webb-Kenyon Act because the “exceptional nature” of alcohol eliminated the concern that Congress might similarly attempt to divest other articles of their interstate character, leaving interstate commerce of such articles under state control.

With the constitutionality of the Webb-Kenyon Act affirmed, the temperance movement gained national momentum—momentum that culminated with the ratification of the Eighteenth Amendment in 1919. Pursuant to the powers granted by the Eighteenth Amendment, Congress, in October of 1919, passed the Volstead Act, which prohibited the production and sale of intoxicating beverages at the federal level—national prohibition had begun. However, our nation’s “noble experiment” of constitutionalizing social policies was short lived. By 1933, the states ratified the Twenty-First Amendment, putting an end to national prohibition.

**B. The Twenty-First Amendment and State Alcoholic Beverage Regulation**

Along with putting an end to national prohibition, the Twenty-First Amendment shifted regulation of alcoholic beverages back a state, rather than federal, concern. Section 2 of the Amendment reads “The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” Precisely what this language means or what power it confers to state governments has been the subject of many Supreme Court opinions, not to mention a number of scholarly articles. Indeed, courts and scholars have noted that the plain meaning and legislative history of the Amendment offer a number of conflicting views on power provided to the states under Section 2, ranging from power to completely control regulation of alcoholic beverages, unfettered by the Commerce Clause, to power for a state to simply remain dry if it chose to do so.
Regardless of the divergent views on the meaning of Section 2, most states were quick to read the language as an unfettered grant of authority to regulate commerce of alcoholic beverages and thus passed comprehensive regulatory schemes to control the manufacture, importation, and sale of such beverages. Most of these schemes took the form of a three-tiered system in which consumers could only purchase alcoholic beverages from a state-licensed retailer, who in turn could only purchase from a state licensed wholesaler. The purpose behind the statutes was to “ensure orderly market conditions” — a reaction to the days of prohibition, when organized crime controlled all phases of the liquor industry in America. Therefore the three-tiered systems prohibited ownership in more than one tier of the industry such that one organization could not “dominate local markets through vertical and horizontal integration.” Moreover, channeling every ounce of alcohol through licensed wholesalers and retailers provided states the ability to tax every ounce of alcohol sold.

C. The Problem

The problem (at least in the eyes of consumers and producers) inherent in the three-tiered systems is obvious: beverage producers have but one avenue to sell their products to out of state consumers—a state-licensed wholesaler—and consumers have but one place to obtain their beverage of choice—a state-licensed retailer. Thus, a producer of alcoholic beverages can only enter a market if a wholesaler is willing to distribute the producer’s products and a consumer can only purchase his beverage of choice if a wholesaler and retailer in his state have opted to carry that product. Moreover, since direct shipment of alcoholic beverages bypasses the wholesale and retail tiers, it is obviously prohibited under such schemes.

In the years following prohibition, this problem was not really a problem at all. At that time, liquor and beer production was consolidated in a handful of national brands and the American wine industry was virtually nonexistent. Thus the three-tiered system met the distribution needs of the national brands while there was little or no demand for products not supplied by wholesalers and retailers. However, changes in the industry, along with the rise of e-commerce, have exasperated the problems associated with the three-tiered system and gave rise to efforts to
amend beverage control laws or have them struck down in court. The wine industry in the United States has experienced a boom over the last three decades, with the number of domestic wineries increasing from 375 in 1963 to over 2100 today. Meanwhile, the number of wholesalers has decreased from over 20,000 to just 300 in 1999. Moreover, the largest ten wholesalers control over half of the market, while the largest twenty wineries make over 90 percent of the wine produced in the United States. With the consolidation of the wholesale industry, the three-tiered distribution scheme tends to accommodate only the large-scale producers, leaving the roughly 2000 small-scale and boutique wineries with little or no access to out-of-state markets.

D. Strategies in the Wine Wars

With limited access to the wholesale market, small-scale producers must rely on direct sales of their products. For most wineries, this means selling wine at their premises to visiting consumers. However, with the rise of e-commerce, a new avenue of business opened: Internet sales accompanied by direct shipment to the customer’s home. As discussed above, however, such shipments run afoul of most state beverage control laws. Thus began the first phase of the wine wars: lobbying for legislative change.

Wineries funded organizations such as the Wine Institute to lobby states to relax or remove bans on direct shipment. Successful lobbying efforts at the state level usually took one of two forms: allowance of direct shipment in accordance with permits or attorney general approval, or reciprocal arrangements where, for example, state A allows direct shipments from state B so long as state B allows direct shipments from state A. Efforts for state legislative change have had significant success. Currently thirteen states allow direct shipment on a reciprocal basis, eight allow direct shipment in accordance with producer or consumer permit, two allow direct shipment in limited quantities either directly by stature or under current attorney general interpretation of the beverage control laws, while one allows direct shipment to a residential address when wine is purchased in on-site from a producer. Despite this success, twenty-six states still prohibit direct shipment of alcoholic beverages to consumers. Intensive lobbying
efforts\textsuperscript{63} by the liquor wholesale industry resulted in six of these states adopting felony provisions for violation of the direct shipment bans.\textsuperscript{64}

Federal intervention has provided one additional outlet for wineries and consumers. Under a provision of the Department of Justice Appropriations Authorization Act, signed into law by President Bush on November 2, 2002, a consumer visiting a winery and making a purchase on-site may have the wine shipped to his home state, so long as that state would allow the consumer to carry wine into the state on his person.\textsuperscript{65} This provision effect the status of seventeen states\textsuperscript{66} that prohibit or limit direct shipment but allow residents to carry into the state alcoholic beverages on their person. Surprisingly, this leaves eleven states\textsuperscript{67} where even this limited avenue of direct shipment is not available, as personal transport of wine is limited or prohibited.

