A NEW APPROACH TO THE WINE WARS: RECONCILING THE TWENTY-FIRST AMENDMENT WITH THE COMMERCE CLAUSE

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At a time when consumers enjoy an unprecedented level of access to the goods of their choice, why does a patchwork of state laws prevent equal access to one class of goods: alcoholic beverages? The not-so-simple answer lies in the history and application of section 2 of the Twenty-first Amendment, and in the tension between the Twenty-first Amendment and the Commerce Clause.

Spearheaded by farmers, wineries, and consumers who seek to expand the market for wine beyond the traditional three-tier system, the "wine wars" of recent years have challenged state statutes that ban or greatly restrict the direct shipment to state residents of wine and other alcoholic beverages from out-of-state sources. Opinion across the circuit courts is divided: The Second and Seventh Circuits favor a strict interpretation of section 2 and have upheld New York and Indiana bans on direct shipment of wine to consumers; the Third, Fourth, Fifth, Sixth, and Eleventh Circuits have enjoined states from enforcing their direct shipping prohibitions and favor an approach that relies on the Dormant Commerce Clause and a realistic assessment of the national wine market. In its 2004–2005 Term, the Supreme Court has consolidated three cases from the Second and Sixth Circuits for review to answer the question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?"

This Comment asserts that reconciliation of the Commerce Clause and the Twenty-first Amendment is preferable to historical interpretations of the Twenty-first Amendment as an exception to the Commerce Clause; specifically, it argues for a reconciliation of the two provisions by analogizing to First Amendment jurisprudence and by using the methodology employed by the Court in R.A.V. v. City of St. Paul.

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> The Twenty-first Amendment . . . fails to specify that the States are authorized by it to do anything at all; that conclusion is evidently thought to follow by some sort of logical necessity. And just what it is they *are* authorized to do—to prohibit importation of liquor, yes; to use their liquor authority to distort the national market, no—is left largely to the constitutional imagination. . . . The upshot is that 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 . . . [t]he other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws . . . .[1]

INTRODUCTION

For a consumer of wine, reading one of Robert Parker's colorful, evocative descriptions[2] of a recently sampled wine in *The Wine Advocate* may be the beginning of an adventure or a tantalizing introduction that ends in disappointment. The difference might depend on the size of one's pocketbook or on the number of bottles produced, but the primary factors may well be the

1. Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons From the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 219–20 (1995).

2. Parker recently described Sine Qua Non's 2001 Net (Roussanne): "An awesome perfume of white currants, flowers, honeyed citrus intertwined with background smoke . . . . It deserves a triple X rating. In the mouth, it is lavishly rich, succulent, fleshy, voluptuous, and so decadently thick that it is obviously an evil wine that will encourage illicit thoughts in the mind of any impressionable person who tastes it." Robert M. Parker, Jr., WINE ADVOCATE, Aug. 23, 2003, at 51.

state in which one lives and that state's approach to regulating the direct shipment of wine from out-of-state sources to state residents. If the wine is not available through a local retail store and the state prohibits an out-of-state supplier from shipping wine directly to a consumer,[3] securing the wine for one's own consumption may be difficult at best, and criminal at worst.[4]

At a time when consumers enjoy an unprecedented level of access to the goods of their choice[5] thanks in large measure to the borderless nature of e-commerce, why does a patchwork of state laws prevent equal access to one class of goods?[6] The deceptively simple answer is the Twenty-first Amendment.[7] Specifically, section 2 of the Amendment provides that "[t]he 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."[8]

Enacted in 1933, the Twenty-first Amendment served two primary purposes: It repealed the constitutional prohibition[9] of the manufacture, sale, or transportation of intoxicating liquor,[10] and it placed power to control the transportation or importation of intoxicating liquor into the hands of the states.[11] To ensure "orderly market conditions," most states adopted a three-tier system[12]

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3. As of this writing, twenty-four states prohibit direct shipment to consumers from out-of-state sources, including Florida, Massachusetts, New Jersey, New York, and Pennsylvania.

4. Of the twenty-four states that prohibit interstate direct shipping, the following states classify violation of the prohibition as a felony: Florida, Georgia, Indiana, Kentucky, Maryland, Tennessee, and Utah.

5. Individual consumers can purchase a host of mundane items from the comfort of home without restriction based on the state in which they wish to take shipment of the goods, including foodstuffs, household goods, and books. Prescription drugs are now readily available online and may be shipped to any U.S. address. More exotic requests can be filled, too: one can purchase high-level uranium ore, http://www.unitednuclear.com/high.htm, ammunition for an AK-47, http://www.ak-47.net/ammo/index.html, or luxury automobiles, boats, and aircraft, http://www.motors.ebay.com.

6. Although states may regulate all "intoxicating liquors" under the Twenty-first Amendment, the focus of this Comment is the regulation of wine.

7. U.S. CONST. amend. XXI.

8. *Id.* § 2.

9. The Eighteenth Amendment instituted the Prohibition by providing in pertinent part:

> Section 1: After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> Section 2: The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

U.S. CONST. amend. XVIII.

10. U.S. CONST. amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

11. *Id.* § 2.

12. *See generally* Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-first Amendment*, 85 VA. L. REV. 353 (1999).

through which liquor passed from producer to wholesaler, from wholesaler to retailer, and finally from retailer to consumer.[13] This system, designed to address the immediate concerns of keeping organized crime out of the liquor business and ensuring an orderly flow of tax revenue to the states, did not foresee a future in which consumers could secure products from around the country with relative ease, let alone without leaving their homes. Along with a general increase in the availability of goods, there has been not only an explosion of growth in the U.S. wine industry but also a dramatic decline in the number of wholesalers; nevertheless, the modus operandi of the three-tier system has not changed since the 1930s. Set within the dizzying web of state statutes regulating the importation of alcoholic beverages made possible by the Twenty-first Amendment, the combination of these factors has limited the growth of interstate commerce in wine and raised new questions about the proper interpretation of the Twenty-first Amendment.

Since the ratification of the Twenty-first Amendment and increasingly in recent years, consumers, vintners, farmers, and advocates of unrestrained interstate commerce have engaged in lobbying efforts and court challenges aimed at repealing or overturning state statutes that ban the direct shipment of wine to consumers. In the popular press these efforts and challenges are known, collectively, as "the wine wars." Such statutes have been challenged primarily as violations of the Commerce Clause.[14] Plaintiffs have argued that state bans on interstate direct shipment are impermissible barriers to interstate commerce and as such are violations of the Commerce Clause. The success of these challenges has been mixed, and legislative and judicial responses have run the gamut of possible interpretations and remedies.

Typically, courts evaluate a statute challenged under the Commerce Clause by applying a two-pronged test. The court first determines whether or not the statute is discriminatory, either facially or as applied. If it is, the court then considers whether there is a legitimate local purpose that would not be served adequately by nondiscriminatory alternatives. If the answer is yes, the statute passes muster; if the answer is no, the statute is deemed unconstitutional.

However, when analyzing statutes purportedly enacted under a state's Twenty-first Amendment powers, courts have traditionally added a third

13. *See infra* Part I for a discussion of the effect of the three-tier system on wine sales to consumers.

14. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."). For purposes of this Comment, I am referring to both aspects of the Commerce Clause: the positive grant of powers to Congress, quoted above, and the negative implication or Dormant Commerce Clause, which prohibits state barriers to interstate commerce. *See infra* Part II.

prong to this test. In these cases, if a statute fails a traditional Commerce Clause test, the court then considers whether the statute is nevertheless saved by virtue of being enacted under the state's Twenty-first Amendment powers, which have historically been unfettered by Commerce Clause concerns. As recently as 1996 the Supreme Court reiterated this interpretation,[15] despite simultaneous acknowledgment that the Twenty-first Amendment does not "diminish the force" of a host of other constitutional provisions.[16]

Presently, the circuits are divided[17] over how to reconcile the seemingly absolute power granted to the states by the Twenty-first Amendment and the historical rejection of barriers to interstate commerce at the heart of Commerce Clause jurisprudence. Although tension between the Commerce Clause and the Twenty-first Amendment is not new, changes in the social, economic, and political fabric of the United States, along with the evolution of constitutional law, demand a more coherent, realistic interpretation of section 2 of the Twenty-first Amendment. This Comment suggests that looking at the interpretive issue through the jurisprudential lens of another textually absolute constitutional provision—the First Amendment—will help focus the debate and, in doing so, demonstrate that the Twenty-first Amendment can be interpreted in tandem with the Commerce Clause, rather than as an exception to it.

This Comment asserts that reconciliation of the Commerce Clause and the Twenty-first Amendment is preferable to historical interpretations of the Twenty-first Amendment as an exception to the Commerce Clause; specifically, it argues for a reconciliation of the two provisions by analogizing to First Amendment jurisprudence. Constitutional analysis of the First Amendment has made sense of the idea that while there may be a constitutional prohibition, there may also be exceptions (or categories of exceptions) to that prohibition, and that the manner in which such exceptions are implemented must still follow constraints established by the prohibition itself.

To illustrate this idea, this Comment will consider the methodology employed by the Court in *R.A.V. v. City of St. Paul*.[18] In *R.A.V.*, the Court considered a First Amendment claim centered on a municipal ordinance regulating proscribed speech. In finding that the ordinance unconstitutionally

15. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 514–15 (1996).

16. *Id.* at 516. The Court refers to "our specific holdings that the Twenty-first Amendment does not in any way diminish the force of the Supremacy Clause . . . the Establishment Clause . . . or the Equal Protection Clause." *Id.* In deciding *44 Liquormart*, the Court concluded that "We see no reason why the First Amendment should not also be included in that list." *Id.*

17. *See infra* notes 45–52 and accompanying text.

18. 505 U.S. 377 (1992).

discriminated against the content of the speech, the Court considered the exceptions to the First Amendment (that is, speech which may be regulated, contrary to the First Amendment's prohibition of the regulation of speech) and concluded that the state's exercise of power under the exceptions was limited by the fundamental prohibition of the First Amendment. The state had exceeded the scope of its power by implementing an exception in violation of an established constraint.

