Notre Dame Law Review

Volume 79
Issue 4 *The Changing Laws of War: Do We Need a New Legal Regime after September 11?*

Article 10

7-1-2004

New Wine in Old Wineskines: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment

Jason E. Prince

NOTES

NEW WINE IN OLD WINESKINS: ANALYZING STATE DIRECT-SHIPMENT LAWS IN THE CONTEXT OF FEDERALISM, THE DORMANT COMMERCE CLAUSE, AND THE TWENTY-FIRST AMENDMENT

*Jason E. Prince**

> And no one pours new wine into old wineskins. If he does, the new wine will burst the skins, the wine will run out and the wineskins will be ruined.
>
> *Luke* 5:37–38[1]

INTRODUCTION

According to wine historian Thomas Pinney, the title of "greatest patron of wine and winegrowing that this country has yet had" belongs to an unlikely candidate: Thomas Jefferson.[2] Although Jefferson's role as one of America's founding oenophiles[3] receives relatively little

* Candidate for Juris Doctor, Notre Dame Law School, 2005; M.Phil., University of Cambridge, 2000; A.B., Davidson College, 1999. I would like to thank Professor Patricia L. Bellia for providing invaluable suggestions and encouragement, and the members of the *Notre Dame Law Review* for their hard work on this Note. Most of all, I wish to thank my parents, Larry and Julie, my sister, Stephanie, my grandparents, Bob and Barbara, and my best friend, Ruth, for their constant love, support, friendship, and guidance.

1 *Luke* 5:37–38. In Jesus' day, "[b]ottles . . . were made of skin. When new wine was put into [the wineskin] it fermented and gave off gas. If the bottle was new, there was a certain elasticity in the skin and it gave with the pressure; but if it was old, the skin was dry and hard and it would burst." WILLIAM BARCLAY, THE DAILY STUDY BIBLE SERIES: THE GOSPEL OF LUKE 67–68 (rev. ed. 1975).

2 THOMAS PINNEY, A HISTORY OF WINE IN AMERICA 129 (1989).

3 Oenophile is defined as "a lover or connoisseur of wine." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1565 (3d ed. 1986). In considering the constitution-

notoriety, his exploits in the field of viticulture are well documented.[4] During his time as Minister Plenipotentiary to France,[5] Jefferson extensively toured the French and German wine countries,[6] taking detailed notes on the "infinite number of painstaking steps required to produce a wine of the first quality."[7] He shipped samples of his favorite French wines across the Atlantic so that such friends as George Washington and John Jay "might decide just what they would like him to get for them in the future."[8] In one shipment, Jefferson sent his brother-in-law seventy-two bottles of "what is the very best Bordeaux wine."[9] Moreover, while back in Virginia, he imported not only European wines, but also those from vineyards in Kentucky, Maryland, and North Carolina.[10] Declaring that "[n]o nation is drunken where wine is cheap,"[11] Jefferson apparently believed the beverage should flow as freely in commerce as it did at his dinner table.[12]

Yet according to some states' modern direct-shipment laws, Jefferson's passion for exporting and importing fine wine would merit him a less distinguished title: "third-degree felon." Florida, for example, criminalizes the direct shipment of alcoholic beverages from out-of-state manufacturers to unlicensed in-state residents and elevates repeat offenses to a third-degree felony.[13] All parties who "conspire" to violate Florida's direct-shipment laws (such as consumers who place

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ality of direct-shipment laws, several courts have described the plaintiffs—primarily wine consumers who want to import out-of-state wine directly to their homes—as "oenophiles." *See, e.g.*, Heald v. Engler, 342 F.3d 517, 520 n.2 (6th Cir. 2003); Dickerson v. Bailey, 336 F.3d 388, 392 (5th Cir. 2003); Beskind v. Easley, 325 F.3d 506, 509 (4th Cir. 2003); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849 (7th Cir. 2000).

4 *See* E.M. HALLIDAY, UNDERSTANDING THOMAS JEFFERSON 72–73 (2001); MARIE KIMBALL, JEFFERSON: THE SCENE OF EUROPE 1784 TO 1789, at 197 (1950).

5 Jefferson began his service as Minister Plenipotentiary in 1784 and was officially relieved of his duties in 1789. KIMBALL, *supra* note 4, at 3, 308.

6 PINNEY, *supra* note 2, at 127.

7 KIMBALL, *supra* note 4, at 197.

8 DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 234–35 (1951).

9 HALLIDAY, supra note 4, at 80.

10 PINNEY, *supra* note 2, at 127–28.

11 A JEFFERSON PROFILE 301–02 (Saul K. Padover ed., 1956) ("I rejoice . . . at the prospect of a reduction of the duties on wine, by our national legislature. . . . No nation is drunken where wine is cheap . . . . Its extended use will carry health and comfort to a much enlarged circle.") (quoting Thomas Jefferson).

12 Jefferson once described his daily wine consumption as follows: "I double . . . the Doctor's glass and a half of wine, and even treble it with a friend . . . ." FRANCIS W. HIRST, LIFE AND LETTERS OF THOMAS JEFFERSON 521 (1926). Moreover, during his first term as President, Jefferson spent $2400 on wine each year—an expenditure that constituted nearly ten percent of his annual salary. *See* NORMAN K. RISJORD, THOMAS JEFFERSON 130 (1994).

13 *See* FLA. STAT. ANN. §§ 561.54(1), 561.545(3) (West 2003).

orders for out-of-state wine shipments) are guilty of the same degree of crime as the out-of-state shipper.[14] Thus, when a wine connoisseur in Florida orders a bottle of chardonnay from California over the Internet, he risks a $5000 fine[15] and up to five years behind bars.[16]

Over the past five years, modern-day oenophiles have launched a bevy of constitutional challenges to direct-shipment laws. Consumers and wine producers[17] contend that these laws violate the dormant Commerce Clause's general prohibition against protectionist state legislation.[18] States and wine wholesalers[19] counter that the Twenty-First Amendment expressly prohibits the "transportation or importation [of alcohol] into any State . . . in violation of the laws thereof."[20] The debate over how to resolve the inherent contradictions between the dormant Commerce Clause and the Twenty-First Amendment revolves around one issue: the extent of state power to regulate liquor commerce.

Analyzing direct-shipment laws in the context of federalism, the dormant Commerce Clause, and the Twenty-First Amendment, this Note argues that the Supreme Court should uphold the states' power to discriminate against out-of-state wine shipments. Part I highlights federalism's role in the historical development of the dormant Commerce Clause and the Twenty-First Amendment. This historical overview demonstrates a cyclical pattern in which Congress and the states repeatedly attempted to vest regulatory control over liquor commerce in the states, yet time after time the Supreme Court used the dormant Commerce Clause to undermine this policy objective. In other words, the Court engaged in judicial activism, or "judges disallowing as unconstitutional policy choices made in the ordinary political process that the Constitution does not clearly disallow—'clearly' because in a democracy the judgment of elected representatives should prevail in cases of doubt."[21]

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14 *See id.* § 562.23.

15 *See id.* § 775.083(1)(c) (West 2000 & Supp. 2004).

16 *See id.* § 775.082(3)(d).

17 *See* 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, 5–10 (2000) (providing an extensive discussion of the various interest groups involved in the direct-shipment debate).

18 *See infra* Part I.B.

19 *See* Martin, *supra* note 17, at 5–6 (naming wholesalers as a main proponent of strong state alcohol regulatory power under the Twenty-First Amendment).

20 U.S. CONST. amend. XXI, § 2.

21 Lino A. Graglia, *The Myth of a Conservative Supreme Court: The October 2000 Term*, 26 HARV. J.L. & PUB. POL'Y 281, 282 (2003).

Part II explores the major post-1933 Supreme Court cases in which the Twenty-First Amendment and the dormant Commerce Clause have come into conflict. Originally, the Court respected the states' sweeping regulatory powers under the Twenty-First Amendment. In 1984, however, the *Bacchus Imports, Ltd. v. Dias*[22] Court reestablished the dormant Commerce Clause as a device through which the judiciary can trump Congress and the states' shared policy preference pertaining to liquor regulation. Part III provides an overview of state direct-shipment statutes and explores how six circuit courts' post-*Bacchus* attempts to address such laws have further eroded state regulatory power over wine.

Part IV considers direct-shipment laws in light of Supreme Court debate over the judiciary's role in (1) enforcing the principle of federalism; (2) guarding against state protectionism via the dormant Commerce Clause; and (3) applying the Twenty-First Amendment. While the current majority supports invoking federalism to uphold states' rights,[23] a strong minority urges allowing the political process to determine the appropriate federal-state balance.[24] The Twenty-First Amendment constitutes a rare example of Congress and the states shifting the equilibrium of federalism in favor of state power. Thus, paradoxically, both sides of the federalism debate can and should cite their respective jurisprudence in overruling *Bacchus* and upholding state direct-shipment laws. Similarly, the dormant Commerce Clause's advocates and opponents alike should respect Congress and the states' mutual desire to grant the states broad power over liquor commerce. Otherwise, the doctrine will devolve from an exercise of judicial *intervention* into a vehicle for judicial *activism*, and the Twenty-First Amendment will be reduced to virtual irrelevance.

The biblical proverb about "new wine in old wineskins"[25] serves as a helpful metaphor for this Note's central arguments. Initially, the Supreme Court respected Congress's and the states' policy preference and granted the states broad Twenty-First Amendment power over li-

22 468 U.S. 263 (1984).

23 As discussed in Part IV, other commentators predict that the Rehnquist Court will uphold direct-shipment laws on states' rights grounds. *See* Martin, *supra* note 17, at 22–23; Gordon Eng, Note, *Old Whine in a New Battle: Pragmatic Approaches to Balancing the Twenty-First Amendment, the Dormant Commerce Clause, and the Direct Shipping of Wine*, 30 FORDHAM URB. L.J. 1849, 1915–16 (2003); Eric L. Martin, Note, *A Toast to the Dignity of States: What Eleventh Amendment Jurisprudence Portends for Direct Shipment of Wine*, 31 HOFSTRA L. REV. 1303, 1305, 1342, 1344 (2003). Rather than focus solely on the Rehnquist Court's purported emphasis on states' rights, this Note investigates direct-shipment laws in the context of the Court's broader federalism jurisprudence.

24 *See infra* Part IV.A.

25 *See supra* note 1 and accompanying text.

quor regulation. However, in *Bacchus*, the Supreme Court resorted to judicial activism by stitching together two constitutional "wineskins": the dormant Commerce Clause (roughly 180 years old), and the Twenty-First Amendment (over seventy years old). The principle of federalism—itself nearly 215 years old—weaves its way through both of these wineskins, serving as the container's uniting thread. Subsequently, the courts have expanded this container in ways the Twenty-First Amendment's ratifiers hardly could have foreseen. While the amendment has steadily ossified, the dormant Commerce Clause has exhibited surprising suppleness. "Pouring" the direct-shipment law debate into the Court's current three-piece patchwork threatens to further rupture not only the Twenty-First Amendment and the dormant Commerce Clause, but also the container's federalist seams.

I. OLD WINESKINS: A HISTORICAL OVERVIEW OF FEDERALISM, THE DORMANT COMMERCE CLAUSE, AND THE TWENTY-FIRST AMENDMENT

A. Federalism

Although the doctrine of federalism does not expressly appear in the Constitution's text, it has long served as one of the document's animating principles. The U.S. federalist system divides governance between two sets of sovereigns: (1) the national government, which possesses "limited" powers, and (2) state governments, which enjoy "reserved" powers.[26] James Madison, "the Father of the Constitution," did not seek to create "a consolidation of the States into one simple republic."[27] Rather, he sought to establish a delicate balance in which "[t]he powers delegated . . . to the federal government, are few and defined. Those which are to remain in the State governments, are numerous and indefinite."[28] Regardless, the Framers' various post-Philadelphia musings fall short of providing a definitive model for the Constitution's division of power between the federal and state governments.

To fill this theoretical void, political scientists have developed two competing models of federalism: dual federalism and cooperative federalism.[29] Dual federalism envisions "two mutually exclusive recipro-

26 *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 83 (14th ed. 2001).

27 2 THE WRITINGS OF JAMES MADISON 338 (Gaillard Hunt ed., 1901).

28 THE FEDERALIST NO. 45, at 241 (James Madison) (George W. Carey & James McClellan eds., 2001).

29 STATES' RIGHTS AND AMERICAN FEDERALISM xx (Frederick D. Drake & Lynn R. Nelson eds., 1999) [hereinafter STATES' RIGHTS].

cally limiting fields of power—that of the national government and that of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions."[30] Cooperative federalism, on the other hand, espouses the view that "the supremacy clause and the necessary and proper clause of the Constitution grant power to the national government, even if the actions of the national government touch state functions."[31] This model "views the state and national governments as partners, but the national government sets policy for the nation."[32]

Despite the theoretical uncertainties surrounding federalism, the Supreme Court invokes the principle to resolve conflicts between Congress and state governments. This mediation most often consists of "protecting the states against invasions by national institutions, . . . protecting states from incursions by their neighbors, and . . . restraining states from transgression on core national/constitutional values."[33] Although significant disagreement exists within the current Supreme Court over whether judges or politicians should serve as federalism's gatekeepers,[34]

> nearly all agree—as the Supreme Court has emphasized—that federalism serves important values. First, in comparison with the national government, state and local governments are closer to the people and more capable of reflecting local needs, values, and mores. Second, the diversity of state and local governments permits experiment and competition. . . . Third, apart from its capacity to promote government that delivers goods and services effectively, federalism fosters connection and community. . . . Finally, state and local governments function as counterweights to national power.[35]

B. Dormant Commerce Clause

The dormant Commerce Clause forbids states from unduly burdening interstate commerce.[36] This doctrine lacks express textual support in the Constitution; rather, it constitutes a negative inference

30 Alpheus Thomas Mason, *Federalism: The Role of the Court*, *in* FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE 8, 24–25 (Valerie Earle ed., 1968).