A final change in the direct shipment limitations of some states had little to do with the lobbying efforts of producers of wholesalers. In recognition of burgeoning in-state wine industries, some states carved out exceptions to their direct shipment statutes such that in-state producers could bypass the three-tiered system and sell directly to producers.\textsuperscript{68} Not surprisingly, the statutes in these states were among the first to be attacked in court.\textsuperscript{69}

The main weapon in the courtroom attack on the direct shipment laws is the dormant Commerce Clause.\textsuperscript{70} The Supreme Court has long recognized that the Commerce Clause has a negative aspect that prevents states from enacting legislation that discriminates against or unduly burdens interstate commerce.\textsuperscript{71} Under modern dormant Commerce Clause jurisprudence, there are three types of state statutes subject to judicial scrutiny: (1) Statutes that amounts to “mere economic protectionism” of in-state interests are per se invalid.\textsuperscript{72} (2) Statutes that discriminate against out-of-state interests or interstate commerce, whether on their face or in their purpose or effect, are subject to strict scrutiny and will be found unconstitutional unless the statute “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”\textsuperscript{73} (3) Those statutes that regulate in-state and out-of-state interests even-handedly, but have an incidental effect on interstate commerce, are “upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local
benefits” of the statute. Thus, under modern dormant Commerce Clause jurisprudence, there is little debate that if the product in question “were cheese rather than wine, [a state] would not be able to either close its borders to imports or to insist that the shippers collect its taxes, despite the effect on its treasury.” However, in the wine war, no one is fighting over cheese. Therefore, the dormant Commerce Clause is by no means the end of the analysis. State laws dealing with the importation and distribution of alcoholic beverages must be analyzed with reference to the powers granted by Section 2 of the Twenty-First Amendment.

II. JUDICIAL INTERPRETATION OF THE TWENTY-FIRST AMENDMENT

The Twenty-First Amendment is perhaps best known as the amendment that put an end to prohibition by repealing the Eighteenth Amendment. However, it is Section 2 of the Twenty-First Amendment that is at the forefront of the debate over direct shipment laws. As discussed above, plain language and legislative history have provided little guidance on the meaning of Section 2. On the other hand, the Supreme Court has repeatedly engaged in analysis of Section 2 almost since the year of the Amendment’s ratification. This part will analyze the Supreme Court opinions that have interpreted Section 2 of the Twenty-First Amendment in order to discern how the grant of authority in Section 2 interrelates with dormant Commerce Clause jurisprudence.

A. Unfettered Power

The starting point for judicial analysis of Section 2 of the Twenty-First Amendment is State Board of Equalization v. Young’s Market Co. In Young’s Market, the Court upheld a state statute that required importers to obtain a license to import beer. In doing so, the Court stated that the words of Section 2 “confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes” and thus does not require states “let imported liquors compete with the domestic on equal terms.” While the plaintiffs claimed that upholding the import license requirement necessarily resulted in “a declaration that the Amendment has, in respect to liquor, freed the States from all restrictions upon the police power to be found in other provisions of the Constitution,” the Court did not directly address the
implications of the Twenty-First Amendment on the Commerce Clause, instead deciding that the issue did not need to be reached.\textsuperscript{[80]}

The Court removed any uncertainty regarding its position on the relationship between the Commerce Clause and the Twenty-First Amendment just three years later in \textit{Indianapolis Brewing Co. v. Liquor Control Commission}.\textsuperscript{[81]} In \textit{Indianapolis Brewing}, the Court came right out and said it: “the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.”\textsuperscript{[82]} The Court again reaffirmed this interpretation later that same year in \textit{Ziffrin, Inc. v. Reeves}:

\begin{quote}
The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a State may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them.\textsuperscript{[83]} Under this interpretation, once a state showed that alcoholic beverages were involved, a statute, even if “patently discriminatory,” would be allowed to stand.\textsuperscript{[84]} It is not surprising that the Court made such an interpretation since the language of Section 2 of the Twenty-First Amendment closely tracked the language of the Webb-Kenyon Act, which just twenty-six years prior, according to the Court, had divested liquor products of their interstate character.\textsuperscript{[85]}
\end{quote}

\textit{B. Saved by the Twenty-First: The Core Powers Balancing Test}

It is clear that under \textit{Young’s Market}, \textit{Indianapolis Brewing}, and \textit{Ziffrin}, the wine war would be short-lived in the courtroom. Since the state direct shipment bans regulate alcoholic beverages, they would be immune to dormant Commerce Clause scrutiny by operation of the Twenty-First Amendment. However, the Court has, in more recent opinions, retreated from its understanding that the Twenty-First Amendment granted unfettered powers to the states.

In 1964 the Court revisited the issue of the interplay between the Twenty-First Amendment and the Commerce Clause in \textit{Hostetter v. Idlewild Bon Voyage Liquor Corp.}, a case
examining the right of a state to regulate a duty-free company selling alcoholic beverages to departing international travelers under authority from the federal Bureau of Customs. The Court found that, although states were unconfined by the Commerce Clause when regulating the importation of alcoholic beverages for distribution and consumption in the state, it could not regulate such imports when they were destined for use in foreign countries—only Congress had this authority. To support this holding, the Court stated that “[t]o draw a conclusion from [the earlier] line of decisions that the Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification.” Rather, the Court found that “[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.”

Although Hosteller dealt with a state’s ability to impose limitations on foreign commerce under the Twenty-First Amendment, the Court did not hesitate to adopt the language of the opinion to support the proposition that the Commerce Clause limited a state’s Twenty-First Amendment rights to regulate domestic alcohol commerce. In California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., a case dealing with a wine distributor challenging California’s wine pricing statute, the Court struck down the pricing system as violative of the Sherman Act, rejecting the state’s argument that the Twenty-First Amendment protected the statute from such a finding. In reaching this result, the Court stated that

The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a “concrete case.”
Thus, for “other liquor regulations,” the Court rejected a bright line approach to Twenty-First Amendment jurisprudence in favor of a balancing test. Exactly what fell within the category of “other liquor regulations” is not clear from the opinion; however, the Court found that California’s wine pricing statute did.\[93\]