An analogy to this approach is apt in the context of the wine wars. The Commerce Clause, like the First Amendment, is a prohibition;[19] its scope is limited, in these cases by the Twenty-first Amendment. States can, under section 2 of the Twenty-first Amendment, exercise powers the Commerce Clause typically would not allow.[20] But that grant of power from section 2 should not be unfettered; it does not explicitly, and should not implicitly, allow states to exercise such power in a discriminatory way. The Commerce Clause therefore has an indirect regulatory effect on states' Twenty-first Amendment powers, an effect that has been ignored or given short shrift by the Court.

Part I presents the controversy that occasions this reevaluation of the relationship between the Commerce Clause and the Twenty-first Amendment, addressing the legal and business issues raised by the cases in the wine wars. Parts II and III outline Commerce Clause and Twenty-first Amendment jurisprudence applicable to the controversy, describing the unique treatment of alcoholic beverages. Part IV argues for a reconciliation of Commerce Clause and Twenty-first Amendment jurisprudence, extending the aforementioned analogy and applying an *R.A.V.*-based methodology to the statutes challenged in the wine wars. For its 2004–2005 Term, the Court granted petitions for writs of certiorari[21] from parties in the cases challenging the New York and Michigan statutes, and this Comment concludes with the recommendation that the Court seize the opportunity to revisit its interpretation of the Twenty-first Amendment and to apply this new, more consistent methodology to reconcile the two provisions. Such a move would

19. Dormant Commerce Clause jurisprudence, discussed further in Part II below, generally prohibits barriers to interstate commerce. The prohibition of the First Amendment is that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

20. *See infra* Part III.

21. The Court consolidated its review of three cases—*Granholm v. Heald*, *Michigan Beer & Wine Wholesalers Ass'n v. Heald*, 124 S. Ct. 2389 (2004), and *Swedenburg v. Kelly*, 124 S. Ct. 2391 (2004)—and limited its writs to the question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?" Oral arguments were presented on December 7, 2004; the transcript is available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1116.pdf.

restore the potency of the Commerce Clause's application to an "invisible"[22] class of goods while preserving a role for the Twenty-first Amendment in keeping with its historical core concerns.

I. THE WINE WARS: THE COMMERCE CLAUSE VERSUS THE TWENTY-FIRST AMENDMENT

A cluster of recent cases, known by the popular collective moniker of "the wine wars," have challenged state restrictions on the direct shipment of wine to consumers from out-of-state sources. Before examining the constitutional questions, it is helpful to understand the business and legal issues surrounding these cases.

A. Increased Market Sophistication

In recent decades, the market for wine in the United States has changed dramatically. As Americans' knowledge about wine has grown, so has their demand for it. The number of wineries has increased from approximately 600 in 1975 to approximately 3000 in 2003, and wineries can now be found in every state.[23] A recent study indicated that "the United States is the third largest wine consuming nation in the world, and will almost certainly become the largest by the end of this decade."[24] Though individual consumption remains low,[25] the overall volume of wine consumed has increased to approximately 250 million cases in 2002.[26]

Speculation about the factors that have spurred such growth abound. Unlike some industries, which can explain growth by pointing to advances in technology or to particular advertising or branding campaigns, wine remains, by and large, a more carefully selected commodity, less subject to trends or consumer whim. For one segment of the wine-consuming public, one wine is as good as the next, and purchasing decisions are made largely on the

22. Just as categories of speech are not "invisible to the Constitution" because they may be regulated despite the First Amendment's prohibition, so too should wine in interstate commerce be "visible" to the Commerce Clause. *See R.A.V.*, 505 U.S. at 383.

23. *See E-Commerce: The Case of Online Wine Sales and Direct Shipment, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce*, 108th Cong. 27 (2003) (statement of David P. Sloane, President, WineAmerica) [hereinafter *Commerce Hearing*].

24. Frank J. Prial, *Americans' Thirst for Wine is Rising*, N.Y. TIMES, Dec. 17, 2003, at F12.

25. Personal consumption of wine in the United States is estimated at approximately 7.69 liters (approximately 10 bottles) of wine per year, a modest amount compared to Luxembourg (63.3 liters), France (58.1 liters) or Italy (53.4 liters). *Id.*

26. *Id.*

basis of price and availability. Such consumers, along with the large producers and in-state producers with a public profile, are essentially unaffected by direct shipping restrictions. But with the exception of wine produced by the largest wineries, most wine is "hand sold," purchased because of a recommendation or a particular inquiry.[27] Wine is not a fungible product. The quality of wines varies from producer to producer, just as the quality of grapes varies from year to year, from vineyard to vineyard, and sometimes within lots from a single vineyard, hence the importance of *terroir*.[28] For a growing subset of consumers, difference in quality is the motivating factor behind their purchasing decisions, and they seek out particular wines. For them, restricting direct shipment from out-of-state producers deprives them of the choice that interstate commerce promises.

B. The Legacy of the Three-Tier Distribution System

At the end of Prohibition, most states implemented a three-tier distribution system to regulate their internal market.[29] Simply put, the distribution chain is this: Producers of alcoholic beverages sell to wholesalers (the first tier); wholesalers sell to retailers (the second tier); and retailers sell to consumers (the third tier). Producers, wholesalers, and retailers are subject to licensing requirements and other state and federal regulations.

While the basic structure generally is the same, particular state statutes vary in significant ways. For example, some states, such as Indiana, require that all alcohol pass through their three-tier systems. Some states, such as Michigan and New York, prohibit interstate direct shipments to resident consumers, but make exceptions for in-state producers, allowing them to ship directly to state residents. Other states allow direct shipment by permit-holders, and still others are so-called "reciprocity" states that extend open-door treatment to other states on a reciprocal basis.[30]

There seems to be little disagreement that the three-tier system played a valuable role in the decades immediately following the repeal of Prohibition, and that is was designed with several aims: to collect taxes, to reduce the hold

27. *See Commerce Hearing*, *supra* note 23, at 28.

28. *Terroir*, the French word for "soil," also refers to "geographic factors that might influence the quality of the finished wine like altitude, position relative to the sun, angle of incline, and water drainage." RON HERBST & SHARON TYLER HERBST, WINE LOVER'S COMPANION 500 (1995). A more lyric explanation of the importance of *terroir* can be found in KERMIT LYNCH, ADVENTURES ON THE WINE ROUTE (1988).

29. For a description of the three-tier system, see generally Shanker, *supra* note 12.

30. *See* Wine Institute, Direct Shipment Laws by State for Wineries, *at* http://www.wineinstitute.org/shipwine/analysis/intro_analysis.htm.

organized crime had gained on the liquor trade during Prohibition, and to prevent sales of alcohol to minors. Although the system was—and in many respects still is—effective, it has not evolved and kept pace with the expansion of the market. Consumer choice has, in fact, been drastically limited.[31]

In stark contrast to the growth of the first and third tiers (the producers and consumers), the number of wholesalers that comprise the middle tier has shrunk by 90 percent, from approximately 6000 in 1950 to 600 in 2002.[32] In the past, producers had some ability to negotiate the terms of distribution arrangements or to find other distributors to handle their products; today, some of the nation's largest markets are dominated by a few wholesalers.[33] In spite of this precipitous decline, the lobbying power of wholesalers appears to be inversely proportionate to their numbers and is dedicated to preserving the status quo. At the state level this lobbying power is an acknowledged force. Wholesalers—primarily via their trade association, the Wine & Spirits Wholesalers of America—have been among the most powerful and vociferous opponents of relaxing state direct shipping restrictions,[34] and have resorted to gross generalizations, mischaracterizations, and the use of fuzzy statistics in attempts to influence public, legislative, and judicial opinion.[35]

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31. *See infra* note 36 and accompanying text.

32. *See* K. LLOYD BILLINGSLEY, SHIP THE WINE IN ITS TIME (2002), *available at* http://www.pacificresearch.org/press/rel/archive.html.

33. For example, 85 percent of alcohol distributed in the state of Illinois flows through four distributors. *See* Ill. Campaign for Political Reform, *Tip the Bar: Liquor Bill Draws Continuing Surge in Campaign Contributions*, *at* http://www.ilcampaign.org/analysis/briefings/ib12.asp [hereinafter *Tip the Bar*]. The requirements for entering the wholesaler tier are not insubstantial; for example, Florida requires that wholesalers "maintain minimum $100,000 in inventory [and a]ctively service 25% of all accounts in their county." Free the Grapes!, Research/Facts and Figures, *at* http://www.freethegrapes.org/research.html.

34. An example of wholesalers' lobbying strength: Named the "Wirtz Bill" after William Wirtz, an owner of Judge & Dolph Distributing, the state's largest liquor wholesaler, Illinois' Wine & Spirits Fair Dealing Act was passed in May 1999. It "prohibits wineries and distillers from canceling a contract with a [distributor] without giving a year's advance notice, and completely bars cancellation except for good cause." This provision effectively gives wholesalers a lock on their business. The Illinois Licensed Beverage Association, a beverage retailers group, "estimated that the distributors collected an additional $26 million in profits during the first six months the law was in effect." *See Tip the Bar*, *supra* note 33. Wholesalers have also intervened as defendants in several "wine wars" cases. *See, e.g.*, Heald v. Engler, 342 F.3d 517 (6th Cir. 2003) (naming Michigan Wine & Beer Wholesalers Association as intervening defendant-appellee), *cert. granted*, 124 S. Ct. 2389 (2004); Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y. 2002) (naming Peerless Importers, Inc., Eber Brothers Wine & Liquor Corp., and Premier Beverage Company LLC among the intervenor-defendants), *aff'd in part, rev'd in part*, 358 F.3d 223 (2d Cir. 2004), *cert. granted*, 124 S. Ct. 2391 (2004).

