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STUDENT ARTICLE

Why All the *Wine*-ing? The Wine Industry's Battle With States over the Direct Shipment Issue

By Scott F. Mascianica*

I. Introduction

The clash of privileges between the dormant Commerce Clause[1] and the Twenty-First Amendment[2] of the Constitution has existed since the amendment was ratified on December 5, 1933. After Prohibition,[3] wholesalers were subject to individual state laws that regulated the sale of alcohol within a state and how alcohol was imported into the state.[4] The majority of states adopted a mandatory three-tier distribution system for the sale of alcoholic beverages.[5] Under the mandatory three-tiered system, producers of alcoholic

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[1] U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

[2] U.S. CONST. amend. XXI, § 2 (giving states the authority to regulate "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

[3] U.S. CONST. amend XVIII, § 1; U.S. CONST. amend. XXI, § 2. The Twenty-First Amendment repealed the Eighteenth Amendment of the Constitution, which prohibited the importation and exportation of intoxicating liquors.

[4] 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).

[5] *Id.*

beverages are permitted to sell only to state-licensed wholesalers.[6] The wholesaler then may sell only to licensed retailers, who in turn sell the alcohol to consumers.[7] Consequently, under these state alcohol regulatory schemes, both in-state and out-of-state producers may sell alcohol to consumers in two ways: 1) obtaining a state issued license to sell alcohol or 2) shipping the beverages through the mandatory three-tier system.[8]

Many states have provided in-state wineries with an exception to the three-tier system, permitting them to ship directly to in-state consumers.[9] Out-of-state sellers condemn this preferential treatment because the extra costs they incur under the three-tier system are avoided by in-state sellers.[10] The regulation of alcohol distribution has been particularly troublesome for wine connoisseurs because they cannot purchase wine using e-commerce and they are essentially barred from receiving direct shipments of wine from out-of-state wineries.[11]

The direct shipment conflict has produced a flurry of support on both sides and is just another issue to fall into the scope of the ongoing dispute between the dormant Commerce Clause and Section 2 of the Twenty-First Amendment. The majority of the federal circuit courts have ruled on this issue and overturned the direct shipment ban as a discriminatory measure.[12] However, diverging from the other

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[6] Duncan Baird Douglass, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1621 (2000).

[7] *Id.*

[8] Russ Miller, *The Wine is in the Mail: The Twenty-First Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages,* 54 VAND. L. REV. 2495, 2497-98 (2001).

[9] *Id.*

[10] *See* Douglass, *supra* note 6, at 1623 (discussing the flurry of debate between out-of-state wineries and states over the depth of the Twenty-First Amendment power to regulate alcohol.).

[11] Miller, *supra* note 8, at 2496.

[12] Beskind v. Easley, 325 F.3d 506, 514-515 (4th Cir. 2002) (affirming the lower court's finding that North Carolina's statutory scheme discriminates between in-state and out-of-state wineries, violates the Commerce Clause and is not saved by the Twenty-First Amendment); Bainbridge v. Turner, 311 F.3d 1104, 1115 (11th Cir. 2002) (finding that Florida's alcohol distribution statutes' differentiation between in-state and out-of-state wineries facially discriminates against interstate commerce and remanding for further fact-finding on whether Florida's statutory scheme is "necessary to effectuate the . . . core concern in a way that justifies

circuits, the Seventh Circuit found Indiana's state alcohol distribution scheme constitutional.[13] In *Swedenburg v. Kelly,* the Second Circuit's decision followed Seventh Circuit's precedent, upholding New York's statutory scheme and setting the stage for the Supreme Court to rule on the direct shipment controversy.[14] The Supreme Court granted writ of certiorari in the *Swedenburg* case on May 24, 2004, but chose to limit their analysis to the following question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the Dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?"[15]

Part II of this article analyzes the history of the dormant Commerce Clause and the Twenty-First Amendment, outlining the creation of their conflict. Part III explores the history of the recent circuit court decisions on this conflict and how the ban on out-of-state direct shipment has impacted consumers. Part IV investigates the *Swedenburg v. Kelly* opinion and the Second Circuit's reasoning in its controversial decision. Finally, Parts V and VI analyze the Second Circuit's deviation from traditional jurisprudence in reaching its decision, the effect of the divided decisions on consumers, and how the Supreme Court will likely address this issue in the *Swedenburg* case.