The Court revisited the conflict between federal power to regulate interstate commerce and state power to regulate alcoholic beverages in *Capital Cities Cable, Inc. v. Crisp.*\[94\] *Capital Cities* dealt with the conflict between a state ban on retransmission of out-of-state alcoholic beverage commercials and a Federal Communications Commission mandate for cable companies to carry local television broadcast signals in full.\[95\] While the decision to strike down the state ban was based largely on federal preemption under the Supremacy Clause, the Court did apply the balancing test announced in *Midcal* to determine whether the advertising ban was shielded by the Twenty-First Amendment. The Court noted that the Twenty-First Amendment “does not license the States to ignore their obligations under other provisions of the Constitution”;\[96\] therefore, the relevant question was “whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.”\[97\] The Court found that the federal interests in creating a competitive cable television market outweighed the state’s goal of promoting temperance through limited restrictions on advertising.\[98\]

*Midcal* and *Capital Cities* made it clear that an alcoholic beverage control statute that interfered with express congressional objectives, as evidenced by federal statutes or regulations, would not be per se shielded from judicial review by the Twenty-First Amendment. The question remained, however, whether, in the absence of congressional action, a state liquor control statute that didn’t interfere with express federal policies, but did interfere with interstate commerce, was immune from judicial scrutiny by operation of the Twenty-First Amendment. The Court provided the answer in *Bacchus Imports, Ltd. V. Dias*, an opinion that provides the foundation of the current challenges to direct shipment bans.\[99\]
In Bacchus, the Court reviewed the constitutionality of the Hawaii liquor tax, a 20 percent tax imposed on wholesale sales of liquor within the state of Hawaii. Specifically, the Court was asked whether the tax was constitutional in light of the fact that the Hawaiian legislature exempted certain domestic products from taxation: okolehado, a brandy distilled from an indigenous Hawaiian shrub, and fruit wine produced from locally grown pineapple.

The Court’s analysis was a two-prong approach, beginning with an analysis under the Commerce Clause: “A cardinal rule of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business.” The Court found that the “undisputed” purpose of the tax exemption was to benefit local industry. However, since the method of achieving that benefit was discriminating against interstate commerce, the statute could not stand under the dormant Commerce Clause, since “it had both the purpose and effect of discriminating in favor of local products.”

After deciding that the tax could not withstand dormant Commerce Clause scrutiny, the Court next addressed whether the tax (and relevant exemptions) were nevertheless “saved” by operation of the Twenty-First Amendment. The Court, citing language from Hostetter, Midcal, and Capital Cities, held that the tax could only be saved if the “principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended.” Finding that “empower[ing] States to favor local liquor industries by erecting barriers to competition” was not core purpose of the Twenty-First Amendment, the Court rejected the claim that the Amendment saved the tax scheme. Thus, the Court adopted a two-prong approach for interpreting the interplay between the Commerce Clause and the Twenty-First Amendment: First, a court must determine whether a state statute is violative of dormant Commerce Clause principles. However, if the purposes of the state statute “sufficiently implicate” the core purposes of the Twenty-First Amendment, the statute can be “saved.”
One question the Court left unanswered in *Bacchus* was just what the “core purposes” underlying the Twenty-First Amendment were. The Court provided some insight in *North Dakota v. United States*.\(^{108}\) In that case, the Court upheld North Dakota’s alcoholic beverage labeling scheme, finding that the state’s interests in “promoting temperance, ensuring orderly market conditions, and raising revenue” were “within the core of the State's power under the Twenty-first Amendment.”\(^{109}\) The Justice Stevens, writing for a plurality, however, reiterated that states still retain “‘virtually complete control’ over the importation and sale of liquor and the structure of the liquor distribution system.”\(^{110}\) Furthermore, states still had “the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets.”\(^{111}\) Thus despite the Commerce Clause limitations, states still enjoyed wide latitude and discretion in regulating alcohol within their borders.

So where does this leave us? Perhaps the Eleventh Circuit, in *Bainbridge v. Turner*\(^{112}\), said it best: “the Twenty-first Amendment alters the dormant Commerce Clause in a way that provides states some added insulation from an otherwise valid attack, but falls short of full immunization.”\(^{113}\)

III. CIRCUIT COURT APPLICATION OF BACCHUS TO THE DIRECT SHIPMENT DEBATE

The *Bacchus* opinion supplies the basis for the current challenges to the constitutionality of direct shipment laws and clearly provides the framework for judicial scrutiny of such laws. While the issue has not yet reached the Supreme Court, it certainly appears to be headed in that direction. Since the year 2000, direct shipment litigation has generated seven district court opinions and three circuit court opinions.\(^{114}\) This section outlines the spate of federal jurisprudence on the direct shipment issue.

A. Bridenbaugh v. Freeman-Willson

The Seventh Circuit, in *Bridenbaugh v. Freeman-Wilson*\(^{115}\), was the first circuit court to hear a direct shipment case. *Bridenbaugh* dealt with a challenge to Indiana’s liquor control
statutes that forbade direct shipments from out-of-state by persons engaged in selling alcoholic beverages in other states or countries. Moreover, in-state producers could obtain permits to directly ship to Indiana customers while out-of-state producers could not. The district court held that this discrimination between in-state and out-of-state interests violated the Commerce Clause and was thus unconstitutional.

The Seventh Circuit, however, seemed to take a considerably different view of the relationship between the Twenty-First Amendment and the Commerce Clause than had the Bacchus Court. Writing for a two-judge panel, Judge Easterbrook demonstrated judicial hostility towards dormant Commerce Clause jurisprudence in an opinion upholding Indiana’s limitations on direct shipment. Judge Easterbrook began the opinion by stating “This case pits the twenty-first amendment, which appears in the Constitution, against the ‘dormant commerce clause,’ which does not.” In a short opinion that dealt more with standing than the conflict between two constitutional doctrine, Judge Easterbrook found convincing guidance in the plain language and legislative history where others could not:

Our guide is the text and history of the Constitution . . . Section 2 tracks the Webb-Kenyon Act and effectively incorporates its approach into the Constitution. Like the Webb-Kenyon Act, § 2 incorporates state prohibitions into a federal rule; like the Webb-Kenyon Act, § 2 closes the loophole left by the dormant commerce clause, abetted by Bowman and Rhodes: direct shipments from out-of-state sellers to consumers that bypass state regulatory (and tax) systems. No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; § 2 speaks directly to these shipments.

