Western New England Law Review

Volume 26 *26 (2004)*
Issue 2

Article 4

12-16-2009

CONSTITUTIONAL LAW—THE "GRAPE" MARCH ON WASHINGTON: THE TWENTY-FIRST AMENDMENT, THE DORMANT COMMERCE CLAUSE, AND DIRECT ALCOHOL SHIPMENTS

Pamela R. Cote

NOTES

CONSTITUTIONAL LAW – THE "GRAPE" MARCH ON WASHINGTON: THE TWENTY-FIRST AMENDMENT, THE DORMANT COMMERCE CLAUSE, AND DIRECT ALCOHOL SHIPMENTS

INTRODUCTION

The convergence of two modern phenomena – the Internet and the popularity of drinking and collecting wine – have resulted in a constitutional controversy that has reached six United States Circuits and will now be resolved by the United States Supreme Court.[1] The controversy arises out of state laws that ban the direct-shipment of alcohol to consumers to varying degrees.[2] The constitutionality of these laws hinges on the relationship between the Twenty-First Amendment[3] and the Commerce Clause.[4] When states were granted the power to regulate alcohol transportation or importation through ratification of the Twenty-First Amendment,[5]

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1. Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004); Heald v. Engler, 342 F.3d 517 (6th Cir. 2003); Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003); Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003); Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000). Both the *Heald* and *Swedenburg* cases were appealed to the United States Supreme Court. A petition for a writ of certiorari was granted in both cases on May 24, 2004 and the cases were consolidated. The question has been limited to the following: "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?" 72 U.S.L.W. 3725 (U.S. 2004).

2. The legislative landscape has changed dramatically; only ten years ago just four states allowed interstate direct-shipments. Twenty-six states now allow direct-shipments, although twenty-four still have prohibitions. Shipping directly to consumers has also been made a felony in several states. Free the Grapes!, at http://www.freethegrapes.com/research.html (last visited Sept. 4, 2004). *See infra* notes 110-123 and accompanying text.

3. U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

4. U.S. CONST. art. I, § 8, cl. 3. This section states that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

5. U.S. CONST. amend. XXI, § 2. *See supra* note 3.

many direct-shipment bans were passed by state legislatures.[6] Subsequently, in-state exemptions were added, and now these laws have been challenged through lawsuits[7] in which plaintiffs argue that direct-shipment laws interfere with interstate commerce and therefore violate the Commerce Clause.[8] The defendant states respond by arguing that the Twenty-First Amendment grants them the right to regulate alcohol shipments despite the Commerce Clause. They believe that the Amendment has granted them this power so that they can create legislation that promotes temperance, implement taxation and regulate market conditions. Specifically, the states argue that the Twenty-First Amendment creates a constitutional exception to the Commerce Clause.

Since 2000, six federal circuits have reviewed the constitutionality of laws banning the direct-shipment of out-of-state alcohol to consumers, four of them in 2003 and 2004.[9] It is not difficult to understand why there is so much interest and activity in this area of the law. Unlike many legal issues that affect only small groups of people, this issue affects everyone from large corporations to small business owners, and from the wealthy wine collector to the casual

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6. *See, e.g.*, N.C. GEN. STAT. §§ 18B-102.1, 18B-109, 18B-1114, 18B-102 passed in 1937 by North Carolina and TEX. ALCO. BEV. CODE ANN. §§ 107.07(a), 107.07(f) passed in 1935 by Texas.

7. *See supra* note 1.

8. U.S. CONST. art. I, § 8, cl. 3. *See supra* note 4.

9. Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004); Heald v. Engler, 342 F.3d 517 (6th Cir. 2003); Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003); Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003); Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000). These cases have also generated a great deal of law review attention and several organizations have formed for the purpose of lobbying for one side or the other. *See, e.g.,* Lloyd C. Anderson, *Direct-shipment of Wine, the Commerce Clause and the Twenty-First Amendment: A Call for Legislative Reform*, 37 AKRON L. REV. 1 (2004); Brannon P. Denning, Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, The Twenty-First Amendment, and State Regulation of Internet Alcohol Sales, 19 CONST. COMMENT. 297 (2002); Susan Lorde Martin, *Wine Wars-Direct Shipment of Wine: The Twenty-First Amendment, The Commerce Clause, and Consumers' Rights*, 38 AM. BUS. L. J. 1 (2000); Andrew J. Kozusko, III, Note and Comment, *The Fight to "Free the Grapes" Enters Federal Court: Constitutional Challenges to the Validity of State Prohibitions on the Direct-shipment of Alcohol*, 20 J.L. & COM. 75 (2000); James Molnar, Comment, *Under the Influence: Why Alcohol Direct-shipment Laws Are a Violation of the Commerce Clause*, 9 U. MIAMI BUS. L. REV. 169 (2001); Matthew J. Patterson, Note, *A Brewing Debate: Alcohol Direct-shipment Laws and the Twenty-First Amendment*, 2002 U. ILL. L. REV. 761 (2002); Jason E. Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment*, 70 NOTRE DAME L. REV. 1563 (2004); Coalition for Free Trade, *at* http://www.coalitionforfreetrade.com (last visited Sept. 4, 2004); Free the Grapes!, *at* http://www.freethegrapes.com (last visited Sept. 4, 2004).

wine drinker.[10]

Part I of this Note examines the jurisprudence of the Dormant Commerce Clause, as well as the history surrounding the Twenty-First Amendment and the alcohol direct-shipment laws that are being challenged. Part II examines the six circuit decisions concerning state direct-shipment laws. Two circuit splits have been created through these decisions. The first circuit split involves the constitutionality of the direct-shipment laws themselves; the second circuit split concerns the selection of an appropriate remedy if a court finds that a direct-shipment law is unconstitutional. The remedial debate focuses on the distinction between courts that chose to strike down the shipment bans in their entirety, and courts that have chosen narrower alternatives. Finally, Part III analyzes the issue of whether the Supreme Court should strike down these laws as violative of the Dormant Commerce Clause. In this context, the proper balance between the two conflicting constitutional provisions will be analyzed. This Note proposes that the United States Supreme Court should respect the clear intent behind the Twenty-First Amendment and treat it as a constitutional exception to the Commerce Clause, thereby permitting states to regulate in what would otherwise be a discriminatory fashion. Such a result preserves the integrity of the amendment process as well as the clear precedent of the Court itself.

I. BACKGROUND

A. *The Dormant Commerce Clause*

The Commerce Clause states that "Congress shall have power . . . [t]o regulate commerce . . . among the several states."[11] This clause has been read to grant Congress the power to regulate commerce, and has also been judicially interpreted "as imposing some self-executing limitations on the scope of permissible state regulation."[12] The constitutional principle that states are limited in the ways that they can affect interstate commerce is commonly referred to as the "Dormant" Commerce Clause. "The dormant commerce

10. Interestingly, this issue has even caused a division in the "conservative legal establishment" – former independent counsel Kenneth Starr is assisting Michigan consumers, while former Supreme Court nominee Robert Bork is representing wholesalers. *See* Anne Gearan, *U.S. Supreme Court says Wine Import Fight Is Ripe for a Ruling*, DETROIT FREE PRESS, May 24, 2004, *available at* http://www.freep.com.

11. U.S. CONST. art. I., § 8, cl. 3.

12. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 8.1, 309 (6th ed. 2000).

clause is meant to prevent the various states from imposing economic protectionism" through passing laws that would favor their own economic interests.[13] If one state passes a law that discriminates against another state, retaliatory legislation would likely result, and the national economy would be seriously affected.[14] The Supreme Court has thus "construed the Commerce Clause as incorporating an implicit restraint on state power even in the absence of congressional action."[15] To hold otherwise would contradict the plan the framers of the Constitution had for a national economy.[16] One of the reasons the Articles of Confederation failed was because of the destructive trade wars the states waged with one another; the Framers sought to avoid this with the new Constitution.[17]

Dormant Commerce Clause jurisprudence has evolved through nearly two hundred years of Supreme Court decisions.[18] Although modern Dormant Commerce Clause jurisprudence has only materialized since the 1930s, the Court has consistently allowed states to regulate for the health and safety of their residents if the burden on

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13. *Id.* at 310.

14. *Id.*

15. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2, 1030 (3d ed. 2000).

16. *See* THE FEDERALIST NO. 32 (Alexander Hamilton). In this essay, Hamilton continues his discussion of taxation and money in the new nation. Although he acknowledges the rights of states to levy and collect taxes, Hamilton points out that the states retain the sovereignty they formerly had so long as the power had not been "*exclusively* delegated to the United States." *Id.* at 241. He further states that "there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States." *Id.* at 244. Thus, it is logical to look to the Commerce Clause as not only granting power to Congress, but also concurrently restricting the power of the states.

17. TRIBE, *supra* note 15 § 6-3, at 1044 (2000).

18. The earliest of these cases include *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). *See also, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (Arizona fruit packaging requirements held unconstitutional for placing an undue burden on interstate commerce without sufficient justification for protecting Arizona growers); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (Court found Illinois statute regulating truck mudflaps to be unconstitutional because the burden on interstate commerce substantially outweighed any value as a safety measure); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (city ordinance requiring pasteurization within a five mile radius found unconstitutional because there were reasonable non-discriminatory alternatives to serve the city's interests); S. Pac. Co. v. Arizona, 325 U.S. 761 (1945) (Arizona law restricting the length of trains found unconstitutional because the benefit of the law as a safety measure did not outweigh the burden on interstate commerce); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (Pennsylvania law requiring ships entering or leaving Philadelphia port to use a local pilot was upheld because the state may regulate if there is a peculiarly local concern involved).

commerce is minimal, while at the same time prohibiting the states from truly interfering with commerce.[19] Specifically, in *Baldwin v. G.A.F. Seelig, Inc.*, the Court decided that a state could not use its power to protect the health and safety of its citizens by engaging in economic protectionism and projecting its legislation into another state.[20] This standard is especially pertinent in the direct-shipment arena. Typically,

> [i]f there is discrimination, then it must appear that there is no other reasonable method of safeguarding a legitimate local interest. If a state law has no other purpose than to favor local industry, this balancing of interest approach should not be used, because the purpose of the state regulation would be illegitimate.[21]

Dormant Commerce Clause jurisprudence began with the case of *Gibbons v. Ogden* in 1824.[22] In that case, the Court found it unconstitutional for New York to grant a steamboat monopoly to Ogden, because federally-licensed Gibbons was prohibited from operating in New York waters.[23] This case was the first to describe the "negative" aspect of the Commerce Clause; Chief Justice Marshall stated that if a state regulates interstate commerce, "it is exercising the very power that is granted to [C]ongress and is doing the very thing which [C]ongress is authorized to do."[24] The early Commerce Clause cases were decided in large part on the distinction between "commerce" and "police" regulations; this would change in the mid-Nineteenth century.[25]

The next major development occurred in 1851 with *Cooley v. Board of Wardens*;[26] here, the Court determined that the state may regulate interstate commerce if there was a peculiarly local concern involved. However, the Court did not establish what distinguished a national concern from a "peculiarly local" concern. In this case,

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19. H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949) (New York's refusal to grant license to operate to a Massachusetts milk distributor found unconstitutional because the provision was not to promote health and safety, but instead to prohibit competition).

20. 294 U.S. 511 (1935) (holding New York laws requiring milk dealers in the state to pay minimum prices in order to be licensed, whether or not milk was bought in New York or elsewhere, unconstitutional on the ground that New York did not have the power to project its legislation into another state and set a barrier to commerce).

21. NOWAK & ROTUNDA, *supra* note 12 §8.8, at 329.

22. 22 U.S. (9 Wheat.) 1 (1824).

23. *Id.*

24. *Id.* at 10.