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treating out-of-state firms differently"); Dickerson v. Bailey, 336 F.3d 388, 403-07 (5th Cir. 2003) (finding that Texas's ban on direct shipment by out-of-state wineries violates the dormant Commerce Clause and that the state failed to demonstrate how a statutory exception for local wineries was justified by any of the traditional core concerns); Heald v. Engler, 342 F.3d 517, 525 (6th Cir. 2003) (holding that it was obvious the Michigan regulatory process discriminated against out-of-state wineries and unnecessarily burdened interstate commerce).

[13] *See* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 854 (7th Cir. 2000) (holding that Indiana's ban on direct shipments was constitutional because the statute did not discriminate between in-state wineries and out-of-state wineries).

[14] *See* Swedenburg v. Kelly, 358 F.3d 223, 239 (2d Cir. 2004) (holding that New York's regulatory scheme is valid given that they are targeting a valid state interest in controlling the importation and transportation of alcohol and this is within the ambit of the Twenty-First Amendment).

[15] Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004), *cert. granted,* 72 U.S.L.W. 3600, 72 U.S.L.W 3722, 72 U.S.L.W. 3725 (U.S. May 24, 2004) (No. 03-1274).

II. The Legislative Provisions Behind the *Wine*-ing

A. The Dormant Commerce Clause

At the end of the Revolutionary War, the United States Government did not have the power to regulate interstate commerce.[16] The states enacted laws for their own benefit, resulting in what the Supreme Court classified as a "conflict of commercial regulations, destructive to the harmony of the states."[17] In an effort to promote the economic development following the war, the government inserted the Commerce Clause into Article I, Section 8, Clause 3 of the Constitution.[18] Clause 3 gives Congress the power to "regulate Commerce with foreign Nations, and *among the several states*, and with the Indian tribes."[19] The negative implication of this federal grant of power was the removal of states' ability to regulate commerce among the several states,[20] referred to as the dormant Commerce Clause.

Long before Congress addressed the need for Prohibition and its subsequent repeal by the Twenty-First Amendment, two acts

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[16] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571 (1997).

[17] *Id.* (quoting Justice Johnson from Gibbons v. Ogden, 22 U.S. 1, 224 (1824)). It should be noted that although Justice Johnson's opinion was only the concurring opinion, Justice Stevens in his majority opinion of *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 571, stated that the Court "subsequently endorsed" Justice Johnson's view. *Id.*

[18] U.S. CONST. art. I, § 8, cl. 3.

[19] U.S. CONST. art. I, § 8, cl. 3 (emphasis added). As remarked in *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 575, the Supreme Court noted the test for a violation of the dormant Commerce Clause is when a state law facially discriminates against interstate commerce, the court has a per se rule of invalidity. Additionally, Justice Scalia noted in his dissent that where the state law is nondiscriminatory, but still affects interstate commerce, there is a balancing test where the law will be sustained unless the burden on commerce outweighs the putative local benefits. *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 596 (Scalia, J., dissenting) (citing to Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)) (emphasis added).

[20] *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 571 ("In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." (quoting Freeman v. Hewit, 329 U.S. 249, 252 (1946))).

expressly dealt with alcohol regulation: the Wilson Act of 1890[21] and the Webb-Kenyon Act of 1913.[22]

B. From State Regulation to Prohibition and Back

According to the Wilson Act of 1890, all intoxicating liquors or liquids transported into a state would be subject to the state's laws "to the same extent and in the same manner as though such liquids or liquors had been produced in such [s]tate."[23] The Wilson Act went further, stating that the liquors "shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."[24] The Wilson Act remained the piece of legislature governing state alcohol regulation until it was extended with the passage of the Webb-Kenyon Act in 1913.[25] The Act stated that any State could regulate the in-state sale of liquor to "any person interested therein, to be received, possessed, sold, or in any manner used."[26]

The Webb-Kenyon Act remained in force for six years until Prohibition became the law when the Eighteenth Amendment was ratified on January 16, 1919.[27] States had little need to individually regulate the alcohol industry after the ratification of the amendment. Yet, several years later, Congress reversed course and repealed Prohibition with the Twenty-First Amendment.[28] Additionally, Congress included language of the Webb-Kenyon Act in Section 2 of the amendment.[29]

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[21] Wilson Act, 27 U.S.C § 121 (1890).