Judge Easterbrook essentially ignored the “core purposes” doctrine developed in Bacchus and subsequent Supreme Court opinions and adopted the Court’s 1930s interpretation of Young’s Market and Indianapolis Brewing. Furthermore, Easterbrook found no functional discrimination in the operation of Indiana’s scheme. Instead, he focused on what he thought
to be the primary purposed of the plaintiffs in this litigation: consumers seeking to bypass Indiana’s three-tiered system and avoid paying state tax on their purchases.\[124\]

Proponents of direct shipment bans (liquor wholesalers) championed Easterbrook’s decision, and the Supreme Court’s denial of certiorari, as confirming the unfettered rights of states to regulate the flow of alcoholic beverages under the Twenty-First Amendment.\[125\] However, Bridenbaugh is by no means the end of the direct shipment debate. The plaintiffs in Bridenbaugh were only in-state consumers and only challenged Indiana’s statute based on their inability to obtain wines of their choice, outside of the three-tiered system.\[126\] Specifically, no out-of-state sellers joined the suit to challenge the fact that Indiana citizens could obtain direct shipment permits while out-of-state producers could not.\[127\] Thus, no one actually challenged the discriminatory aspect of the Indiana statutes. Due to the narrowness of the issue before the Seventh Circuit, proponents of direct shipping were actually quite pleased by the Supreme Court’s decision not to review the case.\[128\]

B. Bainbridge v. Turner\[129\]

Unlike the Seventh Circuit, the Eleventh Circuit, in Bainbridge v. Turner, adopted what it considered a mandate from the Supreme Court: the Bacchus core powers inquiry.\[130\] Moreover, the opinion refined the balancing test between the dormant Commerce Clause and the Twenty-First Amendment. Bainbridge dealt with Florida’s exemptions from its three-tiered system for in-state wineries.\[131\] Florida’s regulations allowed Florida wineries to obtain vendor permits such that they could sell directly to consumers.\[132\] Moreover, in-state wineries holding such permits were allowed to directly ship directly to consumers as long as they used vehicles owned or leased by the winery.\[133\] Out-of-state wineries, on the other hand, were allowed no such exemptions. Out-of-state wineries were not able to obtain vendor permits, and thus were not able to ship directly to consumers.\[134\] Instead, out-of-state wineries could only enter the Florida market via the three-tiered system. The court found that Florida’s scheme failed dormant Commerce Clause scrutiny because it was facially discriminatory “against out-of-state retailers and nondiscriminatory alternatives [were] available to serve the State’s interests.”\[135\]
Relying on *Bacchus*, the court next crafted a four part test that subjected various dormant Commerce Clause principles to the Twenty-First Amendment balancing test, depending on the nature and effect of the statute in question: (1) If a law directly regulates commerce in another state, it is invalid and cannot be saved by the Twenty-First Amendment.\[136\] (2) If a law amounts to mere protectionism, it is invalid and cannot be saved by the Twenty-First Amendment.\[137\] (3) If a law discriminates against out-of-state interests or interstate commerce, whether on its face or in its purpose or effect, it can be saved by the Twenty First Amendment when the state shows that the law is “genuinely needed” to effect a core concern of the Twenty-First Amendment.\[138\] (4) If a law regulates evenhandedly, but has indirect effects on interstate commerce, it can be saved it can be saved by the Twenty First Amendment when the state shows that the law is “genuinely needed” to effect a core concern of the Twenty-First Amendment, regardless of whether the local benefits clearly exceed the burden on interstate commerce.\[139\]

The statute in question fell under prong three of the court’s test, thus the state had the burden of showing that the statute was genuinely needed to effectuate a core concern of the Twenty-First Amendment.\[140\] After dismissing the notion that the statute was required to promote temperance, prevent sales to minors, and ensure orderly market, the court reasoned that raising revenue might be the only legitimate reason the state required such a statutory scheme.\[141\] Since factual issues relevant to this issue were not resolved at the district court, the Eleventh Circuit remanded the issue for further consideration.\[142\]

**C. Beskind v. Easley**\[143\]

The Fourth Circuit is the latest circuit to take up the direct shipment issue. *Beskind* dealt with the North Carolina alcoholic beverage control scheme, which statutorily prohibited direct of alcoholic beverages to state consumers.\[144\] North Carolina, by operation of another statute, created an exemption for in-state wineries such that in-state wineries holding licenses could ship directly to North Carolina customers.\[145\] In other words, in-state wineries could bypass the wholesale and retail tiers of the state system while out-of-state wineries could not. The district court held that by allowing such circumvention, the North Carolina scheme was a “relatively cut
and dry example of direct discrimination” and thus failed commerce clause scrutiny. The district court then noted that the scheme would be afforded “safe harbor” under the Twenty-First Amendment if the state demonstrated that the purpose of the scheme fell within the purpose of the Amendment. However, the state provided no purpose for the differential treatment of in-state and out-of-state wineries, thus the district court enjoined the state from enforcing any laws that prohibit out-of-state wineries from shipping directly to North Carolina residents.

On appeal, the Fourth Circuit affirmed the finding that North Carolina’s scheme unconstitutionally discriminated against out-of-state commerce in favor of in-state interests; however, the court vacated the district court’s injunction. Applying the framework of *Bacchus*, the Fourth Circuit first determined that the discriminatory treatment violated the Commerce Clause. Finding that the state could offer no reason for the favorable treatment of in-state wineries other than economic protectionism, the Fourth Circuit found that the Twenty-First Amendment could not save the statutory scheme. The court noted, however, that the plaintiffs only challenged the disparate treatment, not North Carolina’s overall three-tiered system of alcoholic distribution. Therefore, the proper remedy was not to enjoin enforcement of the existing three-tiered system that prohibited direct shipment, but rather to enjoin only the exception created for in-state wineries. Thus, rather that permitting all direct shipments, as the district court would have, the Fourth Circuit put a stop on all direct shipments, both from out-of-state and from in-state.