25. TRIBE, *supra* note 15 §6-4, at 1046 (2000).

26. 53 U.S. (12 How.) 299 (1851).

the Court permitted Pennsylvania to require ships to use local pilots when entering or leaving Philadelphia; this was held to be acceptable because a local subject was being regulated as opposed to a national one.[27] Although the Court recognized that this state law affected interstate commerce, the Court chose to look to what was being regulated, as opposed to the motivations behind the law.[28]

Eventually, the Court decided that merely looking at the nature of the regulated subject was insufficient; instead, laws needed to be evaluated in light of their burden on interstate commerce, and whether or not that burden was direct or indirect in its effect on interstate commerce.[29] The Court stated in *Pike v. Bruce Church, Inc.* that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[30]

Under the modern analysis that has evolved since the mid-1930s, the first level of analysis for a statute is determining that it concerns a legitimate state end.[31] However, even with a legitimate end, a statute is virtually per se invalid if it discriminates against interstate commerce and has no other purpose but to serve local economic interests.[32] In addition, the standard emerged that if there are reasonable non-discriminatory alternatives available to serve local interests, a law will be unconstitutional.[33]

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27. *Id.*

28. *Id.* at 316. *See also* South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938).

29. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (Court found Illinois statute regulating truck mudflaps to be unconstitutional because the burden on interstate commerce substantially outweighed any value as a safety measure); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (Arizona law restricting length of trains found unconstitutional because the benefit of the law as a safety measure did not outweigh the burden on interstate commerce); DiSanto v. Pennsylvania, 273 U.S. 34 (1927) (Pennsylvania law requiring steamboat ticket sellers to have a license was struck down as an unnecessary and burdensome interference with interstate commerce). *See also* TRIBE, *supra* note 15 §6-4, at 1049.

30. 397 U.S. 137, 142 (1970).

31. TRIBE, *supra* note 15 §6-5, at 1050 (citing Edgar v. MITE Corp., 457 U.S. 624, 644 (1982)).

32. Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). *See supra* note 18. Also, it is important to note that even if a statute does not discriminate against interstate commerce, it may still be struck down if the burden on interstate commerce exceeds the local benefits. *Pike*, 397 U.S. at 142.

33. Dean Milk Co. v. City of Madison, 340 U.S. 329 (1951) (city ordinance requir-

In more recent cases, the current Justices have generally stated that discriminatory statutes will be struck down unless they can be justified by something other than economic protectionism.[34] Great emphasis has been placed on the discriminatory nature of the regulations in question.[35] The Court has plainly stated that "[i]f a restriction on commerce is discriminatory, it is virtually *per se* invalid."[36] At times, the Court has "articulated the test for discriminatory state regulations as requiring invalidation 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.'"[37] However, the Dormant Commerce Clause has its critics among the current Justices as well.[38] This will be explored further in Part III of this Note.

Ultimately, under the Dormant Commerce Clause analysis, a state must prove that its interest in burdening commerce is legitimate, and that there are no less burdensome means of achieving its ends.[39] The plaintiffs in direct-shipment cases argue that the state's intent to ban out-of-state direct alcohol shipments is not legitimate, and that even if it is, there are less burdensome means available to the states to accomplish any legitimate goals. Thus, these plaintiffs assert that the direct-shipment laws are facially discriminatory and designed purely to favor local business by allowing them to ship

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ing pasteurization within five mile radius found unconstitutional because there are reasonable non-discriminatory alternatives to serve the city's interests).

34. Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992).

35. TRIBE, *supra* note 15 §6-6, at 1059.

36. *Oregon Waste Sys.*, 511 U.S. at 99; *see also* Philadelphia v. New Jersey, 437 U.S. 617 (1978) (holding that the state may not discriminate against out-of-state waste products because they do not present a reason apart from their origin, to treat them differently). Only one recent case has involved a discriminatory regulation being upheld – *Maine v. Taylor*, 477 U.S. 131 (1986) (holding that because of the "peculiar evil" presented by the out-of-state products, the state may prohibit their entry into the state).

37. TRIBE, *supra* note 15 §6-6, at 1066 (quoting Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992)).

38. Justice Scalia has been particularly critical of the Dormant Commerce Clause analysis engaged in by the Court, while Justice Thomas and Chief Justice Rehnquist have also raised questions as to the legitimacy and/or state of Dormant Commerce Clause jurisprudence. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 608 (1997) (Scalia, J., and Thomas, J., dissenting); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., joined by Thomas, J., concurring in the judgment); American Trucking Ass'n v. Smith, 496 U.S. 167, 202 (1990) (Scalia, J., concurring in the judgment); Kassel v. Consolidated Freighways Corp. of Del., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting). For further discussion, see also TRIBE, *supra* note 15 §§6-2 and 6-6.

39. *Philadelphia*, 437 U.S. at 617 (New Jersey statute excluding plaintiffs' waste from entering the state found unconstitutional because the statute was a protectionist measure on its face and in effect without a justifiable reason).

directly to consumers intrastate.[40] The defendants, however, argue that the Twenty-First Amendment creates an exception to the Dormant Commerce Clause, allowing them to regulate without regard for the Commerce Clause, and as a result, the balancing test analysis does not apply.

B. *The Twenty-First Amendment*

1. Before Prohibition

Alcohol regulation and the Commerce Clause have repeatedly intertwined over the years, beginning in the first half of the Nineteenth century with *The License Cases*.[41] In 1887, the Supreme Court decided in *Mugler v. Kansas* that state laws banning the production and consumption of alcohol were constitutional.[42] In that case, Peter Mugler built a brewery in 1877 in Kansas; in 1880, the Kansas state constitution was modified to prohibit the manufacture and sale of intoxicating liquor except for medical or scientific purposes.[43] Mugler asserted violations of his constitutional rights under the Fourteenth Amendment, while Kansas argued its right to regulate under the police power.[44] Since there was no evidence that Mugler's beer was intended to enter interstate commerce, the Court did not attempt to discuss the issue of the Dormant Commerce Clause and deferred it until a later date.[45]

Three years later in *Leisy v. Hardin*, the Court finally had a chance to look at an interstate alcohol shipment case when the Leisy Company's beer was seized in Iowa after it was shipped there

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40. The discrimination within these direct-shipment laws comes from the exceptions that some of the states have for in-state wineries to ship direct to consumers, while prohibiting out-of-state wineries from doing so.

41. 46 U.S. (5 How.) 504 (1847).

42. 123 U.S. 623 (1887). Peter Mugler, a naturalized citizen, built a brewery in 1877 in Salina, Kansas. *Id.* An article was adopted into the Kansas state constitution on November 2, 1880 which read that "[t]he manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific, and mechanical purposes." *Id.* at 655. Mugler was found guilty on two separate indictments of violating the statute, for manufacturing and selling beer without a license. *Id.* at 653. Each time he was fined one hundred dollars and put in the county jail until the fine was paid. *Id.* Appealing a decision by the Supreme Court of Kansas, Mugler brought his complaint to the United States Supreme Court arguing a Fourteenth Amendment Privileges and Immunities violation. *Id.* He claimed that he was not being permitted to pursue his trade, which violated his constitutional rights; the state asserted its right under the "police power" to regulate dangerous substances. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 674.

from Illinois in June of 1888.[46] The Iowa law was passed on April 12, 1888, prohibiting the sale and manufacture of intoxicating liquors in the state, except for those who had permits for medicinal, chemical or sacramental purposes.[47] Plaintiffs brought suit against the state alleging that the law violated the Commerce Clause of the U.S. Constitution, and appealed the case to the U.S. Supreme Court.[48] The Court found that the statute violated the Commerce Clause, and that Leisy could ship his beer to Iowa as long as it was in the original packaging because it was an item of interstate commerce.[49]

In response to *Leisy*, Congress quickly passed the Wilson Act[50] in 1890, which allowed states to regulate imported liquor, without discrimination, thereby eliminating the advantage of interstate sale. Narrowly reading the Wilson Act, the Supreme Court interjected its interpretation in 1898, holding in *Vance v. W.A. Vandercook Co.* that the Wilson Act only permitted the state to regulate alcohol in its original packaging, and that the right to otherwise ship liquor is derived from the Constitution and could not be prohibited by the states.[51] Congress responded again in 1913 with the sweeping Webb-Kenyon Act,[52] which gave states complete control over alco-

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46. 135 U.S. 100 (1890).

47. *Id.*

48. *Id.*

49. *Id.* at 125.

50. Wilson Act, 26 STAT. 313 (1890).

> That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Id.

51. 170 U.S. 438, 456 (1898) (holding that South Carolina state officers' seizing of liquor shipped by an out-of-state seller was unconstitutional).

52. Webb-Kenyon Act, 37 STAT. 699 (1913):

> 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, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontinguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the

hol regulation, whether in its original packaging or not.

Bolstered by the Webb-Kenyon Act, the prohibition movement gained momentum and the movement's efforts came to fruition in 1919 with the ratification of the Eighteenth Amendment.[53] The Amendment prohibited all manufacture and sale of "intoxicating liquors."[54] With the Eighteenth Amendment's passage banning alcohol throughout the nation, there would no longer be a question as to how much power the states had to regulate alcohol. The new Amendment guaranteed that the federal government now had complete control over alcohol distribution and sale, while sharing enforcement with the states.

2. After Prohibition

Prohibition proved to be a short-lived era in the nation's history. Franklin D. Roosevelt ran for the presidency on an anti-prohibition platform, and won the office in 1932.[55] The proposed Twenty-First Amendment sought to repeal Prohibition and was presented to the states by Congress on February 20, 1933.[56] By December 5, 1933, enough states had ratified the Amendment and Prohibition was repealed.[57]

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original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

Id.

53. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI:

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.

Id.

54. *Id.*

55. RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY 1880-1920 at 271 (1995).

56. U.S. CONST. amend. XXI.

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed. Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Id.

57. According to a *New York Times* article from December 6, 1933, "[p]rohibition of alcoholic beverages as a national policy ended at 5:32 ½ p.m., Eastern Standard Time." *Final Action at Capital*, N.Y. TIMES, Dec. 6, 1933 at A1. Utah was the last state to ratify, following the Pennsylvania and Ohio ratifications earlier the same day. *Id.*

The amendment itself was introduced by Senator Blaine, Chairman of the Senate Subcommittee that held the hearings on the Amendment. Initially, the amendment contained three sections – it included the two sections in the final adopted version, plus a third section that would have given certain powers to the federal government.[58] Senator Blaine opposed this third section, and believed that it contradicted section 2; he stated that section 2 "[restored] to the States, in effect, the right to regulate commerce respecting a single commodity – namely, intoxicating liquor."[59] He further elaborated, stating that "[t]he purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States."[60]

Senator Blaine was not alone in his opposition to section 3; Senator Wagner stated that by including the section, the amendment "[would] not restore to the States responsibility for their local liquor problems."[61] Other Senators placed great emphasis on the plenary power the second section would grant; Senator Robinson, who motioned the successful striking down of section 3, maintained that "it is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquor may be transported."[62] Senator Wagner summed up this belief by stating that "[t]he real cause of the failure of the 18th Amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits."[63]

Not only did the new Amendment repeal Prohibition, but it also gave the power to regulate alcohol back to the states, closely following the Webb-Kenyon Act wording.[64] It was not long before the Supreme Court needed to define what kind of power the states had been granted through the new Amendment.

In 1936, the Court determined in *State Board of Equalization v. Young's Market Co.* that the states were given an unconditional

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58. The proposed section three would have read that "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 CONG. REC. S4141 (1933).

59. *Id.*

60. *Id.* at S4143.

61. *Id.* at S4144.

62. *Id.* at S4225. Also see the comments of Senators Black, *id.* at S4177-78, and Walsh, *id.* at S4219.

63. *Id.* at S4146.

64. *Id.*

grant of power through the Twenty-First Amendment, reading it literally.[65] In addition, the Court held in two 1939 cases that the amendment sanctioned the right of the states to regulate alcohol "unfettered" by the Commerce Clause.[66] In the first of these cases, *Ziffrin, Inc. v. Reeves*, an Indiana carrier sought to restrain the enforcement of a 1938 Kentucky statute that allowed criminal charges to be brought against someone who transported liquor without a license.[67] The carrier claimed that the statute violated the Commerce Clause, but the Supreme Court disagreed, stating 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."[68]

The second case, *Indianapolis Brewing Co. v. Liquor Control Commission*, dealt with an Indiana brewery that argued that a Michigan statute was unconstitutional as a violation of the Commerce Clause.[69] The Michigan act prohibited the importation of beer from states that restricted the importation of Michigan's alcohol products.[70] The brewery argued that its inability to sell in Michigan violated the Commerce Clause.[71] The Court disagreed, stating that even if the law could be considered retaliatory, "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."[72]

The Court's broad reading of the Twenty-First Amendment was not to last indefinitely. By 1964, the Supreme Court made an altogether different assessment of the Twenty-First Amendment in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*[73] In *Hostetter*, a liquor company named Idlewild was in the business of selling liquor

65. 299 U.S. 59 (1936). In this case, the plaintiffs were licensed wholesalers who refused to apply for a separate importer's license to sell imported beer, arguing that wholesalers of imported products were being discriminated against under the Commerce Clause and the Equal Protection Clause. *Id.* at 60-61. The Supreme Court found that California's statute did not violate either clause. *Id.* at 63-64. Particularly, the statute did not violate the Commerce Clause because the Twenty-First Amendment allowed the state to enforce any conditions it chose for the regulation of alcohol. *Id.* at 64.

66. Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939).

67. *Ziffrin*, 308 U.S. at 132.

68. *Id.* at 137-38.

69. *Indianapolis Brewing Co.*, 305 U.S. at 391.

70. *Id.* at 392.

71. *Id.* at 393-94.

72. *Id.* at 394.

73. 377 U.S. 324 (1964).

at New York's JFK Airport to people going on international flights.[74] When customers purchased the liquor, it was not given to them at that time, but instead placed on the plane for them so they could claim it once they reached their destination.[75] The New York Liquor Authority advised Idlewild that they were in violation of the state's liquor laws because they were "unlicensable" and were to cease operations.[76]

On appeal, the Supreme Court was confronted with the issue of "whether the Twenty-First Amendment so far obliterates the Commerce Clause as to empower New York to prohibit absolutely the passage of liquor through its territory."[77] The Court acknowledged its earlier decisions holding that a state was unconfined by the Commerce Clause.[78] However, the Court said that "[t]o draw a conclusion from this line of decisions that the Twenty-First Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification."[79] Otherwise, "Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor."[80] In this case, the state was essentially prohibiting people from *removing* alcohol from New York. Thus, *Hostetter* stands for the proposition that although states have been granted a broad authority to regulate alcohol, the Twenty-First Amendment does not allow states to extend that authority outside of the state.[81]

Hostetter laid the groundwork for later decisions that would impact the direct-shipment of alcohol. The Court stated that "the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution,

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74. *Id.* at 325.

75. *Id.*

76. *Id.* at 326.

77. *Id.* at 329.

78. *Id.* at 330. *See Indianapolis Brewing Co.*, 305 U.S. at 391 (finding Michigan law that prohibited importation of alcohol from states that did not allow unrestricted importation of Michigan-manufactured alcohol constitutional because Michigan had the right to regulate alcohol within its borders without violating the Commerce Clause); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936) (finding that a required permit for importation of alcohol did not violate the Commerce Clause because the Twenty-First Amendment conferred on the states the power to establish conditions for importation and forbid non-compliant importations).

79. *Hostetter*, 377 U.S. at 331-32.

80. *Id.* at 332.

81. This is an important distinction because the direct-shipment laws currently at issue involve the prohibition of alcohol coming *into* the state.

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."[82] This philosophy would permeate through the next forty years.[83]

Arguably the most relevant direct-shipment case was decided by the Supreme Court twenty years after *Hostetter* in 1984 – *Bacchus Imports, Ltd. v. Dias*.[84] All of the recent direct-shipment cases cite to it frequently, whether they use it as a primary authority or not.[85]

In *Bacchus*, importers challenged a Hawaiian excise tax of 20% based on the exemptions that existed for locally produced Hawaiian beverages.[86] Specifically, the exemptions enacted in the 1970s applied to okolehao brandy and pineapple wine.[87] The Hawaii Supreme Court ruled on the Commerce Clause challenge that "the tax did not illegally discriminate against interstate commerce" because the burden was ultimately borne by Hawaiian citizens.[88]

At the U.S. Supreme Court, the Hawaii argued that even if the tax exemption violated the Commerce Clause, it was "saved" by the Twenty-First Amendment.[89] The Court, as in *Hostetter*, noted the broad language the Court used in earlier decisions, but nevertheless stated that "more recently we have recognized the obscurity of the legislative history of §2"[90] of the Twenty-First Amendment.[91] The

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

83. Although not a Commerce Clause case, it is worth noting that in *Craig v. Boren*, 429 U.S. 190 (1976) the Court recognized that the history of alcohol laws shows that states have been granted broad authority to regulate alcoholic beverages. *Id.* at 205. A brief description of the Twenty-First Amendment's case history is presented in the *Craig* decision. *Id. See also* North Dakota v. U.S., 495 U.S. 423 (1990); Healy v. The Beer Institute, 491 U.S. 324 (1989); Capital Cities Cable v. Crisp, 467 U.S. 691 (1984); and Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

84. 468 U.S. 263 (1984). *See also* Capital Cities Cable v. Crisp, 467 U.S. 691 (1984) (holding that a state regulation prohibiting the retransmission of out-of-state alcoholic beverage commercials was not protected by the Twenty-First Amendment because the regulation of time, place, and manner of alcoholic sales was not implicated).

85. Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004); Heald v. Engler, 342 F.3d 517 (6th Cir. 2003); Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003); Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003); Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000).

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

87. *Id.* The original tax was enacted in 1939. *Id.*

88. *Id.* at 267. The court held that the tax did not violate the Commerce Clause because there was no discrimination against interstate commerce; the liquor tax is on Hawaiian wholesalers, and thus only Hawaiians are burdened by the tax. *Id.*

89. *Id.* at 274. Interestingly, the state did not argue this point until the case reached the Supreme Court level. *Id.* at 274 n.12.

90. *Id.* at 274.

91. U.S. CONST. amend. XXI, §1 ("The eighteenth article of Amendment to the

Court cited in particular to the Senate sponsor of the Amendment resolution, Senator Blaine, who himself offered differing views of the purpose of § 2 of the Amendment.[92] At one point, Senator Blaine said that the purpose was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors . . . ."[93] At another point, Senator Blaine said that it was "to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line."[94]

Stating that it was now "clear" that state regulation was not entirely removed from the Commerce Clause, the Court held in *Bacchus* that if the interests of the state regulation are closely related to the powers reserved by the Twenty-First Amendment, the state law may prevail over the Commerce Clause.[95] The Court concluded that under this analysis, the discriminatory tax could not stand because it favored local business.[96] The Court said that without question, "[t]he central purpose of the [Twenty-First Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition."[97] Therefore, "[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."[98] *Bacchus* would be heavily relied upon by the federal courts of appeals in the direct-shipment cases.

The two most recent Supreme Court cases that contribute to the current direct-shipment debate are *Healey v. The Beer Institute*[99] and *North Dakota v. United States*.[100] In *Healey*, a Connecticut law was challenged; it required that out-of-state beer shippers affirm that the prices at which they sold beer in Connecticut were no higher than their prices in the bordering states of Massachusetts,

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Constitution of the United States is hereby repealed."); U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

92. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 274 (1984). *See* discussion *supra* notes 58-60 and accompanying text.

93. 76 CONG. REC. S4143 (1933).

94. *Id.* at S4141.

95. *Bacchus*, 468 U.S. at 275-76 (adopting and citing to Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).

96. *Id.* at 276.

97. *Id.*

98. *Id.*

99. 491 U.S. 324 (1989).

100. 495 U.S. 423 (1990).

New York, and Rhode Island.[101] In striking down the law, the majority determined that if a statute has the "practical effect" of regulating alcohol in another state, it is not saved by the Twenty-First Amendment.[102] Justice Scalia's concurring opinion found that facial discrimination eliminated the immunity afforded by the Twenty-First Amendment.[103]

In *North Dakota*, the United States brought suit against North Dakota seeking relief from the State's alcohol labeling and reporting requirements.[104] The federal government argued the requirements interfered with its ability to get lower prices for the military bases in the state.[105] In looking at the Twenty-First Amendment, the Supreme Court noted that the state has "virtually complete control" over liquor distribution systems.[106] Also, the Court "made clear that the States have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets."[107] The Court then stated that liquor laws were given a presumption of validity under the Twenty-First Amendment and were "not to be set aside lightly."[108] The North Dakota regulations fell "within the core of the State's power under the Twenty-First Amendment" by "promoting temperance, ensuring orderly market conditions, and raising revenue."[109] These "core concerns" were also to play an important role in the analysis of the courts of appeals in making their decisions in the direct-shipment cases.

C. *The Alcohol Direct-Shipment Laws*

State laws banning direct-shipments of alcohol were typically passed in the years immediately following the repeal of Prohibi-

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101. *Healey*, 491 U.S. at 326.

102. *Id.* at 342 (citing Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 585 (1986)) .

103. *Id.* at 344. It is important to note that this case, like *Hostetter*, dealt with the prohibition of regulation in *another* state and not intrastate.

104. *North Dakota*, 495 U.S. at 423. The North Dakota laws required that out-of-state shippers file monthly reports with the state of all shipments and returns, and also that on each item sold to a federal enclave they affix labels stating that the item is only for domestic consumption within the enclave. *Id.* at 429.

105. *Id.* at 426-29.

106. *Id.* at 431.

107. *Id.* Again, it is important to note the distinction made in this case between a state law regulating within its borders and a state law having the practical effect of regulating outside of its borders.

108. *Id.* at 433.

109. *Id.* at 432.

tion.[110] Twenty-four states still ban direct alcohol shipments.[111] Some states have repealed these laws – only four states permitted interstate direct-shipments a decade ago, but now there are twenty-seven states that permit such shipments.[112]

Direct shipping bans in those twenty-three states occur in three categories: anti-direct-shipment states, limited anti-direct-shipment states, and "reciprocity" states.[113] Anti-direct-shipment states completely prohibit direct-shipments to consumers.[114] A violation of these laws is a felony in Florida, Indiana, Kentucky, Tennessee, and most recently, Utah.[115]

States that limit direct-shipment have varying requirements for quantities and licensing.[116] Sixteen states and the District of Columbia fall within this category.[117] The limitations are varied, and range from vague to specific. For example, in Alaska, a "reasonable amount" of alcohol may be shipped, while in Washington, D.C. there is a limit of one gallon per person.[118] Most of the remaining states require a permit and the payment of taxes, while some just require a permit.[119]

Reciprocity states allow shipments from states with similar laws and privileges.[120] These states typically permit shipments from

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110. For example, North Carolina enacted its laws in 1937. Beskind v. Easley, 325 F.3d 506, 519 (4th Cir. 2003). Texas enacted its code in 1935. Dickerson v. Bailey, 336 F.3d 388, 397 (5th Cir. 2003).

111. Free the Grapes!, *supra* note 2. This includes the following states: AL, AZ, AR, CT, DE, FL, GA, IN, KS, KY, ME, MD, MA, MI, MS, MT, NJ, NY, OH, OK, PA, SD, TN, UT, and VT. *Id.*

112. *Id.*

113. Molnar, *supra* note 9, at 172.

114. Free the Grapes!, *supra* note 2. States with complete bans include AL, AR, DE, FL, IN, KS, KY, ME, MA, MI, MS, NJ, NY, OH, OK, SD, TN, UT, and VT. *Id.*

115. *Id.* Utah's felony legislation passed in 2003. *Id.* Note that although Georgia and Maryland allow for limited direct shipping, a violation of the state's laws is still a felony. *Id.*

116. Molnar, *supra* note 9, at 172. This Comment provides a more detailed background on the different statutory structures.

117. Free the Grapes!, *supra* note 2. States in this category include AK, AZ, CT, DC, GA, LA, MT, NE, NV, NH, NC, ND, SC, RI, TX, VA, and WY.

118. *Id.* The Alaska rule comes from the Alaskan Attorney General's interpretation in 1953 of ALASKA STAT. § 1710 – "An individual who is not in the liquor business may import, without a license, a reasonable quantity of intoxicating liquor for personal use and consumption." ALASKA STAT. § 1710.11. The District of Columbia rule comes from D.C. CODE ANN. § 25-137 (1982).