35. Juanita Duggan, President of the Wine & Spirits Wholesalers of America, has testified on several occasions before congressional subcommittees on the direct shipping issue, and is adamantly opposed to the relaxation of shipping restrictions. Ms. Duggan has characterized those opposed to direct shipping restrictions as "wealthy oenophiles," "self-proclaimed connoisseurs," and an "elitist minority" who "support laws that allow kids to order intoxicating liquor from 'virtual vending

The Chicken Little rhetoric of the wholesalers' association attempts to obscure the market realities faced by wine producers and consumers. An imbalance has developed, and the three-tier system is no longer sufficient as the sole conduit for selling wine to consumers, particularly with the advent of e-commerce. With more varieties of wine being produced and an ever-increasing demand for such wines, consolidation within the wholesaler tier constricts the free flow of interstate commerce and threatens many small producers. As noted in recent Congressional testimony:

> [The] requirement to sell through wholesalers flies in the face of an obvious reality: Wholesalers do not sell, or properly service, the products of smaller wineries. There are too many labels nationwide—some 25,000 in total. Even in a large and vigorous market like Illinois, only about 525 American brands are available—about two percent of the brands produced by U.S. wineries. . . .
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> . . . .
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> While wholesalers have been unwilling to represent small wineries, they have been more than willing to exercise their considerable economic and political clout in state capitals across the country to oppose direct shipment, and to make it a crime. . . .
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> . . . [A]s a direct consequence of wholesaler lobby campaigns, more than half of the states—including several with large populations—have effectively shut all but the top 100 wineries out of their markets by insisting that all products go through the mandatory three-tier system.[36]

While one court has suggested that securing a wholesaler and playing by the rules of the three-tier system is a straightforward, nondiscriminatory

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machines.'" Ms. Duggan has called upon members of Congress to ignore and "wholly discredit" a recently issued FTC report, *see infra* note 38, which she described as "intellectually dishonest and scientifically specious[. . . ,] ignor[ing] evidence contrary to its suppositions, manufactur[ing] evidence out of whole cloth, and misappl[ying] the findings of a geographically limited, inconclusive economic study." *Commerce Hearing*, *supra* note 23, at 20–21 (testimony of Juanita Duggan, President, Wine & Spirits Wholesalers of America).

Ms. Duggan objected to the FTC report, compiled after months of investigation and in cooperation with state attorneys general and other state officials with experience monitoring and evaluating the direct shipment of alcohol, but she hailed the results of a survey commissioned by her organization from an opinion research firm. On the basis of a telephone survey of 918 "adult Americans" conducted over a three-day period in September 2003, Ms. Duggan's association confidently announced that "[t]he overwhelming majority of Americans (77%) oppose allowing beer, liquor, and wine to be sold directly to consumers over the Internet or through the mail." Press Release, Wine & Spirits Wholesalers of America, Cyber Booze Taboo: New Survey Confirms Majority of Americans Oppose Internet Alcohol Sales (Oct. 22, 2003), *available at* http://www.wswa.org/public/media/survey/summary.html.

36. *State Impediments to E-Commerce: Consumer Protection or Veiled Protectionism?: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce*, 107th Cong. 20 (2002) (statement of David P. Sloane, President, American Vintner's Association).

process,[37] this view of the industry ignores the sea changes of recent decades and the importance of interstate commerce to the wine industry.

In July 2003, the Federal Trade Commission (FTC) released the results of its study of the national wine market, which the Commission prepared to provide policymakers with information "about the nature and scope of relevant tradeoffs [involved in relaxing direct shipping restrictions], including the likelihood of any perceived risks."[38] The FTC concluded that "state bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine,"[39] and that "states could significantly enhance consumer welfare by allowing the direct shipment of wine to consumers."[40] The Commission acknowledged state concerns regarding "tax collection and the prevention of sales to minors," but observed that "many states have adopted measures that are less restrictive than an outright ban on interstate direct shipping, and these states generally report few or no problems."[41] The FTC and the Department of Justice further asserted that "[w]ithout a showing of likely harm, restraining competition in a way that is likely to hurt consumers by raising prices and eliminating their ability to choose among competing providers is unwarranted."[42]

C. Legal Challenges and State Responses

Against this backdrop, individual consumers, along with winemakers prohibited from shipping directly to individuals in other states, have joined forces to challenge state prohibitions against interstate direct shipment. The overarching legal question presented by these cases is whether the Twenty-first Amendment can be reconciled with the Commerce Clause, or whether it stands alone as an exception to the Commerce Clause.[43] The question itself is not new to this group of cases, but the concerted effort to force reconsideration of the question across the circuits is a recent strategic development due in part to coordination among plaintiffs bringing the suits.[44]

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37. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853–54 (7th Cir. 2000).

38. FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 2 (2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

39. *Id.* at 3.

40. *Id.*

41. *Id.* According to the Commission, "less restrictive means include requiring an adult signature at the point of delivery and requiring out-of-state suppliers to obtain a permit." *Id.*

42. *Id.* at 2.

43. The Court's grants of certiorari were limited to a more narrow formulation of this question. *See supra* note 21.

44. Challenges have been coordinated in several states by the Institute for Justice, Professor James Tanford of Indiana University, and Robert Epstein, Esq. of Epstein & Frisch.

The results in these cases have been mixed and have left the circuits sharply divided. Courts have held that statutes in North Carolina,[45] Texas,[46] Florida,[47] and Virginia[48] were unconstitutional on the grounds that bans on the direct shipment to state residents of wine from out-of-state sources are violations of the Commerce Clause, and that such violations are not excused because the statutes were not grounded in addressing the core concerns of the Twenty-first Amendment.[49] Rather, courts in these cases found that the challenged statutes amounted to economic protectionism, and that nondiscriminatory alternatives for addressing the state's core concerns were available to, and in use by, the state. Indiana's[50] statute was upheld by the Seventh Circuit Court of Appeals. Michigan's[51] prohibition on direct shipping has been found unconstitutional by the Sixth Circuit Court of Appeals. Enforcement of New York's[52] statute was enjoined by the district court; that injunction was reversed by the Second Circuit Court of Appeals[53] in an opinion that echoes the spirit of *Bridenbaugh v. Freeman-Wilson*[54] and found that the statute at issue was "within the ambit of the Twenty-first Amendment."[55] Both Michigan's and New York's statutes—and the very different interpretations of the Sixth and Second Circuits—are being considered by the Court in its 2004–2005 Term.

The success with which these claims have met represents an acknowledgment of the evolution of the wine market in the United States. It is this evolution that has exacerbated the tension between market conditions and the regulatory powers that states—and some private actors—have enjoyed since ratification of the Twenty-first Amendment.

II. THE COMMERCE CLAUSE

Jurists, scholars, and the Court itself have long acknowledged that the Dormant Commerce Clause is the negative implication of the Commerce

45. Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003).
46. Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003).
47. Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002).
48. Bolick v. Roberts, 199 F. Supp. 2d 397 (E.D. Va. 2002).
49. *See infra* Part III.C regarding disagreement over what constitute "core concerns."
50. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000).
51. Heald v. Engler, 234 F.3d 517 (6th Cir. 2003), *cert. granted* 124 S. Ct. 2389 (2004).
52. Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y. 2002).
53. Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004), *cert. granted*, 124 S. Ct. 2391 (2004).
54. 227 F.3d 848 (7th Cir. 2000).
55. *Swedenburg*, 358 F.3d at 227.

Clause.[56] Essentially, because the Commerce Clause grants to Congress the power to regulate interstate commerce, states are prohibited from acting to impede interstate commerce. This was a chief concern of the Founders and the early Court. Concern about the free flow of interstate commerce was a motivating force behind the Constitutional Convention of 1787.[57] That concern stemmed from the experience of having states erect barriers to goods from other states in an attempt to hoard resources, enrich themselves, or engage in a trade-based, competitive tit-for-tat.

Commerce Clause jurisprudence continues to evolve,[58] but several broad principles have remained strong since the early 1800s. Overt state discrimination against interstate commerce is presumptively invalid and can only be sustained if the discrimination is needed to meet an important state interest. State policies that burden interstate commerce are deemed unconstitutional if the burden is clearly excessive compared with legitimate local benefits. Statutes are subject to two kinds of challenges: facial challenges, when the language of the statute itself if discriminatory, and challenges to the statutes "as applied" when the statute is facially neutral but discriminatory in effect.

Challenged statutes are typically subject to a two-part analysis. First, the court considers whether the regulation or statute "directly regulates or discriminates against interstate commerce" or "favor[s] in-state economic interests over out-of-state interests."[59] If the statute fits this description, it is presumptively invalid. However, the court then must consider whether the statute serves a "legitimate local purpose that cannot be adequately served by

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56. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.").

57. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 403 (2d ed. 2002); *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). For a broad statement of the spirit of the Commerce Clause, see *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949), in which Justice Jackson stated:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation. . . . Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 539.

58. Commerce Clause jurisprudence thus far is commonly divided into four eras: (1) the 19th century/*Gibbons v. Ogden* era; (2) the *Lochner* era between 1890–1937; (3) the return to a more *Gibbons*-like analysis between 1937–1995; and (4) 1995–present, beginning with the Court's determination that the Gun-Free School Zones Act of 1990 was an unconstitutional exercise of Commerce Clause power in *United States v. Lopez*, 514 U.S. 549 (1995), which some commentators describe as a return to the second era. *See generally* CHEMERINSKY, *supra* note 57, at 238–68.

59. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

reasonable nondiscriminatory alternatives."[60] If it does, the statute will be upheld. Facially discriminatory statutes clearly fail the first stage. At the second stage, the analysis becomes more complicated and more fact-sensitive for both facially neutral and facially discriminatory statutes—how a court evaluates the legitimacy, adequacy, and reasonableness of purposes and alternatives is where the complications ensue. Additionally, at this stage states are required to justify the discriminatory nature of the statute, which can be a significant hurdle to overcome, particularly in cases of facially discriminatory statutes, which trigger strict scrutiny by the court.

