

DUELING PROVISIONS: THE 21ST AMENDMENT'S SUBJUGATION TO THE DORMANT COMMERCE CLAUSE DOCTRINE

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I. INTRODUCTION

A constitutional provision limiting the power of the federal government is slowly eroding away with the aid and compliance of the Supreme Court; that provision is section two of the Twenty-first Amendment: “The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”¹ The Supreme Court, however, has modified, altered, and rendered meaningless this seemingly unambiguous language through the use of the dormant Commerce Clause doctrine.

Congress adopted the Twenty-first Amendment to the Constitution in order to give states the right to regulate alcohol in whatever manner those states deemed fit.² The first cases regarding the rights of the several States to regulate alcohol recognized the near total control that the Amendment provided.³ However, during the past six decades, the Supreme Court has slowly whittled away at the Amendment by validating several challenges on the grounds that the challenged laws violate the dormant Commerce Clause of the Constitution.⁴

This article focuses on the “wine wars,”⁵ the current and foremost example of the Supreme Court’s rulings regarding the Twenty-first Amendment and the dormant Commerce Clause. These cases have a common fact pattern; typically, the state’s alcoholic beverage control laws (“ABC laws”) require that alcohol shipped to that state pass through a three-tier system. Usually, the state’s ABC laws mandate that a licensed manufacturer sell only to licensed wholesalers, who thereafter sell only

¹ U.S. CONST. amend. XXI, § 2.

² See discussion *infra* Part II.

³ *Id.*

⁴ *Id.*

⁵ See 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, 1880 (2003).

to licensed retailers.⁶ Only licensed retailers may sell to consumers.⁷ However, the state exempts domestically produced wine, which allows local wineries to ship directly to consumers without going through the normal three-tier system.⁸ States have begun to allow in-state wineries to ship directly to consumers because of the explosion of small, boutique wineries in recent years. Those wineries simply cannot compete in the three-tier system.⁹ The states provide a tremendous commercial advantage to small wineries by allowing them to bypass the wholesale and retail tiers.

These same wineries, however, have challenged laws that prohibit the direct shipment of wine to individuals outside their states.¹⁰ Because the direct shipment laws typically allow only in-state wineries to ship directly to consumers, the challengers rely on the dormant Commerce Clause doctrine.¹¹ Although academics have long debated the legitimacy of the dormant Commerce Clause, the doctrine is firmly rooted in Supreme Court jurisprudence.

The Commerce Clause of the Constitution affirmatively grants Congress the ability to regulate commerce.¹² Justice Scalia noted that the Commerce Clause is merely an affirmative grant, that courts have interpreted many Article I powers as being concurrently held by state and federal government, and that there is no correlative denial of power to the states.¹³

⁶ *Id.* at 1853.

⁷ *Id.*

⁸ *See generally* Heald v. Engler, 342 F.3d 517 (6th Cir. 2003), *cert. granted sub nom.* Granholm v. Heald, 124 S. Ct. 2389 (2004); Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000); Bolick v. Roberts, 199 F. Supp. 2d 397 (E.D. Va. 2002), *vacated and remanded sub nom.* Bolick v. Danielson, 330 F.3d 274 (4th Cir. 2003).

⁹ Andrew J. Kozusko III, Comment, *The Fight to “Free the Grapes” Enters Federal Court: Constitutional Challenges to the Validity of State Prohibitions on the Direct Shipment of Alcohol*, 20 J.L. & COM. 75, 76 (2000).

¹⁰ *Id.* at 76.

¹¹ *See generally* cases cited *supra* note 8.

¹² U.S. CONST. art. I, § 8, cl. 3.

¹³ Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue, 483 U.S. 231, 262 (1987) (Scalia, J., dissenting). Specifically, Scalia noted that bankruptcy, patent power, copyright power, and court martial jurisdiction over the militia were all shared by states, but granted by Article I. In addition, there was no express denial of power as there was with the power to coin money. However, Scalia’s criticism of the dormant Commerce Clause did not prevent him from writing an opinion in opposition to the Twenty-first Amendment. *See infra*, note 181 and accompanying text.

The dormant Commerce Clause springs from the logic that because Congress has the power to regulate Commerce, if it has not so regulated, then Congress must have intended for that area to remain regulation free – including regulation by the several states.¹⁴ Therefore, it is not the Commerce Clause that remains “dormant,” but rather Congress and the application of its regulatory power.¹⁵ Broadly speaking, it is this logic that competes with the grant to the states in the Twenty-first Amendment.

In the current court battles, the district courts, as well as the circuit courts, are divided on how to handle dormant Commerce Clause challenges to states claiming protection under the Twenty-first Amendment.¹⁶ Most cases have relied on recent Supreme Court jurisprudence limiting the Twenty-first Amendment’s command.¹⁷ Yet, other courts have looked to the original intent behind the Amendment, as well as the early Supreme Court decisions interpreting the Amendment, and responded with a different result.¹⁸ The Supreme Court, with its decision in the case of *Granholm v. Heald*,¹⁹ has finally laid the issue to rest.²⁰

In order to fully analyze the issues presented, an examination of the histories of the dormant Commerce Clause and the Twenty-first Amendment is necessary. Part II of this article includes a history as well as a survey on the commentary in this area. Part III examines the decisions of the lower courts, as well as the modern jurisprudence of the Supreme Court that serves as a background to the arguments in *Granholm*. Part IV discusses how the Court reached its decision and what effect that decision will have on anti-shipping and reciprocal shipping states. Finally, Part V concludes the article.

¹⁴ *Welton v. Missouri*, 91 U.S. 275, 282 (1875).

¹⁵ Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 425 n.1 (1982).

¹⁶ See generally cases cited *supra* note 8.

¹⁷ See, e.g., *Bolick v. Roberts*, 199 F. Supp. 2d 397, (E.D. Va. 2002), *vacated and remanded sub nom.* *Bolick v. Danielson*, 330 F.3d 274 (4th Cir. 2003).

¹⁸ See, e.g., *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000).

¹⁹ 125 S. Ct. 1885 (2005).

²⁰ See discussion *infra* Part IV.

II. ANCIENT HISTORY

A. The Dormant Commerce Clause – Creation and Evolution

The Constitution expressly provides that Congress has the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²¹ As stated, this clause provides no textual support for a “negative” or “dormant” aspect of regulation. An examination of the plain meaning of the words does not reveal a denial to the states of any ability to regulate commerce. Commentators and advocates of the clause, however, have found support for the dormant Commerce Clause in the common law of the Supreme Court or in the Court’s “subconstitutional” regime.²² Supporters of the dormant Commerce Clause cannot argue that the Court is interpreting the Constitution itself because the Court has always recognized Congress’s ability to legislate, thereby avoiding a “dormant” state and correcting a judicial decision.²³ Because Congress is not able to easily change the Constitution and overturn judicial decisions, the Court cannot interpret the clause itself.²⁴

Others argue that the Court is not interpreting the Constitution but rather the “silence” of Congress; if the Court mistakes or misreads that silence for something it is not, then Congress is free to speak up and correct the Court.²⁵ Although this theory would avoid the above constitutional concern, it creates yet another. The Constitution expressly prescribes how legislation shall be enacted; legislation requires affirmative action by Congress and the involvement of the President.²⁶ Thus one cannot reconcile total Congressional silence with this justification for the dormant Commerce Clause.²⁷ Where, then, does the Supreme Court get its authority to invalidate state law?

²¹ U.S. CONST. art. I, § 8, cl. 3.

²² See generally Henry P. Monaghan, *Foreward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

²³ *Id.* at 15.

²⁴ *Id.*

²⁵ *Id.* at 16.

²⁶ U.S. CONST. art I, § 7, cl. 2.

²⁷ Monaghan, *supra* note 22, at 16. The Supreme Court itself has also concluded that “to attribute affirmative legislative policy to legislative inaction” is rarely justified. *Id.* at 17. The Court has observed that “[t]he search for significance in the silence of Congress is too often the pursuit of a

Some advocate that the court is actually creating “constitutional common law.”²⁸ Like statutory common law under admiralty, interstate boundary, and foreign affairs cases, this specialized common law has developed in order to further the goals behind the Constitution.²⁹ A judicial tribunal only turns to common law when it has no guidance from the appropriate legislative body. Therefore, Congress may overrule the Supreme Court’s common law in the area of Commerce Clause analysis because the legislature always has the authority to modify or reject the common law.³⁰ Opponents of the dormant Commerce Clause specifically reject this notion.³¹ They point out that “there is a significant difference between judicial creation of statutory common law and constitutional common law: the former arises from congressionally created authority and can therefore logically be overridden by Congress, while the latter is supercongressional, and thus not subject to congressional reversal.”³² This “constitutional common law” theory, like the others, is flawed and insufficient to explain or even form a solid basis for the dormant Commerce Clause’s existence.

Other commentators adopt the view that the dormant Commerce Clause is beneficial because it prevents economic protectionism.³³ In this ends-justifies-the-means analysis, they advocate the use of the dormant Commerce Clause because it prevents the states from engaging in economic warfare.³⁴ However, no evidence exists that the framers intended the Commerce Clause to have this aspect or to be used as a tool to prevent economic protectionism. Although the Framers were

mirage.” *Sampson v. Murray*, 415 U.S. 61, 78 (1974) (quoting *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 11 (1942)).

²⁸ Monaghan, *supra* note 22, at 17.

²⁹ *Id.* at 17-19.

³⁰ *Id.* at 17.

³¹ See Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 601-03 (1987).

³² *Id.* at 602-03. Because the very basis on which the common law is supposedly derived is more authoritative than Congress, the term “constitutional common law” is an oxymoron. It implies both higher and lower authority than Congress holds.

³³ See generally Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

³⁴ See *id.* at 1110-12.

attempting to fix abuses under the weak Articles of Confederation,³⁵ they placed no express restriction on states instituting economic barriers. By contrast, when Australia developed its federal system, the Australian Constitution contained an express restriction prohibiting states from regulating commerce between themselves.³⁶ Clearly the framers could have adopted a similar express approach. Rather than prohibiting such conduct outright, however, the framers gave an express grant to Congress allowing it to pass legislation to curb any excesses.³⁷

There is some evidence, however, that the framers did not intend for the Commerce Clause to deprive the states of any of their authority. Alexander Hamilton seemed to argue against construing the Commerce Clause as an implicit denial of state authority.³⁸ In *The Federalist* No. 32, he points to only three ways in which the Constitution of the United States could deprive individual states of their authority. These limitations could only occur where (1) the Constitution expressly grants an exclusive authority; (2) the Constitution gives a grant to Congress in one place and a denial to the States in another; and (3) the grant to Congress makes a similar power remaining in the states totally “contradictory and repugnant.”³⁹ The Commerce Clause simply cannot fit into either the first or second category because there is no mention of exclusivity nor an express denial anywhere in the Constitution. To qualify under the third category in Hamilton’s regime, the states’ regulation of commerce would have to be contradictory and repugnant to the Constitution, but it is not clear that this is the case. Hamilton gives as an example the definition for naturalization.⁴⁰ The rule against state definitions for naturalization is repugnant because the text of the Constitution requires a “uniform Rule.”⁴¹ Thus the implicit denial has support in the text of the Constitution.

Despite the dearth of solid constitutional foundations for the dormant Commerce Clause, and notwithstanding the struggle in which academics engage to

³⁵ Not the least of these abuses was the economic protectionism and warfare that ran rampant under the Articles. *Id.* at 1114.

³⁶ *See* Eule, *supra* note 15, at 429.

³⁷ *Id.* at 430.

³⁸ *See generally* THE FEDERALIST NO. 32 (Alexander Hamilton).

³⁹ *Id.* at 198 (Clinton Rossiter ed., 1961), available at <http://www.foundingfathers.info/federalistpapers/fed32.htm>.

⁴⁰ *Id.* at 199.

⁴¹ U.S. CONST. art I, § 8, cl. 4.

come up with one, the Supreme Court has had little trouble developing and expanding the doctrine.⁴² The first birthing of the dormant Commerce Clause is found in the dicta of *Gibbons v. Ogden*.⁴³ Justice Marshall observed,

It has been contended...that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing.... There is great force in this argument, and the Court is not satisfied that it has been refuted.⁴⁴

Without giving it a label or creating a doctrine, Justice Marshall opened the door for the later creation of the dormant Commerce Clause. The official question presented in the case was whether a state could regulate in an area that Congress had already regulated, a question which was answered in the negative.⁴⁵

By 1875, the dormant Commerce Clause doctrine was fully developed and rooted in Supreme Court jurisprudence.⁴⁶ In *Welton v. Missouri*,⁴⁷ Justice Field solidified the dormant Commerce Clause by declaring that Congress's "inaction on a subject...is equivalent to a declaration that inter-State commerce shall be free and untrammelled."⁴⁸ If Congress specifically allows state legislation in a given area, then the Court may not strike down laws in violation of the Commerce Clause. If Congress specifically prohibits state legislation, then the Court must strike down state attempts at regulation in that area. When Congress is silent, however, the Court

⁴² Monaghan, *supra* note 22, at 15 & n.81.

⁴³ 22 U.S. (9 Wheat.) 1 (1824); *see also* Redish & Nugent, *supra* note 31, at 575.

⁴⁴ *Gibbons*, 22 U.S. (9 Wheat) at 209.