119. Free the Grapes!, *supra* note 2. States requiring a permit only include CT, MT, SC and TX. *Id.* States requiring a permit and payment of taxes are GA, LA, NE, NV (permit over 2,000 cases), NH, NC, ND, and WY. *Id.* Arizona and Rhode Island are on-site only. *Id.* Virginia requires a permit and a report. *Id.*

120. Molnar, *supra* note 9, at 169.

other states that have a "reciprocal privilege."[121] Thirteen states currently fall into this category.[122]

The laws most commonly challenged in the direct-shipment cases involve a three-tier distribution system that has an in-state exception.[123] In a typical three-tier distribution system, the state-licensed distributor purchases the wine from the winery, then sells it to a state-licensed retailer, who in turn sells it to the general public. In-state exceptions allow consumers to bypass this system if they purchase wine directly from an in-state winery.

Lawsuits have arisen because consumers and wine-makers are upset with their inability to directly ship wine. Wine production is at an all-time high in the United States.[124] In 2002, 595 million gallons of wine were produced as compared to 337 million gallons in 1972.[125] The average amount of wine consumed per person based on the entire population increased from 1.61 gallons per person in 1972 to 2.02 gallons per person in 1999.[126] In the past 30 years, the number of United States wineries has increased by over 500% to 2,100.[127] "U.S. wineries produce over 10,000 new wines each vintage, but nearly all wineries are small producers; 2,050 of America's wineries produce less than 5% of U.S. wine production. And less than 17% of U.S. wineries are represented by distributors in all 50 states."[128] Since distributors will often not carry the vintages of small-production wineries, consumers desiring them have difficulty obtaining the wine of their choice.[129] It is this problem that has some groups, like the Coalition for Free Trade, concerned that

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121. *Id.*

122. Free the Grapes!, *supra* note 2. Reciprocity states include CA, CO, HI, ID, IL, IA, MN, MO, NM, OR, WA, WI, and WV.

123. Note that these in-state exceptions to the direct shipping ban have typically been passed by state legislatures years after the original shipping ban legislation. For example, North Carolina's in-state exception was passed as a 1980 amendment – nearly fifty years after the original legislation. N.C. GEN. STAT. §§ 18B-102.1, 18B-109, 18B-1114, 18B-102, and 105-113.83. It is also interesting to note that there may be a further distinction of "control" states versus "licensing" states – control states actually participate to a certain extent in the merchandising cycle of the alcohol. Brief for the Petitioners at 4, Granholm v. Heald (No. 03-1116). There are currently eighteen control states. *Id.*

124. Wine Institute, *at* http://www.wineinstitute.org/communications/statistics/wine_production_key_facts.html (last visited Sept. 4, 2004).

125. Wine Institute, *at* http://www.wineinstitute.org/communications/statistics/consumption1934_99.html (last visited Sept. 4, 2004).

126. *Id.*

127. Free the Grapes!, *supra* note 2.

128. *Id.*

129. *Id.*

trade is being impinged by the direct-shipment bans.[130] Additionally, with 10,000 new wines being produced each year, it is not feasible for the distributors to carry every vintage on the market.[131] Thus, for oenophiles[132] around the country, the best way to obtain the wine of their choice would be to order it online or by catalog – if the state of their residence permitted it to be shipped directly to them.

The "mom and pop" small wineries are not the only ones who do not benefit from the distribution systems in place. "Boutique" wineries[133] would prefer *not* to use distributors; they are so popular that they could successfully sell their wines entirely through direct channels and not give up the 20% or so in profit that distributors eat up.[134]

Wineries and wine consumers are proponents of laws that permit direct-shipment. They argue that direct-shipment laws are not "saved" by the Twenty-First Amendment, and thus, violate the Dormant Commerce Clause.[135] The direct wine shipment supporters got a boost in July of 2003 by the Federal Trade Commission's (FTC) report on e-commerce and the wine market.[136] The report concluded that consumers would significantly benefit from direct-shipments, and that consumers would save as much as 21% on wine

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130. Coalition for Free Trade, *supra* note 9.

131. It is interesting to note that although the number of wineries has increased significantly in recent years, the same cannot be said for liquor wholesalers. According to the Federal Trade Commission, the number of wholesalers has shrunk from several thousand in the 1950s to only a few hundred at the present. Federal Trade Commission, *E-commerce Lowers Prices, Increases Choices in Wine Market*, *at* http://www.ftc.gov/opa/2003/07/t, released July 3, 2003.

132. An oenophile is "one who appreciates and enjoys wine; a collector of wine." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Houghton Mifflin Company, 4th ed., 2000).

133. "Boutique" wines are small production wines (e.g., Screaming Eagle, Helen Turley) that because of their uniqueness have developed devoted followings. These wines can command very high prices at auction, and are eagerly sought out by wine lovers.

134. Marcia Coyle, *Can This Wine Travel?*, THE NATIONAL LAW JOURNAL, July 28, 2003, at 1.

135. Several of the cases have raised additional claims and/or discussion under the First Amendment and the Privileges and Immunities Clause. The *Swedenburg* case raised both of these sub-issues. Swedenburg v. Kelly, 358 F.3d 223, 239-41 (2d Cir. 2004). *See also* U.S. CONST. art. IV, § 2, cl. 1; Dickerson v. Bailey, 336 F.3d 388, 403, n. 173 (5th Cir. 2003) (court briefly discusses the potential for a "colorable claim" under the Privileges and Immunities Clause). However, the U.S. Supreme Court will not be addressing these additional claims when the *Heald* and *Swedenburg* cases come before it during the 2004-2005 term.

136. Coyle, *supra* note 134, at 1; Wine Institute, *at* http://www.wineinstitute.org/communications/statistics/ftc_online.htm (last visited Sept. 4, 2004).

purchases through e-commerce sales.[137] Further, the FTC believes that the states can regulate through less-restrictive means; they can combat fears of sales to minors by requiring adult signatures upon delivery, and can solve revenue-raising issues by requiring tax on shipments into the state.[138] This strikes directly at the "core concerns" that were expressed in *North Dakota*, and that the states so frequently argue.[139] The wineries and wine consumers accuse the wholesalers of making policy arguments based on myths – the myths that direct shipping will increase underage access, that wineries do not want to pay taxes, and that there will be a fundamental breakdown of law and order.[140] The "myths" have been promulgated by supporters of the shipment bans; for example, the Wine & Spirit Wholesalers of America, Inc. have numerous articles on their website promoting regulation and enforcement of regulations as the best way to prevent underage drinking.[141] The Federal Trade Commission Report directly contradicts their claims.[142]

On the other side, states, supported by wholesalers, oppose direct-shipment laws.[143] They argue that the Twenty-First Amendment grants them the power to regulate alcohol, and in effect creates an exception to the Commerce Clause. These proponents of the Twenty-First Amendment point out the unique treatment alcohol has received, often paraphrasing Judge Frank Easterbrook's comments from the *Bridenbaugh v. Freeman-Wilson* decision when he pointed out that wine is not cheese.[144] States assert the view that alcohol has been treated differently for a reason; there are compelling state interests behind regulations that help prevent sales to minors, assist the state in collecting taxes, and in overall market regulation and monitoring. According to the Michigan petition for certiorari, "the historical basis for the (state) structure, as recog-

137. Federal Trade Commission, *supra* note 131.

138. *Id.*

139. North Dakota v. United States, 495 U.S. 423, 426 (1990).

140. *See* Free the Grapes!, *supra* note 2.

141. Wine & Spirit Wholesalers of America, Inc., *at* http://www.wswa.org/public/policy/direct.html (last visited Sept. 4, 2004).

142. *See supra* note 131.

143. Interestingly, the "Free the Grapes" organization devotes a section of its web page to pointing out the power and determination of the wholesalers' lobbying efforts. For example, they point out that they "aggressively" supported a Texas bill in 1999 that would carry the same penalty for shipping a bottle of wine to an adult consumer as assault with a deadly weapon. They point out that then-governor Bush did not sign the bill into law. *See* Free the Grapes!, *supra* note 2.

144. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000). *See also* Eryn Brown, *The Wine Wars*, N.Y. TIMES, BUSINESS SECTION, Aug. 24, 2003 at 1.

nized by this Court, is to protect against the collusion, price-fixing and monopolization problems that existed before Prohibition."[145]

Wholesalers in particular seem to fear that if the direct-shipment bans are lifted, they will lose a significant portion of their business to the Internet.[146] They also discount the FTC report, asserting that it is politically motivated and not focused on the constitutional issues.[147] The Wine & Spirit Wholesalers of America, Inc. state that "some wineries and retailers – under the guise of promoting 'consumer choice' – market and ship alcohol on an interstate basis directly to consumers."[148] They further assert that over one billion dollars of alcohol is shipped to consumers illegally every year.[149]

In 2000, President Clinton signed the "Twenty-First Amendment Enforcement Act" into law.[150] This law was passed by Congress at the urging of states and wholesalers seeking enforcement methods for the three-tier distribution systems.[151] The Act allows state attorneys general to seek injunctive relief against violators of state anti-shipment laws, if the violator is operating outside of the state.[152] Any violator failing to abide by an injunction could become subject to penalties and/or imprisonment for contempt.[153]

The disagreement between the two sides boils down to two fundamental issues: what are the core purposes of the Twenty-First Amendment, and how can the states regulate to promote those purposes?[154] States feel that the core purposes are to promote temperance, ensure orderly market conditions, and raise revenue through taxes.[155] Further, they believe that the core purposes allow them the power to regulate alcohol in any way necessary to promote

145. Gearan, *supra* note 10 (citing Petition for Certiorari at 3, Heald v. Engler, 342 F.3d 517 (6th Cir. 2003), *available at* http://www.coalitionforfreetrade.org/litigation/michigan/michcert.pdf) (last visited Sept. 4, 2004)).

146. Coyle, *supra* note 134, at 1.

147. *Id.*

148. Wine & Spirit Wholesalers of America, Inc., *supra* note 141.

149. *Id.*

150. 27 U.S.C.S. § 122a (2004).

151. *See generally* 27 U.S.C.S. § 122a (2004); 145 CONG. REC. H6856 (1999).

152. 27 U.S.C.S. § 122a (2004).

153. *Id.*

154. *Id.* Upon granting the petitions for certiorari submitted in the *Swedenburg* and *Heald* cases, the Supreme Court narrowed the question to be decided as follows: "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?" Swedenburg v. Kelly, Granholm v. Heald, 72 U.S.L.W. 3725 (U.S. May 24, 2004).

155. Wine & Spirit Wholesalers of America, Inc., *supra* note 141.

those purposes; thus arises the contention that the amendment provides an exception to the Commerce Clause.[156]

Wineries and their supporters disagree with this assessment.[157] They also believe that a core purpose of the Twenty-First Amendment is to promote temperance, but that the states can only legislate to the extent that they do not interfere with the Commerce Clause.[158] The federal courts of appeals have debated these very questions, and have reached differing results and provided different remedies. Now, the Supreme Court must make the final determination in this ongoing debate.

II. THE CIRCUIT CASES

Six direct-shipment cases have reached the level of a U.S. Court of Appeals.[159] Two circuit splits have resulted from the cases. One concerns the constitutionality of the direct-shipment laws themselves; the second on how to remedy the situation when a direct-shipment ban is found to be unconstitutional. The first case decided was in 2000 when the Seventh Circuit ruled that Indiana's direct-shipment ban was constitutional, and that its regulatory system should be upheld.[160] Two years later, the Eleventh Circuit found that Florida's ban was unconstitutional, thus creating the first circuit split.[161] The second split occurred as a result of the Eleventh and Fourth Circuit decisions, which were then followed by two more decisions, all with differing results and remedies.[162]

The four courts of appeals that have found the statutes to be unconstitutional have generally relied on similar reasoning, although their remedies have differed.[163] First, they look to see if the state regulation violates the Dormant Commerce Clause, and if it does, they look next to see if the principles underlying the Twenty-

156. *Id.*

157. *Id.*

158. *Id.*

159. Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004); Heald v. Engler, 342 F.3d 517 (6th Cir. 2003); Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003); Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003); Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000).

160. *Bridenbaugh*, 227 F.3d at 848. The Second Circuit also found New York's laws to be constitutional. *Swedenburg*, 358 F.3d at 223.

161. *Bainbridge*, 311 F.3d at 1104.

162. *See Heald*, 342 F.3d at 517; *Dickerson*, 336 F.3d at 388; *Beskind*, 325 F.3d at 506; *Bainbridge*, 311 F.3d at 1104.

163. *See Heald*, 342 F.3d at 524; *Dickerson*, 336 F.3d at 407; *Beskind*, 325 F.3d at 514; *Bainbridge*, 311 F.3d at 1112.