States that give preferential treatment to in-state producers by granting them an exemption from the prohibition on direct shipment to consumers have come under particularly close scrutiny because such exemptions have been found to reflect protectionist motives of improving a state's local industry at the expense of out-of-state parties—a classic violation of Commerce Clause principles. In such states, the courts' choice of remedy has had interesting effects. In North Carolina, for example, the Fourth Circuit Court of Appeals chose to strike down the North Carolina direct shipping statute, which gave in-state wineries permission to ship directly to consumers, thereby putting in-state and out-of-state shippers on equal footing.[61] This remedy was in lieu of extending the benefits of direct shipment to out-of-state wineries. Rather than live with this decision and jeopardize the business of their constituents, the North Carolina legislature acted while the decision was on appeal, repealing the prohibition against direct shipment and rendering the appeal moot. The Fifth Circuit Court of Appeals, finding a Texas direct shipping statute unconstitutional, acknowledged that it had a choice between extending and withdrawing benefits, and chose the former, affirming the district court's decision.[62] Such legislative and judicial choices to ultimately extend benefits suggests that the invocation of Twenty-first Amendment power should not save a statute when the rationale for enacting or maintaining the statute is primarily protectionist and only secondarily responsive to the core concerns of the Twenty-first Amendment.

In examining direct shipment prohibitions, the statutes typically fail standard Commerce Clause analysis when they grant exemptions to in-state producers, allowing them to bypass the three-tier system and ship directly to consumers. In considering New York's prohibition of interstate direct shipment to residence, the district court found that the New York Alcoholic

60. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977).
61. Beskind v. Easley, 325 F.3d 506, 517–20 (4th Cir. 2003).
62. Dickerson v. Bailey, 336 F.3d 388, 407–09 (5th Cir. 2003).

Beverage Control (ABC) law "provides . . . for 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"[63] The court then noted that "the burden shifts to the state . . . to show that the local benefits of the statute outweigh its discriminatory effects, and that the state . . . lacked a nondiscriminatory alternative that could have adequately protected the relevant local interests."[64] The district court determined that the New York statute failed both prongs of the test, finding that "the ABC Law provide[s] an impermissible economic benefit and (protection) to only in-state interests . . . [and] there are nondiscriminatory alternatives available."[65]

In Twenty-first Amendment cases, however, the standard analysis does not stop here. Instead, it is complicated by a third prong. If a statute fails the traditional test, but was enacted pursuant to the state's section 2 power, the statute is saved even though it would fail a Commerce Clause analysis. This third prong thereby enables a state to erect a barrier to interstate commerce. Historically, the third prong has effectively stacked the deck in favor of state power, but several circuits have reconsidered the application of the third prong, reevaluating the balance between the Commerce Clause and the Twenty-first Amendment.

The district court faced with the facts of *Swedenburg v. Kelly*[66] did just that. Considering the state's admission that "economic protectionism was the core purpose of the exceptions [allowing in-state producers to ship directly to consumers],"[67] the court found that the discrimination of the New York statute was not excused, and quoted the Supreme Court's admonition in *Bacchus Imports Ltd. v. Dias*[68] that "[s]tate laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."[69]

A third prong may very well be an appropriate addition to the traditional Commerce Clause analysis; indeed, for the Twenty-first Amendment to have a role beyond its repeal of Prohibition, it should have some bearing when the good in interstate commerce is an alcoholic beverage. While *Swedenburg* echoed the certainty of the *Bacchus* Court's pronouncement that "[o]ne thing is certain: The central purpose of the [Twenty-first Amendment]

63. Swedenburg v. Kelly, 232 F. Supp. 2d 135, 144 (S.D.N.Y. 2002) (quoting USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1281 (2d Cir. 1995)).
64. *Id.* (quoting *USA Recycling*, 66 F.3d at 1281–82).
65. *Id.* at 146.
66. *Swedenburg*, 232 F. Supp. 2d 135.
67. *Id.* at 146.
68. 468 U.S. 263 (1984).
69. *Swedenburg*, 232 F. Supp. 2d at 148 (citing *Bacchus*, 468 U.S. at 276).

was not to empower states to benefit local liquor industries by erecting barriers to competition,"[70] the question that remains is: What is the scope of section 2 power? The first step toward an answer is identifying the core concerns of the Twenty-first Amendment that justify upholding a state's exercise of power under section 2. To this end, one must consider the social, political, and legislative history of the Amendment.

III. THE TWENTY-FIRST AMENDMENT

A. History Through Ratification

Identifying and understanding the core concerns underlying the Twenty-first Amendment requires an awareness of the historical events and social developments that led first to the enactment of the nationwide prohibition of alcoholic beverages in 1919, and then to the subsequent repeal of that prohibition in 1933.

The consumption of alcohol, and a corresponding concern about the level and effects of such consumption, have long been features of American life. In his examination of the history and effects of the Eighteenth[71] and Twenty-first Amendments, Richard Hamm noted that

> [t]emperance was a reaction to the pervasiveness of alcohol in late-eighteenth- and early-nineteenth-century American society. Most of the population, from youth to old age, consumed it, often at every meal, from breakfast through supper. It was common practice to drink at every social event and even at work.[72]

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70. *Id.*

71. U.S. CONST. amend. XVIII. The Eighteenth Amendment reads:

Section 1: After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2: The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

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

Id.

72. Richard F. Hamm, *Short Euphorias Followed By Long Hangovers: Unintended Consequences of the Eighteenth and Twenty-first Amendments*, *in* UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 164, 166 (David E. Kyvig ed., 2000).

High levels of corn production spurred high levels of whiskey production, and

> [d]uring the first decades of the 19th century . . . Americans suddenly began drinking more than they ever had before or have since, going on a collective bender that confronted the young republic with its first major public-health crisis . . . . Corn whiskey, suddenly superabundant and cheap, was the drink of choice, and in the 1820's the typical American man was putting away half a pint of the stuff every day.[73]

Growing out of religious revivals and the unease that accompanied the social and cultural changes of the nineteenth century,[74] the American temperance movement sought to curb the prevalence of alcohol through social and legal means.[75] The genesis of the movement toward a constitutional amendment can be found among the activities of the Woman's Christian Temperance Union (WCTU), the Prohibition party, and the Anti-Saloon League, groups that viewed the consumption of alcohol as "a national evil" that "called for a national solution."[76] The national solution they envisioned was "a total national ban on the sale of liquor,"[77] and they lobbied state legislators to enact prohibition statutes.[78]

Although lobbying by prohibitionist associations achieved several legislative successes long before adoption of the Eighteenth Amendment, the

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73. Michael Pollan, *The (Agri)Cultural Contradictions of Obesity*, N.Y. TIMES MAG., Oct. 12, 2003, at 41, 42. Pollan also noted that "the modern coffee break began as a late-morning whiskey break called 'the elevenses,'" and that "[t]he results of all this toping were entirely predictable: a rising tide of public drunkenness, violence and family abandonment and a spike in alcohol-related diseases. Several of the founding fathers . . . denounced the excesses of the 'alcoholic republic,' inaugurating the American quarrel over drinking that would culminate a century later in Prohibition." *Id.*

74. Richard Hofstadter's "widely admired and quoted" characterization of Prohibition was "a pseudo-reform, a pinched, parochial substitute for reform . . . not merely to an aversion to drunkenness and to the evils that accompanied it, but to the immigrant drinking masses, to the pleasures and amenities of city life, and to the well-to-do classes and cultivated men." DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION, at xiv (2d ed. 2000) (citing RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 289–90 (1955)); *see also* RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920, at 22 (1995) (suggesting that the waves of Irish, German, Italian, and Polish immigration—and those ethic groups' liturgical religious affiliations which valued faith over actions—were less inclined to accept prohibitions on their activities than "old-stock" Americans—those of English and Scottish heritage with evangelical religious affiliations—who "saw prohibition as a needed corrective to the nation's moral laxity").

75. *See* Hamm, *supra* note 72, at 166–67.

76. *Id.* at 167–68 (especially note 6 and accompanying text).

77. *Id.* at 167; *see also* HAMM, *supra* note 74, at 12 (describing the WCTU as viewing law "in Mosaic terms," as "a list of ordinances that people were obliged to obey . . . . [Prohibitionists believed l]aw should promote morality and not be used to legitimate evil.").

78. Hamm, *supra* note 72, at 167.

resulting statutes did not go unchallenged in the courts.[79] In the late 1800s, the number of states that prohibited intoxicating liquor varied, from thirteen in the early 1850s to three in the 1870s.[80] States that enacted prohibitionist legislation found themselves at odds with the Commerce Clause and with federal laws regulating interstate commerce, although state assertions that such statutes were legitimate exercises of their police power were not entirely unpersuasive.[81]

The increasing political influence of the prohibitionists and the legislative quandaries over how best to regulate intoxicating liquor are evident in early legislative attempts to divide state and federal power over alcohol regulation. The Wilson Act[82] of 1890 established concurrent federal and state jurisdiction of liquor, and made alcoholic beverages subject to a state's jurisdiction "upon arrival." The COD Act[83] of 1909 regulated interstate sales of liquor by specifying labeling requirements, requiring delivery to the specified consignee, and prohibiting the carrier from collecting payment for the shipment from the consignee. In 1913, the Webb-Kenyon Act[84] prohibited the shipment of intoxicating liquor into a state in violation of that state's laws. State power was further enhanced by threat of federal prosecution under the Reed Amendment[85] to the Postal Act in 1917, which more broadly prohibited

79. *See, e.g.*, Leisy v. Hardin, 135 U.S. 100 (1980) (holding unconstitutional an Iowa statute that prohibited the sale of intoxicating liquor except by a registered pharmacist because in regulating liquor sales in this manner the statute also prohibited the sale of intoxicating liquor by an out-of-state importer, thereby impermissibly regulating interstate commerce); Bowman v. Chicago & Nw. R. Co., 125 U.S. 465 (1888) (holding that an Iowa statute prohibiting common carriers from transporting liquor into the state without a state auditor's certificate was an impermissible regulation of interstate commerce).

80. *See* HAMM, *supra* note 74, at 20.

81. While the majority in *Bowman* emphasized liquor as a good in interstate commerce and acknowledged that Iowa had the right to prohibit the manufacture or sale of liquor within the state and among its citizens, its opinion firmly stated that "[i]t cannot . . . 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." *Bowman*, 125 U.S. at 493. In contrast, Justice Harlan's dissent framed the issue squarely as an exercise of state police power to "protect[ ] the health and morals and the peace and good order of the people of Iowa against the physical and moral evils resulting from the unrestricted manufacture or sale of intoxicating liquors." *Id.* at 510 (Harlan, J., dissenting).