⁴⁵ *Id.* at 200-22. Justice Marshall asserted that the "sole question [was], can a State regulate commerce with foreign nations and among the States, *while Congress is regulating it?*" *Id.* at 200 (emphasis added). Despite this singular question, he was able to provide support for the dormant Commerce Clause in dicta. This dicta soon came alive and was named just five years later in *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829). The court in this instance decided against using the power to vitiate the conduct of the defendant, yet this is the first solid reference to the Commerce Clause in its "dormant" state. *Id.*

⁴⁶ *See generally* *Welton v. Missouri*, 91 U.S. 275 (1875).

⁴⁷ 91 U.S. 275 (1875).

⁴⁸ *Id.* at 282.

makes the quintessentially legislative determination on whether state legislation is appropriate in a specific area. To that end, the dormant Commerce Clause violates the separation of powers principles in the Constitution.⁴⁹

B. The Twenty-first Amendment: The Honeymoon Period

1. State Law Before the Noble Experiment⁵⁰

Prior to Prohibition, the states decided among themselves whether they would be wet (allow alcohol) or dry (prohibit alcohol).⁵¹ Although states had the right to forbid production of alcohol within their own borders,⁵² they could not prevent the importation of alcohol into their state from another state.⁵³ Courts generally denied this ability to the states because Congress had not legislated on the importation of alcohol, and therefore, under the dormant Commerce Clause, that arena should remain free of state regulation.⁵⁴ Congress moved to correct this presumption with the Webb-Kenyon Act.⁵⁵ The Act prohibited any importation, manufacture, or sale of alcohol in violation of state law.⁵⁶ Courts upheld Webb-Kenyon as valid, reasoning that if Congress had the power to eliminate the importation altogether through its commerce power, it had the authority to limit selectively only that commerce that the state prohibited.⁵⁷ Webb-Kenyon soon became irrelevant, however, when the states ratified the Eighteenth Amendment in 1919 and Prohibition began.

⁴⁹ See Redish & Nugent, *supra* note 31, at 581.

⁵⁰ Eng, *supra* note 5, at 1860 n.86.

⁵¹ Lloyd C. Anderson, *Direct Shipment of Wine, the Commerce Clause and the Twenty-first Amendment: A Call for Legislative Reform*, 37 AKRON L. REV. 1, 5 (2004).

⁵² *Id.* at 5-6. See generally *Mugler v. Kansas*, 123 U.S. 623 (1887).

⁵³ See Anderson, *supra* note 51, at 6-7. See generally *Bowman v. Chi. & N.W. Ry. Co.*, 125 U.S. 465 (1888).

⁵⁴ *Bowman*, 125 U.S. at 482-83, 494-95.

⁵⁵ Anderson, *supra* note 51, at 10.

⁵⁶ Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122 (2005)).

⁵⁷ Anderson, *supra* note 51 at 10-11. See generally *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311 (1917). In *Clark Distilling*, the state statute at issue prohibited direct shipping both domestically and from other states. *Id.* at 315-16. While it is not directly on point with the current direct shipping cases, it does demonstrate that the Webb-Kenyon Act vitiated a dormant Commerce Clause challenge.

2. The Twenty-first Amendment

The Twenty-first Amendment repealed the Eighteenth Amendment and put an end to Prohibition.⁵⁸ Section two of the Amendment provided, however, that “[t]he transportation or importation into any State...for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”⁵⁹ This language echoes the wording of the Webb-Kenyon Act, which was meant to prevent the dormant Commerce Clause from interfering with state regulation of intoxicating liquors.⁶⁰ As states began once again to establish regimes to regulate alcohol, most adopted the previously mentioned three-tier system.⁶¹

As modern courts attempt to construe the language of section two of the Twenty-first Amendment, they often fall back on legislative intent, despite the Amendment’s seemingly plain language. The Supreme Court’s post-*Hostetter v. Idlewild Bon Voyage Liquor Corp.*⁶² jurisprudence further complicates interpretation.⁶³ Unfortunately, the Senate debates regarding the adoption of the Twenty-first Amendment are subject to numerous interpretations of legislative intent.⁶⁴ As a result, all sides point to statements in the debates that affirm their views.

As is often the case, the new Amendment was soon challenged. In 1936, less than three years from the Amendment’s adoption, the Supreme Court had its first

⁵⁸ U.S. CONST. amend. XXI, § 1.

⁵⁹ *Id.* at § 2.

⁶⁰ *See supra* notes 56-57.

⁶¹ *See* David H. Smith, *Consumer Protection or Veiled Protectionism? An Overview of Recent Challenges to State Restrictions on E-Commerce*, 15 LOY. CONSUMER L. REV. 359, 366 (2003).

⁶² 377 U.S. 324 (1964).

⁶³ *See infra* Part III.

⁶⁴ *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, 1636 (2000). Douglass points out three distinct interpretations that could be gathered from the Amendment’s debates. First, that the Amendment did not preempt any other portions of the Constitution, but merely returned to states the right to regulate alcohol. Second, that section two was procedural and meant only to allow states that wanted to remain dry to do so. Third, that section two was meant to entirely exempt states from the considerations of the Commerce Clause. *Id.* at 1631. Because this is the only Amendment passed by the people in state conventions rather than by the state legislatures, however, there is strong reason to give the text its plain and ordinary meaning. *See* *Granholt v. Heald*, 125 S. Ct. 1885, 1909 (2005) (Stevens, J., dissenting).

chance to interpret the Amendment and refused to limit its broad language.⁶⁵ In *State Bd. of Equalization v. Young's Market Co.*,⁶⁶ the plaintiffs were licensed beer sellers.⁶⁷ State law, however, required an additional license and a fee to import beer from other states.⁶⁸ The Court noted that, prior to the passage of the Twenty-first Amendment, this requirement would have been an impermissible burden on interstate commerce.⁶⁹ Justice Brandeis declared in an 8-0 opinion that “[t]he words used [in section two of the Twenty-first Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes.”⁷⁰ After pronouncing this broad interpretation, Justice Brandeis specifically rejected any attempt to limit the language by announcing that, although the plaintiffs requested the court “to construe the Amendment as saying, in effect: . . . if [the State] permits . . . manufacture and sale [of alcohol within its borders], it must let imported liquors compete with the domestic on equal terms[, t]o say that, would involve not a construction of the amendment, but a rewriting of it.”⁷¹ The Court went on to reason that, under the Twenty-first Amendment, the state could theoretically monopolize alcohol production and prevent any private individual or company from importing or selling alcohol.⁷²

In this way, the honeymoon period began, and the Court gave effect to the plain meaning of the Amendment. The states were thereby empowered to limit alcohol-related interstate commerce in any way they felt was prudent or necessary. *Young's Market*, then, operated as an exemption from the Commerce Clause. Although the Court expressly reserved the question of whether economic protectionism would be permissible,⁷³ it is difficult to see how the broad language

⁶⁵ *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59, 60 (1936).

⁶⁶ 299 U.S. 59 (1936).

⁶⁷ *Id.* at 60-61.

⁶⁸ *Id.*

⁶⁹ *Id.* at 62. The dormant Commerce Clause, operating by itself, would not have allowed the state to effectively raise a barrier to interstate commerce by charging a fee for the benefit of importation. *See generally* *Welton v. Missouri*, 91 U.S. 275 (1875).

⁷⁰ *Young's Market Co.*, 299 U.S. at 62.

⁷¹ *Id.*

⁷² *Id.* at 63.

⁷³ *Id.* at 64.

could do anything but support such a reading. Under the tenure of *Young's Market*, the state need not worry about whether a court would find its ABC laws violative of the dormant Commerce Clause. *Young's Market* relied on the plain meaning of the text and came to the correct decision.⁷⁴ Just as the Webb-Kenyon Act relieved dormant Commerce Clause concerns before Prohibition, the similar language of the Twenty-first Amendment should do the same after Prohibition.

The question reserved by *Young's Market* (whether economic protectionism was permissible under the Amendment) soon arrived.⁷⁵ In *Indianapolis Brewing Co. v. Liquor Control Comm'n*,⁷⁶ Michigan enacted ABC laws that prohibited (absent excessive fees and bonds) importation from states that, in Michigan's opinion, discriminated against Michigan wineries.⁷⁷ Indiana made Michigan's list of discriminatory states, and Michigan therefore denied Indiana breweries the ability to ship to Michigan customers.⁷⁸ An Indiana brewery sued on behalf of itself and others similarly situated in order to enjoin Michigan from enforcing its ABC laws.⁷⁹ It alleged that Michigan's law was "retaliatory" and argued that it punished Indiana for doing something that *Young's Market* allowed it to do.⁸⁰ The Court, however, found such conduct totally within the power and parameters of the Twenty-first Amendment.⁸¹ The Court declared broadly in another 8-0 decision that "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."⁸² This incredibly expansive language makes the *Young's Market* assumption into an express interpretation; namely, that the dormant Commerce Clause does not invalidate or otherwise restrain ABC laws put into effect by the states under the authority of the Twenty-first Amendment. While the Supreme Court has never expressly overturned this proposition, dissenters have

⁷⁴ See *id.* at 63-64.

⁷⁵ See *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939).

⁷⁶ 305 U.S. 391 (1939).

⁷⁷ *Id.* at 392-93.

⁷⁸ *Id.*

⁷⁹ *Id.* at 393.

⁸⁰ *Id.* at 394.

⁸¹ See *id.*

⁸² *Id.*

often cited it in more modern cases as those cases begin to restrict the Twenty-first Amendment's power.⁸³

Even during the early years, however, courts did not find that the power granted by the Twenty-first Amendment was absolute.⁸⁴ In *Collins v. Yosemite Park & Curry Co.*,⁸⁵ the Park & Curry Company filed a suit to prevent the state of California from enforcing its ABC laws.⁸⁶ The Company was inside of Yosemite National Park, a federal jurisdiction, and therefore beyond the reach of California laws.⁸⁷ While affirming *Young's Market*, the Court asserted that, "though the Amendment may have increased the state's power to deal with the problem;... it did not increase its jurisdiction."⁸⁸ *Collins* simply held that ABC laws were the province of the state; but where the state had no jurisdiction, the ABC laws, like every other state law, were not enforceable.⁸⁹ *Collins* represents a legitimate restriction on the power granted by the Twenty-first Amendment. It does not limit the power itself, but it relegates the power to the appropriate jurisdiction.

⁸³ See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 556 (1991) (O'Connor, J., dissenting); see also *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 352 (1987) (O'Connor, J., dissenting); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 592 (1986) (Stevens, J., dissenting); *Bacchus Imps. v. Dias*, 468 U.S. 263, 282 (1984) (Stevens, J., dissenting); *Dep't of Revenue v. James B. Beam Distilling, Co.*, 377 U.S. 341, 347 (1964) (Black, J., dissenting); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 336 (1964) (Black, J., dissenting).

⁸⁴ See *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938).

⁸⁵ 304 U.S. 518 (1938).

⁸⁶ *Id.* at 519.

⁸⁷ *Id.* at 522.

⁸⁸ *Id.* at 538 (internal quotations omitted).

⁸⁹ See *id.*

III. MODERN REALITIES AND JURISPRUDENCE: THE HONEYMOON IS OVER

A. ABC laws in the several states

1. Three tiers of distribution

After Prohibition, the states developed a three-tier system to control the flow of alcohol within the state, a system still in place today.⁹⁰ Under this system, licensed manufacturers may sell only to licensed wholesalers.⁹¹ The wholesalers, in turn, may sell only to licensed retailers.⁹² Retailers are the only tier allowed to sell to consumers.⁹³ The states intended for this system to displace the pre-Prohibition system in which a producer sold directly to his customers; that system was thought to foster alcohol abuse, corruption, and organized crime.⁹⁴ In order to prevent circumvention of this new system, and because taxes were generally collected at the wholesale tier,⁹⁵ states passed laws to limit or prohibit the direct shipment of alcohol.⁹⁶

2. Direct Shipments

Under the current “wine wars” fact pattern, the state in question allows producers within the state to ship wine directly to consumers but prohibits producers in other states from doing so.⁹⁷ States generally defend the discriminatory ban by contending that allowing only in-state wineries to ship directly to consumers ensures that taxes are collected and that minors do not receive direct shipments.⁹⁸ Essentially, they argue economics and temperance.

⁹⁰ Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 355 (1999).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 355-56.

⁹⁵ See *id.* at 356.

⁹⁶ *Id.*

⁹⁷ See generally cases cited *supra* note 8.

⁹⁸ Shanker, *supra* note 90, at 357-58.

Commentators have found fault with these justifications. They argue that states do not seem concerned with the loss of tax revenue in other direct-to-consumer sales and that the states can prevent minors from getting alcohol through technological means.⁹⁹ However, neither of these arguments against the state is necessarily true. Courts have found a similar law preventing direct shipment in other industries facially discriminatory and have immediately struck it down.¹⁰⁰ Alcohol regulation may be the only area of commerce where a state can pass this kind of discriminatory legislation to ensure that its taxes are collected. They are not whining about their inability to collect taxes in other areas because they are simply resigned to their fate. The dormant Commerce Clause would render any complaints useless.

Suggested mechanisms for preventing access of alcohol to minors via direct shipment include the following: requiring adult signatures on delivery, placing warning labels on the product, or requiring credit cards for purchase.¹⁰¹ Such methods would be impractical or ineffective. Warning labels would do little to dissuade an eager teenager. Requiring adult signatures would do more to hamper delivery to adults, who would likely be at work when the delivery is made, than to prevent access to minors. In addition, many minors have their own credit cards¹⁰² or could “borrow” them from their parents to purchase alcohol. Allowing direct shipments only from domestic wineries would ensure the state adequate power and jurisdiction to prosecute and punish offenders.