First Amendment outweigh the Commerce Clause principles.[164] The other two circuits did not follow this analysis, but instead bypass normal Dormant Commerce Clause analysis and look to "the scope of the Twenty-First Amendment's grant of authority" in determining if the statute falls within that authority.[165]

A. *Seventh Circuit* – Bridenbaugh v. Freeman-Wilson

The original circuit split was created after the first two circuit cases were decided – the Seventh Circuit's decision in *Bridenbaugh v. Freeman-Wilson*[166] and the Eleventh Circuit's decision in *Bainbridge v. Turner*.[167] In *Bridenbaugh*, consumers challenged the constitutionality of Indiana's direct-shipment laws.[168] The laws set out a three-tiered system of manufacturers, distributors, and retailers; Indiana requires the distributors and retailers to have permits in Indiana.[169] The laws permit Indiana wineries and distributors with a valid license to ship directly to consumers, but prohibit out-of-state wineries from doing the same.[170] The district court found the laws violated the Constitution, but the Seventh Circuit stated that "§ 2 of the Twenty-First amendment empowers Indiana to control alcohol in ways that it cannot control cheese."[171] In other words, "[i]f the product were cheese rather than wine, Indiana would not be able either to close its borders to imports or to insist that the shippers collect its taxes."[172]

The parties on both sides asked the Seventh Circuit to look to

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164. This is the "core concerns" test which was adopted by several of the circuits, stemming largely from the *Bacchus* and *North Dakota* cases. *See supra* notes 84 and 104.

165. *Swedenburg*, 358 F.3d at 231. *See also Bridenbaugh*, 227 F.3d at 848.

166. *Bridenbaugh*, 227 F.3d at 848. The Supreme Court denied certiorari on April 23, 2001.

167. *Bainbridge*, 311 F.3d at 1104.

168. IND. CODE § 7.1-5-11-1.5 (2004). The law reads as follows:

> (a) It is unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network. (b) Upon determination by the commission that a person has violated subsection (a), a wholesaler may not accept a shipment of alcoholic beverages from the person for a period of up to one (1) year as determined by the commission.

Id.

169. *Bridenbaugh*, 227 F.3d at 850. *See supra* note 123 and accompanying text.

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

171. *Id.* at 851.

172. *Id.*

the "core concerns" of the Amendment.[173] The plaintiffs argued that the Amendment was intended to promote temperance, and that the Indiana laws were invalid because they did not further such a purpose.[174] The defendants argued that orderly market conditions and revenue-raising were also core concerns.[175] The court noted that it was not necessarily a question of "core concerns," but rather a question of whether or not out-of-state liquor was being discriminated against.[176] The court concluded that there was no discrimination because all alcohol passes through the same three-tier system and that in-state permit holders may deliver wine directly to consumers no matter where the wine is from.[177] They found that Indiana wine producers are not benefited in any way; no matter who ships it, there is no advantage to the local wine producers.[178] Therefore, the law banning direct-shipment was found to be constitutional because the law was considered non-discriminatory; it banned direct-shipment of any wine from out-of-state, no matter where it is manufactured.[179] The court further analyzed the issue by looking to the scope of the Amendment; it stated that "§2 closes the loophole left by the dormant commerce clause."[180] Since the scope included "importation," the laws were deemed valid.[181]

Until February 2004, the Seventh Circuit was the only circuit to have found a direct-shipment ban to be constitutional, and the decision has thus been heavily criticized by other courts of appeals.[182] The strongest criticism is that the Seventh Circuit did not follow proper Commerce Clause analysis.[183] It is suggested that the court

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173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 853. The court's analysis was based on *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984) (holding discriminatory state tax exempting certain Hawaiian-produced products unconstitutional as violative of the Commerce Clause). *See supra* notes 84-98 and accompanying text. *See also* Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986) (finding New York statute unconstitutional economic protectionism under the Commerce Clause because it could in effect control alcohol prices in other states).

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

178. *Id.*

179. *Id.* at 854.

180. *Id.* at 853.

181. *Id. See also* U.S. CONST. amend. XXI, § 2; *supra* note 3.

182. *See* Heald v. Engler, 342 F.3d 517, 526-27 (6th Cir. 2003); Bainbridge v. Turner, 311 F.3d 1104, 1114 (11th Cir. 2002). The primary criticism of *Bridenbaugh* case by these other circuits is that the court did not properly apply a Commerce Clause analysis to the statute before looking at the Twenty-First Amendment.

183. *See, e.g.*, Heald v. Engler, 342 F.3d 517, 526-27 (6th Cir. 2003).

did not engage in enough analysis of the Commerce Clause and it relied too heavily on the text of the Twenty-First Amendment in reaching its decision.[184]

B. *Eleventh Circuit* – Bainbridge v. Turner

In *Bainbridge*, the Eleventh Circuit found the Florida laws to be unconstitutional.[185] This decision was in direct contrast to the Seventh Circuit's decision in *Bridenbaugh*, thereby initiating the first of two direct-shipment law circuit splits. The Eleventh Circuit's decision was followed by three other circuits in 2003, which all found the laws in question to be unconstitutional.[186]

In *Bainbridge*,[187] consumers and out-of-state wineries sued the state of Florida over the constitutionality of its laws banning the direct-shipment of wine.[188] The Eleventh Circuit held the state law to be facially discriminatory because it explicitly favored in-state wineries over out-of-state wineries.[189] The court also noted that there were non-discriminatory alternatives to the law; these could include licensing out-of-state wineries and regulating out-of-state wineries in a similar fashion to those that are in-state.[190] The court stated that the Florida Division of Alcoholic Beverages and Tobacco failed to show as a matter of law that the regulatory scheme was so closely related to the core concern of raising revenue as to escape Commerce Clause scrutiny.[191] The judgment of the district court, which had granted summary judgment in favor of the state, was vacated and remanded for further consideration, requiring that the state demonstrate why the felony prohibition on direct-shipments was required for it to collect taxes.[192] As of this time, there has not been a new decision on remand.

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

185. *Bainbridge*, 311 F.3d at 1104.

186. *See infra* Part II, Sections D-F and accompanying text.

187. *Bainbridge*, 311 F.3d at 1104.

188. FLA. STAT. § 561.22(1), § 561.14(3), § 561.221 (1)(a), § 561.54(1), § 561.57(2). Section 561.54(1) reads that

> it is unlawful for common or permit carriers, operators of privately owned cars, trucks, buses, or other conveyances or out-of-state manufacturers or suppliers to make delivery from without the state of alcoholic beverage to any person, association of persons, or corporation within the state, except to qualified manufacturers, distributors, and exporters of such beverages.

Id.

189. *Bainbridge*, 311 F.3d at 1115.

190. *Id.*

191. *Id.* at 1115.

192. *Id.* at 1116.

C. *Fourth Circuit* – Beskind v. Easley

In *Beskind v. Easley*,[193] California wineries wanting to ship wine to North Carolina and oenophiles in North Carolina wishing to receive shipments brought suit against the state to have the shipment bans declared unconstitutional.[194] Their suit challenged the North Carolina Alcoholic Beverage Control (ABC) laws, which prohibited direct-shipments to consumers, but maintained an in-state exception for North Carolina wineries.[195] The United States District Court for the Western District of North Carolina struck down the ABC laws in their entirety after finding them unconstitutional.[196] On appeal, the state argued that the district court abused its discretion in striking down the core provisions of the laws.[197]

Although the North Carolina ABC laws have been maintained since 1937, the in-state exceptions were not created until an amendment in 1981.[198] The Fourth Circuit held that the laws clearly treated in-state and out-of-state wineries differently and that "in-state wineries benefit from the very sort of vertical integration that the three-tiered scheme was originally designed to prevent."[199] However, the court pointed out that it was only through the 1981 amendment that the state had injected unconstitutional discrimination.[200] According to the court, North Carolina failed to prove that the discriminatory amendment supported a core purpose of the Twenty-First Amendment.[201]

The Fourth Circuit decided not to strike down the core provisions of the statute as the district court had; the court believed that to do so would effectively eradicate the state's authority under the Twenty-First Amendment.[202] The court pointed out the clear legislative intent of the state in asserting its Twenty-First Amendment powers by citing to a section of the laws that declare they "shall be

193. 325 F.3d 506 (4th Cir. 2003). The decision was announced by the court on April 8, 2003. *Id.*

194. N.C. GEN. STAT. §§ 18B-102.1, 18B-109, 18B-1114, 18B-102, and 105-113.83. Section 18B-102.1 states that it is unlawful "for any person who is an out-of-state retail or wholesale dealer in the business of selling alcoholic beverages to ship or cause to be shipped any alcoholic beverage directly to any North Carolina resident who does not hold a valid wholesaler's permit." N.C. GEN. STAT. §§ 18B-102.1.

195. *Id.*

196. Beskind v. Easley, 197 F. Supp. 2d 464 (W.D.N.C. 2002).

197. Beskind v. Easley, 325 F.3d 506, 512 (4th Cir. 2003).

198. *Id.* at 510.

199. *Id.* at 515.

200. *Id.* at 516.

201. *Id.* at 517.

202. *Id.* at 518.

liberally construed to the end that the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages shall be prohibited except as authorized in this Chapter."[203] Therefore, instead of striking down the entire regulatory structure, the court only struck down the offending amendment, thereby eliminating the discrimination in favor of in-state direct shippers.[204] This in effect created the second split, involving the remedy chosen by the courts finding the laws unconstitutional; while the Eleventh Circuit struck down the entire Florida statutory scheme, the Fourth Circuit only struck down the offending portions. In response, the North Carolina state legislature passed a bill allowing direct-shipment, which became effective on October 1, 2003.[205]

D. *Fifth Circuit* – Dickerson v. Bailey

In *Dickerson v. Bailey*,[206] wine consumers sued the State of Texas over the Texas Alcoholic Beverage Control (TABC)[207] laws that were originally established in 1935.[208] As with the other state structures, the Texas laws involve a three-tier distribution system with an in-state exception.[209] The legislative history for the in-state exception blatantly states the economic reasons behind the law. This statement of legislative intent declares that the exception is intended "to assist the Texas wine industry in promoting and marketing Texas wines."[210] As the court says, "[t]o paraphrase the Bard, that which we call discrimination by any other name would still smell as foul."[211] When the court then looked at whether the Twenty-First Amendment saved the TABC laws, it found little room for debate.[212] Since the state did not even attempt to connect the statutory scheme to the core concerns of the amendment, the court found the scheme to be unconstitutional.[213]

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203. *Id.* at 519 (quoting N.C. GEN. STAT. §18B-100 (2004)).

204. *Id.*

205. N.C. GEN. STAT. § 18B-1001.1. The law allows shippers to send a maximum of two cases of wine per month to any individual purchaser, and does not allow for resale of the shipped items. *Id.*

206. 336 F.3d 388 (5th Cir. 2003). This case was decided by the Fifth Circuit on June 26, 2003. *Id.*

207. TEX. ALCO. BEV. CODE ANN. §§ 107.07(a), 107.07(f), 6.01, 11.01., 37.03, and 107.05(a).

208. *Dickerson*, 336 F.3d at 397.

209. *Id.* at 397-98.

210. TEX. ALCO. BEV. CODE ANN. § 110.002(a).

211. *Dickerson*, 336 F.3d at 398.

212. *Id.* at 403-04.

213. *Id.*

In determining a remedy, the court compared its case to *Beskind v. Easley*. The court declined to act as the *Beskind* court did, despite the state's wishes.[214] The court noted that it was easy for the *Beskind* court to strike down the one provision, and that North Carolina's laws had a specific purpose statement[215] which could be construed in favor of the regulation and control of alcohol.[216] The Texas law was construed differently because it was not just one section to be removed from the statute; instead, "substantial portions" of the laws would have to be re-written, forcing the court to act in the place of the legislature, something it was unwilling to do.[217] As a result, the court chose to enjoin the state from enforcing the provisions of the TABC laws.[218] On August 25, 2003, Texas announced that it would not seek review by the U.S. Supreme Court.[219]

E. *Sixth Circuit* – Heald v. Engler

Shortly after *Dickerson* was decided, the Sixth Circuit's decision in *Heald v. Engler* was announced on August 28, 2003.[220] Wine connoisseurs, wine journalists, and an out-of-state winery challenged the constitutionality of the Michigan Alcoholic Beverage Control (MABC) laws.[221] The distribution system in Michigan followed the typical three-tier system, with an in-state exception.[222] The district court held that "Michigan's direct-shipment law is a permitted exercise of state power under § 2 of the Twenty-First Amendment" because it is not "mere economic protectionism" but instead designed for tax collection and to prevent underage drinking.[223]

On appeal, after the Sixth Circuit analyzed the Twenty-First

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214. *Id.* at 408-09.