[22] Webb-Kenyon Act, 27 U.S.C. § 122 (1913).

[23] 27 U.S.C. § 121 (1890).

[24] 27 U.S.C. § 121 (1890).

[25] 27 U.S.C. § 122 (1913). The Webb Kenyon Act was instituted by Congress in order to account for a loophole in the Wilson Act. For a full discussion, *see* Vance v. W.A. Vandercook Company, 170 U.S. 438 (1898).

[26] 27 U.S.C. § 122 (1913).

[27] U.S. CONST. amend. XVIII, § 1 ("After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.").

[28] U.S. CONST. amend. XXI, § 2.

[29] *See id.* ("The transportation or importation into any State, Territory or

The passage of the Twenty-First Amendment signified the return of state regulation and the creation of the three-tier distribution system. The aim of the structure was to prevent large alcoholic beverage producers from "dominat[ing] local markets through vertical and horizontal integration. . . ."[30] Although originally adopted to prevent the operation of illegal liquor empires,[31] the three-tiered structure remains in effect for most states to the present day.

C. *North Dakota v. United States*

Disputes over the validity of the three-tier distribution structure have led to dormant Commerce Clause challenges to the states' power to regulate alcohol. The Supreme Court held that alcohol regulation is purely the province of the states within a state's own borders.[32] Specifically, the Court held that "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders."[33] However, the Court limited this authority, stating that states do not have this authority outside the borders of the state.[34]

D. The Supreme Court's Framework To Resolve Conflict Between The Twenty-First Amendment and the Dormant Commerce Clause

The Supreme Court created a two-part framework to assess whether the regulation of alcohol distribution fell within the states' core interests.[35] First, a court must determine whether a statute was

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possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

[30] Susan Lorde Martin, *Changing the Law: Update from the Wine War*, 17 J. L. & POL. 63, 64 (2001).

[31] Lorde Martin, *supra* note 30, at 63-64 (noting that the "primary purpose of the system was to prevent organized crime—which had run illegal liquor empires during Prohibition—from dominating the legalized liquor industry.").

[32] United States v. North Dakota, 495 U.S. 423, 431 (1986).

[33] *Id.* at 432.

[34] *Id.* at 431.

[35] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 275-76 (1984) ("[W]hether 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

facially discriminatory under the dormant Commerce Clause.[36] If the legislation was not discriminatory, the state regulation did not conflict with the Constitution and the statute was valid. However, if a conflict between the provisions did exist, the court was required to determine whether any non-discriminatory alternatives were available.[37]

If the court failed to find any non-discriminatory alternatives, then the legislation was subject to a balancing test, where the benefits and costs of the regulatory scheme were weighed against one another, and the statute may be upheld at the court's discretion.[38] On the other hand, if non-discriminatory measures were available, then the court would consider the statute in light of the Twenty-First Amendment.[39] Using the core principles in *North Dakota v. United States*, the court must then determine if the state regulation could be saved under the Twenty-First Amendment.[40]

III. The *Wine*-ing Begins: The Circuit Courts Split on Direct Wine Shipment

In each of the circuit court cases discussed below, the general issue was that consumers could not obtain alcohol, specifically wine, directly from out-of-state producers under a state's mandatory three-tier distribution system.[41] In the years following Prohibition, there

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policies." (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984))).

[36] *See id.* at 275 ("It is clear by now the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause.")

[37] Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977) ("When discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake").

[38] *See generally Pike*, 397 U.S. at 142 (reasoning that the legislation will be upheld unless the burden imposed on intrastate commerce outweighed the "putative local benefits.").