This particular domestic-only approach to direct shipping laws is not the only one the states employ. States like Kentucky avoid the concern of discriminatory legislation by outlawing direct shipments of alcohol for both out-of-state and in-state producers.¹⁰³ Other states, like California, have enacted reciprocity statutes in an

⁹⁹ *Id.* at 358-59.

¹⁰⁰ *See, e.g.,* *Welton v. Missouri*, 91 U.S. 275, 282 (1875); *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *cert. granted sub nom. Granholm v. Heald*, 125 S. Ct. 1885 (2005).

¹⁰¹ Shanker, *supra* note 90, at 358-59.

¹⁰² *See* Michael Lopardi, *Charging Your Way Into a Mess*, BUFF. NEWS, Aug. 18, 2004, at N3, 2004 WL 60048629.

¹⁰³ *See* KY. REV. STAT. ANN. §§ 243.130 (in-state), 244.165 (out-of-state) (West 2004). The Wine Institute lists twenty-three other states prohibiting direct shipment of wine including Utah, Florida, and Tennessee. *See* Wine Institute, *Direct-to-consumer Shipment Laws by State for Wineries* (2004), at http://www.wineinstitute.org/shipwine/analysis/intro_analysis.htm.

effort to encourage the repeal of laws prohibiting direct shipment.¹⁰⁴ Under reciprocity statutes, a consumer in State A, the reciprocity state, would be allowed to receive a direct shipment from a winery in State B only if a consumer in State B could legally receive a direct shipment from a winery in State A.¹⁰⁵ The Court's decision on the permissibility of the domestic-only approach will impact the fate of the anti-shipping and reciprocal shipping states.

B. The Supreme Court takes the Twenty-first Amendment to Task

Beginning in the 1960's, the Court began to chip away at the power granted by the Twenty-first Amendment. The tide turned from the near limitless power under *Young's Market* to a stricter scrutiny beginning with *Hostetter v. Idlewild Bon Voyage Liquor Corp.*¹⁰⁶ In truth, the *Hostetter* Court decided the case correctly but on very incorrect principles.

In *Hostetter*, Idlewild, operated a store in New York's JFK Airport, at which it sold alcohol to departing international travelers.¹⁰⁷ The customer received only a receipt at the time of purchase. The alcohol was then loaded directly onto the plane, and the customer picked it up at his destination upon landing.¹⁰⁸ The New York State Liquor Authority found that Idlewild was operating in violation of state ABC laws,¹⁰⁹ but the Court enjoined New York from interfering with Idlewild's business.¹¹⁰ Although some commentators have decried this case as the first to misinterpret the Twenty-First Amendment,¹¹¹ *Hostetter* should be seen as a jurisdictional limitation similar to *Collins*.¹¹² The district court found that "the Liquor

¹⁰⁴ See CAL. BUS. & PROF. CODE § 23661.2(a) (West 2005). The Wine Institute lists thirteen reciprocity states including Missouri, Idaho, and West Virginia. See Wine Institute, *supra* note 96.

¹⁰⁵ See § 23661.2(a).

¹⁰⁶ 377 U.S. 324 (1964).

¹⁰⁷ *Id.* at 325.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 326.

¹¹⁰ *Id.* at 327, 334.

¹¹¹ See, e.g., 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, 316 (2002).

¹¹² *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); see Eng, *supra* note 5, at 1869.

Authority has neither alleged nor proved the diversion of so much as one bottle of plaintiff's merchandise to users within the state of New York."¹¹³ Because none of Idlewild's alcohol was consumed or used within the state of New York, the court could have limited its ruling to the jurisdictional issue, thereby affirming once again the state's increased power to regulate alcohol and confirming that the state must confine its use of that power to its traditional jurisdiction.¹¹⁴

Instead of so limiting the ruling, however, Justice Stewart went on to implicate the Commerce Clause and achieve a stark departure from prior jurisprudence. The direction his opinion will take is clear in his statement of the issue: "whether the Twenty-first Amendment so far obliterates the Commerce Clause as to empower New York to prohibit absolutely the passage of liquor through its territory...for delivery to consumers in foreign countries."¹¹⁵ Stewart then attempted to grapple with the competing considerations. He first paid lip service to prior jurisprudence by stating, "This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations" in regards to alcohol.¹¹⁶ He then argued, however, "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification."¹¹⁷ Continuing on this line of reasoning, Stewart declared that because each was part of the same Constitution, each must be read in the light of the other.¹¹⁸ Although the Court ultimately decided the case on the fact that New York was attempting to regulate beyond its borders,¹¹⁹ the

¹¹³ *Hostetter*, 377 U.S. at 328 (internal quotation omitted).

¹¹⁴ See *Collins*, 304 U.S. at 538; Eng, *supra* note 5, at 1871.

¹¹⁵ *Hostetter*, 377 U.S. at 329.

¹¹⁶ *Id.* at 330.

¹¹⁷ *Id.* at 331-32. Justice Stewart went on to proclaim that a "repeal" of the Commerce Clause would be "patently bizarre." *Id.* at 332.

¹¹⁸ *Id.* at 332.

¹¹⁹ *Id.* at 333-34.

remaining dicta clearly put the formerly supreme Twenty-first Amendment in the shadow of the dormant Commerce Clause.¹²⁰

The vigorous dissent in *Hostetter* became the first in a long line of modern cases to look to the legislative history of the Amendment for guidance. In the legislative history, Justice Black found that the Senate expressly rejected the federal government's concurrent control of alcohol regulation.¹²¹ It seems that the Senate feared that such concurrent power would be used to chip away at the broad power intended for the states.¹²² Congress thereby sought to protect the right of states to control alcohol throughout their territories by preventing federal interference.¹²³ A disapproving Court nevertheless used the dormant Commerce Clause to allow federal interference on state regulation. Detractors claim Stewart mischaracterized Idlewild's business and that although there was no "use" in New York, there was indeed "delivery" to Idlewild's warehouses.¹²⁴ Stewart's opinion exhibits inconsistency and an agenda. Stewart found a way to rationalize the decision he wanted without considering all the relevant facts, the legislative history of the Amendment, or prior jurisprudence.

As if to cement the Court's new disdainful view of the Twenty-First Amendment, the Court handed down *Dep't of Revenue v. James B. Beam Distilling*,¹²⁵ which also limited the application of the Amendment, on the same day as *Hostetter*.¹²⁶ In *James B. Beam Distilling*, the distilling company imported liquor directly from

¹²⁰ Compare *Hostetter*, 377 U.S. at 332 (declaring that each provision must be read in light of the other) with *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) (holding that the Twenty-First Amendment acts as an exception to dormant Commerce Clause challenges).

¹²¹ See *Hostetter*, 377 U.S. at 336-37 (Black, J., dissenting). Justice Black's dissent is especially telling because he was in the Senate during the passage of the Twenty-first Amendment. See *Granholt v. Heald*, 125 S. Ct. 1885, 1908 n.2 (2005) (Stevens, J., dissenting).

¹²² *Hostetter*, 377 U.S. at 337 (Black, J., dissenting).

¹²³ *Id.* at 338.

¹²⁴ Denning, *supra* note 111, at 318. In addition, Denning claims that Stewart phrased the issue the way he did in order to avoid the *Young's Market* cases and that he further avoided those cases "(i) by claiming that through-shipment, not importation, was involved; (ii) by implying that New York's liquor laws were to some degree preempted by the federal customs regulations enacted; and (iii) by implying that the involvement of the Customs Bureau converted JFK into some sort of federal enclave." *Id.*

¹²⁵ 377 U.S. 341 (1964).

¹²⁶ *Id.*

Scotland. Kentucky, the state of importation, charged a ten cent per proof gallon tax on the imports.¹²⁷ The company argued that this was a violation of the Constitution's Import-Export Clause,¹²⁸ and the state defended its ABC laws by claiming protection under the Twenty-first Amendment.¹²⁹

Prior jurisprudence did not constrain the *James B. Beam Distilling* Court because the case involved the Import-Export Clause, and prior cases dealt primarily with the dormant Commerce Clause. Justice Stewart, writing again for the majority, once more phrased the issues in the case in the most extreme terms: "To sustain the tax...would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned.... This Court has never intimated such a view, and now that the claim...is squarely presented, we expressly reject it."¹³⁰ While conceding that the Twenty-first Amendment would allow the State to flatly prohibit any importation and to tax shipments after they arrived, the Court nevertheless denied the State the lesser power to tax the importation.¹³¹

The Court's deciding the case on the basis of the Import-Export clause resulted in a strikingly logical conclusion: while the states have authority to tax and lay duties on alcohol from state to state, the power of the Twenty-first Amendment stops at the seaboard.¹³² Critics note that Stewart's opinion is woefully incomplete because it does not address the statements in the *Young's Market* line of cases that indicate that the states are to have the unfettered right to control alcohol.¹³³ Yet again, Justice Black dissented from the Court's opinion that the Amendment applied only to domestic liquors despite any such language in the Amendment.¹³⁴ Black continued to criticize the decision, arguing that the Court should not use an

¹²⁷ *Id.* at 342.

¹²⁸ U.S. CONST. art. I, § 10, cl. 2.

¹²⁹ See *James B. Beam Distilling Co.*, 377 U.S. at 343.

¹³⁰ *Id.* at 345-46.

¹³¹ *Id.* at 346.

¹³² See Denning, *supra* note 111, at 322.

¹³³ *Id.* at 323.

¹³⁴ *James B. Beam Distilling Co.*, 377 U.S. at 347-48 (Black, J., dissenting).

important but older and more general provision to invalidate an equally important but newer and specific exception.¹³⁵

These two cases make limited inroads into the revocation of state power and mark the turning point in Supreme Court jurisprudence. One can read them as one case limiting the jurisdiction of state power under the Amendment (albeit with a good amount of damaging dicta) and one case prohibiting the Amendment from applying to taxes laid on foreign imports. The Court, however, cites these two cases as gospel; it relies on *Hostetter* and *James B. Beam Distilling* nearly to the exclusion of the earlier cases, the legislative history, and the plain meaning of the Amendment itself.¹³⁶

C. The Twenty-first Amendment Falls

The 1964 decisions of *Hostetter* and *James B. Beam Distilling* became launching pads for a Court dedicated to the repeal of the Twenty-first Amendment.¹³⁷ The more modern cases cite to *Young's Market* for the obligatory “states have broad power” quote, but the newer series of cases rely far more on *Hostetter* and its progeny than on any of the traditional sources.¹³⁸ The Court itself has recognized its seeming unwillingness to look at legislative intent, the plain text, or its early decisions.¹³⁹

A triad of cases accosts, subjugates, and renders the Twenty-first Amendment largely ineffective – *Bacchus Imps., Ltd. v. Dias*,¹⁴⁰ *Capital Cities Cable, Inc. v. Crisp*,¹⁴¹ and *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*¹⁴² The first case

¹³⁵ *Id.* at 348.

¹³⁶ See generally *infra* Part III C.

¹³⁷ *Hostetter* and *James B. Beam Distilling* are cited in all of the cases in this subsection that seek to limit the power of the Twenty-first Amendment.

¹³⁸ See, e.g., *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 275 (1984).

¹³⁹ See *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminium, Inc.*, 445 U.S. 97, 106-07 (1980). Justice Powell asserts that it is unwise to look at legislative intent. See *id.* He further suggests that the Court generally has looked to the plain text of the Amendment, but then he immediately qualifies it with *Hostetter* and other cases that reject a plain reading of the Twenty-first Amendment. *Id.* at 106-10.

¹⁴⁰ 468 U.S. 263 (1984).

¹⁴¹ 467 U.S. 691 (1984).

¹⁴² 476 U.S. 571 (1986).

in the following discussion, *Bacchus*,¹⁴³ revived the dormant Commerce Clause and expressly applied it against a state operating under its Twenty-first Amendment authority.¹⁴⁴

In *Bacchus*, Hawaii imposed an excise tax on liquor sold at the wholesale level.¹⁴⁵ However, the state exempted the local Hawaiian beverages of Okolehao and pineapple wine from the tax in order to encourage the domestic market.¹⁴⁶ The Court went directly to a Commerce Clause analysis and cited recent past precedent in holding, “[no] State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.”¹⁴⁷ The Court then proceeded through an elaborate discussion of whether the wines were in competition with other, non-exempt wines and whether the exemption was therefore discriminatory.¹⁴⁸

Bacchus became an important opinion not because of the state’s flailing attempt to avoid a dormant Commerce Clause analysis but rather because the court made such short work of the Twenty-first Amendment.¹⁴⁹ The Court was able to be so cavalier with the treatment of a constitutional Amendment because the state expressly disclaimed any reliance on the Amendment in a lower court and only brought up the Amendment again when it realized that it could use the Amendment to save the tax.¹⁵⁰ Thus the Court was essentially able to devalue and undermine a constitutional amendment on procedural grounds. Courts cite the language in *Bacchus* time and again to support limiting the power of the Twenty-first

¹⁴³ *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984).

¹⁴⁴ *Id.* at 275-76.