215. *See supra* note 203 and accompanying text.

216. *Dickerson*, 336 F.3d at 409.

217. *Id.* at 408-09.

218. *Id.* at 410.

219. Coalition for Free Trade, *supra* note 9.

220. 342 F.3d 517 (6th Cir. 2003). Note that the case name changed from *Heald v. Engler* to *Heald v. Granholm* after petition for writ of certiorari to the Supreme Court. This is a result of Sup. Ct. R. 35.3 which allows for the automatic substitution of current office holders in an action for the former office holders; Jennifer M. Granholm has replaced John M. Engler as the governor of Michigan.

221. MICH. STAT. ANN. R436.1057, R436.1705(2)(d), R436.1719(4), MLC 436.1113(9).

222. *Heald*, 342 F.3d at 520.

223. *Id.* at 521 (citing Heald v. Engler, 2001 U.S. Dist. LEXIS 24826 (E.D. Mich., 2001)).

Amendment and the Commerce Clause, it concluded that the defendants had not presented sufficient evidence to show that the Michigan scheme furthered the core concerns of the Twenty-First Amendment, and that there were less discriminatory means available to achieve its goals.[224] The district court decision granting summary judgment to the defendants was reversed, and the laws were struck down in their entirety.[225]

On February 2, 2004, Michigan's Attorney General filed a petition for certiorari with the Supreme Court requesting review of the Sixth Circuit decision.[226] Commenting on the petition, Michigan Beer & Wine Wholesalers President Michael Lashbrook stated that "[a]n elite few want anyone with a credit card to be able to order alcohol with the click of a mouse" and that as a result, "minors will gain easy access to beer, wine, and liquor; our state will be robbed of vital revenues; and safeguards ensuring product purity will vanish."[227]

On May 24, 2004 certiorari was granted in the *Heald* case.[228] The Court also granted cert in *Swedenburg v. Kelly*, the circuit decision that immediately followed *Heald*.[229]

F. *Second Circuit* – Swedenburg v. Kelly

The Second Circuit has made the most recent contribution to the on-going debate, announcing its decision in *Swedenburg v. Kelly* on February 12, 2004.[230] This case was appealed from the United States District Court for the Southern District of New York, where that court granted summary judgment to the plaintiff out-of-state wine producers.[231] The Second Circuit reversed the lower court's ruling, and upheld the direct-shipment laws as constitutional.[232]

New York is a critical state in the "wine wars" because it is the second-largest wine market in the country and the largest of the

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224. *Id.* at 525-26.
225. *Id.* at 527-28.
226. *See supra* note 145.
227. *Id.*
228. Granholm v. Heald, 72 U.S.L.W. 3725 (U.S. May 24, 2004). The grant of certiorari combines three cases – *Granholm v. Heald*, No. 03-1116, *Michigan Beer and Wine Wholesalers Association v. Heald*, No. 03-1120, and *Swedenburg v. Kelly*, No. 03-1274. An amicus brief supporting Michigan's petition was signed by thirty-six state attorneys general. Gearan, *supra* note 10.
229. 358 F.3d 223 (2d Cir. 2004).
230. *Id.*
231. Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y. 2002).
232. *Swedenburg*, 358 F.3d at 239-40.

states with shipping bans still in effect.[233] As a result, there had been much speculation regarding the outcome. For example, the Wine & Spirits Wholesalers of America, Inc. had stated that the organization hoped that the district court remedy would be reversed, and that only the in-state exception would be struck down, as it was in *Beskind*.[234] The organization got its wish and more. The Second Circuit upheld the entire statutory scheme, boldly stating that "[t]he Twenty-First Amendment is unequaled in our constitutional experience – it repeals one constitutional provision and creates an exception to another."[235]

The New York statutory structure also consists of a three-tier sale and distribution scheme.[236] Alcoholic beverages may not be shipped into the state without a license; the process of obtaining a license is rigorous, and requires the licensee to have a physical presence in the state, such as a factory, warehouse, or office.[237] Therefore, the plaintiffs argued that although they are not banned from obtaining a license, the qualifications – especially physical presence – are so onerous as to ban them in effect.[238]

In making its decision, the court chose not to follow the two-tier Dormant Commerce Clause analysis and core concerns test as espoused by previous circuits.[239] The court stated that the two-step analysis "is flawed because it has the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language of section 2."[240] Instead, the court followed the method used by the Seventh Circuit in *Bridenbaugh* to determine whether the statute falls within the scope of Twenty-First Amendment authority.[241] The court then found that New York's laws fell "squarely within the ambit of section 2's grant of authority."[242]

A petition for certiorari was submitted to the Supreme Court and cert was granted on May 24, 2004.[243]

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233. Coyle, *supra* note 134, at 1.

234. Wine and Spirit Wholesalers of America, Inc., *supra* note 141.

235. *Swedenburg*, 358 F.3d at 227.

236. N.Y. ALCO. BEV. CONT. LAW § 100(1) (2000). The law provides that "[n]o person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor [sic] required by this chapter." *Id.*

237. N.Y. ALCO. BEV. CONT. LAW §§ 100(1), 110(1)(g), 76, 3(37) (2000).

238. *Swedenburg*, 358 F.3d at 238 n.12.

239. *Id.* at 230-31.

240. *Id.* at 231.

241. *Id.*

242. *Id.* at 237.

243. Swedenburg v. Kelly, 72 U.S.L.W. 3725 (U.S. May 24, 2004).

III. THE ISSUES AND ARGUMENTS BEFORE THE SUPREME COURT

The United States Supreme Court granted certiorari to the Michigan and New York cases on May 24, 2004.[244] The Court has limited its review to the following 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?"[245]

A. *Arguments Presented to the Court*

The parties arguing before the Court on December 7, 2004 have submitted their briefs, presenting their legal arguments to the Court.[246] Numerous amicus briefs have also been filed, supporting either side in one or both of the cases.[247]

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244. *Id.*

245. *Id.*

246. Brief for the Petitioners, Granholm v. Heald (No. 03-1116); Petitioner's Brief on the Merits, Swedenburg v. Kelly (No. 03-1274); Brief for Petitioner, Michigan Beer and Wine Wholesalers Assoc. v. Heald (03-1120); Brief for the Respondents, Granholm v. Heald (No. 03-1116), Michigan Beer and Wine Wholesalers Assoc. v. Heald (03-1120); Brief for Private Respondents, Swedenburg v. Kelly (No. 03-1274); Brief for New York Respondents, Swedenburg v. Kelly (No. 03-1274).

247. *See, e.g.*, Brief Amicus Curiae of Illinois Alcoholism and Drug Dependence Association in Support of Petitioners in Granholm and Respondents in Swedenburg, Granholm v. Heald (No. 03-1116), Michigan Beer and Wine Wholesalers Assoc. v. Heald (03-1120) and Swedenburg v. Kelly (No. 03-1274); Brief of the National Alcohol Beverage Control Association and the National Conference of State Liquor Administrators as Amicus Curiae in Support of Petitioners, Swedenburg v. Kelly (No. 03-1274); Brief of the Virginia Wineries Associations as Amicus Curiae in Support of Petitioners, Granholm v. Heald (No. 03-1116) and Michigan Beer and Wine Wholesalers Assoc. v. Heald (03-1120); Brief of Michigan Association of Secondary School Principals, et al., Granholm v. Heald (No. 03-1116) and Michigan Beer and Wine Wholesalers Assoc. v. Heald (03-1120); Brief of National Beer Wholesalers Association as Amicus Curiae in Support of Petitioners, Granholm v. Heald (No. 03-1116) and Michigan Beer and Wine Wholesalers Assoc. v. Heald (03-1120); Brief for the Wine and Spirits Wholesalers of America, et al., as Amicus Curiae Supporting Petitioners in Nos. 03-1116 & 1120 and Respondents in No. 03-1274; Brief of Ohio and 32 Other States as Amicus Curiae Supporting Petitioners, Granholm v. Heald (No. 03-1116); Brief of Members of the United States Congress as Amici Curiae in Support of Respondents, Granholm v. Heald (No. 03-1116); Brief Amicus Curiae of American Homeowner's Alliance, et al., in Support of Respondent in Granholm v. Heald (No. 03-1116); Brief of Amicus Curiae The Beer Institute in Support of Respondents, Swedenburg v. Kelly (No. 03-1274); Brief of the Goldwater Institute as Amicus Curiae in Support of Respondents, Granholm v. Heald (No. 03-1116); Brief of Amicus Curiae Wine Institute in Support of Respondents, Granholm v. Heald (No. 03-1116); Brief of Millbrook Vineyards & Winery as Amicus Curiae in Support of Petitioners, Swedenburg v. Kelly (No. 03-1274).

1. Michigan Statutory Scheme

In *Granholm v. Heald*,[248] the petitioners, hereinafter referred to as "Michigan," present arguments to the Court that largely focus on the language and legislative history of the Twenty-First Amendment, as well as the "core concerns" that have been such a large part of the debate in the appeals court decisions. According to the petitioner, "Michigan requires that beverage alcohol pass through the hands of licensees with a substantial in-State physical presence that makes them subject to effective state regulation and enforcement."[249] Michigan points out that the licensing process involves rigorous investigation and that even once licensed, the licensees must comply with numerous laws.[250] Because direct-shipment transactions occur largely in private and away from enforcement mechanisms in place, the state has determined that the best way to deal with that problem is to strictly regulate importation and delivery of alcohol to consumers.[251] Striking directly at the "core concerns," Michigan's brief states that "[i]n summary, the principal reasons for the structural purpose of Michigan's alcohol distribution and licensing system is to ensure an orderly importation and distribution system that helps prevent illegal sales to minors and intoxicated persons and secures the effective collection of Michigan taxes."[252]

Critical to Michigan's argument is the discussion of the broad power granted by the Twenty-First Amendment. The brief argues that *North Dakota* and the Webb Kenyon Act stand for broad powers in the hands of the states.[253] Michigan points out that "[n]othing in the text of the 21st Amendment limits states in how they may choose to set up their regulatory framework to deal with the transportation, importation, and distribution of alcoholic beverages. Thus, as a textual matter, there can be no justification for ignoring the plain and unambiguous command of the 21st Amendment."[254]

The brief makes strong arguments against the decision of the Sixth Circuit; they state boldly that the court below "erroneously

248. For purposes of brevity, I have omitted the arguments of the Michigan Beer and Wine Wholesalers Association, which are similar to the state's arguments.
249. Brief for the Petitioners, Granholm v. Heald (No. 03-1116), at 8.
250. *Id.* at 9.
251. *Id.*
252. *Id.* at 11.
253. *See supra* text accompanying note 52; *supra* text accompanying note 104.
254. Brief for the Petitioners, *supra* note 249, at 18.

dismissed this Court's discussion of the 21st Amendment in *North Dakota* as irrelevant because the case involved the Supremacy Clause"[255] and that the court "gave insufficient force to the 21st Amendment and undue prominence" to *Hostetter*, *Bacchus*, and *Healy*.[256] Michigan points out that *Hostetter* and *Healy* merely hold that a state cannot control what happens *outside* of its borders, and that *Bacchus* was wrongly decided.[257]

Instead, the respondent Heald has focused on the economic impact on the wine industry, changes implemented by states allowing direct shipment, the impact of the Michigan laws, and the discriminatory nature of the Michigan laws.[258] In their argument, respondents state that "[t]his Court's cases make clear that States enjoy greater authority over liquor than they do over, say, milk. Yet this Court has also consistently invalidated state liquor regulations . . . that discriminate against out-of-state commerce."[259]

In maintaining this argument, the brief focuses on the discriminatory nature of the Michigan laws, and uses the *Bacchus* case to maintain the position that even in light of the Twenty-First Amendment, states may not engage in discriminatory behavior.[260] The brief argues that the Twenty-First Amendment is not as powerful as the state claims it to be, and points out that it "is to be understood as a part of the whole Constitution."[261]

However, in making this staunch "non-discrimination" argument, respondents cut against their own hoped-for decision in the case. The brief states that "[t]he touchstone of the authority granted the States over alcohol by the Twenty-First Amendment is evenhandedness toward those in and out of state."[262] By making this statement, the brief is pointing out a potential pitfall should the Court decide to uphold the broad language of § 2 – the Court could decide to permit states to ban *all* direct shipments, in effect, doing precisely what the Fourth Circuit did in striking down the discrimination, but upholding the overall regulatory scheme.