82. 27 U.S.C. § 121 (2000).

83. The provisions of the COD Act are now incorporated in 18 U.S.C. § 1263, which is based on Act of March 4, 1909, Pub. L. No. 350, ch. 321, § 240, 35 Stat. 1137 (former 18 U.S.C. § 390).

84. 27 U.S.C. § 122 provided that:

> 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 . . . or from any foreign country into any State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State . . . is prohibited.

Id.

85. Contrast the language of the Webb-Kenyon Act above with the language of the Reed Amendment, which stated in pertinent part:

interstate shipment of intoxicating liquor by addressing both the seller and the purchaser.

Despite the prohibitionists' lobbying success at both federal and state levels, many within the movement believed that the existence of a federal excise tax on alcohol "fostered a benign view of the liquor industry as an important . . . industry."[86] Programs that aimed to reduce liquor sales by placing conditions on sales and requiring sellers to secure a highly priced license failed to appease prohibitionists, who proclaimed that "no evil can be exterminated by selling it the right to exist."[87] In this spirit, movement toward a constitutional amendment accelerated in 1913, when proposed language for just such an amendment was presented to Congress by prohibitionist groups.[88] The proposal was initially rejected, but the prohibitionists' efforts to elect pro-temperance members of Congress paid off during the election of 1916, and garnered for them the Congressional support necessary to secure approval and to dictate the language of the Eighteenth Amendment.[89] The Eighteenth Amendment, which prohibited "the manufacture, sale, or transportation of intoxicating liquors . . . for beverage purposes,"[90] achieved the necessary state votes for ratification on January 16, 1918, and Prohibition became the law of the land in 1919.

After more than a decade of Prohibition, it became clear that the Eighteenth Amendment had several undesirable consequences, not the least

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> Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: *Provided*, that nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State.

Reed Amendment, ch. 162, § 5, 39 Stat. 1069 (1917).

86. Hamm, *supra* note 72, at 168. An interesting historical twist: Prohibitionists initially viewed taxation as indicative of federal approval of alcohol consumption and frowned upon it. In recent years, the importance of generating taxes at a state level, addressed below, is one of two key justifications in support of state restrictions on direct shipping.

87. HAMM, *supra* note 74, at 27–28.

88. Hamm, *supra* note 72, at 169.

89. *Id.* at 170. The prohibitionists' battle to pass the Eighteenth Amendment demonstrates not only their commitment to their deeply held moral beliefs, but also their long-term strategic savvy. In the context of the debate about the merits and risks of an amendment specifically addressing flag burning, Steven Shiffrin highlighted an argument posed by Frank Michelman, who "states that the best reason for preferring an amendment over a statute may 'lie beyond a concern about constitutional *law*, in some other kind of care, some other sort of regard, that people feel for *the Constitution*.' . . . The scriptural Constitution is a more important cultural symbol, and it constitutes us in ways that statutes upheld by the Supreme Court do not." STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 14–15 (1999) (citing Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1354 (1990)).

90. U.S. CONST. amend. XVIII, § 1.

of which was the growth of organized crime.[91] By 1933, a movement to repeal Prohibition outright found tremendous support among Congress and individual states. Moreover, a sense that the general public supported the repeal spurred Congress to take the previously untried step of repealing an amendment by state conventions.[92]

A stunning feature of these conventions was their brevity.[93] Speakers focused more on the "novelty and historical significance of the event,"[94] than on the subject of the event itself. Contemporary observers noted that "[p]erhaps the most outstanding feature of the repeal conventions is their *lack of a truly deliberative character*."[95] Few participants in the state conventions considered the details[96] of the proposed Amendment; by the time the ratifying conventions were underway, the repeal of Prohibition was a foregone conclusion, and the process of amendment overwhelmed the Amendment itself.

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91. Richard Hamm noted that the Eighteenth Amendment was

> designed to make the nation free of the evils of liquor[,] . . . [b]ut prohibition "opened up an enormously profitable field of endeavor" to the existing criminals as the market for liquor did not disappear with the legal liquor industry. The lucrative nature of this trade prompted the expansion of organized crime. . . . [It] inaugurated new patterns of drinking. . . . [In place of the saloon] came new venues, nightclubs, cabarets, and speakeasies . . . . Prohibition changed the drinking patterns of women [because the] "blatant flouting" of prohibition "created new social spaces for drinking" . . . where women as well as men drank without social stigma. . . . Certainly, proponents of prohibition never thought that their amendment would restore the luster to liquor's reputation.

Hamm, *supra* note 72, at 173.

92. *See* RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 3 (Everett Somerville Brown ed., 1938). Although Article V provides for ratification by "the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress," no amendment prior to the Twenty-first was ratified by means of state conventions, despite attempts to do so. *Id.*

93. New Hampshire's convention took only seventeen minutes to ratify the Amendment; no state took longer than a single day. *Id.* at 7.

94. *Id.* Notwithstanding this general assessment, speakers in several states addressed the failure of prohibition, focusing their criticisms on the loss of tax revenue and on the rise of crime. Henry Marshall, Vice-President of the Indiana convention, supported the repeal of prohibition and opined that:

> It is both foolish and intolerable to go on submitting to a fallacious system under which an illicit, outlaw liquor traffic annually draws hundreds of millions of dollars of profits out of the nation's capital . . . and employs those millions for the financing of crime syndicates . . . .
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> . . . .
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> . . . The regulation of the beverage industry . . . will become an important factor in solving the problems connected with the cost of government.

Id. at 142–43.

95. *Id.* at 5 (emphasis added).

96. Commenting on how the text of a constitutional amendment can "miss its mark," Laurence Tribe observed that "in constitutional matters . . . the devil is in the details . . . [s]o one must look closely at the details before signing on to the whole package." Tribe, *supra* note 1, at 218–19.

B. The Consequences of Haste

The rush to ratify the Twenty-first Amendment and the lack of attention paid to the details and to the potential consequences of section 2 have resulted in decades of constitutional uncertainty. Questions about the scope of state power under section 2 and the relationship of the Twenty-first Amendment to other provisions of the Constitution arose soon after ratification and continue to this day.

The dearth of legislative debate left the courts to build their own interpretive foundation, and their unsurprising choice was to interpret the language of section 2 plainly. A spate of cases in the 1930s challenged state restrictions on alcoholic beverages as violations of the Commerce Clause.[97] The Court initially interpreted section 2 as a complete exception to the Commerce Clause, and asserted that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."[98] Subsequently, states enjoyed broad Twenty-first Amendment power, using it as the justification for nearly all state action related to liquor, not solely for the regulation of liquor importation.

It was not until the Warren Court of the 1960s that the Court reconsidered the relationship between the Twenty-first Amendment and the Commerce Clause in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*[99] In upholding an order enjoining New York authorities from interfering with an airport retailer's duty-free liquor sales to departing international passengers, the Court acknowledged the historical relationship between the two provisions, but reasoned that:

> To draw a conclusion . . . 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. If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over

97. *See, e.g.*, Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939) ("Since the Twenty-first Amendment . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."); State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59 (1936) (holding that a state license fee is not a violation of the Commerce Clause); *see also* Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939) (upholding Kentucky's Alcohol Beverage Control Law against a challenge from an Indiana-based shipper denied a license to transport whiskey to Illinois, noting that "[t]he Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause.").

98. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964) (reviewing Twenty-first Amendment jurisprudence).

99. *Id.*

> interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.[100]

The Court went on to observe 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."[101] *Hostetter* thereby introduced the possibility that the Twenty-first Amendment should be reconciled not only with the Commerce Clause, but also with other provisions of the Constitution.

Although the Court's next opportunity to reconcile the Commerce Clause and Twenty-first Amendment did not come for another two decades, the Court did attempt to reconcile the Twenty-first Amendment with other Constitutional provisions, and with federal law, in the intervening years. While finding that state power under the Twenty-first Amendment was subject to limitations under the Equal Protection Clause[102] (*Craig v. Boren*,[103] 1976), the Sherman Antitrust Act (*California Retail Liquor Dealers Ass'n v. MidCal Aluminum Inc.*,[104] 1980), and under FCC regulations of cable television (*Capital Cities Cable, Inc. v. Crisp*,[105] 1984), the Court maintained its strict interpretation with respect to the Commerce Clause. Citing other cases that had addressed conflicts between the Sherman Act and the Twenty-first Amendment, the Court noted:

> These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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

100. *Id.* at 331–32.

101. *Id.* at 332 (relating interpretive history of section 2).

102. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

103. 429 U.S. 190 (1976) (holding that the Twenty-first Amendment does not excuse gender-based discrimination deemed an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment).

104. 445 U.S. 97 (1980) (holding that the California system of retail liquor price maintenance was an impermissible violation of the Sherman Antitrust Act and was not saved by virtue of being enacted under the state's Twenty-first Amendment power).

105. 467 U.S. 691 (1984) (holding that a provision of the Oklahoma Constitution prohibiting the advertisement of alcoholic beverages could not be used to require that such advertisements be blocked by cable television operators broadcasting into Oklahoma).

> federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case."[106]

For evolution of Twenty-first Amendment jurisprudence to progress, a direct conflict between the Commerce Clause and the Twenty-first Amendment would need to make its way to the Court.