31 *See* STATES' RIGHTS, *supra* note 29, at xx.

32 *Id.*

33 William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1359 (1994).

34 *See infra* Part IV.

35 Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 440–41 (2002).

36 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 401 (2d ed. 2002).

drawn from the Commerce Clause.[37] When Congress legislates pursuant to its Commerce Clause power, it can preempt state and local laws.[38] Yet even if Congress refrains from exercising its commerce power in a particular area, the federal courts can strike down state and local laws for burdening interstate commerce.[39] The dormant Commerce Clause enables federal courts to guard Congress's commerce power against state protectionism.[40]

As the states discovered under the Articles of Confederation, extreme state protectionism (1) "is inconsistent with the very idea of political union";[41] (2) "cause[s] resentment and invite[s] protectionist retaliation";[42] and (3) "diverts business away from presumptively low-cost producers without any colorable justification in terms of a federally cognizable benefit."[43] Indeed, when the Framers converged in Philadelphia for the Constitutional Convention, remedying the ills of "economic Balkanization"[44] presided at the top of their agenda.[45]

The dormant Commerce Clause's jurisprudential roots stretch at least as far back as the 1824 Supreme Court decision of *Gibbons v. Ogden*.[46] Chief Justice Marshall attributed "great force"[47] to the argument that Congress's power to regulate commerce "implies in its nature, full power over the thing to be regulated, [and] it excludes necessarily, the action of all others that would perform the same operation on the same thing."[48] Gradually, this concept of Congress's ex-

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37 *See* SULLIVAN & GUNTHER, *supra* note 26, at 234.

38 U.S. CONST. art. VI, § 2. This provision is commonly referred to as the Supremacy Clause.

39 CHEMERINSKY, *supra* note 36, at 401.

40 *See* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY & WAITE 18 (1937) ("[T]he doctrine [is] that the commerce clause, by its own force and without national legislation, puts it into the power of the Court to place limits upon state authority.").

41 Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1113 (1986).

42 *Id.* at 1114.

43 *Id.* at 1119.

44 The term "economic Balkanization" was obviously not part of the Framers' dialogue. However, in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the Supreme Court employed the term to describe the country's economy under the Articles of Confederation. *Id.* at 325.

45 CHEMERINSKY, *supra* note 36, at 403.

46 22 U.S. (9 Wheat.) 1 (1824).

47 *Id.* at 209.

48 *Id.*

clusive power to regulate interstate commerce became firmly embedded in the Supreme Court's jurisprudence.[49]

Although the Supreme Court has upheld the dormant Commerce Clause for roughly 150 years, its legitimacy remains a subject of debate. Much of this disagreement boils down to federalism and the Court's role in enforcing it. On the one hand, Professor Donald Regan argues that the Framers primarily created the Commerce Clause "not to empower Congress, but rather to disable the states from regulating commerce among themselves."[50] Given that state regulations on interstate commerce "are individually too petty, too diversified and too local to get the attention of a Congress hard pressed with more urgent matters,"[51] the federal courts must guard against economic Balkanization on Congress's behalf. This approach prevents state protectionism by appointing federal courts as gatekeepers, which seek to maintain Congress's exclusive power over interstate commerce.

Professors Martin H. Redish and Shane V. Nugent counter that the dormant Commerce Clause spawns judicial activism and "undermines the carefully structured federal balance embodied in the [Constitution's] text."[52] They assert that the Framers intended Congress to guard against economic Balkanization without the dormant Commerce Clause's assistance. The Framers "establishe[d] the intertia *in favor* of the exercise of state power, because the states do not need to overcome any federal barrier before they enact economic legislation."[53] Unless Congress utilizes the Commerce Clause to preempt state law, they argue, the states can seek creative and localized ways to advance their respective economic interests.[54] The dormant Com-

49 Five years after *Gibbons*, in *Willson v. Black Bird Creek*, 27 U.S. (2 Pet.) 245 (1829), Chief Justice Marshall went one step closer to enshrining the dormant Commerce Clause by stating that the challenged state law could not "be considered as repugnant to the [federal] power to regulate commerce in its *dormant* state, or as being in conflict with any law passed on the subject." *Id.* at 252 (emphasis added). Following the 1851 decision of *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), the dormant Commerce Clause became a fixture of the Supreme Court's jurisprudence. *Id.* at 319 (holding that certain categories of interstate commerce are national by nature and require exclusive legislation by Congress); *see also* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 577 (asserting that it was not until *Cooley* "that the [dormant Commerce Clause] became firmly established in the Supreme Court's jurisprudence").

50 Regan, *supra* note 41, at 1125.

51 Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring).

52 *See* Redish & Nugent, *supra* note 49, at 569, 573.

53 *Id.* at 592.

54 *See id.*

merce Clause, however, removes Congress's oversight power to the courts, thus "shift[ing] the political inertia against the states in the regulation of interstate commerce, and leav[ing] federal oversight of state regulation in the hands of the government body traditionally thought to be least responsive to state concerns."[55]

Despite the misgivings of Professors Redish and Nugent, the dormant Commerce Clause remains a fixture of modern Supreme Court jurisprudence. The Court has in recent years adopted a two-step approach to applying the doctrine. First, if a state law facially discriminates against out-of-state commerce, or if it is facially neutral yet has a discriminatory purpose or effect, the Court will apply a strict scrutiny test.[56] As Justice Kennedy stated in *C&A Carbone, Inc. v. Town of Clarkstown*, this test provides that "[d]iscrimination against interstate commerce in favor of local business is *per se* invalid, save in a narrow class of cases in which the [state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."[57] Thus far, the Court's dormant Commerce Clause jurisprudence contains few cases in which a facially discriminatory law has survived this "rigorous scrutiny."[58]

Second, if a state law is nondiscriminatory, but nevertheless burdens interstate commerce, the Court will resort to the balancing test[59] established in *Pike v. Bruce Church, Inc.*[60] Under this test, the Court considers "the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities."[61] The Court will strike down a nondiscriminatory law only if the "burden imposed on [interstate] commerce is clearly excessive in rela-

55 *Id.* at 617; *see also* Eskridge & Ferejohn, *supra* note 33, at 1367 ("[T]he Court will be more prone to strike down state or local, rather than national, regulation on grounds of federalism. This is so in part because the Court is more likely to diverge ideologically from any given state legislature than it is from Congress . . . .").

56 *See* SULLIVAN & GUNTHER, *supra* note 26, at 245.

57 511 U.S. 383, 392 (1994); *see also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571–95 (1997) (striking down a tax scheme that primarily benefited in-state charitable organizations as facially discriminatory); Or. Waste Sys., Inc. v. Or. Dep't of Envtl. Quality, 511 U.S. 93, 98–108 (1994) (deeming facially discriminatory a differential fee for the disposal of out-of-state solid waste).

58 *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 137–52 (1986) (holding that a Maine law banning the importation of out-of-state live baitfish was nevertheless constitutional because the state had no other way to protect its uniquely pristine waters from such baitfish's parasites).

59 *See* SULLIVAN & GUNTHER, *supra* note 26, at 245.

60 397 U.S. 137 (1970).

61 *Id.* at 142.

tion to the putative local benefits."[62] Both the strict scrutiny and balancing tests require the Court to probe the policy justifications underlying state laws in order to determine if a state has unconstitutionally usurped Congress's commerce power.

The doctrine set forth in *C&A Carbone* and *Pike* does not enjoy the unqualified support of Chief Justice Rehnquist, Justice Scalia, and Justice Thomas. These three Justices primarily object to the doctrine because it has no textual basis and enables judicial activism in an arena best left to Congress. For example, Justice Thomas urged the abandonment of the doctrine because it is an "exercise of judicial power in an area for which there is no textual basis."[63] Similarly, Justice Scalia asserted that the balancing test for facially neutral laws "is more like judging whether a particular line is longer than a particular rock is heavy . . . [and is] ill suited to the judicial function."[64] Chief Justice Rehnquist expressed alarm over the dormant Commerce Clause's impact on federalism, criticizing the Court's "messianic insistence on a grim sink-or-swim policy of laissez-faire economics . . . [as] a policy which bodes ill for the values of federalism which have long animated our constitutional jurisprudence."[65]

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62 *Id.*; *see also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470–74 (1981) (rejecting a dormant Commerce Clause challenge to a state law that banned the retail sale of plastic nonreturnable containers but permitted the retail sale of nonplastic nonreturnable containers—a major in-state product); Exxon Corp. v. Governor of Md., 437 U.S. 117, 125–29 (1978) (upholding as nondiscriminatory a state law prohibiting producers or refiners of petroleum from operating retail service stations).

63 *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 612 (1997) (Thomas, J., dissenting). Justice Scalia has also disapproved of the dormant Commerce Clause's lack of textual basis, stating that the "'negative Commerce Clause' . . . is 'negative' not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution." Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (Scalia, J., dissenting).

64 Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., dissenting). Ultimately, Justice Scalia begrudgingly accepts the dormant Commerce Clause, but merely because the "vast number of negative-Commerce Clause cases [have] engender[ed] considerable reliance interests." West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 209 (1994) (Scalia, J., dissenting). Moreover, he only supports using the doctrine in two situations: "(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court." *Id.*

65 *West Lynn Creamery*, 512 U.S. at 217 (Rehnquist, C.J., dissenting); *see also* Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1490 (1995) (positing a theory of federalism in which "the Court should not fetishize the free national market and should approach the [dormant Commerce Clause] cases with a more lenient eye toward state and local police and developmental policies"); Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1325 (1999) (suggesting that the "meaning-

Even if these three dissenting Justices are wrong, and the Framers did intend a dormant Commerce Clause, Congress can still override dormant Commerce Clause rulings. Professor William Cohen asserts that "over a century of Supreme Court decisions establish beyond debate Conress's power to consent to state laws that, absent congressional consent, would be invalid as unreasonable burdens on interstate commerce."[66] Indeed, as early as 1891, the Court ruled that Congress had the power to "divest" certain commercial articles of their interstate character.[67] Over fifty years later, the Court reconfirmed that Congress possesses the "undoubted power to . . . permit the states to regulate commerce in a manner which would otherwise not be permissible."[68] This concept of Congress's ability to carve out exceptions to the dormant Commerce Clause played a crucial role in the history of U.S. liquor regulation.[69] Moreover, it underscores Part IV's discussion of federalism, the dormant Commerce Clause, and direct-shipment laws.

C. *Twenty-First Amendment*

Early in the nation's history, the states enjoyed virtually unfettered authority over alcohol regulation.[70] Beginning with the *License Cases*,[71] the Court held that state police power permitted local liquor regulations, regardless of the Commerce Clause's negative re-

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lessness of federalism" is partly due to the fact that "the dormant Commerce Clause is a commonly invoked constitutional constraint on state action that may be selectively used for ideological ends").

66 William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 387 (1983).

67 *See In re Rahrer*, 140 U.S. 545, 562 (1891); *infra* note 84 and accompanying text.

68 S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945). As recently as 1982, the Court has restated its obligation to set aside the dormant Commerce Clause in the face of Congressional action:

> [W]e only engage in [dormant Commerce Clause] review when Congress has not acted or purported to act. Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck a balance it deems appropriate, the courts are no longer needed to prevent states from burdening commerce . . . . Courts are final arbiters under the Commerce Clause only when Congress has not acted.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154–55 (1982) (citations omitted).

69 *See infra* Part I.C.

70 *See* Sidney J. Spaeth, Comment, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 165 (1991).

71 46 U.S. (5 How.) 504 (1847).

straints.[72] In *Mugler v. Kansas*,[73] for example, the Court upheld a state law banning the production and sale of liquor.[74] The *Mugler* Court expressly recognized that once a state legislature established its preferred method of regulating alcohol, "it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination on that question."[75]

However, a mere year after *Mugler*, the Court backtracked on its traditional recognition of broad state police power over alcohol. Invoking the dormant Commerce Clause, the Court held in *Bowman v. Chicago & Northwestern Railway Co.*[76] that a state's right to regulate liquor under its police power "arises only after the act of transportation has terminated."[77] Shortly thereafter, in *Leisy v. Hardin*,[78] the Court went a step further by holding that imported alcohol constituted an article in interstate commerce so long as it remained inside its original package.[79] Accordingly, enterprising individuals could circumvent their state's temperance laws by importing alcohol and then reselling it to in-state consumers—they merely needed to refrain from removing the liquor's out-of-state packaging.

Recognizing the "original package" rule's absurd impact on local temperance goals, Congress rushed to the states' defense. Within four months of *Leisy*, Congress passed the Wilson Act,[80] which provided that states could regulate imported alcohol "upon arrival" in the same way they regulated locally produced alcohol.[81] Moreover, the Act expressly overruled the Court's "original package" rule.[82] According to the Act's sponsor, Senator James Wilson of Iowa, the Act sought

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72 *See id.* at 579.

73 123 U.S. 623 (1887).

74 *Id.* at 662.

75 *Id.*

76 125 U.S. 465 (1888).

77 *Id.* at 499.

78 135 U.S. 100 (1890).

79 *Id.* at 124–25.

80 Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified as amended at 27 U.S.C. § 121 (2000)).

81 *See id.* The Act reads in relevant part:

> All . . . intoxicating liquors . . . transported into any State or Territory . . . 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.