D. The Modified Bainbridge Test

Of the three circuit court opinions, *Bainbridge* provides the most comprehensive framework for evaluating the direct shipment issue. Moreover, the four-prong *Bainbridge* test is, with one exception, a correct synthesis of Supreme Court precedent. The only problem is the level of scrutiny the Eleventh Circuit would apply to prongs three and four (discriminatory and neutral statutes respectively). Somehow, on the road from *Bacchus* to *Bainbridge*, the Eleventh Circuit moved a state’s evidentiary burden from a showing that a statutory scheme “sufficiently implicated” the core concerns of the Twenty-First Amendment to a showing that the scheme was
“genuinely needed” to effectuate a core concern. While the Eleventh Circuit claimed that this standard is “far less” than strict scrutiny, it is difficult to see it as anything but. In fact the court states that Florida cannot raise the Twenty-First Amendment as a shield unless it can “show that its statutory scheme is necessary to effect the proffered core concern” and questions why the state cannot meet its objectives in a way that treats in-state and out-of-state concerns on equal terms—language and questioning that sounds strikingly similar to the second prong of strict scrutiny under the dormant Commerce Clause, requiring states to show that a statute “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” Thus after a discriminatory statute fails Commerce Clause scrutiny, presumably because the state could not show the unavailability of non-discriminatory alternatives, the Eleventh Circuit would strike down the statute unless a state can prove the statutory scheme was necessary to effect a core concern of the Twenty-First Amendment. If a state could not prove the unavailability of alternatives under Commerce Clause scrutiny, how could it possible prove the scheme was necessary under Twenty-First Amendment scrutiny? It appears as if, in the Eleventh Circuit, the Twenty-First Amendment would provide no shield at all for liquor control statutes that are discriminatory on their face.

That the court’s opinion all but removes the Twenty-First Amendment shield for discriminatory statutes is, in effect, probably not far off base. The line between discriminatory statutes and statutes that amount to mere economic protectionism is not at all sharp. After all, a state should have a significant burden of showing that the proffered reason for the discriminatory treatment is not merely a pretext for economic protectionism. And, as we know from Bacchus, statutes that amount to economic protectionism can never be saved by the Twenty-First Amendment. While a state should not have to prove that there are no alternative means to effectuate a core concern of the Twenty-First Amendment, the state should be held to the burden of proving that the proffered concern is not a pretext for protectionism.

What is more troubling about the Eleventh Circuit’s opinion, however, is its treatment of neutral statues. The Eleventh Circuit would subject even a neutral liquor control statute to the
same least intrusive means inquiry. It is not hard to imagine that a neutral liquor control statute might fail Commerce Clause scrutiny. Take, for example, a state scheme that bans all direct shipments of alcohol, whether from in-state producers or out-of-state producers. Clearly such a scheme places burdens on interstate commerce. Moreover, it is quite conceivable that such burdens could exceed any putative benefits to the state and thus fail the *Pike* balancing test.[159] For such a statute to survive judicial scrutiny, the state would have to show that the scheme was necessary to effectuate the states core concerns under the Twenty-First Amendment. This ignores the “substantial discretion” the Court has stated that states have in establishing liquor regulations.[160] Even the Fourth Circuit in *Beskind*, though citing *Bainbridge* with approval, recognized that neutral alcohol control schemes should be afforded more protection under the Twenty-First Amendment in its decision not to enjoin enforcement of North Carolina’s three-tiered system that prohibited direct shipment: “The plaintiffs do not challenge North Carolina’s three-tiered system standing alone, perhaps due to their recognition that it is a longstanding regulatory scheme authorized by the Twenty-first Amendment.”[161]

A better approach to prongs three and four would be as follows: If a law discriminates against out-of-state interests or interstate commerce, whether on their face or in their purpose or effect, it can be saved by the Twenty First Amendment when the state shows that the law sufficiently implicates a core concern of the Twenty-First Amendment and that the core concern is not merely a pretext for protectionism. If a law regulates evenhandedly, but has indirect effects on interstate commerce, it can be saved it can be saved by the Twenty First Amendment when the state shows that the law is rationally related to a core concern of the Twenty-First Amendment, regardless of whether the local benefits clearly exceed the burden on interstate commerce. I will refer to the *Bainbridge* test with this substitute for prongs three and four as the “modified *Bainbridge* test.”

IV. EXISTING LIQUOR CONTROL SCHEMES ANALYZED UNDER THE MODIFIED BAINBRIDGE TEST
Now that we have a suitable test for evaluating the interplay between the Twenty-First Amendment and the Commerce Clause, we can apply it to the various direct shipment restrictions challenged in district courts. We begin with a summary of three recent district court opinions striking down direct shipment bans.

A. District Court Decisions

1. Bolick v. Roberts

   At issue in Bolick was Virginia’s alcoholic beverage control scheme that permitted out-of-state wine producers to ship only to state licensed wholesalers, while allowing in-state producers to ship directly to in-state or out-of-state consumers. The court found the direct shipment scheme to be facially discriminatory and thus subject to strict scrutiny under traditional dormant Commerce Clause analysis. The court dismissed the notion that the discriminatory scheme was implemented to promote temperance or raise revenue. The court then noted that the state of Virginia had implemented a policy to develop new markets for Virginia wine and grape products and enact any regulations necessary to meet these goals. Such economic protectionism, the court found, eliminates the protection offered by the Twenty-First Amendment.

2. Dickerson v. Bailey

   In Dickerson, a district court again evaluated a beverage control scheme that prohibited out-of-state producers from directly shipping to in-state consumers while creating an exemption such that in-state wineries could do so. The statute in question was Texas’ Alcoholic Beverage Code, which permitted a consumer visiting an in-state winery to have any wine purchased at the winery shipped to his home. Moreover, a customer not present at an in-state winery could still order wine and have it shipped to a participating package store near his home. Out-of-state wineries, on the other hand, could only enter the Texas market through sales to a licensed wholesaler. The Court found the scheme to be discriminatory on its face and the state failed to prove that the exemption for in-state wineries was justified by any core concerns of the Twenty-First Amendment. Rather, the court found that Texas’ purpose behind the exemption
was merely to promote the burgeoning Texas wine industry—in other words, it was mere economic protectionism.\footnote{173}