Respondents' brief continues by discussing Commerce Clause analysis in greater detail, making arguments about alternatives to

255. *Id.* at 24 (citing Heald v. Engler, 342 F.3d 517, 523-24 (6th Cir. 2003)).
256. *Id.* at 25.
257. *Id.* (emphasis added).
258. Brief for the Respondents, Granholm v. Heald (No. 03-1116), at 1-9.
259. *Id.* at 9.
260. *Id.* at 15-16.
261. *Id.* at 19.
262. *Id.* at 21-22.

discriminatory laws, in particular discussing the "core concern" issues of sales to minors, and taxes.[263] The brief boldly states that "[u]nder the appropriately exacting scrutiny these constitutional principles require, Michigan's discriminatory wine shipment laws must fall."[264]

2. New York Statutory Scheme

In the *Swedenburg v. Kelly* case, the petitioners, Juanita Swedenburg et al, spend the bulk of their brief arguing Dormant Commerce Clause analysis. They explain that prior to 1970, New York permitted some direct-shipments, but this was changed by legislation passed in that year.[265] However, there are exemptions allowing in-state wineries to ship directly through certain methods.

Swedenburg summarizes her argument by pointing out that one of the primary purposes of the Commerce Clause is to protect "stalwart family farmers" and that as a result, the Court through *Bacchus* has held that the Twenty-First Amendment does not nullify the Commerce Clause and therefore the Court should not now change this holding.[266] Swedenburg argues that the Second Circuit incorrectly found that there was no real discrimination because the out-of-state wineries could simply establish an in-state presence and therefore be allowed to ship directly to consumers.[267]

After first arguing why the discrimination violates the Commerce Clause, the brief finally discusses the Twenty-First Amendment. They state that "this Court's precedents all make it clear that a state must choose one set of governing rules, not two."[268] The petitioners repeat this argument a short time later in the brief by stating that "a state has merely to choose a single set of rules regarding direct-shipment and apply them to both domestic and out-of-state wineries."[269] While they imply that they want any such set of rules to permit all wineries to ship directly, they neglect to mention in this context that to apply such a holding also would allow the states to completely ban direct-shipments, something that would not serve the states' interests very well. In discussing the two tier-analysis rejected by the Court below, they argue that a ruling strik-

263. *Id.* at 35-47.
264. *Id.* at 10.
265. Petitioner's Brief on the Merits at 3, Swedenburg v. Kelly (No. 03-1274).
266. *Id.* at 10-12.
267. *Id.* at 20-21.
268. *Id.* at 31.
269. *Id.* at 37.

ing down the discriminatory powers "would disturb but little the state's broad regulatory powers over alcohol distribution."[270]

The New York Respondents' brief[271] makes arguments that are similar to Michigan's arguments. The summary of their argument is simple:

> The plain language of both the Twenty-First Amendment and the Webb-Kenyon Act grant states virtually unfettered authority to regulate the importation of alcoholic beverages for delivery or use within their borders. The legislative history and historical context of these provisions makes clear that they were intended to shield state regulation from the impediments otherwise posed by the dormant Commerce Clause.[272]

The respondents back up these statements with discussion of the plain language and histories of these two provisions, and discuss the Court's cases supporting the position.

In citing those cases, the brief argues that the Court has read the Twenty-First Amendment to permit all "reasonable" regulations promulgated by the states.[273] Much like Michigan, the New York position on *Bacchus* is clear: "*Bacchus* is an anomaly in this Court's Twenty-First Amendment jurisprudence."[274] Still, the brief goes on to distinguish *Bacchus*, arguing that the Hawaiian tax did not serve the legitimate purposes of the Twenty-First Amendment, but instead was pure protectionism.[275] For all the above reasons, respondents argue, the New York laws are "fully constitutional."[276]

B. *Language and Legislative History of the Twenty-First Amendment*

In evaluating the arguments in these cases, the Court must first look to the language of the Twenty-First Amendment and its legislative history in order to determine the constitutionality of the direct-shipment statutory schemes. The Court has done this to varying degrees in past decisions, but has never come to any strong conclusions.

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270. *Id.* at 39.

271. Brief for New York Respondents, Swedenburg v. Kelly (No. 03-1274). For purposes of brevity, I have omitted the arguments of the private respondents, which are similar to the state's arguments.

272. *Id.* at 11.

273. *Id.* at 23.

274. *Id.* at 28.

275. *Id.*

276. *Id.* at 12.

Out of recent cases, the most comprehensive discussion of the Amendment and its legislative history occurred in *324 Liquor Corp.*[277] However, this discussion did not occur in the majority decision authored by Justice Powell and joined by Justices Brennan, White, Marshall, Blackmun, Stevens and Scalia.[278] Instead, it appeared in the dissent authored by Justice O'Connor and joined by Chief Justice Rehnquist.[279]

In her discussion of the Twenty-First Amendment's history, Justice O'Connor opened by pointing out that early cases immediately after the passage of the Amendment "conferred plenary power on the States to regulate the liquor trade within their boundaries."[280] She then discussed the "thoughtful and powerful dissent" of Justice Black in the *Hostetter* case.[281]

Justice Black's dissent in that case focused on the legislative history of the Twenty-First Amendment; Justice Black had very strong feelings on this matter since he had been a Senator at the time of the Amendment's debate in the Senate before its ratification. In his dissent, according to O'Connor, "the Senators who approved the Twenty-First Amendment thought they were returning absolute control over the liquor industry to the States" without federal interference.[282] She then discusses much of the debate the Senators engaged in, concluding that

> [t]he history of the Amendment strongly supports Justice Black's view that the Twenty-First Amendment was intended to return absolute control of the liquor trade to the States, and that the Federal Government could not use its Commerce Clause powers to interfere in any manner with the States' exercise of the power conferred by the Amendment.[283]

Later in the dissent, O'Connor argues that "[d]espite this clear intent, the Court in recent years has used a balancing test to resolve

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277. 324 Liquor Corp. v. Duffy et al., 479 U.S. 335 (1987) (holding that New York's liquor pricing system was not exempted from anti-trust laws and not permissible under the Twenty-First Amendment).

278. *Id.* at 337.

279. *Id.* at 352.

280. *Id.* (citing Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939)). *See also* Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

281. *324 Liquor Corp.*, 479 U.S. at 353 (citing Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 338 (1964) (Black, J., dissenting)).

282. *Id. See supra* notes 58-63 and accompanying text.

283. *324 Liquor Corp.*, 479 U.S. at 356 (O'Connor, J., dissenting).

conflicts between federal statutes and state laws enacted pursuant to § 2."[284] The proper question, she believed, was not determining whether a motivation of the state was linked to a central purpose of the Twenty-First Amendment or not, but rather if the provision is a result of a power that has been expressly conferred by the Constitution.[285]

If Justice O'Connor's opinions expressed in this dissent still hold true,[286] then it would appear that she would engage in the more limited analysis undertaken by the *Bridenbaugh* and *Swedenburg* courts. Likewise, if Chief Justice Rehnquist still agrees with her, he may also decide to engage in this limited analysis. It is also commonly known that Justices Scalia and Thomas tend to read the Constitution from a "textualist" perspective; as a result, they too may choose to read the Twenty-First Amendment as permitting any intra-state regulation.[287]

The only Supreme Court case that is truly "in the way" of a broad reading of the Twenty-First Amendment's power is *Bacchus*.[288] This case is the only Court precedent where a discriminatory action affecting intra-state regulation under the Twenty-First Amendment umbrella was struck down as violative of the Commerce Clause. However, it is significant that only three of the cur-

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284. *Id.* at 359 (O'Connor, J., dissenting).

285. *Id.* at 360 (O'Connor, J., dissenting) (citing Bacchus Imports, Ltd v. Dias, 468 U.S. at 287 (Stevens, J., dissenting)).

286. It is not improbable that she would extend the same analysis involving a Dormant Commerce Clause case. *324 Liquor Corp.* involved federal antitrust allegations, which are derived from the Commerce Clause just as the Dormant Commerce Clause is.

287. Justice Scalia has been particularly critical of the Dormant Commerce Clause analysis engaged in by the Court, while Justice Thomas and Chief Justice Rehnquist have also raised questions as to the legitimacy and/or state of Dormant Commerce Clause jurisprudence. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., joined by Thomas, J., concurring in the judgment); American Trucking Ass'n v. Smith, 496 U.S. 167, 202 (1990) (Scalia, J., concurring in the judgment); Kassel v. Consolidated Freightways Corp. of Del., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting). For further discussion, see also TRIBE, *supra* note 15 §§ 6-2 and 6-6. Of particular interest is the fact that both Justices Scalia and Thomas have been highly critical of Dormant Commerce Clause analysis, although despite their protests, they usually apply the principles of the analysis. For example, in *Wyoming v. Oklahoma*, Justice Scalia pointed out in his dissent that the Dormant Commerce Clause is only a mere inference from the Constitution. Wyoming v. Oklahoma, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting). Still, both Justices have also been highly critical of discriminatory regulations in general. *See* TRIBE, *supra* note 15 § 6-6, at 1063-64 n.24.

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

rent members of the Court were present at the time of the *Bacchus* decision – Justices Rehnquist, Stevens, and O'Connor. Even more critical is that all three dissented in that decision; Justice Stevens wrote the dissenting opinion which was joined by the other two Justices.[289] His opinion made it clear that he would not have struck down the tax laws "because the wholesalers' Commerce Clause claim is squarely foreclosed by the Twenty-First Amendment to the United States Constitution."[290] The dissent points out that the Amendment itself is plain as to allowing states the power to control the passage of liquor *into* the state.[291] Justice Stevens cites to the numerous cases holding that this regulatory power is broad, and "[a]s I read the text of the Amendment, it expressly authorizes this sort of burden."[292] Although the majority attempts to argue that the Amendment was not passed in order to allow economic protectionism of local markets, "[t]his is a totally novel approach to the Twenty-First Amendment" and that "the [real] question is whether the [statute] in this case is an exercise of a power expressly conferred upon the States by the Constitution. It plainly is."[293]

It is therefore not improbable that several members, even a plurality or a majority, would end their analysis of the issue with the Twenty-First Amendment itself. The legislative history of the Twenty-First Amendment is crystal clear – the Amendment was intended to create a narrow exception to the Commerce Clause in the area of alcoholic beverages. The Court can, and should, read the Amendment this way and thereby maintain the integrity of the Amendment itself and by extension the process of amending the Constitution.[294] However, in order to end its analysis with the Amendment itself, the Court would have to overrule, or distinguish the one case prohibiting them from doing so – *Bacchus*. Other than *Bacchus*, all other precedent striking down laws has dealt exclusively with regulation affecting other states.[295]

C. *The Core Concerns of the Twenty-First Amendment*

Should the Court determine after the direct analysis of the

289. *Id.* at 278 (Stevens, J., dissenting).
290. *Id.* at 279 (Stevens, J., dissenting).
291. *Id.* at 280 (Stevens, J., dissenting).
292. *Id.* at 282 (Stevens, J., dissenting).
293. *Id.* at 286-87 (Stevens, J., dissenting).
294. *See* Denning, *supra* note 9, at 341.
295. *See, e.g.*, Healy v. The Beer Institute, 491 U.S. 324 (1989); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).

Twenty-First Amendment language and legislative history that the Amendment does not explicitly permit the regulation of alcohol by the States within their borders under any and all circumstances, the Court will likely then look to its prior decisions, and probably focus on the "core concerns" it has developed through prior case law.