27 U.S.C. § 121 (2000).

82 *See id.*

to "leave every State in the Union free to determine for itself what its policy shall be in respect of the traffic in intoxicating liquors."[83]

The *In re Rahrer* Court upheld the Wilson Act, acknowledging that Congress could "provide that certain designated subjects of interstate commerce shall be governed by a rule which *divests* them of that character."[84] Professors Noel T. Dowling and F. Morse Hubbard explain this concept of "divesting" as follows: "Congress has power under the commerce clause . . . to divest intoxicating liquor of its interstate character—to strip it of that something which gives it immunity from the operation of state laws—and the liquor, after being thus divested, is subject to state laws."[85] By "divesting" alcohol of its interstate nature "upon arrival" in each state, the Wilson Act granted the states broader regulatory power over liquor importations.

However, the Supreme Court soon allowed alcohol importers to exploit yet another loophole in state temperance regimes: direct mail order shipments from out-of-state producers to in-state consumers. In *Rhodes v. Iowa*,[86] the Court interpreted the Wilson Act's "upon arrival" provision to mean that state liquor laws could not constitutionally apply until the alcohol shipments "arrive[ed] at the point of destination and [were] deliver[ed] there to the consignee."[87] Although Iowa argued that the Act "operate[d] to attach the legislation of the State of Iowa to the goods in question *the moment they reached the state line*,"[88] the Court disagreed. Consequently, states could not regulate alcohol until it reached the homes of consumers, and "[m]ail order booze, of course, flourished."[89] Yet again, the Court used the dormant Commerce Clause to undermine Congress's efforts to enable state alcohol regulation.

Eventually, temperance advocates convinced Congress to close the direct-shipment loophole and fully divest imported alcohol of its interstate character. The Webb-Kenyon Act, officially entitled "An Act divesting intoxicating liquors of their interstate character in certain cases,"[90] provided that "[t]he shipment or transportation [into a state] . . . of any . . . liquor . . . [which] is intended . . . to be received,

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83 21 CONG. REC. 4954 (1890) (statement of Sen. Wilson).

84 *In re* Rahrer, 140 U.S. 545, 562 (1891) (emphasis added).

85 Noel T. Dowling & F. Morse Hubbard, *Divesting an Article of Its Interstate Character: The Doctrine Underlying the Webb-Kenyon Act*, 5 MINN. L. REV. 100, 101 (1921).

86 170 U.S. 412 (1898).

87 *Id.* at 426.

88 *Id.* at 420 (emphasis added).

89 Spaeth, *supra* note 70, at 173.

90 Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. § 122 (2000)).

possessed, sold, or in any manner used . . . in violation of any law of such State . . . is prohibited."[91] Avoiding use of the phrase "upon arrival," the Webb-Kenyon Act revoked the Court's ability to apply the dormant Commerce Clause to state alcohol regulations.[92]

Although President Taft vetoed the Act as an unconstitutional delegation of Congress's exclusive power to regulate interstate commerce,[93] Congress overrode his veto.[94] Subsequently, in *Clark Distilling Co. v. West Maryland Railway Co.*,[95] the Court recognized that the Webb-Kenyon Act "did not simply forbid the introduction of liquor into a State for a prohibited use, but took the protection of interstate commerce away."[96] The Court did not distinguish between discriminatory and nondiscriminatory state laws; rather, it recognized that Congress placed state liquor laws outside the dormant Commerce Clause's ambit.[97]

Unfortunately for states' rights advocates, the Webb-Kenyon Act emboldened temperance proponents at the federal level.[98] In 1919, the Eighteenth Amendment ushered in the temperance era's high-water mark—nationwide prohibition of liquor.[99] This amendment simultaneously constituted the lowest ebb of state power over alcohol regulation. Although the amendment granted Congress and the states "concurrent power to enforce this article by appropriate legislation," it had the practical effect of making "a seemingly invincible states' rights movement toward local regulation of alcohol simply evaporate[ ] in the face of federal regulation."[100] The flaws of this "one-size-fits-all alcohol regulatory regime"[101] soon became evident. Government corruption and gangster bootlegging ran rampant, leading President Harding eventually to admit that federal regulation of liquor had devolved into "nationwide scandal."[102] This deep disdain for the federal government's handling of Prohibition not only hastened the Eighteenth Amendment's demise, but also fueled a desire

91 *Id.*

92 *See id.*

93 *See* 49 CONG. REC. 4291 (1913).

94 27 U.S.C. § 122 (2000).

95 242 U.S. 311 (1917).

96 *Id.* at 325.

97 *See id.* at 324.

98 *See* Spaeth, *supra* note 70, at 174–75.

99 U.S. CONST. amend. XVIII.

100 Spaeth, *supra* note 70, at 175.

101 Matthew J. Patterson, Note, *A Brewing Debate: Alcohol Direct Shipment Laws and the Twenty-First Amendment*, 2002 U. ILL. L. REV. 761, 769.

102 LAURENCE F. SCHMECKEBIER, THE BUREAU OF PROHIBITION 46 (1929).

among "Congress and . . . the states to insist on state control of liquor upon repeal."[103]

Fourteen years after its inception, national prohibition ended with the enactment of the Twenty-First Amendment.[104] Section 1 of the Twenty-First Amendment expressly repeals the Eighteenth Amendment,[105] and Section 3 sets a seven year time limit on ratification.[106] The most crucial provision is Section 2, which declares that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[107] Notably, neither Congress nor the federal government receives any mention. Unlike the Eighteenth Amendment's provision of "concurrent"[108] authority between Congress and the states, Section 2 seems to vest power in the states alone.

Regardless, the history leading up to the Twenty-First Amendment indicates its primary purpose was to shield state liquor regulations from the dormant Commerce Clause. Support for this interpretation derives from the remarkable parity between the language of Section 2 and the Webb-Kenyon Act.[109] While the Webb-Kenyon Act statutorily divested alcohol of its interstate character, the Twenty-First Amendment went a step further by enshrining this sweeping state power in the Constitution's text.[110] In other words, Congress saw a Constitutional amendment as the only way to "insulate . . . state control from either congressional second-thoughts about the Webb-Kenyon Act or a hostile Supreme Court decision striking down the Act."[111]

Nevertheless, some commentators proffer a narrower reading of the amendment's plain language. For example, Professor Lawrence H. Tribe asserts that the amendment's "text actually forbids the private conduct it identifies, rather than conferring power on the States

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103 Spaeth, *supra* note 70, at 180.

104 U.S. CONST. amend XXI.

105 *Id.* § 1.

106 *Id.* § 3.

107 *Id.* § 2.

108 U.S. CONST. amend XVIII, § 2.

109 *See supra* text accompanying note 91.

110 *See* Craig v. Boren, 429 U.S. 190, 205–06 (1976) ("The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes.").

111 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, 304 (2002).

as such."[112] Admittedly, if divorced completely from its historical context, Section 2 could be given such a reading. History, however, makes the correctness of this interpretation unlikely. Roughly twenty years before the Twenty-First Amendment's ratification, the Supreme Court interpreted the Webb-Kenyon Act's language as having completely divested liquor of its interstate character.[113] Accordingly, the amendment's drafters likely believed that their use of remarkably similar language would effectively elevate liquor's divested character to constitutional status. Indeed, Professor Tribe himself acknowledges that the amendment's "evident objective" was to "empower the States, notwithstanding the inhibitions of the Dormant Commerce Clause, to bar transporting or importing intoxicants for local delivery or consumption."[114]

Although plain text and general history make the Twenty-First Amendment's meaning sufficiently clear, the amendment's ratification history also augments a broad interpretation. At first glance, the legislative history underlying the amendment appears ambiguous. Upon closer inspection, however, the legislative history of Senate Joint Resolution 211[115]—the resolution that gave rise to the amendment—supports a sweeping states' rights interpretation. Indeed, the Twenty-First Amendment's sponsor, Senator John J. Blaine, explained that "[w]hen our government was organized and the Constitution of the United States was adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the states . . . the right to regulate commerce respecting a single commodity—namely, intoxicating liquor."[116] Similarly, in his floor statement, Senator William E. Borah of Idaho provided an overview of the previous cases in which the Supreme Court used the dormant Commerce Clause to frustrate Congress's efforts to empower state liquor regulation via federal statute.[117] Wanting to ensure "States rights, the right of the people of the respective States to adopt and enjoy their own

112 Lawrence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 219 (1995).

113 *See supra* notes 90–95 and accompanying text.

114 *See* Tribe, *supra* note 112, at 218. As discussed in Part II.A, Justice Brandeis—whose interpretive vision was not obscured by the passage of over a half-century—had no trouble gleaning this "evident objective" from the amendment's plain text.

115 S.J. Res. 211, 72d Cong., 76 CONG. REC. 4138 (1933).

116 76 CONG. REC. 4141 (1933) (statement of Sen. Blaine).

117 *See id.* at 4170–71 (statement of Sen. Borah).

policies," Senator Borah demanded constitutional protection of the states' regulatory power.[118]

However, other remarks made during the floor debates suggest that Section 2 only sought to protect states that wanted to remain dry after Prohibition's repeal.[119] For example, Senator Blaine commented that Section 2 was included "to assure the so-called dry States against the importation of intoxicating liquor into those States."[120] Similarly, Senator Borah expressed concerns about the post-Prohibition plight of dry states.[121] Yet proponents of this narrow reading overlook the fact that the broader interpretation of Section 2 includes the narrower interpretation. In other words, a constitutional regime in which states have sweeping power to discriminate against out-of-state liquor is also a regime in which dry states have sweeping power to remain dry. Thus, Senators Blaine and Borah could simultaneously endorse both positions. Conversely, if they had intended to advocate solely for a narrow interpretation of Section 2, they would not have concurrently espoused a broad states' rights interpretation.

Moreover, the Senate's rejection of a proposed third section provides additional support for a broad reading of the amendment's language. This controversial provision would have granted the federal government "concurrent" power "to regulate or prohibit the sale of intoxicating liquor to be drunk on the premises where sold."[122] According to Justice Black, who participated in the floor debates as a Senator from Alabama,[123]

> [i]t is clear that the opposition to Section 3 and its elimination from the proposed Amendment rested on the fear, often voiced during

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118 *See id.* at 4172 (statement of Sen. Borah).

119 *See* Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1634 (2000) (arguing that the Senate floor debates on Section 2 "suggest[ ] that the provision was understood simply as protection for dry states"); *cf.* Clayton L. Silvernail, Comment, *Smoke, Mirrors and Myopia: How the States Are Able to Pass Unconstitutional Laws Against the Direct Shipping of Wine in Interstate Commerce*, 44 S. TEX. L. REV. 499, 545 (2003) (asserting that Section 2's "obscure legislative history is no help in ascertaining its true meaning," but nevertheless claiming the provision only sought to provide states the option of remaining dry).

120 76 CONG. REC. 4141 (1933) (statement of Sen. Blaine).

121 *See id.* at 4170–71 (statement of Sen. Borah) (expressing concerns that, without Section 2, "we are asking dry States to rely upon the Congress . . . to maintain indefinitely the Webb-Kenyon law").

122 S.J. Res. 211, 72d Cong., 76 CONG. REC. 4138 (1933).

123 *See* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 353 (1987) (O'Connor, J., dissenting) (noting that Justice Black served in the Senate during the Twenty-First Amendment's ratification).

> the Senate debate, that any grant of power to the Federal government . . . could be used to whittle away the exclusive control over liquor traffic given the States by Section 2."[124]

Those who discredit the amendment's ratification history as ambiguous overlook evidence of an equally important part of the constitutional amendment process: state ratification.[125] Unfortunately, the states did not provide definitive statements indicating the reasoning behind their ratification of the amendment.[126] Yet, their actions following ratification speak louder than any express declaration. Indeed, states immediately utilized their Twenty-First Amendment powers to enact "'bold and drastic experiments in price control,' including price posting, regulation by private associations, and mandatory resale price maintenance contracts."[127] Notably, such regulatory actions were taken by states that did not remain dry following Prohibition. In other words, these states ratified the Twenty-First Amendment with the understanding that it constituted a sweeping grant of states' rights, not a narrowly tailored protection for dry states.

Plain text and history combine to suggest that Congress and the states enacted the Twenty-First Amendment in an effort to fundamentally shift the traditional federalist balance of liquor regulation in the states' favor. As the Supreme Court repeatedly asserted, Congress can empower the states to regulate interstate commerce in ways that would otherwise violate the dormant Commerce Clause.[128] Following the nation's dismal experience under Prohibition, Congress conceded that effective liquor control required local support and local solutions.[129] Accordingly, Congress proposed the Twenty-First Amendment as a "liquor regulation" exception to the dormant Commerce

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124 Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 337 (1964) (Black, J., dissenting).

125 Indeed, under Article V of the Constitution, the states possess greater power to amend the Constitution than Congress. First, Congress cannot single-handedly ratify constitutional amendments; rather, it can only propose amendments, which three-fourths of the states must then ratify. *See* U.S. CONST. art. V. Second, even if Congress initially refused to propose amendments, the legislatures of two-thirds of the states can force Congress to "call a Convention for proposing Amendments." *Id.*

126 *See* Spaeth, *supra* note 70, at 181.

127 *324 Liquor Corp.*, 479 U.S. at 357 (O'Connor, J., dissenting) (quoting Joz de Ganahl, *Trade Practice and Price Control in the Alcoholic Beverage Industry*, 7 LAW & CONTEMP. PROBS. 665, 680 (1940)).

128 *See supra* notes 66–68 and accompanying text.

129 *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Clause. The states ratified Congress's proposal and immediately enacted sweeping laws under their newfound authority.

II. STITCHING TOGETHER THE SUPREME COURT'S JURISPRUDENTIAL PATCHWORK

Given the Court's pre-1933 eagerness to strike down state alcohol laws on dormant Commerce Clause grounds, alcohol producers immediately claimed that the post-1933 liquor regulations unconstitutionally burdened interstate commerce. This Part charts such dormant Commerce Clause suits through to the Supreme Court's most recent rulings at the time of writing.[130]

Starting with its 1936 decision in *State Board of Equalization v. Young's Market Co.*,[131] the Court did not strike down a discriminatory state liquor law on dormant Commerce Clause grounds for nearly a half-century. However, the 1984 case of *Bacchus* constituted a resurgence in judicial activism via the dormant Commerce Clause. The Court yet again negated Congress's and the states' joint effort to establish a federal balance in which the dormant Commerce Clause does not apply to state liquor regulations.