3. \textit{Swedenburg v. Kelly}\footnote{174}

This case once again dealt with a statute that prohibited an out-of-state wine producer from directly shipping to an in-state consumer while permitting an in-state wine producer to do so.\footnote{175} Specifically, the New York alcoholic beverage control scheme allowed licensed New York farm wineries and in-state commercial wineries with retail sales licenses to ship directly to consumers.\footnote{176} Any alcoholic beverages from out-of-state, however, could only be shipped to a New York licensed distributor or retailer.\footnote{177} Based on “the very wording (let alone the impact) of the exemptions favoring in-state wineries,” the district court judge found the New York scheme to be discriminatory on its face.\footnote{178} Since the state did not make a showing that the ban on direct shipment and the in-state producer exceptions implicated any of the state’s core concerns under the Twenty-First Amendment, the court concluded that the ban on direct shipment was unconstitutional.\footnote{180}

B. \textit{Winning the Battle but not the War?}

The courts in \textit{Bolick}, \textit{Dickerson}, and \textit{Swedenburg} would likely reach a similar result under the modified \textit{Bainbridge} test proposed above. In each case the court made the factual determination that the direct shipment schemes amounted at best to facial discrimination against out-of-state commerce, or at worst mere economic protectionism. Thus each scheme would fall under either prong two or three of the modified \textit{Bainbridge} test. Under prong two (economic protectionism), the direct shipment ban could not be saved by the Twenty-First Amendment and would thus fail.\footnote{181} If not mere economic protectionism, but facial discrimination, the scheme would fall under prong three. Therefore, the statute would only be saved by the Twenty-First Amendment if the state made a showing that the scheme sufficiently implicated a core concern and that the concern was not a pretext for protectionism.\footnote{182} In each case, the court found that either the state did not meet its burden of showing the scheme implicated a core concern of the
Twenty-First Amendment, or that state’s goal (economic aid to in-state interests) was not a core concern. Thus, each scheme would fail under prong three of the modified Bainbridge test.

The three decisions discussed above by no means indicate that the fight against direct shipment laws has come to an end. It is quite apparent the statutory schemes in Virginia, Texas, and New York (as well as those in North Carolina and Florida) all shared a common provision: an exception to the direct shipment bans for in-state producers. It is also clear that the results in each of the above cases turned on these exceptions. A more intriguing question, however, is whether a direct shipment ban that lacks such an exception would fail under the modified Bainbridge test. In all likelihood, it would not.

Such a statute that bans both in-state and out-of-state direct shipments would by a neutral statute—one that regulates evenhandedly. If the statute had indirect effects on interstate commerce, and the burden on interstate commerce clearly exceeded local benefits, such a statute would fail under traditional dormant Commerce Clause jurisprudence. Under the modified Bainbridge test, the statute would be saved if the state showed that the statute was rationally related to effecting a core concern of the Twenty-First Amendment. Thus, if a state could simply show that a direct shipment ban was implemented to facilitate taxation (raising revenue) or an orderly structure of its liquor market, the statute would stand. Such a result is more in line with the Supreme Court’s view that states are afforded substantial discretion in organization of alcoholic beverage markets.

V. CONCLUSION

There is great commotion in the wine industry today. Wine’s increasing popularity with American consumers has led to tremendous growth in the number of domestic wine producers. Coupled with this growth was the rise of e-commerce and direct marketing, which give these new wine producers an efficient means to not only serve existing customers, but exploit new markets as well. Winemakers, pursuing e-commerce coupled with direct shipment to customers, soon ran into a substantial legal obstacle: decades-old state liquor regulations that mandated alcohol passed from producer to wholesaler to retailer before reaching the consumer.
Challenges to these laws under the dormant Commerce Clause has met with some success, however this by no means indicates that the battle for uncurtailed direct shipment has been won. States retain considerable latitude under the Twenty-First Amendment to structure their in-state alcohol market and regulate production, importation, and distribution of alcoholic beverages. And without a showing of economic protectionism or in-state favoritism, such state regulatory schemes are likely to be shielded from judicial scrutiny by the Twenty-First Amendment.

This is not intended to argue the merits of state laws that allow, limit, or even prohibit direct shipment, or whether state rationales for such limitations make sense in today’s world—that issue has been sufficiently debated by others elsewhere. Rather, this Comment only suggests that many of these state liquor control schemes should withstand judicial scrutiny under a correct application of Twenty-First Amendment jurisprudence. In light of this, proponents of direct shipment cannot—or at least should not—win the wine war in the courtroom.

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[3] Florida’s direct shipment ban provides that:

Any person in the business of selling alcoholic beverages who knowingly and intentionally ships, or causes to be shipped, any alcoholic beverage from an out-of-state location directly to any person in this state who does not hold a valid manufacturer’s or wholesaler’s license or exporter’s registration issued by the Division of Alcoholic Beverages and Tobacco or who is not a state-bonded warehouse is in violation of this section.

FLA. STAT. Ch. 561.545(1).


[5] Florida’s felony provisions read as follows:
Any person found by the division to be in violation of subsection (1) shall be issued a notice, by certified mail, to show cause why a cease and desist order should not be issued. Any person who violates subsection (1) within 2 years after receiving a cease and desist order or within 2 years after a prior conviction for violating subsection (1) commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. Ch. 561.545(3).

Any common carrier or permit carrier, or any operator of a privately owned car, truck, bus, or other conveyance found by the division to be in violation of subsection (2) as a result of a second or subsequent delivery from the same source and location, within a 2-year period after the first delivery shall be issued a notice, by certified mail, to show cause why a cease and desist order should not be issued. Any person who violates subsection (2) within 2 years after receiving the cease and desist order or within 2 years after a prior conviction for violating subsection (2) commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. Ch. 561.545(4).

The other “felony” states are Indiana, Georgia, Kentucky, Maryland, North Carolina, and Tennessee. Wine Institute, Direct Shipment Laws by State for Wineries, at http://www.wineinstitute.org/shipwine/analysis/intro_analysis.htm (last modified Oct. 22, 2002).


[9] Susan Lorde Martin argues that for these small-scale wineries, the markups imposed by the tier system is far too expensive. Martin, supra note 7, at 64. Moreover, she points out that, while the number of wineries in the United States has grown from less than 400 to over 2100, the number of wholesalers has declined from 20,000 to less than 400, making it difficult for small wineries to find wholesalers willing to carry their products. Id.