C. The Identity and Role of Core Concerns: *Bacchus* and Beyond

In 1984, the Court took a significant step toward reconciling the Commerce Clause with the Twenty-first Amendment. In *Bacchus Imports Ltd. v. Dias*,[107] the case that is often cited as the progenitor of the wine wars, the Court considered Hawaii's exemption for locally produced alcoholic beverages made from native plant products from the Hawaii Liquor Tax. The tax had been enacted to generate funds to support government services and to "encourage development of the Hawaiian liquor industry."[108] Plaintiff wholesalers claimed that by exempting Hawaiian products from the tax, the state had violated their rights under several constitutional provisions, primarily the Commerce Clause. The Court found that despite the limited nature of the discriminatory effect, the tax was a violation of the Commerce Clause because locally made products were competitive with products from outside Hawaii, and the state's purpose in implementing the tax was both discriminatory and protectionist.[109]

After reaching this conclusion, the Court then considered whether the Twenty-first Amendment "saved" the state tax exemption.[110] The Court rejected the state's argument, specifically noting that the Hawaii tax did not "promote temperance or carry out any other purpose of the Twenty-first Amendment,"[111] and more generally that "[s]tate laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."[112]

The *Bacchus* Court opened the door to a new interpretation of the relationship between the Commerce Clause and the Twenty-first Amendment not

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106. *Cal. Retail Liquor Dealers*, 445 U.S. at 110.
107. 468 U.S. 263 (1984).
108. Bacchus Imps. Ltd. v. Dias, 468 U.S. 263, 265 (1984).
109. *Id.* at 269–73.
110. *Id.* at 274. It is interesting to note the Court's observation that Hawaii had "expressly disclaimed any reliance upon the Twenty-first Amendment" in the lower courts, but adopted the argument before the Supreme Court. *Id.* at 274 n.12. Perhaps this change in strategy was not lost on the petitioners' counsel, Frank Easterbrook.
111. *Id.* at 276.
112. *Id.*

only by its holdings, but also by the observations it made. Acknowledging that opinions of the Court in the years following ratification of the Twenty-first Amendment included "broad language" about the meaning of section 2, the Court noted the "obscurity of the legislative history" and concluded that "[n]o clear consensus concerning the meaning of the provision is apparent."[113] Citing *Hostetter*, the Court acknowledged that "[i]t is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause"[114] and reiterated the harmonizing approach espoused in that same case.[115] The Court also announced its certainty that "[t]he central purpose of [section 2] was not to empower States to favor local liquor industries by erecting barriers to competition."[116]

While it is helpful to determine what section 2's purpose is *not*, *Bacchus* shows us that we must, as a first step, identify the core concerns of the Twenty-first Amendment so we can determine section 2's purpose and how it should be reconciled with the Commerce Clause. Doing so is particularly important because of the lack of guidance from the language of the Amendment itself and the murkiness of the Amendment's history. Courts deciding the wine wars cases have made clear that there is no consensus on the specific identity of the core concerns, nor on the manner in which state action with respect to core concerns—whatever their identity—should be evaluated. Several years after *Bacchus in North Dakota v. United States*,[117] the Court upheld a North Dakota regulation as a legitimate exercise of the state's Twenty-first Amendment power, in part because the regulation was enacted "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue"[118]—that is, in the interest of what the Court determined to be the core concerns of section 2.

The wine wars cases, however, have not followed a straight interpretive line from *Bacchus* to the present day: They have not agreed on the identity of the core concerns, on what role they should play in evaluating a statute enacted under a state's Twenty-first Amendment power, or on how they can or should be used as part of a Commerce Clause analysis. Until the Second Circuit's reversal of the district court's injunction in *Swedenburg*, the Seventh Circuit stood virtually alone in its narrow view of the Commerce Clause, and in its refusal to consider the use of core concerns.

113. *Id.* at 274.
114. *Id.* at 275.
115. *Id.*
116. *Id.* at 276.
117. 495 U.S. 423 (1990).
118. *Id.* at 432 (plurality opinion).

Bridenbaugh v. Freeman-Wilson[119] stands out among the recent series of cases for several reasons. The Seventh Circuit acknowledged that the challenged statute would not survive Dormant Commerce Clause analysis but for the power conferred by section 2 of the Twenty-first Amendment.[120] The plaintiffs' successful argument at the district court level was that the core concern of section 2—temperance—was not furthered by the state statute, and therefore the statute's discrimination against out-of-state shippers was fatal.[121] The Seventh Circuit Court of Appeals considered the core concerns of section 2 to be broader: In addition to temperance, the court agreed with the defendants that "there are others, including raising revenue and 'ensuring orderly market conditions.'"[122] Rather than evaluating the statute in light of multiple concerns, however, the court dismissed such "suppositions about mental processes" (as it characterized the concerns and motivations behind the Twenty-first Amendment) as "unilluminating," noting that "our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters."[123] Interpreting section 2 as "clos[ing] the loophole left by the dormant commerce clause,"[124] the court pronounced that "[n]o longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; § 2 speaks directly to these shipments. Indeed, all 'importation' involves shipments from another state or nation."[125]

As tidy as it is, the Seventh Circuit's dismissal of the use of a core concerns analysis is hardly satisfactory. The flaw in Judge Easterbrook's opinion is its unquestioning acceptance that Indiana's three-tier system is even-handed and nondiscriminatory. Distinguishing *Bacchus* by noting that Indiana does not favor Indiana products, Judge Easterbrook found that there was "no functional discrimination"[126] because "Indiana insists that *every* drop of liquor pass through its three-tiered system and be subjected to taxation."[127] The problem with this argument is that Indiana's system *was* discriminatory.

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119. The consumer-brought claim challenged an Indiana statute regulating shippers, not recipients, of alcoholic beverages. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849–51 (7th Cir. 2000); *see also* IND. CODE § 7.1-5-11-1.5(a) (2001) (the target of the *Bridenbaugh* challenge); *id.* §§ 7.1-5-10-5, 7.1-5-10-7 (which applied to the consumer end of direct shipping transactions).

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

121. Bridenbaugh v. O'Bannon, 78 F. Supp. 2d 828 (N.D. Ind. 1999).

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

123. *Id.*

124. *Id.* at 853.

125. *Id.*

126. *Id.*

127. *Id.*

Permits for direct shipment to consumers were limited to Indiana citizens;[128] out-of-state wineries were ineligible. Additionally, restrictions imposed by state-licensed wholesalers amounted to de facto discrimination by restricting the entry of small producers to the three-tier system. Small, out-of-state producers who cannot meet wholesaler-mandated thresholds for minimum annual production and others conditions are therefore shut out of the Indiana market.[129]

Taking such factors into account, other courts have expanded their inquiry into the operative effects of state direct shipping statutes by considering the core concerns of section 2 as part of the third prong of their Commerce Clause/Twenty-first Amendment analysis. For example, in *Swedenburg v. Kelly*,[130] the district court considered the state's assertions that its direct shipping restriction was in the interest of promoting the core concerns of temperance, limiting minors' access to alcoholic beverages, and generating tax revenue, but hesitated to agree that these concerns were definitive. Notwithstanding the Court's opinion in *North Dakota v. United States*, the *Swedenburg* court noted that "[a]s a threshold matter, it is not entirely clear that collection of taxes is, in and of itself, a core concern of the Twenty-first Amendment."[131] An earlier opinion from the same district court, acknowledged in *Swedenburg*, suggested that the only core concern was temperance.[132] In *Heald v. Engler*,[133] the Sixth Circuit took issue with the Court's formulation in *North Dakota* and announced that "we do not interpret the 'in the interest of' language to mean that a state need only be *motivated* by the 'core concerns' of the Twenty-first Amendment to shield its laws from constitutional scrutiny. . . . [T]he state must demonstrate that no reasonable nondiscriminatory alternatives are available to advance the same legitimate goals."[134]

Based on legislative efforts before Prohibition and on the social and political history surrounding the Eighteenth and Twenty-first Amendments

128. Judge Easterbrook minimized the importance of this statutory detail by noting that "[p]laintiffs do not complain" about it and elided the impact of that restriction on out-of-state shippers by noting that permit-holders "may deliver California and Indiana wines alike." *Id.* at 853–54.

129. *See supra* note 36 and accompanying text (comments by David Sloane on the difficulty faced by small wineries seeking wholesaler representation).

130. 232 F. Supp. 2d 135 (S.D.N.Y. 2002).

131. *Id.* at 149.

132. *Id.* at 147 (citing Loretto Winery Ltd. v. Gazzara, 601 F. Supp. 850, 861 (S.D.N.Y. 1985)). The Second Circuit Court of Appeals could not disagree more strongly. In considering the *Swedenburg* case, the court stated: "We disagree with the proposition that the Supreme Court's Twenty-first Amendment jurisprudence confines the scope of section 2 to state regulations that advance so-called core concerns." Swedenburg v. Kelly, 358 F.3d 223, 233 (2nd Cir. 2004), *cert. granted*, 124 S. Ct. 2391 (2004).

133. 342 F.3d 517 (6th Cir. 2003), *cert. granted sub nom.* Granholm v. Heald, 124 S. Ct. 2389 (2004).

134. *Id.* at 524.

discussed above, this Comment assumes arguendo that the two core concerns of the Twenty-first Amendment are promoting temperance and promoting orderly market conditions, with the latter concern specifically achieved by the exercise of the state's power to levy taxes on goods sold to state residents.

With this working assumption, the next step is to describe a methodology that the Court should adopt to evaluate whether a statute enacted pursuant to a state's Twenty-first Amendment power impermissibly violates the Commerce Clause. For a statute to have as its goal the promotion of temperance and orderly market conditions should be necessary, but not sufficient. Statutes that discriminate facially (by disallowing any direct shipment to consumers from out-of-state sources) or that are discriminatory as applied (for example, by requiring all shipments to pass through a three-tier system that effectively forecloses participation by a significant portion of first-tier segment) would be subject to strict scrutiny to determine whether the state's Twenty-first Amendment core concerns could be adequately served by nondiscriminatory regulations.

Currently, if a statute fails the traditional two-pronged test (meaning it is an unconstitutional violation of the Commerce Clause), courts typically consider whether the statute's discrimination is excused by virtue of being enacted under section 2 of the Twenty-first Amendment.[135] This all-or-nothing approach has had the effect of flipping, not merely tipping, the scales in favor of state power, and does nothing to reconcile the Twenty-first Amendment and the Commerce Clause. However, it is at this point, when courts evaluate whether a statute serves the core concerns of section 2, that one finds an opportunity for reconciliation. Already, and in many cases decided since *Bridenbaugh*, this third analytic step has been conducted not in the vacuum of statutory text and precedent but in the full light of market conditions and with a renewed consideration of the purposes and concerns that underlie the statute. The remaining task is to articulate a methodology that gives meaning to both the Commerce Clause and the Twenty-first Amendment.