A. Sweeping State Power: 1936–1984

1. Justice Brandeis and Plain Language: The *Young's Market* Line of Cases

Initially, the Supreme Court held that the Twenty-First Amendment granted states sweeping powers over alcohol importations. In *Young's Market*, the Court considered a dormant Commerce Clause challenge to state alcohol regulations for the first time since Prohibition's collapse.[132] A group of California wholesalers wished to import

130 Most of the previous scholarly works on state direct-shipment laws include extensive discussion of various Twenty-First Amendment cases that do not involve the dormant Commerce Clause. Admittedly, this method has its merits. The Court peppered its landmark decision of *Bacchus*—a case dealing exclusively with the dormant Commerce Clause and the Twenty-First Amendment—with dicta from Twenty-First Amendment cases that had nothing to do with the dormant Commerce Clause. Accordingly, analysis of the Court's overall Twenty-First Amendment jurisprudence can prove helpful in putting the dormant Commerce Clause cases in context. At the same time, however, this broad approach risks diluting the dormant Commerce Clause's unique role as the driving force behind the Twenty-First Amendment's ratification. This Note focuses almost exclusively on cases that consider both the Twenty-First Amendment and the dormant Commerce Clause.

131 299 U.S. 59 (1936).

132 *See id.* at 59.

beer from Missouri and Wisconsin; in order to do so, however, they had to pay a $500 importation license fee.[133] Given that domestic beer producers did not have to purchase this $500 license to ship their products within the state, the importers claimed that California's mandatory importation license violated the dormant Commerce Clause.[134] The wholesalers urged the Court to construe the amendment to mean that "[t]he state may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms."[135]

Writing for a unanimous Court, Justice Brandeis bluntly rejected the wholesalers' argument. He asserted that their interpretation "would involve not a construction of the amendment, but a rewriting of it."[136] Because the amendment's plain language "confered upon the state the power to forbid all importations which do not comply with the conditions which it prescribes,"[137] the Court refused to consider the wholesalers' argument that the amendment's history suggested a narrow interpretation.[138] Moreover, the unanimous Court dismissed the wholesalers' secondary argument that "a state may not regulate importations except for the purpose of protecting the public health, safety, or morals; and that the importer's license fee was not imposed to that end."[139] Justice Brandeis countered the wholesalers' claim with a rhetorical question: "If [a state] may permit the domestic

133 *Id.* at 60–61.

134 *Id.* at 61. Interestingly, Justice Brandeis ruled that California's licensing scheme did not "present a question of discrimination prohibited by the commerce clause." *Id.* at 62. Rather, he regarded the importation fee as raising constitutional concerns because it imposed "a direct burden on interstate commerce." *Id.* Although Justice Brandeis refrained from treating the state licensing laws as discriminatory, it is difficult to view them in any other way. To bring out-of-state beer into California, importers had to pay an extra $500—a payment not required to obtain domestically produced beer. Similarly, the Hawaiian law considered in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), placed a twenty percent excise tax on imported liquor but exempted certain domestic alcohol. *See id.* at 265. The *Bacchus* Court deemed Hawaii's tax scheme facially discriminatory. *Id.* at 268. Thus, although the Court's characterization of the challenged laws in *Young's Market* and *Bacchus* may have differed, both legal regimes had the same discriminatory impact on foreign liquor. Regardless, Justice Brandeis suggested in dicta that the Twenty-First Amendment protected even discriminatory state liquor regulations. *See infra* note 140 and accompanying text.

135 *Young's Market*, 299 U.S. at 62.

136 *Id.*

137 *Id.*

138 *See id.*

139 *Id.* at 63.

manufacture of beer and exclude all made without the state, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee?"[140] In other words, Justice Brandeis viewed the amendment as granting states not only the power to *exclude* foreign liquor, but also the power to *discriminate* against foreign liquor.[141]

Three years later, the Court upheld *Young's Market* in *Indianapolis Brewing Co. v. Liquor Control Commission*[142] and *Ziffrin, Inc. v. Reeves*.[143] Justice Brandeis again wrote the majority opinion in *Indianapolis Brewing*, which upheld a Michigan law that prohibited in-state liquor retailers from selling beer produced in states that discriminated against Michigan-produced beer.[144] Basing its ruling on *Young's Market*, the Court reasoned that "[s]ince the Twenty-first Amendment . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."[145]

The *Ziffrin* case involved a Kentucky law that sought to "channelize the traffic [of alcohol], minimize the commonly attendant evils [and] also to facilitate the collection of revenue."[146] Upholding the law, the Court found Kentucky's liquor regulation regime "clearly appropriate."[147] The Court not only reaffirmed the states' sweeping Twenty-First Amendment power to inhibit alcohol commerce, but also sanctioned the states' ability to "adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them."[148] Thus, the trilogy of *Young's Market*, *Indianapolis Brewing*, and *Ziffrin* stands for the proposition that the Twenty-First

140 *Id.* Notably, laws that "subject the foreign article to a heavy importation fee" are the same as the Hawaiian importation tax that was challenged—and overturned—in *Bacchus*. *See infra* Part II.B.

141 Two years later, Justice Brandeis again wrote for a unanimous Court in upholding a Minnesota statute that "clearly discriminate[d] in favor of liquor processed within the State as against liquor completely processed elsewhere." Mahoney v. Joseph Triner Corp., 304 U.S. 401, 403 (1938). Although *Mahoney* involved the Equal Protection Clause, *id.* at 402, and not the dormant Commerce Clause, it confirmed that the Twenty-First Amendment empowered states to discriminate against out-of-state liquor.

142 305 U.S. 391 (1939).

143 308 U.S. 132 (1939).

144 *Indianapolis Brewing*, 305 U.S. at 392, 394.

145 *Id.* at 394.

146 *Ziffrin*, 308 U.S. at 134.

147 *Id.* at 139.

148 *Id.* at 138.

Amendment empowers states to enact even "blatantly discriminatory statutes."[149]

2. A Glimpse of Things to Come: *Duckworth* and *Carter*

The *Young's Market* line of cases seemed to suggest that the Twenty-First Amendment constituted the states' primary source of power over the transportation and importation of liquor. However, the 1940s witnessed a reversion to the Court's pre-1888 preference for upholding state alcohol regulations as a valid exercise of police power.[150] In both *Duckworth v. Arkansas*[151] and *Carter v. Virginia*,[152] the Court considered challenges to laws requiring people to secure permits before transporting alcohol through a state. Because the liquor was not intended for "delivery or use" within the state, the Court in both cases reasoned that the Twenty-First Amendment did not apply.[153] Both decisions nevertheless upheld the state permit requirements because they fell within the states' police powers.[154] Yet, in both cases, the Court reserved the power to strike down such state police power regulations if they extended beyond "reasonable" bounds.[155]

In *Duckworth*, Justice Jackson warned in a concurring opinion that "[i]f the Twenty-first Amendment is not to be resorted to for the decision of liquor cases, it is on its way to becoming another 'almost for-

149 Spaeth, *supra* note 70, at 183.

150 *See supra* notes 70–75 and accompanying text.

151 314 U.S. 390 (1941).

152 321 U.S. 131 (1944).

153 *See id.* at 135 (stating that because "the intoxicating liquors in question are intended for continuous shipment through [the state] . . . a different question arises from those considered under the Twenty-First Amendment, where transportation or importation into a state for delivery or use therein was prohibited"); *Duckworth*, 314 U.S. at 392 (asserting that "[w]e have no occasion to decide whether the Arkansas statute, when applied to transportation passing through that state for delivery or use in another, derives support from the Twenty-first Amendment").

154 *See Carter*, 321 U.S. at 135 ("The commerce power of Congress [was] not invaded by such police regulations as Virginia has here enforced."); *Duckworth*, 314 U.S. at 394 ("While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern . . . .").

155 *See Carter*, 321 U.S. at 134 (noting the appellants' assertion that state police powers are "limited by the Commerce Clause to regulations reasonably necessary to enforce its liquor laws"); *Duckworth*, 314 U.S. at 396 (providing that state police power regulations on alcohol do not violate the Commerce Clause so long as they are "reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state").

gotten' clause of the Constitution."[156] Rather than rely on state police power over liquor, Justice Jackson argued that the majority should have upheld the state permit requirements because the Twenty-First Amendment "obviously gives to state law a much greater control over interstate liquor traffic than over commerce in any other commodity."[157] By relying instead on reasonable state police power, Justice Jackson asserted, the majority ignored the Twenty-First Amendment's very purpose:

> The people of the United States knew that liquor is a lawlessness unto itself. . . . They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's "tendency to get out of legal bounds." It was their unsatisfactory experience with that method that resulted in giving liquor an exclusive place in constitutional law as a commodity whose transportation is governed by a special constitutional provision.[158]

Justices Black and Frankfurter echoed Justice Jackson's concerns in concurring opinions in *Carter*. In his concurring opinion, Justice Black (who served in the Senate during the debates surrounding the Twenty-First Amendment)[159] stated that he was "not sure that statutes regulating intoxicating liquor should ever be invalidated by this Court under the Commerce Clause except where they conflict with valid federal statutes."[160] Relying on *Young's Market*, *Indianapolis Brewing*, and *Ziffrin*, Justice Black concluded that "local, not national, regulation of the liquor traffic is now the general Constitutional policy."[161]

Similarly, Justice Frankfurter asserted that questions about state power over alcohol regulation were "peculiarly political, that is legislative, questions which were not meant by the Twenty-first Amendment to continue to be the fruitful apple of judicial discord, as they were

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156 *Duckworth*, 314 U.S. at 399 (Jackson, J., concurring).

157 *Id.* (Jackson, J., concurring).

158 *Id.* at 398–99 (Jackson, J., concurring). Justice Frankfurter pursued a strikingly similar line of reasoning in *Carter*:

> It is now suggested that a State must keep within "the limits of reasonable necessity" and that this Court must judge whether or not [the state] has adopted "regulations reasonably necessary to enforce its local liquor laws." Such canons of adjudication open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which lead first to the Eighteenth and then to the Twenty-first Amendment.

Carter, 321 U.S. at 142 (Frankfurter, J., concurring).

159 *See supra* note 123 and accompanying text.

160 *Carter*, 321 U.S. at 138 (Black, J., concurring).

161 *Id.* (Black, J., concurring).

before the Twenty-first Amendment."[162] Because the amendment provided a "general Constitutional policy" in favor of local regulation, the three concurring Justices wisely urged deference to the states' policy judgments.

Conversely, both the *Duckworth* and *Carter* Courts "brushe[d] aside the liquor provisions of the Twenty-first Amendment"[163] in favor of their own case law regarding state police power. Unlike *Leisy* and *Rhodes*,[164] in which the Court used the dormant Commerce Clause to displace state temperance regulations, these decisions did not instantly abridge state power over liquor. Nevertheless, just like their nineteenth century predecessors, these cases made state liquor regulations the "fruitful apple of judicial discord"[165] and created the likelihood of a reversion to judicial intervention.[166]

Throughout the roughly forty years following *Duckworth* and *Carter*, the Court never questioned the states' power to enact discrimi-

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162 *Id.* at 142 (Frankfurter, J., concurring).

163 *Duckworth*, 314 U.S. at 399 (Jackson, J., concurring).

164 *See supra* Part I.C.

165 *Carter*, 321 U.S. at 142; *see* text accompanying note 158. Placing *Duckworth* and *Carter* in broader historical context sheds additional light on the Court's eagerness to recognize broad state police powers over liquor. In 1937, a mere four years before *Duckworth*, the Court overturned *Lochner v. New York*, 198 U.S. 45 (1905), in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). During *Lochner*'s thirty-two year reign, the Court struck down roughly two hundred state laws as violating the Fourteenth Amendment's Due Process Clause. CHEMERINSKY, *supra* note 36, at 592. The *West Coast Hotel* Court, on the other hand, "unequivocally declared . . . that government could regulate to serve any legitimate purpose, and that the judiciary would defer to the legislature's choices so long as they were reasonable." *Id.* at 600.

The Court's decisions in *Duckworth* and *Carter* coincided with the post-*Lochner* trend toward respecting the reasonable policy decisions of state legislators. However, as Justices Jackson, Black, and Frankfurter pointed out, the Court's failure to utilize the Twenty-First Amendment actually increased the possibility that courts would strike down state liquor laws. These three Justices regarded the Twenty-First Amendment as requiring greater deference to state alcohol regulations than even the early post-*Lochner* Court was willing to provide.