[13] For example, the nation’s largest liquor wholesaler, Southern Wine and Spirits, collects an estimated $2.3 billion in annual revenue. National Center for Policy Analysis, Wine Shipment Laws Protect Wholesaler’s Monopolies, arwnw.ncpa.org/pd/state/pd020700d.html.


Temperance is defined as the “habitual modification or total abstinence in the indulgence of alcoholic liquors.” THE RANDOM HOUSE COLLEGE DICTIONARY 1352 (rev. ed. 1984).


For an in-depth summary of pre-prohibition legislation and judicial decisions, see Miller, supra note 20, at 2503–12.

Mugler v. Kansas, 123 U.S. 623 (1887) (upholding Kansas constitutional amendment banning the manufacture and consumption of alcohol within the state).

125 U.S. 465 (1888).

Id. at 500.


Id.

Id.

See Bridenbaugh v. Freeman-Wilson, 277 F.3d 848, 852 (7th Cir. 2000).

The Wilson Act enabled states to regulate imported liquors “to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory” regardless of whether such liquors were in their original packaging. Id.

37 Stat. 699 (1913). The Webb-Kenyon Act provides:

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.
Rhodes v. Iowa, 170 U.S. 412 (1898) (construing Wilson Act to allow states to regulate sales of alcohol, but not importation).

Indeed, the Webb-Kenyon Act was entitled “An Act Divesting intoxicating liquors of their interstate character in certain cases.” 37 Stat. 699. The history, language, and effect of the Webb-Kenyon Act is critical to the understanding of Section 2 of the Twenty-First Amendment, as the language of the Amendment is patterned after the language of the Act. See infra Part II.A.


Clark Distilling Co. v. Western M. R. Co., 242 U.S. 311, 332 (1917). See also Miller, supra note 20, at 2511.

41 Stat. 305 (1919). The Volstead Act is also know as the National Prohibition Act. Id.


See Bridenbaugh v. Freeman-Wilson, 277 F.3d 848, 853 (7th Cir. 2000).

U.S. CONST. amend. XXI, § 2.

The language is also the subject of Laurence Tribe’s humorous jab at “constitutionally dumb idea[s].” See supra note 1 and accompanying text.


See, e.g., Martin, supra note 7, at 64; Douglass, supra note 43, at 1621. For a comprehensive summary of the alcoholic beverage control laws of each state, see the Wine Institute’s State-by-State analysis of statutes at www.wineinstitute.org/shipwine/analysis/state_analysis.htm.


Martin, supra note 7, at 64.

See Molnar, supra note 46, at 171.

Some producers have risked criminal prosecution by resorting to bootlegging. Wineries in State Resort to Bootlegging, THE SAN FRANCISCO CHRONICLE, Feb. 16, 2003 (reporting that some wineries use such tricks as labeling wine as olive oil to evade direct shipment limitations).


See Dickerson v. Bailey, 212 F. Supp. 2d 673, 678 n.10 (S.D. Tex. 2002). For a thorough analysis of the changes in the industry, see Molnar, supra note 46, at 172–74.

Martin, supra note 7, at 64; Douglass, supra note 43, at 1622.
1. Shipments can be made only from states to states that afford each other the same reciprocal privilege.
2. Sales must be made only to persons over the age of 21 and the shipping container must be clearly marked to indicate that it cannot be delivered to a minor or to an intoxicated person.
3. Wine shipped under these provisions is for personal consumption only and is not for resale.
4. A case can contain no more than 9 liters of wine.
5. Reciprocal legislation generally applies only to shipments by wineries and not retailers.

Id.

These states are California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, Wisconsin, and West Virginia. Wine Institute, Direct Shipment Laws by State for Wineries, at www.wineinstitute.org/shipwine/analysis/state_analysis.htm. The Wine Institute notes that reciprocal statutes usually have these common provisions:

Id.

For a comprehensive summary of the wholesale industry lobbying efforts, see Molnar, supra note 46.

Indeed, lawsuits challenging the constitutionality of direct shipment bans have been filed or prosecuted in Florida, Michigan, New York, North Carolina, Texas, Virginia, as well as Indiana and Washington. Wine & Spirits Wholesalers of America, Inc., Direct Shipping Litigation: Challenges to State’s Rights Under the 21st Amendment, at http://www.wswa.org/public/LEGAL/direct.html.

Interestingly enough, the statute challenged in Washington is a reciprocal statute, which one would think would be among the last to be challenged, as it does allow for direct shipment. Nonetheless, a group of law students challenged the statute under the dormant Commerce Clause on the grounds that the reciprocal requirement unduly burdened consumer’s rights to order wine from nonreciprocal states. Wine & Spirits Wholesalers of America, Inc., Challenges to State’s Rights Under the 21st Amendment: Washington, at http://www.wswa.org/public/state/showdet.php?state=WA&search_area=direct_shipping. Actually, the most favored exception to direct shipping bans, reciprocity, might be the most vulnerable to a constitutional challenge. See Sporhase v. Nebraska, 458 U.S. 941 (1982) (holding that Nebraska statute that allowed withdraw of water for use in another state only if the other state grants reciprocal rights withdraw water from that state for use in Nebraska imposed an undue burden on interstate commerce).


Bridenbaugh v. Freeman-Wilson, 277 F.3d 848, 851 (7th Cir. 2000). See also Bainbridge v. Turner, 311 F.3d 1104, 1106 (2002) (“If the subject of [the state’s] regulatory scheme were an ordinary widget (rather than liquor), the statutes would violate the Commerce Clause.”).

“The eighteenth article of amendment to the Constitution of the United States is hereby repealed.” U.S. CONST. amend. XXI, § 1.

299 U.S. 59 (1936).

Id. at 64.

Id. at 62.

Id. at 64.

305 U.S. 391 (1939).

Id. at 394.
308 U.S. 132 (1939).


See supra note 37 and accompanying text.


Id. at 334.

Id. at 332.

Id.


Id. at 106, 113–14.

Id. at 110.

Id. at 113–14.


Id.

Id. at 712.