¹⁴⁵ *Id.* at 265.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 268 (quoting *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 329 (1977)). This statement of Commerce Clause jurisprudence and the analysis of the state’s obligations and actions under it come before and without any mention of the Twenty-first Amendment. *See id.*

¹⁴⁸ *See id.* at 268-69.

¹⁴⁹ *See id.* at 274-76.

¹⁵⁰ *Id.* at 274 n.12.

Amendment, yet they never mention the fact that the *Bacchus* Court devalued the provision on procedural grounds.¹⁵¹

In dealing with its Twenty-first Amendment jurisprudence, the *Bacchus* Court very candidly admitted that it was deviating from its earlier decisions.¹⁵² Relying on *Hostetter*, the Court effectuated a balancing test between the dormant Commerce Clause and the Twenty-first Amendment.¹⁵³ The Court would allow discrimination only if the legislation sufficiently implicates the core concerns of the Twenty-first Amendment.¹⁵⁴ The Court then handily determined that Hawaii's laws did not implicate core concerns; the core concerns, while not fully defined by the court, do not include protection of domestic industry.¹⁵⁵

Justice Stevens' vigorous dissent, joined by Chief Justice Rehnquist and Justice O'Connor, argued that the Twenty-first Amendment validated this tax even if the tax were discriminatory.¹⁵⁶ Stevens pointed out that the Court's holding meant that a tax is unconstitutional when it places a burden on liquor imported into a state for use therein but does not burden local industry.¹⁵⁷ Stevens further correctly noted that the Court had previously heard and expressly authorized this scenario in *Young's Market*.¹⁵⁸ Stevens also recognized that Hawaii had the power under the Twenty-first Amendment to create a total local monopoly.¹⁵⁹ He reasoned that if the state could create a local monopoly, it should also have the lesser power of merely imposing a

¹⁵¹ See e.g., *Brown-Forman*, 476 U.S. at 584.

¹⁵² *Bacchus*, 468 U.S. at 274. The Court professed rather matter of factly, "Despite broad language in some of the opinions of this Court written shortly after ratification of the Amendment, more recently we have recognized the obscurity of the legislative history of § 2 [of the Twenty-first Amendment]." *Id.* (footnote omitted).

¹⁵³ *Id.* at 275.

¹⁵⁴ See *id.* at 276.

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* at 278-79 (Stevens, J., dissenting).

¹⁵⁷ *Id.* at 282.

¹⁵⁸ *Id.* In *Young's Market*, discussed *supra*, the issue was an additional license fee required to import beer. Similarly, *Bacchus* requires an additional tax on imported alcohol. Both were fees levied for the importation of alcohol for use within the state.

¹⁵⁹ *Id.* at 286.

tax on imported liquor.¹⁶⁰ Despite Stevens' forceful dissent, the Court successfully incorporated strong Commerce Clause language in to any future Twenty-first Amendment case. Unfortunately for the states, Stevens is correct that, under the logic of *Bacchus*, any discrimination in pricing or taxing of alcohol would violate the dormant Commerce Clause, and the Twenty-first Amendment cannot provide salvation to such laws.

The second case demonstrating the Court's corrosive handling of the Twenty-first Amendment, *Capital Cities Cable*,¹⁶¹ was decided less than a month prior to *Bacchus*. *Capital Cities Cable* involved the Twenty-first Amendment but not in the traditional manner. In *Capital Cities Cable*, Oklahoma had a law banning television advertisements for alcoholic beverages.¹⁶² Out-of-state cable companies who serviced Oklahoma residents faced a troubling dilemma: either they would be fined by the state for transmitting alcohol commercials into Oklahoma, or they would be fined by the FCC for altering the advertisements.¹⁶³ The Court first noted that federal regulations, no less than federal law, would preempt state legislation through the Supremacy Clause of the Constitution.¹⁶⁴ What most concerns this note, however, is that the state attempted to save its regulation by appealing to the Twenty-first Amendment.¹⁶⁵

The plain text of the Amendment does not support Oklahoma's reliance on it.¹⁶⁶ Oklahoma did not seek to regulate importation or use of intoxicating liquors but rather to ban a certain breed of commercial advertising.¹⁶⁷ Despite all the power the Amendment confers on states regarding the regulation of alcohol, it does not provide the states with additional power to regulate advertisement of alcohol.

Instead of limiting its analysis, however, the Court saw an opportunity to strike another blow against the Twenty-first Amendment. Displaying the dissonance

¹⁶⁰ *Id.*

¹⁶¹ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

¹⁶² *Id.* at 694-95.

¹⁶³ *See id.* at 695-97.

¹⁶⁴ *See id.* at 698-99.

¹⁶⁵ *Id.* at 711-12.

¹⁶⁶ *See* U.S. CONST. amend. XXI, § 2.

¹⁶⁷ *See Capital Cities Cable*, 467 U.S. at 694-96.

of its holdings, the Court spouted in a single paragraph that “[s]tates enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders.... [The] Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause,” but also that “[w]e have cautioned, however, that ‘[t]o draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification.’”¹⁶⁸ Initially the Court gave broad power to the states, but by the end of the same paragraph, it took the power back. The Court then promulgated an extremely narrow balancing test that largely deflates any hope of the states ever relying on the Twenty-first Amendment. Writing for the Court, Brennan declared that the test is “whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.”¹⁶⁹

This excessively narrow test, later employed in *Bacchus*,¹⁷⁰ destroys the inherent power of the Twenty-first Amendment. The *Young's Market* line of cases pronounced that the Twenty-first Amendment acted as a complete defense to dormant Commerce Clause challenges.¹⁷¹ That power has experienced a dramatic reduction. Now, through judicial decree, the state's asserted interests must be “so closely related” to the “core” concerns of the Twenty-first Amendment before they can excuse discriminatory laws. This concept is a novel and ad hoc limit on constitutional authority. In essence, a state must justify any use of its “broad power” as not just within the purview of the Twenty-first Amendment but also closely related to its core concerns.

Finding a legitimate but “limited” interest,¹⁷² the Court in *Capital Cities Cable* then balanced this interest against the express federal interest embodied by the FCC.¹⁷³ This case heralds the beginning of exactly what Congress intended the

¹⁶⁸ *Id.* at 712-13 (quoting *Craig v. Boren*, 429 U.S. 190, 206 (1976)); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964).

¹⁶⁹ *Id.* at 714.

¹⁷⁰ *See Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 275-76 (1984).

¹⁷¹ *See, e.g., Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939).

¹⁷² *Capital Cities Cable*, 467 U.S. at 715.

¹⁷³ *Id.* at 715-16.

Twenty-first Amendment, and Webb-Kenyon before it, to prevent. Whereas the Amendment aimed to allow states to enact liquor laws free of federal influence,¹⁷⁴ a federal body would now weigh federal concerns against state concerns.¹⁷⁵ In fact, unless the state concerns are “closely related” to the federal body’s view of the concerns of the Twenty-first Amendment, the federal concerns will always trump the weighing analysis.

The last in the triad of cases is *Brown-Forman*,¹⁷⁶ which operates as the final nail in the Amendment’s coffin. The case concerns a New York price affirmation statute.¹⁷⁷ New York required any licensed seller of alcohol who sold to wholesalers to fill out a form indicating that the price it was charging was no higher than the lowest price it charged in any other state.¹⁷⁸ However, Brown-Forman Distillers offered certain “promotional allowances,” which were essentially cash payments intended, but not required, to be used for the purchase of advertising materials promoting Brown-Forman products.¹⁷⁹ The New York Liquor Authority found that this lowered the “effective price” in other states in violation of the affirmation statute and attempted to revoke Brown-Forman’s license.¹⁸⁰

Brown-Forman articulately applies the two-tier test now used in Twenty-first Amendment cases.¹⁸¹ The case begins by stating the rule regarding the dormant Commerce Clause: “When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further

¹⁷⁴ See Denning, *supra* note 111, at 304-05.

¹⁷⁵ See *Capital Cities Cable*, 467 U.S. at 715-16.

¹⁷⁶ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.* 476 U.S. 573 (1986).

¹⁷⁷ *Id.* at 576.

¹⁷⁸ See *id.*

¹⁷⁹ *Id.* at 576-77.

¹⁸⁰ *Id.* at 577. For example, if the seller charged a New York wholesaler \$20, then, to comply with New York’s statutes, it could not charge New Jersey wholesalers less than \$20. But if it charged New Jersey wholesalers \$20 and then gave them a “promotional allowance” that amounted to \$3 per unit sold, the “effective price” would be \$17 for New Jersey wholesalers and thus in violation of the New York statute.

¹⁸¹ See *id.* at 584-85.

inquiry.”¹⁸² Once the producer had filed its schedule of prices with the state of New York, it could not thereafter reduce its prices in other states without risking the revocation of its New York license.¹⁸³ Therefore the Court concluded that the “practical effect” of the law was to control prices in other states.¹⁸⁴ For this reason, the law directly regulated interstate commerce and was struck down without a balancing of interests.¹⁸⁵

The state brought up the pesky Twenty-first Amendment, however, and the Court was forced to analyze it as well. The Court had little time or patience for a Twenty-first Amendment contention. Indeed, the case mentions only in passing the “wide latitude” given by the Amendment.¹⁸⁶ Instead, it cuts right to the abrogation of the Amendment’s power by citing directly to *Bacchus* and *Hostetter*.¹⁸⁷ The Court held that, because the effect of the law was to regulate prices outside the borders of the State, an Amendment allowing regulation of “importation” of liquors into the state could not possibly save it.¹⁸⁸

In this case, the Court attempted to use sleight of hand to achieve its desired goal. The Court invalidated the law under the Commerce Clause by emphasizing the law’s effect on other states. It then used the same reasoning for why the Twenty-first Amendment could not thereafter “save” the law, declaring that because the law affected other states, the Twenty-first Amendment did not apply. It would seem, then, that any violation of the Commerce Clause would result in the impotence of

¹⁸² *Id.* at 579. The court also explains, “when, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.” *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Although dormant Commerce Clause analysis is thus split into two lines of inquiry, regulation of alcohol will almost always fall into the first line in which it is directly discriminatory.

¹⁸³ *Brown-Forman*, 476 U.S. at 582.

¹⁸⁴ *Id.* at 583.

¹⁸⁵ *Id.* at 582.

¹⁸⁶ *Id.* at 584.

¹⁸⁷ *See id.*

¹⁸⁸ *See id.* at 585.

the Twenty-first Amendment. Although Justice Stevens dissented, his analysis of the Twenty-first Amendment reads more like a sad farewell than a strenuous defense.¹⁸⁹

Three years later, the Court decided *Healy v. The Beer Institute*¹⁹⁰ as a corollary to *Brown-Forman*. The opinion of the Court in *Healy* merits little discussion because it provided little analysis of the Twenty-first Amendment and instead relied heavily on *Brown-Forman*.¹⁹¹ Justice Scalia's concurring opinion, however, makes this case an interesting companion. Scalia asserted that the "immunity" conveyed by the Twenty-first Amendment will vanish if the law seeking its protection is discriminatory.¹⁹² In this catch twenty-two, the Twenty-first Amendment provides immunity from the dormant Commerce Clause unless the law would actually run afoul of the Clause. If the dormant Commerce Clause would prohibit the action, then the "immunity" evaporates. By this logic, the Twenty-first Amendment's power is ephemeral and exists in name only.

Though these cases represent the most direct attacks on the power and authority of the Twenty-first Amendment, a series of other cases have invalidated state laws regarding the regulation of alcohol, including laws providing different drinking ages for men and women and restrictions on advertising.¹⁹³

D. Circuits Split

Against this backdrop, the direct shipment litigation began. With two important exceptions, the district and circuit courts applied the reasoning handed down by the Supreme Court in *Bacchus* and *Capital Cities Cable*.¹⁹⁴ While many of the circuit and district judges often remarked on the "broad powers" the Twenty-first

¹⁸⁹ See *id.* at 590-91 (Stevens, J., dissenting).

¹⁹⁰ 491 U.S. 324 (1989).

¹⁹¹ See *id.* at 341-42.

¹⁹² *Id.* at 344 (Scalia, J., concurring).

¹⁹³ Denning, *supra* note 111, at 324-25.

¹⁹⁴ See, e.g., *Bolick v. Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002); *Bainbridge v. Bush*, 148 F. Supp. 2d 1306 (M.D. Fla. 2001).

Amendment guaranteed to the states, the powers are never broad enough to save state statutes from invalidation under the dormant Commerce Clause.¹⁹⁵

1. The Seventh Circuit

The earliest of the domestic-only direct shipping cases, *Bridenbaugh v. Freeman-Wilson*,¹⁹⁶ made its way to the Seventh Circuit's docket and was decided in 2000.¹⁹⁷ Judge Easterbrook began his analysis of the case by observing, "This case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not."¹⁹⁸ For Easterbrook, then, this case was a duel of authority between an express constitutional provision and a doctrine implied by the Supreme Court.

In *Bridenbaugh*, Indiana had adopted the three-tier distribution system.¹⁹⁹ The state declared that it had done so to ensure "orderly market conditions," which the Court correctly pointed out was a "euphemism for reducing competition and facilitating tax collection."²⁰⁰ As part of this system, Indiana allowed local wineries to ship directly to consumers but prevented wineries in foreign nations or other states from doing the same.²⁰¹

Judge Easterbrook departed remarkably from the Supreme Court's established Twenty-first Amendment jurisprudence. Rejecting a "core powers" analysis of the Amendment, he pronounced, "[O]ur guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters."²⁰² The Seventh Circuit's decision to discard the standard "core powers"

¹⁹⁵ See, e.g., *Bolick*, 199 F. Supp. 2d 397. But see *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000).