166 In 1958, the Court considered *Gordon v. Texas*, 355 U.S. 369 (1958) (per curiam), in which the defendant had been convicted of illegally importing liquor without obtaining a permit or paying taxes. *See* Gordon v. State, 310 S.W.2d 328, 329 (Tex. Crim. App. 1956). The Court upheld the challenged portions of Texas's liquor regulatory regime with a single sentence: "Twenty-first Amendment to the Constitution of the United States." *Gordon*, 355 U.S. at 369. Curiously, the Court also cited *Carter* to support its brief ruling. *Id.* As discussed above, *Carter* relied on state police power doctrine to uphold the challenged law, not the Twenty-First Amendment. Thus, *Gordon* seems to constitute a belated nod of approval to Justices Black and Frankfurter's concurring opinions in *Carter* that the Court could have equally based its ruling on the Twenty-First Amendment.

natory liquor laws under the Twenty-First Amendment.[167] During this same period, however, the Court took various steps to whittle away the states' Twenty-First Amendment powers in non-dormant Commerce Clause cases. Notably, in a trilogy of decisions issued between 1964 and 1984, the Court declared that the Twenty-First Amendment had not stripped Congress of its concurrent power to regulate liquor commerce.[168] None of these opinions threatened the Twenty-First Amendment's preeminence over the dormant Commerce Clause. In fact, each case paid tribute to the *Young's Market* line of cases.[169] Nevertheless, when *Bacchus*[170] reached the Supreme Court in 1984, the Court resuscitated its century-old penchant for striking down state liquor regulations under the dormant Commerce Clause.[171]

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167 Indeed, in the 1966 case of *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), the Court once again confirmed the states' sweeping regulatory powers under the Twenty-First Amendment. *Seagram* involved a dormant Commerce Clause challenge to a New York price-affirmation statute, which required liquor producers to affirm that their New York prices were no higher than the lowest price offered elsewhere in the country during the preceding month. *Id.* at 39–40. The Court held that the "mere fact that [New York's price-affirmation statute] is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute." *Id.* at 43. Beginning in 1983, the Court has subsequently narrowed the states' power to require price affirmation in a series of three decisions. *See infra* notes 171 and 195.

168 *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).

169 *See Capital Cities*, 467 U.S. at 712 (noting that *Young's Market* stands for the proposition that Section 2 "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause"); *Midcal*, 445 U.S. at 107 (pointing to the *Young's Market* line of cases in confirming that "each State holds great powers over the importation of liquor from other jurisdictions"); *Hostetter*, 377 U.S. at 330 (highlighting the *Young's Market* line of cases in asserting that the Twenty-First Amendment renders a state "totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders").

170 Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984).

171 It might be argued that the Supreme Court quietly presaged the dormant Commerce Clause's imminent resurgence in *Healy v. United States Brewers Ass'n* (*Healy I*), 464 U.S. 909 (1983). Decided roughly one year before *Bacchus*, *Healy I* revolved around a Connecticut price-affirmation statute, which sought to prevent beer producers from selling below Connecticut wholesaler prices to any wholesaler in a neighboring state. *See* U.S. Brewers Ass'n, Inc. v. Healy, 692 F.2d 275, 276 (2d Cir. 1982). The Second Circuit struck down Connecticut's price-affirmation statute as an unconstitutional burden on interstate commerce. *Id.* at 284. Based on the Supreme Court's ruling in *Seagram*, the Second circuit acknowledged that Connecticut could require a beer brewer to "set its Connecticut prices at the lowest levels it [chose] to set in surrounding states." *Id.* at 283–84. However, the Second Circuit determined that the

B. Bacchus *and the Full-Fledged Return of Judicial Activism: 1984–Present*

In *Bacchus*, out-of-state liquor wholesalers challenged a Hawaiian law that imposed a twenty percent excise tax on wholesale alcohol sales.[172] Specifically, the wholesalers protested the law's exemption of Hawaiian-produced okolehao[173] and fruit wine from the excise tax. Hawaii's legislature enacted this exemption with the express hope of encouraging development of the state's liquor industry.[174] The wholesalers argued that Hawaii's tax regime violated the dormant Commerce Clause by favoring certain in-state beverages.[175]

From the opening lines of its analysis, the Court turned *Young's Market* on its head. In *Young's Market*, the Court began its examination by first asking whether the challenged law fell within the state's broad Twenty-First Amendment powers.[176] Once the Court determined that the state did possess the requisite regulatory power, it did not explore whether the law violated the dormant Commerce Clause. The *Bacchus* Court, on the other hand, began by subjecting the Hawaiian tax exemption to the modern two-prong dormant Commerce Clause analysis.[177] Finding that "the purpose of the exemption was to aid Hawaiian industry,"[178] the Court deemed the exemption "clearly discriminatory."[179] Accordingly, Hawaii did not deserve "entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce."[180]

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state could not pursue the "far more drastic, and clearly excessive, method of controlling minimum prices at which liquor may be sold outside of its own territory." *Id.* at 284. In other words, the Second Circuit ruled that Connecticut's price-affirmation statute did not fall within the Twenty-First Amendment's protection of state laws pertaining to the "delivery or use [of liquor] therein." U.S. CONST. amend. XXI, § 2.

The Supreme Court summarily affirmed the Second Circuit's decision. *Healy I*, 464 U.S. at 909. Although the Court refrained from providing any reasoning, it soon elaborated on the unconstitutionality of price-affirmation statutes shortly after *Bacchus*. *See infra* note 195. Regardless, *Healy I* signaled that state regulatory power under the Twenty-First Amendment was not invulnerable to dormant Commerce Clause challenge.

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

173 According to the Court, "[o]kolehao is a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii." *Id.*

174 *Id.*

175 *Id.* at 266.

176 State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936).

177 *Bacchus*, 468 U.S. at 270. For an overview of the Court's strict scrutiny analysis, see *supra* notes 56–58 and accompanying text.

178 *Bacchus*, 468 U.S. at 271.

179 *Id.*

180 *Id.* at 270.

Having ruled that Hawaii's tax exemption "violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products,"[181] the Court then asked whether the exemption was "saved by the Twenty-first Amendment to the Constitution."[182] Turning to a balancing test, the Court inquired "whether the principles underlying the Twenty-first Amendment [were] sufficiently implicated by the [tax] exemption . . . to outweigh the Commerce Clause principles that would otherwise be offended."[183]

The Court did not analyze the amendment's text and dismissed the provision's ratification history as "obscur[e]."[184] Despite its professed "[d]oubts about the scope of the Amendment's authorization," the Court concluded that "[t]he *central purpose* of the provision was not to empower States to favor local liquor industries by erecting barriers to competition."[185] Accordingly, the Court struck down Hawaii's tax exemption "because [it] violate[d] a central tenet of the Commerce Clause but [was] not supported by any *clear concern* of the Twenty-first Amendment."[186] While the Twenty-First Amendment's "central purposes" and "clear concerns" played a crucial role in the Court's decision, the Court did not define these novel terms. Moreover, the Court reached its holding without ever expressly overruling *Young's Market*; rather, it jettisoned stare decisis by relegating the case to a footnote.[187]

Justice Stevens, joined by then Justice Rehnquist and Justice O'Connor, dissented on the grounds that "the wholesalers' Commerce Clause claim [was] squarely foreclosed by the Twenty-first Amendment."[188] According to Justice Stevens, the majority adopted a "totally novel approach to the Twenty-first Amendment."[189] In his estimation, the proper question "is not one of 'deference,' nor one of 'central purposes'; the question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution."[190]

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181 *Id.* at 273.

182 *Id.* at 274.

183 *Id.* at 275.

184 *Id.* at 274.

185 *Id.* at 276 (emphasis added).

186 *Id.* at 276 (emphasis added).

187 *Id.* at 274 n.13.

188 *Id.* at 279 (Stevens, J., dissenting).

189 *Id.* at 286–87 (Stevens, J., dissenting).

190 *Id.* at 287 (Stevens, J., dissenting).

Looking first to the text, Justice Stevens read the amendment to expressly authorize Hawaii's tax exemption. Because the tax applied to the sale of liquor intended for consumption in Hawaii, it "[fell] squarely within the protection given to Hawaii by the . . . Twenty-first Amendment, which expressly mentions 'delivery or use therein.'"[191] Justice Stevens then reviewed the events leading up to the Twenty-First Amendment's enactment, highlighting Congress's efforts to overturn *Leisy* by divesting liquor of its interstate character.[192] Moreover, he retrieved Justice Brandeis's *Young's Market* opinion from the majority's footnotes and pointed out the Court's previous adherence to a broad interpretation of the amendment.[193] Ultimately, Justice Stevens concluded:

> If the State has the constitutional power to create a total local monopoly—thereby imposing the most severe form of discrimination on competing products originating elsewhere—I believe it may also engage in a less extreme form of discrimination that merely provides a special benefit . . . for locally produced alcoholic beverages.[194]

Unlike Justice Stevens's bright-line approach—which would have respected text, history, and stare decisis—the majority opinion reverted to its pre-Webb-Kenyon Act judicial activism. Ignoring the amendment's text, eschewing prior case law, and dismissing the provision's history, the Court opted for a vague balancing test that enabled broad judicial discretion. By applying its dormant Commerce Clause analysis first, the Court placed a presumption of invalidity on the challenged state law—a presumption states can only overcome by wading into a murky realm of "central purposes" and "clear concerns."[195]

This failure to specify the Twenty-First Amendment's "central purposes" or "clear concerns" rendered *Bacchus* a blank check for fu-

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191 *Id.* at 280 (Stevens, J., dissenting).

192 *Id.* at 280–81 (Stevens, J., dissenting).

193 *Id.* at 282 (Stevens, J., dissenting).

194 *Id.* at 286 (Stevens, J., dissenting).

195 Just as *Bacchus* brushed aside *Young's Market*, two post-*Bacchus* cases dealing with price-affirmation statutes obliterated *Seagram*, *see supra* note 167 and accompanying text, without expressly overruling its holding. First, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court struck down a New York price-affirmation statute because it had "the 'practical effect' [of] control[ling] liquor prices in other States." *Id.* at 583 (quoting S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 775 (1945)). Similarly, in *Healy v. Beer Institute*, 491 U.S. 324 (1989), the Court overturned a Connecticut price-affirmation law because "the Commerce Clause . . . precludes application of a state statute to commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the State." *Id.* at 336 (citations omitted).

ture judicial activism. The *Bacchus* Court hinted that "combat[ing] the perceived evils of an unrestricted traffic in liquor"[196] constituted at least one of the amendment's "central purposes." On the other hand, the Court held that "mere economic protectionism"[197] could not justify discriminatory state regulation. More recently, in *North Dakota v. United States*,[198] the Court implied that "promoting temperance, ensuring orderly market conditions, and raising revenue"[199] might pass muster as legitimate exercises of state power under the Twenty-First Amendment. However, *North Dakota* revolved around the Supremacy Clause, not the dormant Commerce Clause.[200] Because a precise definition of "central purposes" and "clear concerns" remains elusive, the appellate courts have drastically diverged in their approaches to applying *Bacchus* to state direct-shipment laws.[201]

III. NEW WINE: STATE DIRECT-SHIPMENT LAWS AND THE CIRCUIT COURTS

A. The Uncorked Controversy of State Direct-Shipment Laws

To be precise, state direct-shipment laws themselves do not constitute "new wine"; rather, many such laws have been on the books since shortly after the Twenty-First Amendment's ratification.[202] Following Prohibition's demise, the vast majority of states implemented a three-tier regulatory system whereby alcohol producers (tier one) sell their products to state-licensed wholesalers (tier two), who in turn sell the goods to state-licensed retailers (tier three), who may then sell to consumers.[203] States justify this three-tier regime on the grounds that it ensures the orderly collection of taxes, prevents the vertical and horizontal integration of the state alcohol market, and helps fulfill temperance goals.[204]

Despite direct-shipment laws' vintage status, the advent of e-commerce and several recent developments in the wine industry have

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

197 *Id.*

198 495 U.S. 423 (1990).

199 *Id.* at 432.

200 *Id.* at 426.

201 *See infra* Part III.

202 *See* Ann Faircloth, *The Crackdown on Booze-of-the-Month Clubs: Mail-Order Wine Buyers, Beware!*, FORTUNE, Feb. 16, 1998, at 46.

203 Russ Miller, Note, *The Wine Is in the Mail: The Twenty-First Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND. L. REV. 2495, 2497 (2001).

204 *See* Susan Lorde Martin, *Changing the Law: Update from the Wine War*, 17 J.L. & POL. 63, 64 (2001); Patterson, *supra* note 101, at 763.

combined to make the laws a celebrated new legal issue. The 1990s witnessed a stunning boom in the number of wineries and the volume of wine sales. Between 1995 and 2000, the number of wineries nationwide increased by fourteen percent.[205] The decade also experienced a 1579% increase in the sale of wines priced greater than fifteen dollars.[206]

Generally, however, only the major labels like Kendall-Jackson possess the sales volumes capable of profitably penetrating the three-tier system in all fifty states.[207] Many connoisseurs can obtain bottles of their favorite boutique wines only by traveling to out-of-state wineries or having the wine shipped directly to their homes.[208] Thanks to the rise of e-commerce, consumers can now order wine from all over the world with the click of a mouse.[209] To salvage their three-tier systems—and the significant amount of tax revenue they generate—states began aggressively enforcing direct-shipment laws.[210]

The myriad direct-shipment laws adopted at the state level provide a prime example of federalism in action. By turning alcohol regulation over to the states, the Twenty-First Amendment encouraged a diverse legal regime that tailors itself to local attitudes about alcohol. According to the Wine Institute (an organization that represents the interests of California wineries), direct-shipment laws fall into three broad categories:[211] (1) twenty-four states prohibit direct shipments of wine, and four of those states make direct-shipment violations a fel-

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205 Martin, *supra* note 17, at 2.

206 Andrew J. Kozusko III, Note, *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, 77–78 (2000). In 1999, Chase Bailey, a former Cisco Systems executive, made his contribution to the 1990s wine boom by purchasing one large bottle of 1992 Screaming Eagle Cabernet Sauvignon for $500,000 at an auction. *Id.* at 75–76, 75 n.3.

207 *See* Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 364 (1999); Stephanie Ahrens Waller, Note, Bacchus *Rules: Recent Court Decisions on the Direct Shipment of Wine*, 40 HOUS. L. REV. 1111, 1114 (2003).

208 *See* Shanker, *supra* note 207, at 367.

209 In fact, "a Solomon Smith Barney study suggests that internet wine sales will go from under $100 million in 1998 to nearly $3 billion by 2005." Martin, *supra* note 17, at 8–9 (citing *Review & Outlook: America's Musty Wine Laws*, WALL ST. J., June 1, 2000, at A22).