IV. TOWARD RECONCILIATION: REASONING BY ANALOGY

Despite Judge Easterbrook's contention that solving the direct shipping question merely involves weighing "the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not,"[136]

135. *See* Bacchus Imps. Ltd. v. Dias, 468 U.S. 263, 274 (1984).
136. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849 (7th Cir. 2000).

the previous section has illustrated how the relationship between the two provisions has defied simple interpretation for decades.

In the wine wars cases, defendant states and wholesalers have seized upon Judge Easterbrook's dismissive tone despite its unfavorable reception in other circuits,[137] seeing in it support for a "plain language" approach which favors a broad view of state power. Outside the Seventh and Second Circuits, however, courts are not shrinking from the opportunity presented by the direct shipping challenges to reconsider the relationship between the Commerce Clause and the Twenty-first Amendment.

One cannot argue with Judge Easterbrook's observation that the Dormant Commerce Clause is not "in the Constitution." This is true, and for advocates of a plain meaning interpretation of constitutional provisions, this fact is dispositive. But if one adopts this position wholesale, one is left with a significant body of constitutional law that falls short of that standard (that is, the Dormant Commerce Clause). Perhaps a distinction suggested by Frank Michelman is helpful. He observed:

> Plainly, constitutional law in this practical, descriptive sense is not identical with the scriptural text we know as the Constitution. Moreover, as between that scriptural text and constitutional law, it must be *constitutional law* that is the immediate concern of the practical-minded. For, again plainly, it is *constitutional law*, and not the scriptural Constitution, that in actual practice directly affects ongoing exercises of governmental powers.[138]

Merely evoking the Twenty-first Amendment, or acting "in the interest of" core concerns, has not been and should not be sufficient to immunize state statutes from the Commerce Clause's prohibition against barriers to interstate commerce. In evaluating the Commerce Clause claims brought in the wine wars cases, most courts have attempted to take a "practical-minded" approach and reconcile the Commerce Clause and the Twenty-first Amendment. Constrained by the limits of current jurisprudence in this area, however, this practical-minded approach has essentially involved a more stringent consideration of traditional Commerce Clause/Twenty-first Amendment analysis. This more stringent approach was adopted explicitly by the Sixth

137. One tart example: In *Beskind v. Easley*, the district court noted that "[d]efendants cite *Bridenbaugh* in an attempt to describe 'the legal issue before the court as one pit[ting] the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause' which does not.' The Court disagrees. Instead, the Court believes this case pits the Supreme Court, whose opinions govern this Court, against the Seventh Circuit, whose opinions do not." Beskind v. Easley, 197 F. Supp. 2d. 464, 475 n.12 (W.D.N.C. 2002) (internal citations omitted).

138. Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1340 (1990).

Circuit in *Heald v. Engler* and by the Fourth Circuit in *Beskind v. Easley*,[139] and adopted implicitly by other courts (with the exception of the Seventh and Second Circuits) that have reached decisions in these cases.

Although the wine wars have resulted in many of the lower courts inching Twenty-first Amendment jurisprudence toward a reconciliation with the tenets of the Commerce Clause, the Supreme Court should authoritatively resolve the issue of how to reconcile the two provisions, and it should do so with a creativity and effectiveness that has eluded the Court in the past. A more creative form of reconciliation is necessary because the Court's resolution of individual cases involving the interplay of the Commerce Clause and the Twenty-first Amendment has not yielded a methodology that makes both provisions meaningful and that the lower courts can apply consistently.

Generally speaking, the Court's Twenty-first Amendment jurisprudence has so far evolved only to the extent that the Amendment does not operate as an across-the-board exception to the constitutional provisions that predate it. With *Hostetter* and *Bacchus*, the Court took significant steps toward a more nuanced view of the Twenty-first Amendment and toward a reconciliation with the Commerce Clause. As recently as 1996, however, the Court exhibited a hesitation toward pursuing a reconciliation when it echoed the 1939 Court, suggesting that "[t]he States' regulatory power over this segment of commerce is . . . largely 'unfettered by the Commerce Clause.'"[140]

The Court would be short-sighted to ignore both the jurisprudential progress and the dramatic changes that have occurred in the national wine market. Rather than resorting to an outdated approach, the Court should instead employ a more creative form of reconciliation. The history of the Twenty-first Amendment—and particularly the history of its ratification—is an unusual one. It is so unusual that the language of the Amendment merits a more creative analysis than might be justified when the language and the potential consequences of an amendment have been the subject of debate.

By using the adjective "creative" I do not mean to imply that the recommended form of reconciliation is without a jurisprudential or logical foundation, or that the Court should effectively revise or rewrite the Amendment. The goal of the methodology outlined below is to reconcile the Commerce Clause and the Twenty-first Amendment in a manner that makes both provisions meaningful and has historical, jurisprudential, and logical justifications. To that end, this Comment suggests that looking at the

139. 325 F.3d 506 (4th Cir. 2003).

140. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 514–15 (1996) (quoting Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939)).

interpretive issue through the jurisprudential lens of another textually absolute constitutional provision—the First Amendment—will help focus the Court's analysis and ultimately allow the Court to demonstrate that the Twenty-first Amendment can be interpreted in tandem with the Commerce Clause, rather than as an exception to it. Indeed, *R.A.V. v. City of St. Paul* offers us a methodology for evaluating whether the implementation of an exception to a prohibition follows the constraints established by the prohibition, or whether the implementation exceeds those constraints and is an unconstitutional exercise of power.

The reconciliation this Comment recommends is therefore based upon constitutional analysis that has made sense of the idea that while there may be an absolute constitutional prohibition, there may also be exceptions (or categories of exceptions) to that prohibition, and that the manner in which such exceptions are implemented must still follow constraints established by the prohibition itself.

Analogizing to *R.A.V.*'s approach is useful in the context of the wine wars. The Commerce Clause, like the First Amendment, is a prohibition; its scope with respect to the importation of alcoholic beverages into a state is limited by an exception, the Twenty-first Amendment. States can, under section 2 of the Twenty-first Amendment, exercise powers the Commerce Clause typically would not allow; however, contrary to precedent, that grant of power from section 2 need not be, and should not be, unfettered. Following *Bacchus*, the Commerce Clause can be read to show that the Twenty-first Amendment does not provide states with a justification for exercising their power in discriminatory ways. Viewed in this light, the Commerce Clause, therefore, exerts an indirect regulatory effect on states' Twenty-first Amendment powers. Neither provision may trump the other.

But first, *R.A.V.*

A. Locating the Methodology: *R.A.V. v. City of St. Paul*

R.A.V. v. City of St. Paul presented a First Amendment challenge to a municipal ordinance that was interpreted to prohibit the use of "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'"[141] The petitioner, a youth who had been convicted under the statute, asserted that the ordinance was both "overbroad and impermissibly content-based."[142] In finding for the petitioner, the Court

141. R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992).
142. *Id.*

considered the exceptions to the First Amendment (that is, speech that may be regulated, contrary to the First Amendment's prohibition) and concluded that the state's exercise of power under the "fighting words" exception was limited by the fundamental prohibition of the First Amendment itself. Specifically, the Court agreed that the state had exceeded the scope of its power by regulating not only the speech itself, but also the content of the speech. Content discrimination is impermissible under First Amendment jurisprudence and acts as a constraint on the exception (the ability of a state to regulate "fighting words"), established by the prohibition (the First Amendment).

Elaborating on its reasoning, the Court found that the statute violated the First Amendment because its discrimination among types of unprotected speech did not meet one of three criteria. First, the discrimination embodied in the ordinance "[did] not [rest upon] . . . the very reasons why the particular class of speech is proscribable."[143] Second, the statute was not "aimed only at the 'secondary effects' of speech."[144] Third, the discrimination "[was] not justified on the ground that the ordinance is narrowly tailored to serve a compelling state interest."[145] Ultimately for the Court, the "dispositive question . . . [was] whether [] discrimination is reasonably necessary to achieve St. Paul's compelling interests . . . ."[146] It came to the conclusion that "[i]t plainly is not."[147]

In defending this approach against the objections raised by the dissenting Justices, the Court noted:

> Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government "may regulate [them] freely." . . . Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.[148]

Indeed, the same is true of Twenty-first Amendment regulation vis-à-vis the Commerce Clause—a "simplistic, all-or-nothing-at-all" approach is at odds with common sense. In contrast to the plain meaning approach that was the hallmark of the Court's early Twenty-first Amendment decisions, *R.A.V.*'s methodology offers an appropriately creative way to reconcile the goal of

143. *Id.* at 393.
144. *Id.* at 394.
145. *Id.* at 378.
146. *Id.* at 395–96.
147. *Id.* at 396.
148. *Id.* at 384 (quoting White, J., concurring in the judgment).

freely flowing interstate commerce with deference to the core concerns of the Twenty-first Amendment that justify its role as an exception—albeit one with constraints—to the Commerce Clause.

This Comment proposes that the *R.A.V.* methodology be applied when evaluating claims that a state prohibition against the direct shipment of wine presents an impermissible barrier to interstate commerce. To do so, the Court should consider four factors to determine whether or not a state barrier to interstate commerce is a permissible exercise of state power under the Twenty-first Amendment.

First, the Court should inquire whether the statutory discrimination against direct shipment from out-of-state sources to state residents is necessary for the state to further the core concerns of the Twenty-first Amendment: specifically, the promotion of temperance and orderly market conditions.

Second, the Court should inquire whether direct shipment from out-of-state sources is associated with any significant secondary effects that might justify the discrimination.

Third, the Court should consider whether the discrimination is justified on the ground that the statute is narrowly tailored to serve a compelling state interest.

Finally, then, the dispositive question for the Court should be whether the discrimination is reasonably necessary to achieve the state's compelling interests in promoting temperance and promoting orderly market conditions.

B. Applying the Methodology: *Swedenburg v. Kelly*

In *Swedenburg v. Kelly*, the district court enjoined the State of New York from enforcing its alcohol beverage control laws that prohibit direct shipment from out-of-state wineries to New York residents, finding that the prohibition was a violation of the Commerce Clause. To reach this conclusion, the district court used the standard three-prong Commerce Clause/Twenty-first Amendment analysis described above.[149]

Considering the first prong, the district court concluded that the New York statute discriminates because it "provide[s] . . . for differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[150] It did so by allowing *in-state* wineries to bypass New

149. *See supra* note 135 and accompanying text.