¹⁹⁶ 227 F.3d 848 (7th Cir. 2000).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 849; accord *Swedenburg v. Kelly*, 358 F.3d 223, 231 (2d Cir. 2004), *cert. granted* 541 U.S. 1062 (2004) ("The inquiry, in our view, should not allow the protective doctrine of the dormant Commerce Clause to subordinate the plain language of the Twenty-first Amendment.").

¹⁹⁹ *Bridenbaugh*, 227 F.3d at 851.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

analysis that had driven the Supreme Court in its decisions since *Hostetter* has received heavy criticism.²⁰³

Reading the Supreme Court's recent cases narrowly, Judge Easterbrook found that "[n]o decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause.... [T]he Court *has* held, however,...that the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms."²⁰⁴ By examining the case as an importation case, Judge Easterbrook was able to distinguish *Bacchus* and *Brown-Forman* on the facts.²⁰⁵ Those cases involved discriminatory taxation and price affirmation statutes, respectively.²⁰⁶ In Judge Easterbrook's opinion, as long as the importation law is not discriminatory, it should be allowed under section two of the Twenty-first Amendment.

Somewhat paradoxically, the Seventh Circuit denied any discrimination inherent in the law because Indiana required that "every drop of liquor pass through its three-tiered system and be subjected to taxation."²⁰⁷ The circuit court reasoned that all liquor must be imported by an Indiana wholesaler or retailer, which would then be subject to the appropriate taxation, and that therefore all wine imports went through the same tiers.²⁰⁸ Yet only wineries in Indiana could ship directly to consumers.²⁰⁹ The Court concluded that there was no discrimination because out-of-state wineries may directly ship wines from other states. The only requirement was that they import the alcohol to Indiana wineries first.²¹⁰

Concluding that no discrimination existed, however, was a fiction. Either Judge Easterbrook was attempting to use judicial sleight of hand, or he simply did not realize that discrimination remained. The state allowed Indiana wineries to direct

²⁰³ See *Dickerson v. Bailey*, 212 F. Supp. 2d 673, 682 (S.D. Tex. 2002), *aff'd*, 336 F.3d 388 (5th Cir. 2003).

²⁰⁴ *Bridenbaugh*, 227 F.3d at 853.

²⁰⁵ See *id.*

²⁰⁶ See *supra* part III C.

²⁰⁷ *Bridenbaugh*, 227 F.3d at 853.

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ *Id.* at 853-54.

ship, thereby allowing them to reduce prices. If a California winery shipped directly to Indiana, it would have to go through an Indiana middle-man, thereby raising the price. To the Seventh Circuit, however, this was not discrimination if it read the statute carefully enough. The law did not prevent foreign wineries from doing something that domestic wineries could do. It merely required that all wines be subject to Indiana's tiers and taxes.²¹¹ Reading the statute in this light, one could make a barely tenable holding that the law treated all wines the same and therefore did not discriminate. Judge Easterbrook was able to get away with this decision, however, because the plaintiffs in *Bridenbaugh* were Indiana residents, not wholesalers or retailers, and therefore were able to receive direct shipments.²¹² Therefore the statute did not discriminate against the plaintiffs in the same way as it did out of state wineries that wished to ship directly to Indiana residents.

Judge Easterbrook was driven by history and the states' attempts to close loopholes in the law prior to the enactment of the Eighteenth Amendment.²¹³ With history on his side, Easterbrook obtained the correct result. Although the legislative intent is ambiguous,²¹⁴ the historical problems of the states, combined with the adoption of section two and the Supreme Court's early interpretations giving broad plenary power to the States, makes a strong case that Congress meant for section two to exempt states from Commerce Clause challenges concerning the regulation of alcohol. Taking that into consideration, Judge Easterbrook's decision was morally correct, though it questionably evaded certain realities in order to avoid being subject to binding precedent.

2. The Eastern District of Virginia, et al.

Other courts looked to and followed the binding precedent of the Supreme Court. *Bolick v. Roberts*,²¹⁵ was the first case to apply the two-tier analysis of *Brown-Forman*, and soon other district courts in Texas, North Carolina, and New York did

²¹¹ See *id.* at 854

²¹² See *id.*

²¹³ See *id.* at 851-53.

²¹⁴ See *supra* note 64 and accompanying text.

²¹⁵ 199 F. Supp. 2d 397, 424-25 (E.D. Va. 2002), *vacated as moot and remanded*, 330 F.3d 274 (holding that, because Virginia had altered some of the statutes at issue in the lower court, lower court's decision was moot).

the same.²¹⁶ *Bolick* was a magistrate's recommendation, and while the magistrate did not clearly explain the two-tier analysis, he did apply it.²¹⁷ *Bolick* expressly rejected *Bridenbaugh* as "improperly decided because it does not rely upon the established dormant Commerce Clause analysis."²¹⁸ In *Dickerson v. Bailey*,²¹⁹ the district court spelled out the steps more clearly, but sped through the analysis. It declared that because the domestic-only direct shipment legislation was facially discriminatory in violation of the dormant Commerce Clause and that the Twenty-first Amendment "core power" of temperance was not implicated because the measure was designed for economic protectionism, the Twenty-first Amendment did not save the offending legislation.²²⁰

The strictest court in this line of cases that applied the two-tier *Brown-Forman* test was *Beskind v. Easley*,²²¹ in which the court found that the direct shipping legislation was a "cut and dry example" of a violation of the Commerce Clause.²²² Because the court found no legitimate reason for the state to exempt itself from the direct shipping laws, it saw those laws as pure economic protectionism.²²³ Once the court deemed the ABC laws protectionist, the death knell of the legislation rang. The court firmly stated that "[n]o equilibrium can be achieved when economic protectionism is placed on one side of the scale, and the Commerce Clause's need to preserve the respect of the several states for each other is placed on the opposite side."²²⁴ Under this scrutiny, the Twenty-first Amendment cannot save any facially discriminatory law. The court applied a second-tier analysis in name only. It seems that even if a "core power" were implicated, it could not "save" or reach an "equilibrium" with a law offensive to the Commerce Clause.

²¹⁶ See generally *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); *Swedenburg v. Kelly*, 232 F. Supp. 2d 135 (S.D.N.Y. 2002), *rev'd* 358 F.3d 223 (2d Cir. 2004), *cert. granted* 124 S. Ct. 2391 (2004); *Dickerson v. Bailey*, 212 F. Supp. 2d 673 (S.D. Tex. 2002) *aff'd* 336 F.3d 388 (5th Cir. 2003).

²¹⁷ *Bolick*, 199 F. Supp. 2d at 447.

²¹⁸ *Id.* at 408.

²¹⁹ 212 F. Supp. 2d 673 (S.D. Tex. 2002) *aff'd* 336 F.3d 388 (5th Cir. 2003).

²²⁰ *Dickerson*, 212 F. Supp. 2d. at 675.

²²¹ 197 F. Supp. 2d 464 (W.D.N.C. 2002), *aff'd in part, vacated in part*, 325 F.3d 506 (2003).

²²² *Beskind*, 199 F. Supp. 2d 464, 471 (W.D.N.C. 2002) *aff'd in part, vacated in part*, 325 F.3d 506 (2003) (the appellate court affirmed the unconstitutionality of the direct shipping laws in its entirety).

²²³ *Id.* at 472.

²²⁴ *Id.* at 472-73.

Courts have recognized the *Brown-Forman* two-tier analysis as flawed.²²⁵ The two-tier analysis inevitably shifts the burden to the states, essentially treating them as “guilty until proven innocent.”²²⁶ Despite criticism, courts continue to ask the states to explain themselves, and then they do away with the law, regardless of the text of the Constitution, when they disapprove of the explanation.

3. The Eleventh Circuit

The district court in *Bainbridge v. Bush*,²²⁷ made an attempt at reconciling these views. The case concerned the familiar fact pattern of a state allowing domestic wineries to ship directly to consumers but preventing foreign wineries from doing the same.²²⁸ The district court began its discussion by stating that the Twenty-first Amendment gives the states “virtually complete control over the importation and sale of liquor” and that state liquor laws carry “a presumption of validity and should not be set aside lightly.”²²⁹ The district court also recognized, however, that earlier decisions had qualified this power, and the court prepared itself to execute a standard two-tier evaluation of the direct shipping laws.²³⁰

Judge Whittmore, the district judge in the *Bainbridge* case, found a tier one violation²³¹ and then dropped to the second tier – whether the Twenty-first Amendment saves the offending legislation.²³² The district court looked to *Brown-Forman* and *Bacchus* but found that they did not require the law’s invalidation.²³³ Echoing the reasoning in *Bridenbaugh*, Whittmore held that *Brown-Forman* stood for the principle of extraterritoriality.²³⁴ If a state’s ABC laws attempted to control

²²⁵ See *Swedenburg v. Kelly*, 358 F.3d 223, 231 (2d Cir. 2004) *cert. granted*, 541 U.S. 1062 (2004); Eng, *supra* note 5, at 1901.

²²⁶ Eng, *supra* note 5, at 1901.

²²⁷ 148 F. Supp. 2d 1306 (M.D. Fla. 2001), *vacated sub nom.*, *Bainbridge v. Turner*, 311 F. 3d 1104 (11th Cir. 2002).

²²⁸ *Id.* at 1308.

²²⁹ *Id.* at 1310 (internal quotations omitted).

²³⁰ *Id.*

²³¹ *Id.* at 1311.

²³² *Id.* at 1312.

²³³ *Id.* at 1315.

²³⁴ *Id.*

events outside the state's borders, then the Twenty-first Amendment could not save them. Similarly, Whittmore held that *Bacchus* stood against "mere economic protectionism."²³⁵ Mere economic protectionism would not allow the Twenty-first Amendment to save discriminatory legislation. Courts have, however, allowed mixed motives to stand,²³⁶ and the district court found such mixed motives in this case.²³⁷ For the district judge, implication of core powers without "mere protectionism" is enough to save discriminatory legislation as long as the legislation does not seek to control conduct outside of its borders.

This method seeks to reconcile the purpose of the Amendment with the Supreme Court cases and the history leading up to its adoption. Yet Whittmore's construction met a roadblock in the form of the Eleventh Circuit. On appeal, Judge Tjoflat vacated and remanded the case.²³⁸ Following the same path as the lower court, the circuit court found the law facially discriminatory and offensive to the Commerce Clause.²³⁹ The court then held, as did the lower court, that Florida's regulations did not regulate any conduct outside the state.²⁴⁰ Judge Tjoflat further agreed with the lower court that extraterritoriality or mere protectionism would not allow Twenty-first Amendment salvation.²⁴¹ However, the circuit court's analysis was not over.

The circuit court created another hurdle for the states. The new element holds that when a law implicates a core concern, "the Amendment removes the constitutional cloud from the challenged law so long as the state demonstrates that it genuinely needs the law to effectuate its proffered core concern."²⁴² This added "genuine need" requirement separates the circuit court's test from that of the lower

²³⁵ *Id.*

²³⁶ *Id.* at 1313 & n.12 (citing *Milton S. Kronheim & Co., Inc. v. District of Columbia*, 91 F.3d 193, 203-05 (D.C. Cir. 1996)).

²³⁷ *Id.* at 1313 & n.11.

²³⁸ *Bainbridge v. Turner*, 311 F.3d 1104, 1115-16 (11th Cir. 2002).

²³⁹ *Id.* at 1109-10.

²⁴⁰ *Id.* at 1111.

²⁴¹ *Id.* at 1112.

²⁴² *Id.*

court. The circuit court remanded the case to the district court to give Florida the opportunity to show a “genuine need” for the law.²⁴³

4. Certiorari granted

Michigan is the birthplace of *Heald v. Engler*,²⁴⁴ now termed *Granholm v. Heald* after certiorari was granted by the Supreme Court.²⁴⁵ *Heald* declared domestic-only direct shipping laws invalid.²⁴⁶ Meanwhile, just a few states away in New York, the *Swedenburg v. Kelley* court came to the opposite conclusion.²⁴⁷ These two cases reached different decisions on similar fact patterns, and the Supreme Court granted certiorari to both in a consolidated case in order to settle the question.²⁴⁸

In *Heald*, a familiar fact pattern arose again: a state allowing domestic wineries to ship directly to consumers while preventing out of state wineries from doing the same.²⁴⁹ The arguments of the parties pitted the dormant Commerce Clause against the Twenty-first Amendment.²⁵⁰ As is often the case, the framing of the issue hinted at the decision the court would make. The court stated the issue as, “how the ‘dormant’ Commerce Clause and the Twenty-first Amendment interact to limit the ways in which a state can control alcohol sales and distribution.”²⁵¹ Under the court’s formulation of the issue, the two provisions interact to *limit* the state’s power. For Judge Daughtrey, the circuit judge in *Heald*, the Commerce Clause was unquestionably superior to the Twenty-first Amendment.²⁵²

²⁴³ *Id.* at 1115-16.

²⁴⁴ 342 F.3d 517 (6th Cir. 2003) *cert. granted sub nom.* Granholm v. Heald, 125 S.Ct. 1885 (2005).

²⁴⁵ *Id.*

²⁴⁶ *See id.* at 527.