Id. at 714.

Id. at 714–15.


Id. at 265.

Id.

Id. at 268 (internal quotations and citations omitted).

Id. at 271.

Id. at 271–73.

Id. at 274. The state advanced the theory that Section 2 of the Twenty-First Amendment “saves” liquor control statutes even when those statutes violate “ordinary Commerce Clause principles.” Id.

Id. at 274–76 (emphasis added).

Id. at 276.


Id. at 432 (plurality).
Id. at 431 (quoting California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)) (Stevens, J., plurality).

Id.

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

Id. at 1112.

See supra notes 14–17 and accompanying text.

227 F.3d 848 (7th Cir. 2000), cert. denied, 532 U.S. 1002 (2001).

Id. at 849.

Id. at 850. See also Martin, supra note 7, at 70.

Bridenbaugh 227 F.3d at 849.

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

Id. at 849.

Id. at 851, 853.

It is exceedingly difficult to understand how Judge Easterbrook so easily rejects the Bacchus doctrine seeing as he himself argued the cause for the appellant importers in Bacchus. 468 U.S. 263 (1984).

One commentator has called Judge Easterbrook’s inability to find discrimination “patently silly.” Martin, supra note 7, at 70. “As a matter of fact, however, whereas Indiana vintners too small to be of interest to Indiana wholesalers can obtain an Indiana permit and ship directly to Indiana consumers, the challenged statute prohibits out-of-state vintners from doing likewise. This would seem to be a clear case of economic discrimination.” Id.

Bridenbaugh, 227 F.3d at 854.

Martin, supra note 7, at 70.

Bridenbaugh, 227 F.3d at 854.

Id.

Id. at 70–71.

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

Id. at 1114. “We think, however, that the ‘core concerns’ inquiry was prescribed by the Supreme Court, and we decline to embark on a different path.” Id.

Id. at 1106.

Id.

Id.
134] *Id.* at 1107.

135] *Id.* at 1110. *See supra* note 73 and accompanying text.


137] *Bainbridge,* 311 F.3d at 1112.

138] *Id.*

139] *Id.*

140] *Id.* at 1114.

141] *Id.* at 1115.

142] *Id.*


145] *Id.* at 467.

146] *Id.* at 471.

147] *Id.* at 474.

148] *Id.* at 474–76.


150] *Id.* at __.

151] *Id.* at __.

152] *Id.*

153] *Id.*

154] Bainbridge v. Turner, 311 F.3d 1104, 1115 n.17 (11th Cir. 2002) (“This evidentiary standard is far less than the strict scrutiny required under a traditional tier-one analysis of discriminatory laws. For example, the State need not show that there are no nondiscriminatory alternatives available.”).

155] *Id.* at 1115 (emphasis added).

156] *Supra* note 73 and accompanying text.

157] *Id.*


Id. at 420. The Virginia system also established state-owned retail stores that were permitted to sell imported distilled spirits, but only Virginia-produced wine. Id.

Id. at 425 n.11.

Id. at 444. “[I]t is a fiction to argue that this arrangement promotes temperance.” Id.

Id. at 446.

Id.


Id. at 676.

Id.

Id.

Id. at 694–95.

Id. The state was, in all likelihood done in by the title and legislative purpose stated in the Act. The title of the act that created the exemption for in-state wineries was the “Texas Wine Marketing Assistance Program Act. Id. at 676. The purpose behind the Act was stated as follows:

The growth of the Texas wine industry has had a positive impact on the Texas economy. California produces many times the amount of wine Texas produces, but consumes only a fraction more than Texas consumes. Texas is a significant consumer of wine, but demand is not being supplied by Texas wineries. H.B. 892 allows Texas wineries increased access to the Texas market and provides consumers with better access to Texas wines.

Id. (quoting H.B. 892 77(R)).


The plaintiffs also challenged a provision of the New York statute that prohibited advertising of certain alcoholic products on the grounds that it violated their right to free speech. Id. at 139.

A farm winery is defined by the New York statute as a winery located on a farm within the state of New York. Id. at 144.

Id. at 143–44.

Id. at 143.

Id. at 145. “[E]very drop of (only) out-of-state wine must pass through New York's three-tier system. Wine produced in-state may bypass at least two tiers.” Id.
The court has not yet decided the appropriate remedy. *Id.* at 152–53.

See *supra* Part III D.

See *supra* Part III D.

See, e.g., Martin, *supra* note 7 (discussing the many proposals for amending direct shipment laws in state legislature); Martin, *supra* note 6 (in depth discussion of the issues); Douglass, *supra* note 43 (analyzing various direct shipment statutes under recent Supreme Court jurisprudence and suggesting a federal scheme governing interstate shipment of alcoholic beverages); John Foust, Note, *State Power to Regulate Alcohol under the Twenty-First Amendment: The Constitutional Implications of the Twenty-First Amendment Act*, 41 B.C. L. REV. 659 (2000) (arguing that direct shipment laws are unconstitutional under the dormant Commerce Clause and the proposed Act cannot enable states to enforce the direct shipment laws in federal court); Andrew J. Kozusko III, Note and Comment, *The Fight to “Free the Grapes” Enters Federal Court: Constitutional Challenges to the Validity of State Prohibitions on the Direct Shipment of Alcohol*, 20 J.L. & COM. 75 (2000) (discussing the status of direct shipment litigation in federal courts and suggesting the Supreme Court adopt the reasoning in *Dickerson v. Bailey*, 87 F. Supp. 2d 691 (S.D. Tex. 2000); Miller, *supra* note 20 (arguing that direct shipment laws are constitutional unless states enact such laws along with licensing schemes with residency requirements); Matthew J. Patterson, Note, *A Brewing Debate: Alcohol Direct Shipment Laws and the Twenty-First Amendment*, 2002 U. ILL. L. REV. 761 (2002) (analyzing Supreme Court Twenty-First Amendment jurisprudence and arguing that the Court readopt a classical approach: the Twenty-First Amendment provides an unconditional grant of power to the states to regulate the importation and distribution of alcohol); Spaeth, *supra* note 70 (analyzing the relationship between the Twenty-First Amendment and the Supremacy Clause).