210 Shanker, *supra* note 207, at 356.

211 *See* Wine Institute, *Direct Shipment Laws by State for Wineries*, *at* http://www.wineinstitute.org/shipwine/analysis/intro_analysis.htm (last visited May 8, 2004). Other commentators divide direct-shipment laws into roughly the same three categories. *See* Douglass, *supra* note 119, at 1648–49; Shanker, *supra* note 207, at 356–57.

ony;[212] (2) fourteen states place various limits on direct shipments, such as mandating special permits, imposing particular tax deadlines, and requiring consumers to place their direct-shipment orders "on-site" at the out-of-state winery;[213] and (3) thirteen "reciprocity" states allow direct-shipments only from states that extend the same courtesy to their own wineries.[214] The Wine Institute's categorization system demonstrates the vast array of approaches states have taken to address the direct-shipment issue.

The most controversial direct-shipment laws require wineries to obtain permits to ship their products directly to consumers, yet allow only local residents to apply for these permits. Faced with such discrimination, oenophiles and small out-of-state wineries challenged direct-shipment laws in the courts.[215] On one side, states and wholesalers contend that direct-shipment laws are crucial to maintaining orderly market conditions, collecting taxes, and preventing minors from obtaining alcohol over the Internet.[216] Wine producers and consumers counter that the desire for orderly market conditions and tax collection cannot run afoul of the dormant Commerce Clause.[217] Moreover, they contend that less onerous measures exist to prevent underage drinkers from abusing direct shipping.[218] This Note now turns to the six circuit court decisions on the issue.

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212 *See* Wine Institute, *supra* note 211 (grouping Alabama, Arkansas, Connecticut, Delaware, Florida, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and Vermont under the heading "Direct-to-Consumer Shipment Prohibited," and denoting Florida, Kentucky, Tennessee, and Utah as "felony for winery to direct ship" states).

213 *See id.* (including Alaska, Arizona, Georgia, Louisiana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Rhode Island, South Carolina, Virginia, Washington, D.C., and Wyoming under the category of "Limited Direct Shipping & Permit States").

214 *See id.* (categorizing California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin as "Reciprocity" states).

215 *See infra* Part III.B.

216 *See* Martin, *supra* note 17, at 5–6.

217 *See id.* at 8.

218 *See id.* at 37–39 (discussing a model direct-shipment law that requires common carriers who deliver alcohol to check the identification and obtain the signature of a person age twenty-one years or older at the delivery address); Shanker, *supra* note 207, at 358–59 (asserting that "[a]ccess by minors can . . . be prevented by protective mechanisms, such as requiring adult signatures upon delivery and warning labels on packages").

B. *Life After* Bacchus*: Circuit Court Decisions on the Direct-Shipment Issue*

Thus far, six circuit courts have weighed in on the constitutionality of direct-shipment laws. Of these six, two upheld the challenged direct-shipment laws;[219] three struck down the discriminatory state laws for violating the dormant Commerce Clause;[220] and one remanded to the district court for further evidence.[221] These cases reveal that *Bacchus*'s vague two-prong test has generated confusion, inconsistency, and an even greater depletion of the states' regulatory power over alcohol.

1. Dismissing Two-Prong Tests and Upholding Direct-Shipment Laws: *Bridenbaugh* (Seventh Circuit) and *Swedenburg* (Second Circuit)

Despite *Bacchus*'s centrality to the Supreme Court's Twenty-First Amendment and dormant Commerce Clause jurisprudence, both the Seventh and Second Circuits refused to utilize the case's two-prong test. The Seventh Circuit was the first appellate court to address state direct-shipment laws in *Bridenbaugh v. Freeman-Wilson*.[222] *Bridenbaugh* involved an Indiana law requiring out-of-state wine sellers to obtain a wholesaler license before importing wine directly to in-state consumers.[223] The plaintiffs, a group of consumers, challenged the law as a violation of the dormant Commerce Clause.[224] Although Indiana only granted these permits to state residents—a seemingly discriminatory practice—the plaintiffs did not attack this provision.[225] Rather, their claim "concerned only . . . direct shipments from out-of-state sellers who lack[ed] *and* [*did*] *not want* Indiana permits."[226]

Judge Easterbrook began his analysis in a fashion true to the *Young's Market* line of cases. Acknowledging that both parties' briefs focused on the Twenty-First Amendment's "core purposes," the court asserted that "our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its

219 Swedenburg v. Kelly, 358 F.3d 223, 237 (2d Cir. 2004); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 854 (7th Cir. 2000).

220 Heald v. Engler, 342 F.3d 517, 527 (6th Cir. 2003); Dickerson v. Bailey, 336 F.3d 388, 409–10 (5th Cir. 2003); Beskind v. Easley, 325 F.3d 506, 517 (4th Cir. 2003).

221 Bainbridge v. Turner, 311 F.3d 1104, 1116 (11th Cir. 2002).

222 227 F.3d at 848.

223 *Id.* at 849.

224 *Id.*

225 *Id.* at 854.

226 *Id.*

drafters. Objective indicators supply the context for § 2; suppositions about mental processes are unilluminating."[227] Judge Easterbrook then conducted a historical overview of the events leading up to the Twenty-First Amendment's enactment.[228] Drawing on this history, he concluded, "[n]o longer may the dormant Commerce Clause be read to protect interstate shipments of liquor from regulation: § 2 speaks directly to these shipments."[229] In other words, up to this point in the opinion, Judge Eaterbrook seemed precariously close to completely ignoring *Bacchus*.

However, Judge Easterbrook then summarized the Supreme Court's Twenty-First Amendment jurisprudence as holding that "the greater power to forbid imports does not imply the lesser power to allow imports on discriminatory terms."[230] Because Indiana insisted "*every* drop of liquor pass through its three-tier system and be subjected to taxation,"[231] the court found no such discrimination and upheld the challenged provision of Indiana's direct-shipment law.[232]

Based on the Seventh Circuit's approach, any law discriminating against foreign liquor is unconstitutional—end of analysis. The Twenty-First Amendment's "core concerns" do not apply and cannot save an otherwise discriminatory law. Thus, paradoxically, even though it upheld Indiana's law, and largely ignored the Supreme

227 *Id.* at 851.

228 *Id.* at 851–53.

229 *Id.* at 853.

230 *Id.*

231 *Id.*

232 *Id.* at 854. Before taking the bench, Judge Easterbrook represented the liquor importers and succeeded in overturning Hawaii's liquor-tax scheme in *Bacchus*. Interestingly, Judge Easterbrook's *Bridenbaugh* opinion not only eschews the Supreme Court's two-prong test from *Bacchus*, it also conflicts in certain respects with the arguments he made before the Supreme Court in that case. Just as Judge Easterbrook determined in *Bridenbaugh* that the Twenty-First Amendment did not permit discrimination against out-of-state commerce, his clients' brief in *Bacchus* asserted that "Section 2 . . . provides no basis for discriminatory state taxes." Brief for Appellant at 29, Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984) (No. 82-1565). In this respect, his *Bridenbaugh* opinion and the *Bacchus* brief are entirely consistent.

However, the brief also argued that "[t]he *central purpose* of section 2 was to allow states wishing entirely to exclude alcoholic beverages from their borders to do so." *Id.* (emphasis added). Judge Easterbrook supported his understanding of Section 2's "central purpose" by citing Senators Blaine's and Borah's remarks during the floor debates on S.J. Res. 211. *Id.* at 34; *see also supra* notes 120–21 and accompanying text. In other words, the *Bacchus* brief refutes Judge Easterbrook's quip in *Bridenbaugh* that "our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters." *Bridenbaugh*, 227 F.3d at 851. Ironically, the "central purpose" approach Judge Easterbrook zealously advocated before the Supreme Court in *Bacchus* became the very approach he rejected in *Bridenbaugh*.

Court's methodology, the Seventh Circuit placed even greater limits on state liquor control than *Bacchus*.

In *Swedenburg v. Kelly*,[233] the Second Circuit also dismissed *Bacchus*'s two-prong test and upheld New York's direct-shipment law. Under New York law, out-of-state wineries can obtain licenses to ship wine directly to New York consumers.[234] To secure this license, however, the out-of-state wineries must first establish and maintain a physical presence (e.g., branch office or warehouse) in New York.[235] Two out-of-state wineries and three New York wine consumers challenged the licensing scheme for "provid[ing] an unconstitutional advantage to in-state wineries."[236]

Writing for the court, Judge Wesley expressly rejected *Bacchus*'s analytical framework: "We think this two-step approach 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."[237] Acknowledging that other courts regarded *Bacchus*'s two-prong test as binding precedent, Judge Wesley responded in a footnote that "[w]e are hard pressed to find any mandate from the Court directing us to utilize *Bacchus* as a template in analyzing the New York statute."[238] Rather, he reasoned, *Bacchus* merely stands for the proposition that states cannot "invoke section 2 as a pretext for economic protectionism."[239]

The Second Circuit instead opted for a "second mode of analysis,"[240] which derived from the court's interpretation of the history[241] and jurisprudence[242] underlying Section 2. This alternative approach "considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause."[243] According to the Second Circuit, New York's "regulatory regime falls squarely within the ambit of section 2's grant of authority . . . [because it] regulates only the importation and distribution of alcohol in New York."[244]

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233 Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004).
234 *Id.* at 229.
235 *Id.*
236 *Id.*
237 *Id.* at 231.
238 *Id.* at 236 n.10.
239 *Id.*
240 *Id.* at 231.
241 *Id.* at 231–33.
242 *Id.* at 233–37.
243 *Id.* at 231.
244 *Id.* at 237.

Moreover, Judge Wesley asserted that New York's law does not run afoul of *Bacchus*'s ban on "'mere economic protectionism,'"[245] because "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state."[246] Judge Wesley conceded that New York's law "could create substantial dormant Commerce Clause problems if [it] regulated a commodity other than alcohol."[247] Indeed, "out-of-state wineries will incur some costs in establishing and maintaining a physical presence in New York, costs not incurred by in-state wineries."[248] Despite such discrimination, the court ruled that "[t]hese effects . . . do not alter the legitimacy of section 2's delegation of authority."[249]

Although the Second Circuit claimed to adopt the Seventh Circuit's analytical approach,[250] Judge Wesley's and Judge Easterbrook's opinions seem to allow for different amounts of state power under the Twenty-First Amendment. According to *Bridenbaugh*, the Twenty-First Amendment cannot save discriminatory state liquor laws. *Swedenburg*, on the other hand, suggests that the Twenty-First Amendment enables states to enact some discriminatory liquor laws, so long as the laws serve valid regulatory interests. By limiting *Bacchus*, and relying instead on a test that places state liquor laws largely beyond the dormant Commerce Clause's reach, the Second Circuit seemingly took a step toward reviving *Young's Market*. As the following cases demonstrate, however, the Second Circuit is currently the only appellate court to move in this direction.

2. Faithful to *Bacchus*: *Beskind* (Fourth Circuit) and *Dickerson* (Fifth Circuit)

Unlike the Seventh and Second Circuits, the Fourth and Fifth Circuits followed *Bacchus*'s two-pronged approach as faithfully as possible. In *Beskind v. Easley*,[251] a California winery and individual oenophiles challenged North Carolina's direct-shipment laws.[252] North Carolina's laws required all out-of-state wine producers to sell through the state's three-tier system but allowed in-state wine manufacturers to ship their products directly to consumers.[253] The plaintiffs alleged

245 *Id.* (quoting Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 276 (1984)).
246 *Id.*
247 *Id.* at 238.
248 *Id.*
249 *Id.*
250 *See id.* at 231.
251 325 F.3d 506 (4th Cir. 2003).
252 *Id.* at 509.
253 *Id.* at 510.

that this discrepancy between out-of-state and in-state wine producers constituted unconstitutional discrimination.[254]

Writing for the court, Judge Niemeyer noted that *Bacchus* required him to first consider whether North Carolina's law was facially discriminatory and then, if so, to determine if the Twenty-First Amendment saved the otherwise unconstitutional law.[255] In accordance with this two-prong approach, the court began by subjecting North Carolina's law to a strict scrutiny analysis.[256] After determining the law facially discriminated against out-of-state wine, Judge Niemeyer concluded the state had failed to satisfy its burden of demonstrating that no reasonable nondiscriminatory alternatives existed.[257]

Next, Judge Niemeyer considered whether the facially discriminatory law served "'any clear concern of the Twenty-first Amendment' and [was] thereby saved."[258] To further define these "clear concerns," the Fourth Circuit adopted the *North Dakota* Court's three criteria of "'promoting temperance, ensuring orderly market conditions, and raising revenue.'"[259] After considering the state's justifications for its discriminatory regulatory regime, the court concluded the state's law "could not credibly be portrayed as anything other than local economic boosterism in the guise of a law aimed at alcoholic beverage control."[260] Accordingly, the Fourth Circuit struck down the residency requirement provision of North Carolina's direct-shipment statute.[261]

Similarly, in *Dickerson v. Bailey*,[262] the Fifth Circuit considered the constitutionality of a Texas law that allowed in-state—but not out-of-state—wine producers to ship their products directly to Texas consumers.[263] Moreover, the statute enabled Texas wineries to sell 25,000 gallons of wine directly to in-state consumers each year (with no per customer restrictions), but annually allowed Texans to personally bring into the state only three gallons from an out-of-state winery.[264]

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254 *Id.* at 511.

255 *Id.* at 513–14.

256 *See id.* at 514–16.

257 *Id.* at 515–16.

258 *Id.* at 516 (quoting Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 276 (1984)).

259 *Id.* at 513, 516 (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990)).

260 *Id.* at 517.

261 *Id.*

262 336 F.3d 388 (5th Cir. 2003).

263 *Id.* at 397.

264 *Id.* at 397–98.