²⁴⁷ Swedenburg v. Kelly, 358 F.3d 223, 239 (2d Cir. 2004) *cert. granted*, 125 S. Ct. 1885 (2005).

²⁴⁸ *See* Swedenburg v. Kelly, 541 U.S. 1062 (2004); Granholm v. Heald, 541 U.S. 1062 (2004); Neal R. Stoll & Shepard Goldfein, *Antitrust Trade and Practice*, N.Y.L.J., Dec. 21, 2004, at 3.

²⁴⁹ *Heald*, 342 F.3d at 519.

²⁵⁰ *Id.* at 519-20.

²⁵¹ *Id.* at 522.

²⁵² *See id.* at 524. Daughtrey spoke quite plainly and argued that the Twenty-first Amendment “has little value in a case requiring a Commerce Clause analysis.” *Id.*

Judge Daughtrey combined the “core concerns” analysis with heightened scrutiny under the Commerce Clause.²⁵³ When a law is facially discriminatory and therefore offensive to the Commerce Clause, it requires a high showing of proof in Judge Daughtrey’s court; a nondiscriminatory method that would advance a “core concern” of the Twenty-first Amendment must not exist.²⁵⁴ In this way, *Heald* merged the “core concerns” inquiry with a very elevated Commerce Clause scrutiny in order to produce an extremely difficult test for any state to pass. This merger has the flaws of the *Brown-Forman* two-tier approach,²⁵⁵ yet it also incorporates a heightened scrutiny analysis and forces the state to prove both the implication of a “core concern” *and* that there are no less discriminatory alternatives.²⁵⁶

Judge Daughtrey criticized the lower court for not applying strict scrutiny and for relying on reasoning analogous to the lower court in Florida.²⁵⁷ Not surprisingly, the state was not able to meet the Sixth Circuit’s high burden, and the court pronounced the statute unconstitutional.²⁵⁸ By contrast, the Second Circuit reached the opposite conclusion.²⁵⁹ In a near opposite statement of the issue from the Sixth Circuit, Judge Wesley, writing for the Second Circuit, proclaimed, “[t]he inquiry should be sensitive to the manner in which these two constitutional forces interact in light of the impact the Twenty-first Amendment has on dormant Commerce Clause concerns.”²⁶⁰ Looking to *Bridenbaugh* for support, the court adopted the Seventh Circuit’s historical analysis test.²⁶¹

²⁵³ *See id.*

²⁵⁴ *Id.*

²⁵⁵ *See supra* notes 227-28 and accompanying text.

²⁵⁶ *See Heald*, 342 F.3d at 525-26. The court summarized its test by declaring that a facially discriminatory statute may be saved if it, “fall[s] within the core of the State’s power under the Twenty-first Amendment, having been enacted in the interest of promoting temperance, ensuring orderly market conditions, and raising revenue[]...and...these interests cannot be adequately served by reasonable nondiscriminatory alternatives.” *Id.* (internal quotations omitted).

²⁵⁷ *See id.* at 527.

²⁵⁸ *Id.* at 527-28.

²⁵⁹ *See Swedenburg v. Kelly*, 358 F.3d 223, 239 (2d Cir. 2004) *cert. granted*, 541 U.S. 1062 (2004).

²⁶⁰ *Id.* at 231.

²⁶¹ *Id.*

Judge Wesley followed the example of *Bridenbaugh* and began with a history of Prohibition and a recounting of the legislation and jurisprudence regarding alcoholic beverages.²⁶² First, the court first found that the State's regulatory scheme had legitimate purposes and was not mere economic protectionism as forbidden by *Bacchus*.²⁶³ Rather than go through the requisite Commerce Clause analysis, Judge Wesley looked to see whether the scheme fell within the purview of the Twenty-first Amendment.²⁶⁴ Because it did, the court upheld the statutory regime as valid without further inquiry into the dormant Commerce Clause.²⁶⁵

While *Swedenburg* adopted an historical approach, one that represented probable intent as well as the Amendment's first interpretations, it failed to follow precedent by refusing to engage in a Commerce Clause analysis.²⁶⁶ *Swedenburg* thereby opened itself to the same criticisms as *Bridenbaugh*. It seemingly abandoned binding precedent in order to come to a conclusion that is morally, if not legally, correct.²⁶⁷ Although this historical perspective test would be accurate and ideal when dealing with a blank slate, Judge Wesley overlooked the fact that the Supreme Court had already spoken in this area.

In order to put an end to the conflict in the circuit courts, the Supreme Court granted certiorari to the Sixth and Second Circuits to resolve the question.²⁶⁸ The Court granted certiorari for a single issue: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?"²⁶⁹ Oral argument occurred on December 7, 2004.²⁷⁰

²⁶² *See id.* at 231-37.

²⁶³ *See id.* at 237-38 ("state laws that constitute mere economic protectionism are . . . not entitled to the same deference as law enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 237 (quoting *Bacchus*, 468 U.S. at 276)).

²⁶⁴ *Id.* at 239.

²⁶⁵ *Id.*

²⁶⁶ *See id.* at 223-39.

²⁶⁷ *See* *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984) (enunciating the two-tier analysis to be used when determining if a statute is saved by the Twenty-first Amendment).

²⁶⁸ *Swedenburg v. Kelly*, 541 U.S. 1062 (2004); *Granholt v. Heald*, 541 U.S. 1062 (2004).

²⁶⁹ *Swedenburg*, 541 U.S. 1062.

²⁷⁰ Medill School of Journalism, Northwestern University, On the Docket, at <http://docket.medill.northwestern.edu/archives/000969print.php> (last visited October 4, 2005).

The Supreme Court's phrasing of the issue did not bode well for the states; the Supreme Court took the "in light of" language directly from *Hostetter*.²⁷¹ The Court's suggestion of looking at each provision "in light of" the other also indicated that it would use some form of balancing test. Clearly the Court would not adopt the historical perspective approach of *Bridenbaugh* and *Swedenburg*.²⁷²

5. In a Perfect World

The Court should have departed from its current line of cases and recognized that the Twenty-first Amendment provides an exception to the dormant Commerce Clause doctrine when the regulation of alcohol is involved. As argued above, the combination of legislative intent, relevant historical background, and initial expansive interpretation of the Amendment made a strong case that section two of the Twenty-first Amendment should "save" any legislation offensive to the dormant Commerce Clause doctrine.²⁷³ Only when a state attempts to use the Amendment to extend its jurisdiction should the Court overturn such a law.²⁷⁴ This principle of extraterritoriality appears in modern cases through the use of price-affirmation statutes.²⁷⁵ Keeping in line with these cases, courts should not uphold statutory regimes that seek to extend the control of a state's law beyond its borders by clinging to the Twenty-first Amendment. A state cannot directly legislate inside another state's borders; nor should a state have the power to legislate indirectly.

Bacchus, on the other hand, should have been overruled. Although it is sometimes characterized by lower courts as representing a limitation on "mere economic protectionism,"²⁷⁶ the courts should allow such protectionism. The plain text of the Twenty-first Amendment declares that it is unconstitutional for a person to violate the ABC laws of any state.²⁷⁷ Under the plain text, a state may establish a

²⁷¹ See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964).

²⁷² See *Swedenburg v. Kelley*, 358 F.3d 223, 231-33 (2d Cir. 2004) cert. granted 541 U.S. 1062 (2004); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851-53 (7th Cir. 2000).

²⁷³ See text accompanying note 205.

²⁷⁴ See, e.g., *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938).

²⁷⁵ See *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers, Corp. v. N.Y. State Liquor Auth.* 476 U.S. 573 (1986).

²⁷⁶ See *supra* note 237 and accompanying text.

²⁷⁷ See U.S. CONST. amend. XXI, § 2.

state monopoly on liquor production and importation.²⁷⁸ It is illogical to hold that a state has the power to create a state monopoly over liquor but not a lesser power to simply tax disproportionately or to exempt local business from certain regulations. *Bacchus* is simply a bad decision that relies more on case law than on the Amendment's text, history, or earliest interpretations.

Understandably, however, the court was loathe to overrule one of the defining cases of Twenty-first Amendment jurisprudence. The court, then, should have adopted the reasoning of the Florida district court in *Bainbridge*.²⁷⁹ The fact pattern in *Bacchus* is distinct enough to have isolated it from the rest of the alcohol regulation cases. *Bacchus* did not concern a regulation on importation but rather a tax and a tax exemption on certain kinds of liquor.²⁸⁰ The Supreme Court could easily follow the district court's example in *Bainbridge* and find that *Bacchus* stands as a limitation on "mere economic protectionism."²⁸¹ In this way, it could hold true to the purpose of the Twenty-first Amendment, give full (or nearly full) power to the plain text of section two, and still retain the *Bacchus* and *Brown-Forman* line of cases as representing limited exceptions for extraterritoriality and mere protectionism.

6. Party Briefs and Oral Argument

The Supreme Court's recent cases display the Court's suspicion of protectionist implications and its favor of the Commerce Clause's promise of a national economic union.²⁸² The makeup of the court has changed dramatically since *Hostetter*, and even since *Brown-Forman* just two decades ago. Only three judges who were present to hear *Brown-Forman* remained on the Court to hear *Granholm* and *Swedenburg*.²⁸³ Yet the very different composition of the Court mattered little in the Court's trend toward the decimation of the Twenty-first Amendment.

²⁷⁸ See *id.*; see also *Bacchus Imps. v. Dias*, 468 U.S. 263, 286 (1984) (Stevens, J., dissenting).

²⁷⁹ *Bainbridge v. Bush*, 148 F. Supp. 2d 1306 (M.D. Fla. 2001), *vacated sub nom.* *Bainbridge v. Turner*, 311 F. 3d 1104 (11th Cir. 2002).

²⁸⁰ *Bacchus*, 468 U.S. at 265-66.

²⁸¹ *Id.* at 276; *Bainbridge*, 148 F. Supp. 2d at 1315.

²⁸² See *e.g.*, *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Bacchus*, 468 U.S. 263.

²⁸³ Compare *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.* 476 U.S. 573 (1986) with *Swedenburg v. Kelly*, 541 U.S. 1062 (2004).

The Parties expected the Court to adopt the *Brown-Forman* two-tier analysis and to apply it as the Fourth and Fifth Circuits did.²⁸⁴ The Court established this test through *Capital Cities Cable* and *Brown-Forman*, and it was unlikely that it would deviate from a recent pronouncement.²⁸⁵ Under this test, the regulatory schemes involved are facially discriminatory and therefore fail the first tier. Accordingly, the second tier is implicated, and the arguments centered on whether the legislation is “so closely related” to one of the “core powers” of the Twenty-first Amendment that it can be saved. The briefs of Petitioners and Respondents show extensive debate over this issue.²⁸⁶

Petitioners began their argument by pointing out that the plain text of the Amendment supports their position and by noting other cases in which the Court looked first to the text of statutes in order to interpret them.²⁸⁷ However, the Petitioners quickly commenced preparing for the second tier of the analysis by arguing that regulation of alcohol within a state, collecting tax revenue, and temperance were all core concerns of the Twenty-first Amendment.²⁸⁸ Petitioners spent considerable time distinguishing the present fact pattern from *Hostetter, Bacchus*, and other modern era Twenty-first Amendment cases.²⁸⁹

Respondents likewise prepared their brief with the two-tier analysis in mind and devoted substantial space to arguing that the scheme failed both tiers.²⁹⁰ The respondents began by emphasizing the character and purpose of the dormant

²⁸⁴ See generally *Beskind v. Easley*, 325 F.3d 506, 512 (4th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388, 395 (5th Cir. 2003).

²⁸⁵ See *Brown-Forman*, 476 U.S. at 584-85; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984).

²⁸⁶ See generally Brief for the Petitioners, *Granholt v. Heald*, 125 S. Ct. 1885 (2005) (No. 03-1116), available at <http://www.law.indiana.edu/webinit/tanford/wine/granholtmerits.pdf> [hereinafter “Brief for Petitioner”]; Brief for Respondent, *Granholt v. Heald*, 125 S. Ct. 1885 (2005) (No. 03-1116), available at <http://www.law.indiana.edu/webinit/tanford/wine/HealdFINAL.pdf> [hereinafter “Brief for Respondent”].

²⁸⁷ See Brief for Petitioner at 17-18; see also *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion) (identifying the goals of temperance, ensuring orderly market conditions, and raising revenue as core concerns of the Twenty-first Amendment).

²⁸⁸ Brief for Petitioner at 19-20.

²⁸⁹ *Id.* at 25-30. The Petitioners paid careful attention to *Bacchus* and asserted both that it was inapplicable to the current case and that it was wrongly decided and should be overruled. See *id.* at 27-29.

²⁹⁰ See generally Brief for Respondent.

Commerce Clause and the state's failure to comply with its requirements.²⁹¹ They indicated that even plain text in the Constitution may still be subject to certain qualifications and suggested that the Twenty-first Amendment is one such area.²⁹² They read *Bacchus* and *Brown-Forman* broadly to show that, even when laws fall within the Twenty-first Amendment's plain grant of authority, courts have still found them to be unconstitutional through the dormant Commerce Clause.²⁹³ Unfortunately for the states, even an average reading of *Bacchus* and *Brown-Forman* supported the respondent's contentions. Predicting the court's direction to be the same as that of the Fourth and Fifth Circuits,²⁹⁴ the respondents removed any doubt that less discriminatory measures were available to the states to meet their needs.²⁹⁵

It is apparent that both sides readied themselves for a two-tier analysis. While the petitioners made a brief appeal to history,²⁹⁶ neither side seriously considered that the court would adopt the historical perspective approach of the Second and Seventh Circuits.²⁹⁷ Although it would not be the first time the Court adopted a standard that neither party had urged,²⁹⁸ such occurrences are rare.