150. Swedenburg v. Kelly, 232 F. Supp. 2d 135, 144 (S.D.N.Y. 2002) (quoting USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1281 (2d Cir. 1995)).

York's three-tier system and to ship directly to consumers. Moving to the second prong, the court shifted the burden to the state "to show that the local benefits of the statute outweigh its discriminatory effects, and that the state . . . lacked a nondiscriminatory alternative that could have adequately protected the relevant local interests."[151] In this regard, the state failed by admitting that the "exceptions [for in-state wineries] were intended to be protectionist."[152] In doing so, the state admitted that nondiscriminatory alternatives existed, but that it chose to forego them in order to give an economic benefit to in-state wineries.

Finally, the court considered whether the New York statute was saved by the Twenty-first Amendment. Following the precedent established by *Loretto Winery, Ltd. v. Gazzara*,[153] the court evaluated the statute solely on whether or not it directly promoted temperance.[154] Quoting *Bacchus*' pronouncement that "[s]tate laws that constitute mere economic protectionism . . . are not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor,"[155] the court concluded that "it is doubtful whether the . . . [l]aws . . . are grounded in the promotion of temperance."[156]

When reviewing the decisions of the Sixth Circuit and the Second Circuit, the Supreme Court should apply the *R.A.V.* methodology proposed herein and specifically consider the following:

Is the statutory discrimination against out-of-state wineries necessary for the state to promote temperance and orderly market conditions? Even if New York's admitted goal in discriminating against out-of-state wineries had been the promotion of temperance and orderly market conditions instead of economic protectionism, it is still unlikely that this factor could be decided in its favor. New York defended its discrimination against out-of-state suppliers by arguing that extending the benefit of direct shipment to out-of-state suppliers would undermine the state's ability to promote the core concerns of temperance and orderly market conditions.[157] Specifically, the state emphasized its concerns regarding "limit[ing] minors' access to alcoholic beverages"[158] and "the potential for evasion of state liquor taxes."[159] The New York district court found these arguments unpersuasive. With respect to access by minors,

151. *Id.* (quoting *USA Recycling*, 66 F.3d at 1282).
152. *Id.* at 146.
153. 601 F. Supp. 850 (S.D.N.Y. 1985).
154. *Swedenburg*, 232 F. Supp. 2d at 147.
155. *Id.* at 148 (quoting Bacchus Imps. Ltd. v. Dias, 468 U.S. 263, 276 (1984)).
156. *Id.* at 147.
157. *Id.* at 148.
158. *Id.* at 149.
159. *Id.*

the court noted that the same protective measures required of in-state shippers could be applied to out-of-state shippers.[160] For example, the requirements that deliveries be made only to a person twenty-one years of age or older and that common carriers who make such deliveries verify the recipient's age before concluding the delivery do not depend on the status of the shipper for their effectiveness. In-state and out-of-state shippers who use the same common carriers (such as UPS and Federal Express) can presumably require the same standards for their deliveries. Putting aside the issue of minors' access to wine and taking a broader view, the district court echoed the observation of the Fifth Circuit, which opined that "[t]here is no temperance goal served by the [Texas direct shipping] statute since Texas residents can become as drunk on local wines . . . as those that . . . are in practical effect kept out of the state by the statute."[161]

Having found that the statutory discrimination does not promote temperance, the district court, recalling *Bacchus*, noted that the promotion of orderly market conditions via taxation may not be, on its own, a sufficient justification for discriminating against out-of-state suppliers. In considering the relationship between the promotion of temperance and the promotion of orderly market conditions in Twenty-first Amendment cases, the court "question[ed] whether each of the interests referenced in *North Dakota* [promoting temperance, ensuring orderly market conditions, and raising revenue] is, standing alone, sufficient to outweigh a discriminatory ban upon the direct shipment of out-of-state wine."[162] The answer, in keeping with Commerce Clause jurisprudence, must be no.

Is direct shipment from out-of-state sources associated with secondary effects that justify the discrimination? New York essentially presented a "secondary effects" argument by asserting that undesirable secondary effects—increased access by minors to wine and the loss of tax revenue—would result if out-of-state wineries were allowed to ship directly to consumers on the same terms as in-state wineries. This argument was unpersuasive to the district court under the traditional analysis and should be equally unpersuasive under the *R.A.V.* methodology because the state did not demonstrate the likelihood of such secondary effects. The state's argument in this respect was further undermined because the state asserted that in-state direct shipments were made "in a manner that accommodates the State's concerns for minors, temperance and revenue collection."[163] Presumably, if direct shipment from out-of-state

160. *Id.*
161. *Id.* at 150.
162. *Id.* at 149 n.30.
163. *Id.* at 150.

wineries were subject to the same conditions as direct shipment from in-state wineries, the state should experience no secondary effects linked to eliminating the discriminatory barrier.

Is the discrimination justified because the statute is narrowly tailored to serve a compelling state interest? As part of New York's assertion that the statute was "saved" by virtue of it being an exercise of the state's Twenty-first Amendment power, the state argued that "the direct shipping ban is 'a narrowly tailored exercise of the State's police power to control access to alcoholic beverages, to further the interests of public health, welfare, and safety, and to promote temperance.'"[164] To evaluate this argument, the court would consider whether nondiscriminatory alternatives exist, for such alternatives undercut this defense under the *R.A.V.* methodology. Here, too, an economically protectionist foundation of a direct shipping ban is an acknowledgment that such nondiscriminatory alternatives exist. A state's choice of a discriminatory alternative is not sufficient.

Is the discrimination reasonably necessary to achieve the state's compelling interests in promoting temperance and orderly market conditions? By allowing in-state producers to ship directly to consumers, New York effectively acknowledged that direct shipment does not itself hinder the state's efforts to promote temperance and orderly market conditions. Further, the state has not demonstrated that out-of-state shippers, operating under the same requirements as those in state, would present a unique threat to its efforts. If, as the investigation of the FTC suggests, states can "adopt[] measures that are less restrictive than an outright ban on interstate direct shipping, and . . . report few or no problems,"[165] then unsubstantiated assertions by states and wholesalers that interstate direct shipping represents a threat to temperance and orderly market conditions are exposed as attempts at economic protectionism, unrelated to the promotion of temperance and orderly market conditions. Such justifications fail to satisfy this fourth factor and ultimately fail the test as a whole.

C. Advantages of the New Approach

Adopting the methodology outlined above provides several key advantages. The application of the *R.A.V.* methodology itself represents an improvement to the current approach insofar as it standardizes the factors to be considered when evaluating a claim that implicates the Commerce Clause and the Twenty-first Amendment.

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164. *Id.* at 147.
165. *See supra* note 41 and accompanying text.

Although the origin of the formulations is an abstract application of *R.A.V.*, parallels to Commerce Clause jurisprudence and to Twenty-first Amendment jurisprudence are immediately apparent. Introduction of this methodology has a desirable evolutionary, rather than revolutionary, effect. To wit:

The first factor in the recommended methodology parallels the third prong of Commerce Clause/Twenty-first Amendment inquiry, which "saves" an otherwise impermissibly discriminatory statute if it was enacted pursuant to a state's Twenty-first Amendment power. In this formulation, however, the state actions must be *necessary* to uphold the core concerns of the Twenty-first Amendment. As in *Bacchus*, mere economic discrimination or protectionist legislation would not pass muster.

The second factor formalizes the scrutiny with which courts in the wine wars cases have considered state justifications for discriminating against out-of-state shippers of wine. States and wholesalers defending direct shipping prohibitions assert that prohibiting direct interstate shipment to state residents protects against two "secondary effects": the increased availability of alcoholic beverages to minors, and the loss of tax revenue due to evasion by consumers and shippers. Under the recommended methodology, as in *R.A.V.*, the state would bear the burden of *proving* such secondary effects, not merely identifying the potential for such effects or articulating a fear of such effects. While it is true that the requirement that a state demonstrate the existence of secondary effects would present a higher hurdle for states to clear, their ability to do so would be a valuable indicator of the validity of the state's assertions.

The third factor considers the scope of the discriminatory statute. In *R.A.V.*, the Court found that the St. Paul statute was overbroad and noted that "[t]he existence of adequate content-neutral alternatives thus 'undercuts significantly' any defense of such a statute."[166] This factor parallels the second prong of traditional Commerce Clause analysis, which inquires whether non-discriminatory alternatives exist.

The fourth and dispositive factor challenges distinctions between in-state and out-of-state shippers. If a state can demonstrate that discrimination against out-of-state shippers is necessary to promote the core concerns of temperance and orderly market conditions, its direct shipping statute would survive scrutiny. This factor ultimately places the burden for justifying discrimination on the state, places the Commerce Clause and the Twenty-first Amendment in equipoise, and is in keeping with traditional Commerce

166. R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) (quoting Boos v. Barry, 485 U.S. 312, 329 (1988)).

Clause principles that demand that restrictions on the free flow of interstate commerce be subject to heightened scrutiny.

Because of its origin in First Amendment jurisprudence, the *R.A.V.* methodology is particularly helpful as an interpretive approach to a constitutional prohibition that does not explicitly acknowledge its own constraints. The Court's Twenty-first Amendment jurisprudence has cried out for an interpretive tool. The approach suggested herein is that tool.

CONCLUSION

The time for reconciling the Twenty-first Amendment with the Commerce Clause is long overdue. A recent spate of cases known as "the wine wars" offers an opportunity to the Court to advance its Twenty-first Amendment jurisprudence, and the Court should seize the opportunity to do so by adopting a methodology that supports a robust national wine market *and* stays true both to the core concerns of the Twenty-first Amendment and to the Commerce Clause. By analogizing to First Amendment jurisprudence, this Comment has presented a concrete, four-step inquiry derived from *R.A.V. v. City of St. Paul* that should provide guidance to the Court when settling the wine wars once and for all.

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