[39] *Bacchus Imp.*, 468 U.S. at 275 (recognizing that the court would look at the state's Twenty-first Amendment interests and determine "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the [State regulation] . . . to outweigh the Commerce Clause principles that would otherwise be offended.").

[40] *Id.* at 274.

[41] *See* Lloyd C. Andersen, *Direct Shipment of Wine, the Commerce Clause*

was explosive growth in the total number of alcohol wholesalers.[42] However, this growth was stifled by immense consolidation in the wholesaling industry.[43] The entire alcohol industry was affected by a series of alliances and mergers with one exception—the wine industry, which experienced a large increase in the number of small wineries in recent decades.[44] The resulting dichotomy between the large wholesalers and small wineries created a conflict due to differences in market strategy, economies of scale and business goals.[45] Wholesalers are hesitant to purchase from small, low volume wineries because they do not offer the bulk volume sales to produce sufficient profits.[46] With wholesalers buying less from these small wineries, small wineries cut out the middleman as a means of economic survival and used the Internet to ship directly to customers.[47]

Retailers joined wholesalers in their attack on direct shipment as both parties fought for their vested interests in preventing out-of-state wineries from selling directly to consumers.[48] Sensing that the direct shipment of wine posed a threat to their share and composition of the market, these parties demanded states enforce laws that prohibited the direct shipment of alcohol.[49] The wine industry responded by filing suits in federal courts, seeking to overturn state laws that permitted in-state producers to ship directly to consumers, but prevented the same action by out-of-state wineries.[50]

This conflict of interests produced five circuit court cases that preceded the *Swedenburg* decision. Four of these cases overturned

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and the Twenty-First Amendment: A Call for Legislative Reform, 37 AKRON L. REV. 1, 3 (2004).

[42] Anderson, *supra* note 41, at 3.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Anderson, *supra* note 41, at 3.

[48] *See* Miller, *supra* note 8, at 2546 (Retailers "have a strong interest in legislation that restricts competition, like direct shipments.").

[49] *See id.* ("Legislatures are motivated to pass direct shipment laws by desires to appease these influential lobby groups.").

[50] Andersen, *supra* note 41, at 3-4.

the bans on out-of-state shipments,[51] while only one circuit upheld the ban prior to the Second Circuit's decision in *Swedenburg*.[52]

A. Fourth Circuit: *Beskind v. Easley*

In *Beskind v. Easley*, an out-of-state California winery and group of individual wine consumers brought an action challenging the constitutionality of North Carolina's Alcoholic Beverage Control ("ABC") Law.[53] They challenged the section of the law addressing the direct shipment of wine to consumers.[54] The law prohibited out-of-state wine manufacturers from selling and shipping directly to consumers, and barred North Carolina residents from receiving out-of-state wine without a wholesale permit.[55] In addition, the North Carolina law required non-resident wine vendors to obtain a permit even to sell to wholesalers, while the local wineries could ship directly to consumers.[56]

The winery indicated its willingness to obtain a license and remit taxes to North Carolina to satisfy the state requirements of direct shipment because it would not be economically feasible for them to go through the three-tier system.[57]The plaintiff's argument asserted that North Carolina's ABC law violated the dormant Commerce Clause because the state gave in-state wineries the competitive advantage of direct shipment to consumers while out-of-state wineries were denied this privilege.[58]

In analyzing the history of the Twenty-First Amendment and the Commerce Clause, the Fourth Circuit agreed that with the passage of the amendment, "some power to regulate interstate

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[51] *See e.g., Beskind* 325 F.3d at 517 (affirming the lower court's finding that North Carolina's statutory scheme discriminates between in-state and out-of-state wineries, violates the Commerce Clause, and is not saved by the Twenty-First Amendment).

[52] *See Bridenbaugh*, 227 F.3d at 853 (holding that "[w]ine originating in California, France, Australia, or Indiana passes through the same three tiers and is subjected to the same taxes. Where's the functional discrimination?").

[53] *Beskind*, 325 F.3d at 509.