In this context, the Court will need to pay particular attention to its decisions in *Bacchus* and *North Dakota*. This could result in an overruling or a strengthening of *Bacchus* in particular. *Bacchus*, as discussed in Part I of this Note, is the case in which the Court held that a state law may prevail over the Commerce Clause if it was closely related to the powers granted under the Twenty-First Amendment.[296] *North Dakota* elaborated on this holding by establishing that regulations would be valid if they fell "within the core of the State's power under the Twenty-First Amendment" by "promoting temperance, ensuring orderly market conditions, and raising revenue."[297]

The core concerns of the Twenty-First Amendment have been an important part of each Circuit's analysis where the laws have been found unconstitutional.[298] The core concerns that are consistently debated are those for temperance, market regulation, and taxation as outlined in the *Bacchus* and *North Dakota* cases.[299] Supreme Court case law does point to these as the "core concerns,"[300] but it has never been clearly explained how these "core concerns" affect state regulation of alcohol. Specifically, the Court needs to address whether or not the core concerns outlined in *North Dakota* are an exclusive list, to what extent state regulations must further any core concerns in order to be acceptable, and finally, what should be done if the regulations do not meet the established standard.

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296. *See supra* Part I. In *Bacchus*, only three of the current Justices were sitting on the Court – Justices Rehnquist, Stevens and O'Connor. Justice Stevens wrote a dissenting opinion in the case, which was joined by both Rehnquist and O'Connor. *See Bacchus*, 468 U.S. at 278 (Stevens, J., dissenting). In *North Dakota*, where the regulations were upheld, Justice Stevens announced the Court's decision and wrote an opinion which Justice O'Connor and Chief Justice Rehnquist both joined. Justice Scalia concurred, and Justice Kennedy dissented. *See* North Dakota v. United States, 495 U.S. 423 (1990).

297. *North Dakota*, 495 U.S. at 432.

298. Heald v. Engler, 342 F.3d 517, 522-24 (6th Cir. 2003); Dickerson v. Bailey, 336 F.3d 388, 403-04 (5th Cir. 2003); Beskind v. Easley, 325 F.3d 506, 513 (4th Cir. 2003); Bainbridge v. Turner, 311 F.3d 1104, 1113 (11th Cir. 2002).

299. See supra note 298. *See also North Dakota*, 495 U.S. at 423; *Bacchus*, 468 U.S. at 263.

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

Several of the cases at the appeals courts have found that the states' discriminatory bans do not further the core concerns of the Twenty-First Amendment.[301] In *Bainbridge*, the Eleventh Circuit found that the state did not present sufficient evidence to prove that the laws were in furtherance of a core concern.[302] The court stated that merely presenting a core concern is insufficient.[303] Instead they must present evidence of the interest and "show that its statutory scheme is necessary to effectuate the proffered core concern in a way that justifies treating out-of-state firms differently from in-state firms."[304]

The Fifth Circuit in *Dickerson* also found that there was insufficient evidence presented by the state Administrator to connect the Texas statute to the core concerns; only conclusory statements were presented.[305] *Heald* similarly resulted in a finding of insufficient evidence by the court, because the defendants did not show that the discriminatory laws furthered core concerns.[306]

In *Beskind*, the Fourth Circuit concluded that only the North Carolina in-state exception failed to further the core concerns of the Twenty-First Amendment.[307] The court found that there was insufficient evidence to prove that this exception furthered the core concerns.[308] However, the court established that the legislative history attached to the laws clearly stated that the statutes were to be liberally construed in favor of the regulation and control of alcohol.[309] Therefore, since the court believed that the combination of the original laws and the in-state exception was the problem, and not the laws in their entirety, only the offending amendment was eliminated.[310] The court held that it was "duly bound" to disturb "only as much of the State regulatory scheme as is necessary to enforce the U.S. Constitution."[311] The court further noted that "[a]ny further objection to the State's proper exercise of its powers under the Twenty-First Amendment must now be taken up directly with

301. Heald v. Engler, 342 F.3d 517, 526 (6th Cir. 2003); Dickerson v. Bailey, 336 F.3d 388, 406 (5th Cir. 2003); Beskind v. Easley, 325 F.3d 506, 517 (4th Cir. 2003); Bainbridge v. Turner, 311 F.3d 1104, 1115 (11th Cir. 2002).

302. *Bainbridge*, 311 F.3d at 1115.

303. *Id.*

304. *Id.*

305. *Dickerson*, 336 F.3d at 406.

306. *Heald*, 342 F.3d at 526.

307. Beskind v. Easley, 325 F.3d 506, 517, 519 (4th Cir. 2003).

308. *Id.* at 517.

309. *Id.* at 519.

310. *Id.*

311. *Id.*

the North Carolina legislature."[312]

Because of the court's decision, the matter was then properly taken up by the North Carolina state legislature.[313] A new law has since been passed allowing all direct-shipments through a licensing structure.[314] The state acted in conformance with the Twenty-First Amendment powers granted to it to regulate alcohol, and has utilized those powers to give consumers what they want – the ability to send and receive wine through direct-shipments. Here, the proper and fair result has been achieved without the courts overstepping their bounds. This presents a constitutional solution that preserves the integrity of the Twenty-First Amendment while not completely eliminating the federal government's interest in free trade and commerce between the states.

Although this seems to be the best option for the courts to follow under a "core concerns" analysis, the Fourth Circuit is the only court to have implemented this outcome. For example, the court in *Heald* pointed out that "the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals," but whether the discriminatory scheme specifically promotes the core concerns.[315] However, the court struck down the entire shipping scheme instead of just the offending exception.[316] *Heald* is most similar to *Bainbridge* in that although the court struck down the laws as unconstitutional, the primary reason for doing so was for a lack of evidence supporting the "core concerns" of the Twenty-First Amendment.[317]

The Fifth Circuit was not able to find that the core concerns were implicated by the statutory construction of the Texas laws because no evidence had been proffered.[318] Further, in *Dickerson*, the Fifth Circuit found that it would be too difficult to take out the offending in-state exception from the Texas laws because it was not a cleanly inserted amendment like in the North Carolina structure.[319] The Fifth Circuit pointed out that in creating a situation with equal treatment, the court could choose to either grant the

312. *Id.* at 520. By striking down the in-state exception only, the decision effectively banned all direct-shipments to the state's residents, thus prompting the legislature to act.

313. N.C. GEN. STAT. § 18B-1001.1. *See supra* note 205.

314. N.C. GEN. STAT. § 18B-1001.1.

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

316. *Id.* at 527.

317. *Id.* at 526.

318. Dickerson v. Bailey, 336 F.3d 388, 406 (5th Cir. 2003).

319. *Id.* at 407-09.

same benefits to all, or take away the benefits from all.[320] As a result, the court decided to grant the same benefits to all, relying on a tax case which is unrelated to the present issue.[321] The court also stated that it would grant the benefit to all because they could not just sever the offending portions of the law.[322] Doing so would have involved "the nullification or enjoined enforcement of many statutes that have been in effect for a substantial time" and they would have been forced "to act in a legislative capacity."[323]

However, in effect, the court acted in a legislative capacity by granting the shipping rights to all, which is clearly not what the Texas laws intended. The laws were established under the Twenty-First Amendment, and the court's actions appear to have nullified the state's right to act under the Amendment.

The approach taken by the *Bridenbaugh* and *Swedenburg* courts is quite different than the above-mentioned courts.[324] Although the Second and Seventh Circuits have found it appropriate to protect the Twenty-First Amendment rights of the states, they have done so in a way that discounts the applicability of the Supreme Court's decision in *Bacchus*.[325] They instead choose to look exclusively to the Amendment, and not apply the core concerns.[326] The Second Circuit is particularly vehement in its rejection of the *Bacchus* analysis.[327] The court said that the analysis was "[r]egrettably" used in four other Circuit decisions and that it found "nothing in the Supreme Court's opinion" that required it to "transpose the resolution of one case into an analytical model for all."[328] The court later points out that the drafters of § 2 of the Twenty-First Amendment crafted the section to allow states to circumvent the Dormant Commerce Clause.[329]

After looking to the analyses utilized by the Courts of Appeals, it seems that the courts striking down the shipment laws have taken the "core concerns" to a place never intended by the Supreme Court – rather than using the core concerns to permit states regula-

320. *Id.* at 407 (citing Heckler v. Mathews, 465 U.S. 728, 740 (1984)).
321. *Heckler*, 465 U.S. at 740.
322. *Dickerson*, 336 F.3d at 408.
323. *Id.*
324. Swedenburg v. Kelly, 358 F.3d 223, 231 (2d Cir. 2004); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000).
325. *Swedenburg*, 358 F.3d at 236; *Bridenbaugh*, 227 F.3d at 853.
326. *Swedenburg*, 358 F.3d at 231; *Bridenbaugh*, 227 F.3d at 848.
327. *Swedenburg*, 358 F.3d at 236.
328. *Id.*
329. *Id.* at 237.

tory control under the Twenty-First Amendment, they have in effect taken it upon themselves to place a burden of proof on the states that is so high that the Twenty-First Amendment has lost its very soul. As a result, what must happen at this point is that the Supreme Court, if it does not choose to overrule *Bacchus*, should establish a standard allowing states broad deference in defending laws effectuated under the Twenty-First Amendment. By deferring to the states in this way, the Court can uphold the integrity of the Twenty-First Amendment without explicitly overruling *Bacchus*.

D. *A Solution to Balance Constitutional Interests*

The Supreme Court does not routinely overturn its own precedent, and the Court may not do it in this case either; but in reality, the Court does *not* need to explicitly overrule any of its own precedent. Instead, the Court can simply reaffirm its long-standing precedent and elaborate upon its most recent decisions related to the Twenty-First Amendment and the Commerce Clause. The Court simply has to reaffirm the long-standing principle that the Twenty-First Amendment granted a broad regulatory power to the states as the language and history of the Amendment indicate, and that *Bacchus* was an aberration in the Court's jurisprudence on this matter. If the Court decides to elaborate on the "core concerns" test that has so befuddled the Courts of Appeals, the Court can clarify the matter by allowing states broad deference when they invoke the core concerns as a defense to their otherwise discriminatory laws.

Although it is easy to be sympathetic to the plight of wine-lovers wanting shipments of their favorite bottles at their homes, this sympathy should not cloud the constitutional reality that states have been granted this power. In this modern era, numerous states have taken it upon themselves to change their laws to permit direct-shipments. This is the critical distinction – the state legislatures are the proper forum to make changes in the law, and not in the courts by eradicating the Twenty-First Amendment.

E. *Implications of the Court's Decision*

It is critical to understand the implications of the Court's decision in these cases. First, if the Amendment is read to not grant Commerce Clause exceptions, the integrity of the amendment process will be compromised. While some believe that the legislative history behind the Twenty-First Amendment is not crystal clear, legislative histories rarely are. If a broadly phrased constitutional

amendment is interpreted in such a restrictive manner as to fundamentally undermine the purpose behind its passing in order to satisfy modern sensibilities, any provision of the Constitution is then at risk.

Second, if the Amendment is read by the Court to completely restrict trade regulation, the states will lose a very important tool in market regulation of a product that is capable of much more harm than something as innocuous as a book. There is no question that states have a vested interest in regulating intoxicating liquors – this is the very cornerstone behind the Amendment. This very issue is one of the reasons behind Congress' taking action in the passing of the 21st Amendment Enforcement Act – a recognition by Congress of the powers granted to the states in alcohol regulation and in giving them even more control in enforcing that regulation. If the Court should not uphold the integrity of the Twenty-First Amendment by permitting the direct-shipment laws to stand, then the Amendment will lose its very essence and become nothing more than a footnote in constitutional history.

CONCLUSION

The integrity behind the Twenty-First Amendment is now in the hands of the Supreme Court. In order to uphold the validity of the Amendment specifically, and the amendment process generally, the Court must uphold the direct-shipment laws by literally reading the Twenty-First Amendment, and/or broadly interpreting the meaning behind the "core concerns" of the Amendment. Regardless of what decision the Court reaches, it is sure to have broad ramifications for the wine and liquor industries, state enforcement agencies, and consumers.

*Pamela R. Cote**

* I would like to extend special thanks to the Production Editors and Staff of Western New England Law Review Volume 27 for their assistance with editing this Note.