Oral argument revealed a number of insights into the direction the Justices were leaning. Stevens and Rehnquist had been solid dissenters in each of the cases that pit the Twenty-first Amendment against the dormant Commerce Clause.²⁹⁹ O'Connor, likewise, dissented from *Bacchus*,³⁰⁰ and the three joined in dissent in

²⁹¹ See *id.* at 11-15.

²⁹² *Id.* at 18-20.

²⁹³ *Id.* at 27-32.

²⁹⁴ See *supra* note 287 and accompanying text.

²⁹⁵ See Brief for Respondent at 35-47.

²⁹⁶ See Brief for Petitioners at 15-17, 19-20.

²⁹⁷ See *Swedenburg v. Kelly*, 358 F.3d 223, 231-32 (2d Cir. 2004) *cert. granted* 541 U.S. 1062 (2004); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000).

²⁹⁸ See David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 880 & n.452 (2004).

²⁹⁹ See *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 586 (1986) (Stevens, J., dissenting) (Justice Rehnquist joined in the dissent); *Bacchus Imps. v. Dias*, 468 U.S. 263, 278 (1984) (Stevens, J., dissenting) (Justices Rehnquist and O'Connor joined in the dissent).

³⁰⁰ See *Bacchus*, 468 U.S. at 278 (Stevens, J., dissenting) (O'Connor joined in the dissent).

Healy.³⁰¹ Although these three Justices were presumptively in favor of the States, reading the oral argument transcript reveals much more.³⁰²

The oral argument showed a Court that was very much concerned with *Bacchus* and state discrimination.³⁰³ Justice O'Connor asked for methods of distinguishing *Bacchus* and told the states not to plan on *Bacchus* being overruled.³⁰⁴ She probed for less restrictive alternatives to the states' current action and thereby hinted that the Court might have considered a strict scrutiny line of reasoning.³⁰⁵ Justice Kennedy, meanwhile, seemed to engage in academic testing; he expressed concern for what effect the Court's ruling might have on reciprocal shipping states³⁰⁶ as well as the three-tier system of distribution generally.³⁰⁷ However, as the states began their arguments, Kennedy declared his support of *Bacchus* by announcing, "[T]he language of *Bacchus*, in effect, restored the anti-discrimination component of the Commerce Clause to liquor control. I think that's a fair and necessary reading of the case."³⁰⁸ By holding to this "necessary" reading of *Bacchus*, Kennedy dedicated himself to the two-tier Commerce Clause analysis. Justice Ginsburg, by contrast, focused almost exclusively on *Bacchus* and the dormant Commerce Clause in finding that *Bacchus* stands for the principle of anti-discrimination.³⁰⁹ She asked incredulously if the states would have the Court overrule both *Bacchus* and the dormant Commerce Clause,³¹⁰ thereby signaling her intent to apply the two-tier analysis. Her implication that it would be absurd to overrule both is an echo of the language in *Hostetter*.³¹¹

³⁰¹ See *Healy v. Beer Inst.*, 491 U.S. 324, 345 (1989) (Rehnquist, C.J., dissenting) (Justices O'Connor and Stevens joined in the dissent).

³⁰² See generally Oral Argument, *Granholt v. Heald*, 125 S. Ct. 1885 (2005) (No. 03-1116), available at 2004 WL 2937830 [hereinafter "Oral Argument"].

³⁰³ *Id.* at 30-45

³⁰⁴ *Id.* at 31.

³⁰⁵ See *id.* at 35-36.

³⁰⁶ *Id.* at 26.

³⁰⁷ *Id.* at 4-5, 14.

³⁰⁸ *Id.* at 30.

³⁰⁹ See *id.* at 33.

³¹⁰ See *id.* at 40-41.

³¹¹ See *supra* note 117.

Justice Souter, likewise, seemed concerned with discrimination. He theorized ways in which the states could make their requirements less restrictive, including the use of audit by internet.³¹² The focus on less restrictive alternatives again indicates that Souter may have been looking to strict scrutiny principles. He conceded that, while alcohol may be treated as unique under the Twenty-first Amendment, “the issue here is whether [the states are] really doing that in a way that supports [their] claim of interest.”³¹³ Therefore the Twenty-first Amendment may treat alcohol uniquely as long as that treatment does not discriminate, which reaffirms Scalia’s concurrence in *Healy*.³¹⁴

Justice Scalia was unsympathetic to the states. He first refused reasoning along the lines of the district court in *Bainbridge*, specifically, that *Bacchus* stood for mere protectionism.³¹⁵ He found instead that *Bacchus* encompassed importation as well.³¹⁶ Moreover, Scalia hinted at a core powers analysis in commenting that the state must have a “good reason” to discriminate.³¹⁷ Scalia also remarked that the burden of showing a “good reason” was “a little higher” than merely bearing “some relationship to their goals of protecting the integrity of the state’s system.”³¹⁸

Justice Breyer seemed sympathetic to the claims of the wineries when he asserted that Congress meant for the Webb-Kenyon Act, and therefore the Twenty-first Amendment, to void the dormant Commerce Clause as to the doctrine of original packaging but not anti-discrimination.³¹⁹ In addition, when Justice Kennedy attempted to characterize the claims of the wineries broadly, Justice Breyer came to the rescue and asserted that the wineries intended a “more modest” position.³²⁰

³¹² See Oral Argument at 25.

³¹³ *Id.* at 50.

³¹⁴ See *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring).

³¹⁵ See Oral Argument at 32.

³¹⁶ See *id.*

³¹⁷ *Id.* at 48.

³¹⁸ *Id.* at 57.

³¹⁹ See *id.* at 40.

³²⁰ *Id.* at 6.

Justice Stevens maintained his dissenter's position. When Kennedy mentioned the danger of the wineries' argument to reciprocity states, Stevens agreed.³²¹ He found himself in the familiar position of dissenting in favor of the states. The record was silent as to the minds of Chief Justice Rehnquist and Justice Thomas.³²² Rehnquist was absent from the debate, and Thomas kept his peace. However, because Thomas is generally a strict textualist³²³ and Rehnquist has been a consistent dissenter,³²⁴ it was likely they would support the claims of the states.

IV. OMINOUS REPERCUSSIONS

A. An Opinion Rendered

The Court decided *Granholm v. Heald* on May 16, 2005.³²⁵ The case was a narrow 5-4 decision in favor of the wineries.³²⁶ Justice Kennedy wrote for the majority, and Justices Ginsburg, Scalia, Souter, and Breyer joined the opinion.³²⁷ Justice Stevens wrote a dissenting opinion in which Justice O'Connor joined,³²⁸ and Justice Thomas wrote a dissenting opinion in which Chief Justice Rehnquist and Justices Stevens and O'Connor joined.³²⁹ Since the 1994 term, the Supreme Court has delivered 175 decisions with a 5-4 majority; this is the first case in which these five Justices have aligned to be the majority.³³⁰

Writing for the Court, Justice Kennedy did not begin with a legal analysis of the issues but rather with a discussion of the economic pressures facing small

³²¹ See *id.* at 27-28.

³²² See generally Oral Argument.

³²³ See Rebecca L. Spiro, Note, *Federal Sentencing Guidelines and the Rehnquist Court: Theories of Statutory Interpretation*, 37 AM. CRIM. L. REV. 103, 108-09 (2000).

³²⁴ See *supra* notes 302, 304.

³²⁵ See *Granholm v. Heald*, 125 S. Ct. 1885 (2005).

³²⁶ *Id.* at 1891-92.

³²⁷ *Id.* at 1891.

³²⁸ *Id.* at 1907 (Stevens, J., dissenting).

³²⁹ *Id.* at 1909 (Thomas, J., dissenting).

³³⁰ Stephen Bainbridge, Supreme Court strikes down discriminatory bans on interstate wine shipment, at http://www.professorbainbridge.com/2005/05/supreme_court_s.html (May 16, 2005).

wineries.³³¹ He lamented that “small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products.”³³² Yet Kennedy never explained what this economic analysis has to do with the law. He instead made his decision from a policy standpoint. All small businesses have difficulty keeping demand for their brand high; this is not unique to the wine trade. Kennedy went on to criticize the “low-level trade war” that domestic-only direct shipment laws, and reciprocity laws in particular, had fostered.³³³ Again, this argument focused on policy and modern sensibilities rather than on law or the text of the Constitution.

Kennedy began his legal argument with a discussion of the Wilson Act.³³⁴ The Wilson Act, predecessor to Webb-Kenyon, was Congress’ first attempt to allow states to regulate alcohol free of dormant Commerce Clause concerns.³³⁵ The Act came about because states had the power to ban domestic production of alcohol but could not ban its importation from other states due to dormant Commerce Clause concerns.³³⁶ The Wilson Act, however, only allowed states to regulate incoming alcohol “to the same extent and in the same manner as domestic liquor.”³³⁷ Yet, when the Court interpreted the Wilson Act, it found that the state could regulate liquor only “upon arrival” and that a direct shipment to a consumer gave no opportunity for the state to regulate the alcohol.³³⁸

Because of this “direct shipment gap,” Kennedy determined that Congress passed Webb-Kenyon only to close the gap and not to remove alcohol from dormant commerce clause scrutiny entirely.³³⁹ As support for this proposition, Kennedy pointed out that Webb-Kenyon did not repeal the Wilson Act.³⁴⁰ Further,

³³¹ *Granholm*, 125 S. Ct. at 1892-93.

³³² *Id.* at 1892.

³³³ *Id.* at 1896.

³³⁴ *See id.* at 1898-99.

³³⁵ *See id.*

³³⁶ *See id.* at 1898.

³³⁷ *Id.* at 1899 (internal quotations omitted).

³³⁸ *See id.* at 1900.

³³⁹ *Id.* at 1900-02.

³⁴⁰ *Id.* at 1901.

he argued that if Congress had truly intended to divest all Commerce Clause protection, it could have inserted much clearer language.³⁴¹ Through this questionable reading of the acts, Kennedy disregarded much of Webb-Kenyon's effectiveness. His selective reading of the law allowed him to craft a ruling more in line with his views on policy than on legal principles.

Turning to the Amendment, Kennedy gave the obligatory "broad powers" reference.³⁴² He immediately abrogated those broad powers, however, and even suggested that the broad language in *Young's Market* was dicta.³⁴³ The Court then turned to *Bacchus* for guidance and expressly held that it reintroduced the "nondiscrimination principle" into Twenty-first Amendment jurisprudence.³⁴⁴ The Court refused to overrule *Bacchus* or limit it to its facts as "mere protectionism."³⁴⁵ Resting on *Bacchus*, the Court found that the Twenty-first Amendment did not provide any protection against the dormant Commerce Clause in situations involving discriminatory laws.³⁴⁶

Interestingly, the Court never discussed the "core powers" of the Twenty-first Amendment.³⁴⁷ As Thomas pointed out in dissent, this omission is hopefully an implicit recognition of the legal bankruptcy of that analysis.³⁴⁸ Instead, the Court discussed what it had previously considered "core powers" in a general dormant Commerce Clause analysis without regard to the Twenty-first Amendment.³⁴⁹

The Court examined whether the direct-shipping-only scheme may still be saved despite its discriminatory character and despite the absolute failure of the

³⁴¹ *See id.* Kennedy points to the McCarran-Ferguson Act, which removed dormant Commerce Clause scrutiny from the insurance industry. *See* 15 U.S.C. § 1101 (2005).

³⁴² *Granholm*, 125 S. Ct. at 1903.

³⁴³ *See id.*

³⁴⁴ *Id.* at 1904.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *See generally Granholm*, 125 S. Ct. 1885.

³⁴⁸ *See id.* at 1925.

³⁴⁹ *See id.* at 1905-07.

Twenty-first Amendment to come to its aid. Following a more traditional Commerce Clause analysis,³⁵⁰ the Court addressed two issues the States raised that might allow them to maintain their “discriminatory” laws. The Court first dismissed the allegation that direct shipping increases minors’ access to alcohol.³⁵¹ For support, Kennedy cited an FTC report stating that states that allow direct shipment have reported no problems with underage drinkers due to increased access to wine.³⁵² He also referenced teenagers’ desire for “instant gratification,” which decreases their desire to buy through the mail or internet.³⁵³ Kennedy further argued that, even if direct shipping resulted in increased access, the state already allowed direct shipping domestically. Because minors are just as likely to buy wine from a domestic winery as from an out-of-state winery, the state already faces that problem.³⁵⁴ Apparently the potential to exacerbate an existing problem is not an overriding concern in the mind of the Court.

Similarly, the Court dismissed the states’ argument that the laws are necessary to ensure the collection of taxes.³⁵⁵ The Court reasoned that because the states issued permits to domestic direct shippers to protect themselves from tax evasion, it could do the same with out-of-state shippers.³⁵⁶ However, this reasoning omits the additional hurdles a state must overcome in order to enforce its regulations in other jurisdictions – hurdles which do not exist for in-state offenders.