[54] *Id.*

[55] *Id.* at 510.

[56] *Id.*

[57] *Id.* at 511.

[58] *Beskind*, 325 F.3d at 510.

commerce was withdrawn from Congress so that the Commerce Clause could not be construed to prevent the enforcement of State laws regulating the importation of alcoholic beverages and the manufacture and consumption of alcoholic beverages within State borders."[59]

Following the precedent established in *North Dakota*, the court recognized that Congress has the power to regulate interstate commerce under the Commerce Clause.[60] The Fourth Circuit followed the Supreme Court two-step framework, stating that:

> All components of the dormant Commerce Clause remain in force unless a 'core concern' of the Twenty-First Amendment is implicated. When such a concern is implicated, 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. In no event can the law directly regulate extraterritorially; nor can a law ever be motivated by mere economic protectionism.[61]

In its Commerce Clause analysis, the court held that because the law resulted in preferential treatment of in-state economic interests, the facial examination of the statute left little doubt that those laws were discriminatory.[62] The court adopted the district court's view 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."[63]

Next, the Fourth Circuit analyzed whether North Carolina's

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[59] *Beskind*, 325 F.3d at 513 ("The Twenty-First Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." (citing Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939))).

[60] *Beskind*, 325 F.3d at 513 ("It is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." (citing *Bacchus Imp.*, 468 U.S. at 275)).

[61] *Beskind*, 325 F.3d at 514 (quoting *Bainbridge*, 311 F.3d at 1112).

[62] *Beskind*, 325 F.3d at 514.

[63] Beskind v. Easley, 197 F. Supp. 2d 464, 472-73 (W.D.N.C. 2002); Gordon Eng, *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, 1890 (2003).

scheme advanced a legitimate local purpose that could not be adequately served by reasonable, nondiscriminatory alternatives.[64] The court found at least two non-discriminatory alternatives to the statute: (1) require the in-state wines to pass through the three-tier system or (2) permit out-of-state wines to engage in direct shipping.[65]

The court then turned its attention to whether the ABC law violated the Twenty-First Amendment.[66] The Fourth Circuit held that North Carolina failed to identify any Twenty-First Amendment interest that would be served by authorizing the in-state wineries to sell and ship directly to consumers.[67] Because North Carolina's statutory scheme discriminated against out-of-state interests while non-discriminatory alternatives existed, and failed to pursue any of the core concerns under the Twenty-First Amendment, the Fourth Circuit found the scheme was unconstitutional.

B. Sixth Circuit: *Heald v. Engle*

In *Heald v. Engler*, the Sixth Circuit addressed similar issues involving a Michigan state alcohol regulation.[68] In *Heald*, an out-of-state winery, wine connoisseurs, and wine journalists brought an action against Michigan state officials alleging that the state's alcohol regulations were unconstitutional.[69] Similar to North Carolina's law in *Beskind,* the Michigan law required out-of-state wineries to obtain an "outstate [sic] seller of wine license."[70] The licensing procedure forced the out-of-state wineries to sell to wholesalers before selling to consumers.[71] The Michigan law included an exception for in-state wine producers, permitting the delivery of their products to customers without a "specially designated merchant license."[72] In addition, the legislation offered further benefits to in-state wineries as the out-of-state winery license cost $300.00, compared to the in-state license

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[64] *Beskind*, 325 F.3d at 514 (citing Or. Waste Sys. Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 100-01 (1994)).

[65] *Beskind*, 325 F.3d at 515.

[66] *Id.* at 516.

[67] *Id.* at 517.

[68] Heald v. Engler, 342 F.3d 517, 519 (6th Cir. 2003).

[69] *Id.*

[70] *Id.* at 521.