A group of oenophiles from Houston alleged that these provisions violated the dormant Commerce Clause.[265]

Like the Fourth Circuit, Judge Wiener of the Fifth Circuit acknowledged that Supreme Court precedent prescribed use of *Bacchus*'s two-prong test.[266] Noting the statute's facial discrimination, and highlighting the Texas Legislature's candid declarations of its discriminatory aspirations,[267] the court asserted the case's "operable facts . . . [were] identical" to those in *Bacchus*.[268] Accordingly, Judge Wiener ruled that the Texas law discriminated against interstate commerce[269] and did not constitute the only available means by which Texas could achieve its regulatory goals.[270]

Turning to the *Bacchus* test's second prong, the court initially cited "the promotion of temperance" as the amendment's core concern.[271] However, it then noted some courts had also incorporated other policies into the test, such as "the prevention of monopolies or organized crime from (re)gaining control of the alcohol industry and the collection of taxes."[272] Regardless, the court's second stage of analysis did not need to proceed much past this point. The administrator of the Texas Alcoholic Beverage Commission "reject[ed] outright any requirement that he proffer evidence connecting the disputed statutes to the 'core concerns' of the Twenty-first Amendment."[273] Given that the administrator had not presented any arguments to the contrary, the Fifth Circuit struck down Texas' law as unconstitutional.[274]

The Fourth and Fifth Circuit opinions demonstrated the confusion resulting from the Supreme Court's failure to define the Twenty-First Amendment's "core concerns" in *Bacchus*. While the Fourth Circuit looked to the three criteria set forth in *North Dakota*, the Fifth Circuit hinted at a narrower test, which may have focused on the "promotion of temperance." Depending on which definition of "core concerns" a court adopts, the range of acceptable justifications for a state's regulatory regime can vary considerably.

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265 *Id.* at 392.
266 *Id.* at 394–95.
267 *Id.* at 399–400.
268 *Id.* at 400.
269 *Id.* at 402–03.
270 *Id.* at 401–02.
271 *Id.* at 404.
272 *Id.*
273 *Id.* at 406.
274 *Id.* at 407.

3. Scrutinizing the "Core Concerns": *Bainbridge* (Eleventh Circuit) and *Heald* (Sixth Circuit)

The Eleventh and Sixth Circuits applied *Bacchus*'s two-prong test in novel ways and placed even stricter limits on state regulatory power. In *Bainbridge v. Turner*,[275] Judge Tjoflat of the Eleventh Circuit considered a challenge to Florida's direct-shipment laws, which allowed in-state wineries to ship directly to consumers.[276] Out-of-state wineries, on the other hand, risked treble damages and a felony conviction for directly shipping their products.[277]

Like the Fourth and Fifth Circuits, the *Bainbridge* court recited the need to follow *Bacchus*.[278] And similarly, the court found Florida's law facially discriminatory and determined that nondiscriminatory alternatives existed.[279] Turning to the test's second prong, however, the Eleventh Circuit took an unprecedented step: it required the state to not only facially demonstrate that its law satisfied the Twenty-First Amendment's "core concerns," but it also mandated the production of extensive supporting evidence.[280] Noting that it lacked clear guidance from the Supreme Court on the definition of "core concerns," Judge Tjoflat settled on *North Dakota*'s three criteria.[281] Although Florida asserted that its law facilitated temperance, orderly market conditions, and the collection of revenue,[282] the court deemed such justifications unsatisfactory.[283] Rather, Florida had to demonstrate "its statutory scheme [was] necessary to effectuate the proffered core concern in a way that justifie[d] treating out-of-state firms differently from in-state firms—a fact question."[284] This evidentiary standard was allegedly "far less than the strict scrutiny required under a traditional tier-one analysis of discriminatory laws."[285] Regardless, it still required the court to remand *Bainbridge* for further consideration of Florida's justification.[286]

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275 311 F.3d 1104 (11th Cir. 2002).

276 *Id.* at 1106–07.

277 *Id.* at 1107; *see also* notes 13–16 and accompanying text.

278 *Id.* at 1108.

279 *Id.* at 1109–10.

280 *Id.* at 1114.

281 *Id.* at 1113–14.

282 *Id.* at 1114–15.

283 *See id.*

284 *Id.* at 1115.

285 *Id.* at 1115 n.17.

286 *Id.* 1115–16.

Judge Daughtrey of the Sixth Circuit adopted an even stricter evidentiary standard in *Heald v. Engler*.[287] Michigan's direct-shipment laws allowed in-state wineries to obtain a wholesaler's license but did not extend the same privilege to out-of-state wineries.[288] Consequently, a collection of wine consumers, a small out-of-state winery, and wine journalists brought a dormant Commerce Clause challenge.[289] After addressing the first-prong of *Bacchus* and finding Michigan's law "facially discriminatory,"[290] the court moved to the second-prong analysis.

The Sixth Circuit struggled to define the Twenty-First Amendment's "core concerns." Earlier in its opinion, the court acknowledged that "[s]ince *Bacchus*, the Supreme Court has been less than prolific in construing the content of the Twenty-first Amendment's 'core concerns.'"[291] Thus, when it began the prong-two "core concern" analysis, it initially cited *North Dakota*'s three policies as the appropriate standard.[292] Yet, two paragraphs later, Judge Daughtrey declared that the court could not rely on *North Dakota* because it "involved a Supremacy Clause challenge and did not implicate the Commerce Clause."[293] Accordingly, the court stated it needed to rely on "cases that do discuss the intersection of the Twenty-first Amendment and the Commerce Clause, such as *Bacchus*."[294] Unable to identify a suitable definition for "core concerns," the court forged ahead with its analysis.

Next, Judge Daughtrey curiously incorporated *Bacchus*'s prong-one strict scrutiny standard into her prong-two analysis. Although *Bacchus*'s prong-one test requires courts to apply a strict scrutiny standard to facially discriminatory laws, prong-two specifies no such standard of review.[295] Nevertheless, the Sixth Circuit claimed that "Supreme Court precedent" required strict scrutiny when determining whether the Twenty-First Amendment empowered Michigan to enact discriminatory liquor laws.[296] Because it was "not enough that the Michigan Legislature ha[d] chosen this particular regulatory

287 342 F.3d 517 (6th Cir. 2003).

288 *See id.* at 520.

289 *Id.* at 519.

290 *Id.* at 525.

291 *Id.* at 523.

292 *Id.* at 525–26.

293 *Id.* at 526.

294 *Id.*

295 *See supra* notes 177–86 and accompanying text.

296 *Heald*, 342 F.3d at 527.

scheme to further what are legitimate objectives,"[297] the Sixth Circuit struck down the state's direct-shipment law.[298]

Needless to say, this type of circuit court disarray would have never occurred under Justice Brandeis's simple bright-line rule from *Young's Market*.[299] Yet such is the price of the Court's intervention into an area of commerce that Congress deemed best handled by the states. So long as the Supreme Court maintains its vague two-prong test, the lower courts will continue to reach disparate holdings, and state regulatory power over alcohol will commensurately dwindle. Accordingly, the Supreme Court should utilize direct-shipment laws as an opportunity to overturn *Bacchus* and reinstate the *Young's Market* line of cases.

IV. RUPTURE OR RENEWAL: WHEN DIRECT-SHIPMENT LAWS MEET THE REHNQUIST COURT

Thus far, this Note has discussed numerous cases dealing with the Twenty-First Amendment and the dormant Commerce Clause; markedly, not a single one mentioned the principle of federalism. In the years following *Bacchus*, however, the Supreme Court has increasingly relied upon federalist values to strike down federal laws.[300] Indeed, "[i]t seems agreed on all sides now that the Supreme Court has an agenda of promoting constitutional federalism."[301]

This purported "antifederalist revival"[302] has not enjoyed broad support within the Court. On the contrary, the Court's recent cases involving federalism have divided along 5-4 lines, with Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Kennedy, and Justice Thomas in the majority, and Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer dissenting.[303] This Part explores direct-shipment laws in the context of the 5-4 federalism split. The Twenty-First Amendment constitutes a rare example of Congress and the states shifting the balance of federalism in favor of state power.[304]

297 *Id.*

298 *Id.* at 527–28.

299 *See supra* Part II.A.1.

300 Between 1991 and 2002, the Court "held at least ten federal statutes to be constitutionally invalid, either in whole or in part, on grounds involving federalism. By contrast, the Court had found only one federal statute to violate principles of constitutional federalism during the previous span of more than fifty years . . . ." Fallon, *supra* note 35, at 430.

301 *Id.* at 429.

302 SULLIVAN & GUNTHER, *supra* note 26, at 230.

303 *See* Fallon, *supra* note 35, at 430.

304 *See supra* Part I.C.

Thus, paradoxically, Justices on both sides of the 5-4 divide—those who support the judicial enforcement of federalism and those who favor a political solution—have ample reason to uphold direct-shipment laws on federalism grounds. Moreover, in the interests of salvaging the dormant Commerce Clause and the Twenty-First Amendment, both camps should vote to overrule *Bacchus*.

A. The Fragile Seams of Federalism

1. States' Rights and the Current Five-Justice Majority

On one side of the debate stands the five-Justice majority, which used federalism to strike down multiple federal laws for unconstitutionally encroaching upon state sovereignty. *United States v. Lopez*[305] constitutes perhaps the most famous example of the Court's willingness to intervene on the states' behalf. In *Lopez*, the Court considered the constitutionality of the Gun-Free School Zones Act, which made it a federal offense for an individual to knowingly possess a firearm in a school zone.[306] During the roughly sixty years prior to *Lopez*, the Court did not overturn a single exercise of congressional commerce power;[307] thus, the Commerce Clause acquired an aura of virtual omnipotence.

However, the *Lopez* Court unexpectedly halted this trend.[308] In an opinion written by Chief Justice Rehnquist, the Court held that Congress exceeded its power under the Commerce Clause and struck down the Gun-Free School Zones Act.[309] Although the Court did not overturn any of its prior decisions, the opinion made it clear that Congress could no longer "convert [its] authority under the Commerce Clause to a general police power of the sort retained by the States."[310]

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305 514 U.S. 549 (1995).

306 *See id.* at 551.

307 *See* SULLIVAN & GUNTHER, *supra* note 26, at 137–49 (providing an overview of the Court's Commerce Clause jurisprudence between 1937 and 1995).

308 The unexpectedness of the Court's decision is aptly illustrated by Professor Jesse H. Choper's pre-*Lopez* prediction that "the Supreme Court will uphold the constitutionality of [the Gun-Free School Zones Act] . . . . The true surprise will be if there are many dissenting votes." Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J.L. & PUB. POL'Y 460, 463 (1995).

309 *Lopez*, 514 U.S. at 551.

310 *Id.* at 567; *see also* United States v. Morrison, 529 U.S. 598, 617–19 (2000) (holding that § 13,981 of the Violence Against Women Act exceeded Congress's commerce power).

Following this decision, some commentators declared that a states' rights revolution was officially underway within the Court.[311]

Two years later, in *Printz v. United States*,[312] the Court struck down a portion of the Brady Handgun Violence Protection Act, which required state law enforcement officers to help administer federal background checks on prospective handgun purchasers.[313] Because the Act constituted "executive-commandeering" of state officers, the Court, in an opinion written by Justice Scalia, declared the law "fundamentally incompatible with our constitutional system of dual sovereignty."[314] This ruling established that the principle of federalism prevented Congress from commanding state officers to enforce a federal regulatory scheme.

Combined with multiple cases upholding state sovereign immunity under the Eleventh Amendment,[315] decisions like *Lopez* and *Printz* signal a trend toward curbing the federal government's power. While some commentators viewed this jurisprudential shift as drastic "right-wing judicial activism,"[316] others labeled the Court's purported federalism agenda as "modest and equivocal."[317] Regardless, respect for state sovereignty has enjoyed a resurgence under the Rehnquist Court.

Professor Susan Lorde Martin focuses on the *Lopez* and *Printz* line of cases to predict the Court's ruling on direct-shipment laws.[318] Not-

311 *See, e.g.*, Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1 (asserting "it is only a slight exaggeration to say that . . . the Court [is] a single vote shy of reinstalling the Articles of Confederation").

312 521 U.S. 898 (1997).

313 *Id.* at 902–04.

314 *Id.* at 916, 935.

315 *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 72–92 (2000) (ruling that Congress cannot use its civil rights enforcement powers under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity); Alden v. Maine, 527 U.S. 706, 712–30 (1999) (extending state sovereign immunity to lawsuits brought against states in state court); Seminole Tribe v. Florida, 517 U.S. 44, 54–73 (1996) (holding that Congress cannot abrogate state sovereign immunity under the Indian Commerce Clause). Based in part on his overview of the Rehnquist Court's Eleventh Amendment jurisprudence, *see* Martin, *supra* note 23, at 1333–42, one commentator concludes that the Court "will, unfortunately, uphold the power of the states to prohibit and limit the direct-shipment of wine from out-of-state." *Id.* at 1344.

316 *See* Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23.

317 Robert F. Nagel, *Real Revolution*, 13 GA. ST. U. L. REV. 985, 1003–04 (1997).

318 *See* Martin, *supra* note 17, at 22–25; *see also* Eng, *supra* note 23, at 1915–16 (drawing upon the *Printz* and *Lopez* line of cases to argue that the "conservative" Rehnquist Court will likely uphold state direct-shipment laws). Although he does not mention specific cases, Professor Brannon P. Denning asserts that "[t]here is a certain

ing the Court's "recent record of state's rights in a variety of circumstances," Professor Martin suggests the Court's potential willingness to strike down direct-shipment laws "is far from a certainty."[319] She notes that the *Lopez* Court overturned the Gun-Free School Zones Act on the grounds that "criminal law is a subject of primary state responsibility."[320] Accordingly, the Court may uphold direct-shipment laws because "alcoholic beverage control is, too, a subject of primary state responsibility . . . [and i]f federalism is to have real meaning, there have to be some areas in which states have exclusive power."[321]

Professor Martin correctly points out that the likes of Chief Justice Rehnquist and Justice O'Connor will probably view direct-shipment laws at least partly in terms of states' rights. Indeed, the Twenty-First Amendment constitutes one of the Constitution's few express commitments of state power. These two Justices dissented in *Bacchus* on the grounds that the amendment's broad constitutional language gave states the power to discriminate against out-of-state liquor.[322] To protect the states' constitutionally ensured right to regulate alcohol, Chief Justice Rehnquist and Justice O'Connor very well might vote to overturn *Bacchus* and uphold direct-shipment laws.