The final ruling of the Court began with mere lip service to the “broad powers” of the Twenty-first Amendment: “States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. . . . If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.”³⁵⁷ One can hardly describe these severely limited and curtailed “powers” under the Amendment as “broad.” There are now more exceptions to the power of the Twenty-first Amendment than actual instances in which states may use that power.

³⁵⁰ See *supra* note 182.

³⁵¹ Granholm, 125 S. Ct. at 1905-06.

³⁵² *Id.* at 1905 (citing FTC Report 34).

³⁵³ *Id.*

³⁵⁴ *Id.* at 1906.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 1906.

³⁵⁷ *Id.* at 1907.

In his dissent, Justice Stevens pointed out that if Congress can abrogate the presumption of the dormant Commerce Clause, then surely the people of the United States can do so by passing an amendment to the Constitution.³⁵⁸ Joined by O'Connor, a large part of Stevens' brief dissent was an answer to Kennedy's remarks lamenting how domestic-only direct shipping laws have become a burden in the modern economy.³⁵⁹ Although much of the social condemnation that enshrined alcohol as a special item of commerce through enactment of the Eighteenth and Twenty-first Amendment has faded away, the law has not changed. Because the law was enacted as an amendment to the Constitution, it should be changed through another amendment rather than through judicial "interpretation." Stevens pointed out a number of discriminatory activities that occurred just after the passage of the Twenty-first amendment.³⁶⁰ This early discrimination indicates that the original understanding of the amendment is in direct contradiction to the Court's reading of the text in this case.

Disputing the majority's reading of the history of the Amendment, Justice Thomas wrote a lengthy dissent, joined by Chief Justice Rehnquist and Justices Stevens and O'Connor.³⁶¹ Before even reaching the issue of the Twenty-first Amendment, Thomas concluded that Congress negated the dormant Commerce Clause through the Webb-Kenyon Act, which is still law.³⁶² Thomas then criticized the majority for its holding that the Act immunized only "generally applicable" laws from the Commerce Clause.³⁶³ Thomas condemned this reading as an "ad hoc" judicial addition to Webb-Kenyon's text.³⁶⁴ He further described the erroneous nature of the Court's ruling by noting that when an act removes dormant Commerce Clause concerns, it does so in its entirety. It does not need to specifically list all the kinds of laws that are now beyond the reach of the Commerce Clause.³⁶⁵

³⁵⁸ *See id.* (Stevens, J., dissenting).

³⁵⁹ *Compare id.* at 1907-09 *with id.* at 1892-93. *See also id.* at 1927 (Thomas, J., dissenting) (making a similar argument as that made by Justice Stevens).

³⁶⁰ *See id.* at 1909.

³⁶¹ *Id.* at 1909 (Thomas, J., dissenting).

³⁶² *Id.* at 1910.

³⁶³ *Id.* at 1911.

³⁶⁴ *Id.*

³⁶⁵ *See id.* at 1912 n.3.

Thomas further disputed the Court's reading of the Wilson and Webb-Kenyon Acts. According to Thomas, Webb-Kenyon's removal of the Wilson Act's requirement that imported liquor be regulated "to the same extent and in the same manner" as in-state liquor is even more compelling evidence that Webb-Kenyon eliminates dormant Commerce Clause concerns where alcohol is involved.³⁶⁶ Delving deeper into the majority's historical recount, Thomas found that the Court unnecessarily narrowed the holding of *Clark Distilling v. W. Md. Ry. Co.*,³⁶⁷ by saying that it applied only to "nondiscriminatory" state laws.³⁶⁸ He argued, "*Clark Distilling* recognized that the Webb-Kenyon Act took 'the protection of interstate commerce away from *all receipt and possession of liquor prohibited by state law.*'"³⁶⁹ In fact, earlier versions of the Webb-Kenyon Act contained amendments retaining the nondiscrimination principle, but those were removed.³⁷⁰ Again, this change indicates that Congress meant for Webb-Kenyon to remove alcohol from dormant Commerce Clause scrutiny.

Turning to the Twenty-first Amendment itself, Thomas remarked that the language of the Constitution is even broader than Webb-Kenyon, and if the Act allows discrimination, then the Amendment certainly allows it.³⁷¹ Stating his case simply, Thomas argued, "The widespread, unquestioned acceptance of the three-tier system of liquor regulation,...and the contemporaneous practice of the States following the ratification of the Twenty-first Amendment confirm that the Amendment freed the States from negative Commerce Clause restraints on discriminatory regulation."³⁷² Thomas continued to chide and rebuke the Court for ignoring the large consensus that established the meaning of the Twenty-first Amendment and instead relying on "scattered academic and judicial commentary."³⁷³

Finally arriving at the modern Twenty-first Amendment cases, Thomas began an attack on *Bacchus*: "*Bacchus* should be overruled, not fortified with a

³⁶⁶ *Id.* at 1912.

³⁶⁷ 242 U.S. 311 (1917).

³⁶⁸ *Granholm*, 125 S. Ct. at 1912 (Thomas, J., dissenting).

³⁶⁹ *Id.* (quoting *Clark Distilling*, 242 U.S. at 325).

³⁷⁰ *Id.* at 1916.

³⁷¹ *See id.* at 1919-20.

³⁷² *Id.* at 1921.

³⁷³ *Id.* at 1923.

textually and historically unjustified ‘nondiscrimination against products’ test.”³⁷⁴ He argued that, although the Amendment did not repeal the Commerce Clause, the Commerce Clause did not justify *Bacchus*’s narrowing of the Amendment’s power.³⁷⁵ Thomas declared, “Authorizing States to regulate liquor importation free from negative Commerce Clause restraints is a far cry from precluding Congress from regulating in that field at all.”³⁷⁶ Further, the breadth of the Twenty-first Amendment is not an excuse for ignoring the independent authority of the Webb-Kenyon Act.³⁷⁷

In conclusion, Thomas made a similar point to the argument advanced by Stevens. He criticized Kennedy for beginning his opinion with an appeal to policy rather than to legal principles.³⁷⁸ Thomas ended by comparing the majority to those earlier Justices who crafted opinions that ignored the Acts of Congress, thereby necessitating the Wilson and Webb-Kenyon Acts.³⁷⁹

B. Fallout

Granholm is a landmark decision that has laid to rest the question of domestic-only direct shipping’s constitutionality. In addition, it will have repercussions in other states using alternative methods for regulating alcohol. The domestic-only direct shipping regime is not the only one that states employ. Two other systems are also extensively used: anti-shipping and reciprocal shipping.

Granholm is the new *Bacchus*. It explicitly subjects the Twenty-first Amendment to dormant Commerce Clause scrutiny and expressly eliminates much of the Amendment’s power by holding that laws must be “evenhanded” in order for the Amendment to apply.”³⁸⁰ The Court’s decision in the domestic-only direct shipping regime will be highly persuasive in the reciprocal direct shipping and anti-

³⁷⁴ *Id.* at 1925.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 1926.

³⁷⁷ *Id.*

³⁷⁸ *See id.* at 1927.

³⁷⁹ *See id.*

³⁸⁰ *See id.* at 1907.

shipping regimes. Both sides will analogize to or distinguish themselves from *Granholm*.

California is representative of the states with reciprocal shipping laws.³⁸¹ Reciprocal shipping states allow their citizens to receive direct shipments of alcohol from a producer in any state that allows its citizens to receive shipments from the reciprocal state.³⁸² These states have the most to fear from the ruling in *Granholm*. These laws would certainly fail the Commerce Clause tier one test. The Commerce Clause abhors economic discrimination and economic protectionism, and reciprocal states engage in both. A reciprocal state discriminates based on geography to at least the same extent as the direct shipping states. That geography may change based on the laws of the other forty-nine states, but the discrimination is still present. In addition, reciprocal shipping regimes set up the kind of barriers and retaliatory economic policies that dormant Commerce Clause jurisprudence has sought to avoid.

Furthermore, these statutory regimes implicate the principle of extraterritoriality. They provide incentive for other states to change their laws as well. Other states will face pressure from liquor lobbyists to adopt reciprocal regimes even if reciprocal shipping laws are not the best strategy for the state. Although this scenario is less severe than the extraterritoriality involved in *Brown-Forman*, it is nonetheless present, and it remains an indirect attempt at influencing and coercing the laws of other states.

An analysis of the reciprocal state's situation under *Granholm* indicates that the Twenty-first Amendment does not immunize those laws. The constant theme throughout *Granholm* is discrimination.³⁸³ Under *Granholm*, discriminatory practices not only mandate a failure of the first tier Commerce Clause test; in addition, traditional (formerly "core powers") concerns are not enough to avoid a failure of the second tier.³⁸⁴ Further, the central holding of *Granholm* is that the Twenty-first Amendment provides no shelter to discriminatory laws.³⁸⁵ Because reciprocal shipping states engage in geographic discrimination, and because courts have

³⁸¹ See CAL. BUS. & PROF. CODE § 23661.2(b) (West 2005).

³⁸² See *id.*; see also *supra* Part III A 2.

³⁸³ See generally *Granholm*, 125 S. Ct. 1885.

³⁸⁴ See *supra* text accompanying notes 357-60.

³⁸⁵ *Granholm*, 125 S. Ct. at 1907.

declared that behavior unlawful, reciprocal shipping laws will fall wherever they are challenged.

Other states have decided to avoid the debate completely and prevent direct shipping in its entirety. These anti-shipping states are the antithesis of discrimination. Kentucky serves as an excellent example of a member of the anti-shipping states.³⁸⁶ In Kentucky, it is illegal to ship alcohol directly to anyone who is not a licensed wholesaler or distributor.³⁸⁷ The state supports its prohibition by declaring that any direct shipment after the first is a class D felony.³⁸⁸

Anti-shipping states have little to fear from the decision in *Granholm*. Every drop of liquor passes through their three-tier systems. Whether shipped into the state and sent through the tiers or produced in the state and passed through the tiers, nothing gets to the consumer without first being handled by all three tiers. However, even though Kentucky does not discriminate between in state and out of state alcohol, it would still fail tier one scrutiny under the dormant Commerce Clause because it prevents some interstate commerce (direct shipments from other states). The Twenty-first Amendment, however, would save the law in the second tier. Many states enacted the three-tier system just after the ratification of the Twenty-first Amendment,³⁸⁹ and the Supreme Court has previously held that system valid under the Twenty-first Amendment.³⁹⁰ Therefore the Commerce Clause has no power to invalidate Kentucky's laws.

This situation creates a sad state of affairs for the Twenty-first Amendment. It can very rarely, at best, "save" a statute offensive to the dormant Commerce Clause. When there is no discrimination, the Amendment is hardly necessary. The Twenty-first Amendment is being quietly swept under the rug, soon to become an unnecessary appendix-like attachment to the Constitution. Perhaps the "broad power" spoken of by the Supreme Court is just this – a simple euphemism that means only the power to require all alcohol go through the three tiers and to ban all direct shipments.

³⁸⁶ See KY. REV. STAT. ANN. §§ 243.130 (in-state), 244.165 (out-of-state) (West 2004). Other anti-shipping states include Utah, Tennessee, and Arkansas. Wine Institute, *supra* note 103.

³⁸⁷ See KY. REV. STAT. ANN. §§ 243.130, 244.165(1).

³⁸⁸ § 244.165(2).

³⁸⁹ See Shanker, *supra* note 90, at 355.

³⁹⁰ See *Granholm*, 125 S. Ct. at 1892 (citing *North Dakota v. United States*, 495 U.S. 423, 432 (1990)).

V. CONCLUSION

The Supreme Court should abandon its current agenda of chipping away at the Twenty-first Amendment and instead give it the force it deserves. Because of the decision in *Granholm*, reciprocity states will find themselves looking down the barrel of a lawsuit. States will have to choose between allowing direct shipments from every state, meaning officials in Maine would have to inspect wineries in Southern California and accrue the associated expense, or closing up completely and denying their citizens the chance to buy boutique wines. Either the state will have to raise taxes to pay for added inspections, or it will have to deny its consumers available products. One way or the other, the state must injure its consumers.

Many direct shipping proponents view the debate as old economy vs. new economy.³⁹¹ The three tiers are merely barriers to be circumvented in order to allow e-commerce to flourish. To that end, one litigant has thrust its blade deep into the powers of the Twenty-first Amendment, eager to draw blood.³⁹² Costco, a provider of bulk goods at low prices, is bringing an action in Washington state court seeking to bypass the three-tier system entirely.³⁹³ If the debate is really a struggle of old methods vs. new methods, then the three-tier system will eventually give way. Unfortunately, it will do so at the expense of the Constitution. If that is the goal, Congress should repeal the Amendment according to constitutionally prescribed methods rather than having the Supreme Court interpret the Amendment into oblivion.

Although the Washington court will certainly rebuff Costco's challenge – if only due to the Court's prior approval³⁹⁴ and simple historical inertia – it will not be long before more challenges arise. The market is too tempting for producers to allow the barriers to stand. It is merely a matter of time before judicial action makes the Twenty-first Amendment into a dead letter.

³⁹¹ See Smith, *supra* note 61, at 365-67.

³⁹² See Monica Soto Ouchi, *Costco fighting wine, beer sales rules*, SEATTLE TIMES, Nov. 19, 2004, at D1, available at 2004 WLNR 11731888.

³⁹³ *Id.*

³⁹⁴ See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 23 n.3 (1990) (mentioning without question Florida's three tiers of distribution).