[71] *Id.*

[72] *Id.*

price of only $25.00.[73] The Sixth Circuit found the regulation was not "a proper exercise of Michigan's Twenty-First Amendment authority, despite the fact that such a system places a minor burden on interstate commerce."[74]

Finding that the law was facially discriminatory, the court applied what it termed the "proper approach" to analyzing this scenario: apply the traditional dormant Commerce Clause analysis and, if the provisions are unconstitutional, determine whether the state offered no reasonable nondiscriminatory means to support a "core concern."[75] According to the court, the regulation clearly benefited in-state wineries to the burden of out-of-state wineries by giving the Michigan wineries greater access to consumers.[76] The court noted the possibility that an out-of-state winery could be shut out of the state all together if it could not find a wholesaler.[77]

The court then turned its focus to the statute's validity in light of the powers conferred to the states in the Twenty-First Amendment.[78] In analyzing Michigan's law, the court found that the discrimination did not further the core concerns permitted by the amendment.[79] Specifically, the court noted that

> [i]t is important to keep in mind that the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of temperance, ensuring an orderly market, and raising revenue, but whether the discriminatory scheme challenged in this case—the direct-shipment ban for out-of-state wineries—does so.[80]

The Sixth Circuit held Michigan's law was facially discriminatory and gave in-state wineries a competitive advantage

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[73] *Heald*, 342 F.3d at 521.

[74] *Id.* at 524.

[75] *Id.*

[76] *Id.* at 525.

[77] *Id.* at 525.

[78] *Heald*, 342 F.3d at 526.

[79] *Id.*

[80] *Id.*; *see Beskind*, 325 F.3d at 517 (holding that "the question is not whether North Carolina can advance its regulatory purpose by imposing fewer burdens on in-state wineries than out-of-state wineries . . . Rather, the question is whether *discriminating* in favor of in-state wineries . . . serves a Twenty-first Amendment interest.").

over the out-of-state wineries.[81] Because this discrimination did not further any of the core concerns, the statute was therefore unconstitutional.[82] With this decision, the Sixth and Fourth Circuits were in agreement over the direct shipment issue.

C. Fifth Circuit: *Dickerson v. Bailey*

The Fifth Circuit followed suit and addressed the direct shipment issue in a manner similar to the Fourth and Sixth Circuits.[83] In *Dickerson,* a group of oenophiles brought suit against the Administrator of the Texas Alcohol and Beverage Commission ("TABC") to challenge the Texas alcohol regulation that prohibited direct shipment to consumers by out-of-state wineries.[84] The oenophiles charged that the discrimination against out-of-state wineries gave an economic advantage to in-state wineries.[85]

The court applied the *North Dakota* two-step analysis and found that the structure of the alcoholic beverage industry is designed to aid Texas in the regulation and control of alcohol consumption.[86] However, in its Commerce Clause analysis, the court found that the regulation was facially discriminatory because in-state wineries were permitted to deal directly with Texas consumers in both selling and shipping wines.[87] For example, Texas wineries could sell up to 25,000 gallons of wine annually directly to Texas consumers without any per-customer restrictions.[88] In contrast, a Texas resident was prohibited from personally bringing into the state more than three gallons of wine purchased from an out-of-state vintner.[89] Additionally, Texas wineries were permitted to ship directly to a Texas consumer any portion of the 25,000 gallons of wine that they have sold to the consumer, but out-of-state wineries were prohibited from shipping directly to any Texas resident, and may face criminal

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[81] *Heald,* 342 F.3d at 521.

[82] *Id.* at 524.

[83] Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003).

[84] *Id.* at 392.

[85] *Id.* (citing TEX. ALCO. BEV. CODE ANN. §§ 11.01 (2001), 107.12 (2001)).

[86] *Dickerson,* 336 F.3d at 398.

[87] *Id.*

[88] *Id.* at 397-98 (construing TEX. ALCO. BEV. CODE ANN. § 16.01(a) (2001)).