However, the dissenting opinion from *Bacchus* also provides the major reason why Professor Martin's analysis of federalism and direct-shipment laws comes up short: Justice Stevens. Justice Stevens's dissenting opinion suggests he will view dormant Commerce Clause challenges to state direct-shipment laws as "squarely foreclosed by the Twenty-first Amendment."[323] Yet, his views on federalism are diametrically opposed to those of Chief Justice Rehnquist and Justice O'Connor. Thus, if Chief Justice Rehnquist, Justice O'Connor, and Justice Stevens find the two additional votes necessary to overturn *Bacchus*, their holding will not fit into the current "antifederalist revival."[324]

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irony that in the midst of the most vigorous judicial enforcement of federalism in over sixty years, a specific textual reservation of power to states [i.e., the Twenty-First Amendment] has been eroded almost to the point of irrelevance." Denning, *supra* note 111, at 335.

319 Martin, *supra* note 17, at 22.

320 *Id.* at 23.

321 *Id.*

322 *See supra* notes 188–94 and accompanying text.

323 468 U.S. 263, 279 (1984) (Stevens, J., dissenting).

324 *But see* Timothy Schnabel, Note, *A Circuit-Splitting Headache: The Hangover of the Supreme Court's Twenty-First Amendment Jurisprudence*, 21 YALE L. & POL'Y REV. 547, 556 (2003) (positing that "an even more aggressively pro-state outcome is possible should two additional Justices side with the three *Bacchus* dissenters and hold that even discriminatory statutes are permitted").

2. Politically Enforced Federalism: The Curious Case of Justice Stevens

How can one explain Justice Stevens's broad reading of the Twenty-First Amendment based on the principle of federalism? The answer lies partly in a pre-*Lopez* and pre-*Printz* case that the Rehnquist Court has yet to expressly overrule—*Garcia v. San Antonio Metropolitan Transit Authority*.[325] As mentioned in the Introduction, much of the current Court's disagreement over federalism revolves around whether the political system or the courts should serve as the doctrine's primary guardian. The direct-shipment law issue presents a unique situation in which the lines separating these two theories become blurred.

In *Garcia*, the Court ruled that the Fair Labor Standards Act's minimum wage and overtime requirements applied to a municipal transit authority.[326] Justice Stevens joined Justice Blackmun's 5-4 majority opinion, which asserted the "principal means chosen by the Framers to insure the role of the States in the federal system lies in the structure of the Federal Government itself."[327] Because the political system had settled on a policy requiring state compliance with federal labor standards, there was no need for the "unelected federal judiciary to [decide] which state policies it favor[ed] and which ones it dislike[d]."[328] Justice O'Connor countered in her dissenting opinion that "[t]he problems of federalism . . . are capable of a more responsible resolution than holding that the States as States retain no status apart from that which Congress chooses to let them retain."[329] Rather, she asserted, the Court needed to intervene when the federal government overstepped its bounds.[330]

Although Justice O'Connor's view appears to have since gained the upper hand, Justice Stevens and his fellow *Lopez*/*Printz* dissenters continue to prefer political solutions to purported imbalances in the federalist system. For example, in *Printz*, Justice Stevens argued in dissent that "unelected judges are better off leaving the protection of federalism to the political process in all but the most extraordinary

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325 469 U.S. 528 (1985).

326 *Id.* at 555–56.

327 *Id.* at 550.

328 *Id.* at 546.

329 *Id.* at 588 (O'Connor, J., dissenting).

330 *See id.* (O'Connor, J., dissenting). In his terse dissenting opinion, Chief Justice Rehnquist wrote: "I do not think it incumbent on those of us in dissent to spell out further the fine points of principle that will, I am confident, in time again command support of the majority of this Court." *Id.* at 579–80 (Rehnquist, C.J., dissenting).

circumstances."[331] When Congress has determined how to best "serve the interests of cooperative federalism," he argued, the courts should "respect both its policy judgment and its appraisal of its constitutional power."[332]

The Twenty-First Amendment exemplifies Justice Stevens's desire for political solutions to issues of federalism. Throughout the more than one hundred years leading up to Prohibition, Congress evinced a clear preference for allowing the states to broadly regulate the liquor trade. This policy predilection derived from a belief that alcohol constituted a peculiar article of commerce best left to local regulatory regimes. The federal government's resounding failure to effectively enforce nationwide prohibition only confirmed this conviction. Thus, Congress and the states joined forces to push through a constitutional amendment to ensure the states' dominion over liquor intended for "delivery or use therein."[333] Viewed in such a light, Justice Stevens's broad interpretation of the Twenty-First Amendment neatly squares with his vision of federalism.

Accordingly, the Twenty-First Amendment fosters the unlikely confluence of *Printz* and *Garcia*—on the one hand, it constitutes a commitment to states' rights; on the other, it represents a political solution to federalism. Taken together, these two values provide at least one way of bridging the traditional 5-4 federalism divide. Even if the Court refrains from expressly discussing federalism when it takes up the direct-shipment issue, it should keep federalist values in mind. Otherwise, the reasoning underpinning each side of the federalism debate will incur a jurisprudential rupture. If the Court's states' rights advocates meekly uphold *Bacchus* in striking down direct-shipment laws, they will abdicate their professed duty to defend state sovereignty. If the Court's proponents of politically determined federalism follow the same path, they will let judicial activism trump Congress and the states' joint solution to the liquor conundrum. Thus, both sides of the federalism debate should seize upon direct-shipment laws as an opportunity to renew the *Young's Market* line of cases.

B. The Ever Expanding Dormant Commerce Clause

Should the Court overrule *Bacchus* and uphold direct-shipment laws, it will also preserve another imperiled piece of its jurisprudential patchwork: the dormant Commerce Clause. Unlike the principle of federalism, which the Court's Twenty-First Amendment jurisprudence

331 Printz v. United States, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting).

332 *Id.* at 970 (Stevens, J., dissenting).

333 U.S. CONST. amend. XXI, § 2.

has steadily eroded, the dormant Commerce Clause runs the risk of rupturing because it has expanded too far. Beginning with *In re Rahrer*,[334] the Court has consistently affirmed the notion that Congress can utilize its commerce power to revoke the Court's use of the dormant Commerce Clause.

Through the Wilson Act and the Webb-Kenyon Act, Congress attempted to exercise its power to divest liquor of its interstate character. Intending to take this concept one step further, Congress and the states enacted a constitutional amendment that shielded state liquor regulations from the dormant Commerce Clause in a way legislation never could. Justice Brandeis (who first interpreted the amendment a mere three years after its ratification) recognized the amendment as having achieved this goal.[335] Likewise, Justice Black (who participated in the Senate debates on the Twenty-First Amendment) regarded the amendment's purpose as patently clear.[336] Rather than risk trampling an express textual provision of the Constitution with a judicial inference, the Court should err on the side of caution and deem direct-shipment laws valid.

This need to proceed cautiously should hold true for the dormant Commerce Clause's champions and critics alike. For the doctrine to maintain its legitimacy, there can be no doubt that Congress retains its commerce power over alcohol regulation, albeit in a "dormant" state. When the Court invokes the dormant Commerce Clause in an area where Congress has ceded its commerce power to the states, the doctrine's credibility becomes attenuated at best. A doctrine of judicial *intervention* begins to look more like a doctrine of judicial *activism*. Thus, those who regard the dormant Commerce Clause as valid should stay their hands when it comes to liquor regulations like direct-shipment laws.

Furthermore, the Twenty-First Amendment gives those who reject the dormant Commerce Clause even more reason to do so in the direct-shipment context. Regarding the doctrine as a textless vehicle for judicial activism, these critics should have no problem exercising judicial restraint. In *Department of Revenue v. James B. Beam Distilling Co.*,[337] Justice Black argued in dissent that "[i]t seems a trifle odd to hold that an Amendment adopted in 1933 in specific terms to meet a specific twentieth-century problem must yield to [the Export-Import Clause,] a provision *written* in 1787 to meet a more general, although no less

334 *See supra* notes 66–69 and accompanying text.

335 *See supra* Part II.A.

336 *See supra* note 124 and accompanying text.

337 377 U.S. 341 (1964).

important, problem."[338] Similarly, critics of the dormant Commerce Clause can argue that it seems outright absurd that the Twenty-First Amendment must yield to a judge-made doctrine that was never "written" anywhere in the Constitution. Moreover, those who regard the dormant Commerce Clause as a disruption of the Framers' intended federalist system should have even greater reservations about the doctrine's impact on liquor regulation—an area of commerce the Twenty-First Amendment turned over to state control.

C. The Incredible Shrinking Twenty-First Amendment

The Twenty-First Amendment constitutes perhaps the most endangered piece of the Court's jurisprudential patchwork. *Young's Market* acknowledged the amendment as having freed states of the dormant Commerce Clause's strictures. *Bacchus*, however, reduced the amendment to a mere last-ditch provision, which comes into play only after the courts conduct a strict scrutiny dormant Commerce Clause analysis. In two major respects, direct-shipment laws present the Twenty-First Amendment with a make-or-break proposition.

First, direct-shipment laws strike at the heart of the Twenty-First Amendment's text. Assuming, arguendo, that the amendment's text is ambiguous, one thing remains certain: the phrases "central purposes" and "clear concerns" appear nowhere in Section 2. Moreover, the amendment never provides a special distinction between discriminatory and nondiscriminatory liquor regulations. Rather, the amendment plainly proscribes the importation of wine into any state, "for delivery or use therein," in violation of a state's direct-shipment laws.[339] As Justice Brandeis quipped in *Young's Market*, to say otherwise "would involve not a construction of the amendment, but a rewriting of it."[340] The Court essentially rewrote the amendment with *Bacchus* and should now seize upon direct-shipment laws as an opportunity to restore the provision to its original purpose.

Second, if the Court strikes down direct-shipment laws, it truly will have come full circle. In *Rhodes*, the Court frustrated state attempts to regulate mail-ordered direct shipments from out-of-state liquor producers to in-state consumers. Congress responded with the Webb-Kenyon Act and, subsequently, united with the states to free liquor from the dormant Commerce Clause's grip via the Twenty-First Amendment. Needless to say, the technology has changed over the years: out-of-state wineries now accept Internet orders via DSL connec-

338 *Id.* at 348 (Black, J., dissenting) (emphasis added).

339 U.S. CONST. amend. XXI, § 2.

340 State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936).

tions instead of mail orders via Pony Express. Yet, the concept of liquor's constitutionally divested character remains the same. Rather than continue back down the road to *Rhodes*, the Court should readopt the deference it showed to the states shortly after the Twenty-First Amendment's enactment.

CONCLUSION

Thomas Jefferson, the man who spent over fifty years unsuccessfully trying to establish his own vineyard at Monticello,[341] would undoubtedly toast the recent exponential growth of small wineries.[342] Even more to the point, he would probably hope the ongoing boom in wine sales signals that the nation's attitude toward wine has changed to the point where direct-shipment laws will soon become yet another curious remnant of America's temperance-laden past.

Yet it seems equally plausible that a staunch states' rights proponent like Jefferson[343] would favor letting the states determine when and how wine should once again flow directly to the homes of oenophiles. If direct-shipment laws have outlived their usefulness, each state can certainly amend its own laws to accommodate this cultural transformation.[344] Alternatively, perhaps Section 2 of the Twenty-First Amendment—like its predecessor the Eighteenth Amendment—should even be repealed. If so, Congress and the states can play their constitutionally prescribed role in bringing about such an amendment.[345]

Either way, the amendment's fate should rest in the hands of legislators, not in those of the unelected judiciary. When the Court established its two-prong test in *Bacchus*, it essentially declared itself better suited to determine the nation's alcohol policy than the states

341 PINNEY, *supra* note 2, at 129 (noting that between 1771 and 1822, Jefferson made numerous unsuccessful attempts to establish his own vineyard in Monticello by planting various native and imported vines).

342 *See supra* note 205 and accompanying text.

343 For example, Jefferson boldly asserted in the Kentucky Resolutions "that the several States composing the United States of America, are not united on the principle of unlimited submission to their general government." STATES' RIGHTS, *supra* note 29, at 81. Rather, Jefferson argued, each state possesses "the residuary mass of right to [its] own self-government." *Id.* Given that the Twenty-First Amendment constitutes one of the Constitution's few express grants of power to the states, Jefferson's antifederalist leanings may have ultimately outweighed his oenophilia.

344 *See also* Swedenburg v. Kelly, 358 F.3d 223, 239 (2d Cir. 2004) ("Changes in marketing techniques or national consumer demand for a product do not alter the meaning of a constitutional amendment. If New York wishes to further relax its regulatory control of the flow of wine into New York, it can do so.").

345 *See supra* note 125 and accompanying text.

and Congress. This display of judicial activism calls into question the Court's federalism and dormant Commerce Clause jurisprudence. Rather than risk further undermining these two doctrines—let alone the Twenty-First Amendment—the Court should scrap its current jurisprudential patchwork of "old wineskins" and re-stitch a container capable of accommodating the "new wine" of direct-shipment laws.