[89] *Dickerson,* 336 F.3d at 398 (construing TEX. ALCO. BEV. CODE ANN. § 107.07(a) (2001)).

penalties if they did so.[90]

Focusing on the disparity between the gallons permitted to in-state and out-of-state vintners, the Fifth Circuit found the Texas law to be facially discriminatory.[91] The court recognized that even those out-of-state wineries could only export to wholesalers that had a permit to import.[92] Moreover, not only did the TABC Administrator fail to identify the lack of any non-discriminatory measures to justify the discriminatory provisions, but the legislative intent of the statute was to "help the Texas wine industry."[93] Therefore, the court concluded that it was clear the TABC provided the in-state wineries with a competitive advantage by permitting them to evade the regulatory scheme.[94]

The court next analyzed the TABC legislation to determine if it could be saved by the Twenty-First Amendment's core-concerns privilege.[95] The court determined that the TABC Administrator gave "lip service to the core concerns analysis under the Twenty-First Amendment" and did not properly address the balance between the Twenty-First Amendment and the dormant Commerce Clause.[96] Given that the administrator chose to challenge the process rather than offer any core concerns to support the regulation, the court found that the sole purpose of Texas scheme was economic protectionism, and was thus unconstitutional.[97]

D. Eleventh Circuit: *Bainbridge v. Turner*

In *Bainbridge v. Turner*, the Eleventh Circuit faced a similar case disputing the constitutionality of Florida's ABC law and applied

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[90] *Dickerson*, 336 F.3d at 398 (construing TEX. ALCO. BEV. CODE ANN. § 107.07 (2001)).

[91] *Dickerson*, 336 F.3d at 398.

[92] *Id.*

[93] *Id.* at 402 (noting that "under the two-tiered Commerce Clause analysis, however, the Administrator *must* establish the absence of any available alternative methods for enforcing any otherwise legitimate policy goals of the TABC.") (emphasis added).

[94] *Id.*

[95] *Id.* at 404.

[96] *Dickerson*, 336 F.3d at 405-06. The Administrator argued that Texas discriminatory restrictions were exempt from all judicial scrutiny under the Commerce Clause. *Id.*

[97] *Id.* at 406-07.

the *North Dakota* two-step analysis.[98] In *Bainbridge*, wine consumers, along with out-of-state wineries, brought an action challenging Florida's statutory scheme.[99] Florida's law permitted an exception to its three-tier structure as it allowed in-state wineries to receive vendor permits and ship directly to consumers.[100] Meanwhile, out-of-state wineries were not only prohibited from shipping directly to consumers,[101] but violators were potentially subject to treble damages and criminal prosecution.[102]

The Eleventh Circuit stated that it would abide by the Supreme Court's ruling in *Bacchus Imports* and *Brown-Forman Distillers Corp.* in analyzing the Florida law.[103] However, the court fashioned an exception to the two-step analysis, noting that when "a statute has only indirect effects on interstate commerce and regulates evenhandedly, [the court will examine] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."[104]

The court determined that Florida's scheme could not withstand the first level of scrutiny in the analysis.[105] The Eleventh Circuit agreed with the district court that the rule was facially discriminatory where it allowed in-state wineries to ship directly to consumers if they had a permit to do so.[106] Therefore, the law could only be saved if there were not any non-discriminatory measures that would serve a legitimate state purpose.[107] Florida, however, could offer a similar provision to out-of-state wineries, and thus cure the

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[98] Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002).

[99] *Id.*

[100] *Id.* (construing Fla. Stat. Ann. §§ 561.22(1) (1997), 561.221(1)(a)(1994)).

[101] *Id.* at 1107 (construing FLA. STAT. ANN. § 561.54(1)(1997)).

[102] *Id.* at 1107 (construing FLA. STAT. ANN. § 561.54(2)(1997)).

[103] *Bainbridge*, 311 F.3d at 1108-09 (stating that they would rely on the Supreme Court's ruling in *Bacchus Imp.* and then use the two-step analysis in Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986)); *See generally Bacchus Imp.*, 468 U.S. at 263 (applying the analytical framework used by Supreme Court).

[104] *Bainbridge,* 311 F.3d at 1109 (citing *Brown-Forman Distillers Corp.*, 476 U.S. at 579).

[105] *Bainbridge*, 311 F.3d at 1109.

[106] *Id.*

[107] *Id.* at 1109-10.

discriminatory aspect of the law.[108]

In its analysis of the Twenty-First Amendment, the court noted that "[t]he Amendment is thus treated as though it permits states to enact some laws banning the importation of alcoholic beverages even though such laws might, without the Twenty-first Amendment, violate the dormant Commerce Clause."[109] The Eleventh Circuit then reevaluated the conflict, noting that the amendment did alter the dormant Commerce Clause, but did not fully insulate states from scrutiny.[110]

Ultimately the Fifth Circuit's view of the case was similar to the aforementioned circuits as it held

> All components of the dormant Commerce Clause doctrine remain in force unless a "core concern" of the Twenty-First Amendment is implicated. When such a concern is implicated, 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. In no event can the law directly regulate extraterritorially; nor can a law ever be motivated by "mere economic protectionism."[111]

If Florida could demonstrate a core concern, e.g., raising revenue, ensuring orderly markets, and protecting minors, the state may be able to withstand the Commerce Clause challenge.[112] The Court held that before a state could resort to the Twenty-First Amendment protection, the state "must show that its statutory scheme is necessary to effectuate the proffered core concern in a way that justifies treating out-of-state firms differently from in-state firms—a fact question."[113]

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[108] *Id.* at 1110.

[109] *Bainbridge*, 311 F.3d at 1112 ("[T]he Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders. . . ." (quoting Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996))).

[110] *Bainbridge*, 311 F.3d at 1112.

[111] *Id.* (citations omitted).

[112] *Id.* at 1115.

[113] *Id.*

E. The Seventh Circuit Goes Against the Norm—or Does it?

Despite the relative uniformity in the decisions of the Fourth, Fifth, Sixth and Eleventh Circuits, respectively, the Seventh Circuit reached a different result. In *Bridenbaugh v. Freeman-Wilson*, Indiana consumers challenged a state statute that prohibited the direct shipment of out-of-state alcoholic beverages directly to Indiana consumers.[114] The court noted that like many states, Indiana had the three-tier structure of alcohol distribution with different classes of permits for each group within the chain of distribution.[115] Indiana permitted local wineries, but not wineries from another state or country, to ship directly to consumers.[116]

The court engaged in a thorough analysis of the temperance battle fought by the states before Prohibition and examined how states dealt with the dormant Commerce Clause in light of liquor regulation.[117] Noting the Supreme Court's decision in *Leisy v. Hardin*,[118] the court held that the dormant Commerce Clause could not be used to shield interstate shipments from state regulation.[119]

The crux of the court's argument was that *every* use of Section 2 of the Twenty-First Amendment would be discriminatory because every statute limiting importation would affect shipment and distribution of certain alcohol.[120] For example, if Indiana were trying to regulate cheese with this scheme, and not alcohol, that court recognized that this would not be permitted because of the conflicts with the Commerce Clause.[121] However, the court held that Section 2 of the Twenty-First Amendment empowers Indiana to control alcohol in a manner that it cannot control other products.[122]

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[114] Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849-50 (7th Cir. 2000).

[115] *Id.* at 851.

[116] *Id.*

[117] *Id.* at 851-52.

[118] *Id.* at 852. The court found that the Wilson and Webb-Kenyon Acts expanded the power of the States to regulate liquor shipments, especially given the close parallel of the Twenty-First Amendment to the Webb-Kenyon Act. *Id. See also* Leisy v. Hardin, 135 U.S. 100 (1890) (permitting States to regulate liquor once it was removed from its original package).

[119] *Bridenbaugh*, 227 F.3d at 852.

[120] *Id.*; *see also* Eng, *supra* note 63, at 1886.

[121] *Bridenbaugh*, 227 F.3d at 851.

[122] *Id.*

In turning its attention to the Indiana laws, the court held that Section 2 has been deemed a violation where the laws have imposed a discriminatory condition on importation i.e., favoring an Indiana winery over an out-of-state winery.[123] However, because Indiana required that *all* alcohol pass through their three-tier system and be subjected to state taxation, the law did not discriminate against out-of-state wineries.[124]

The court recognized that both in-state and out-of-state permit holders could deliver wine directly to consumers.[125] For example, wines from Indiana and Illinois have to be re-imported through an Indiana wholesaler or retailer before they reach the consumer.[126] Moreover, the plaintiffs in this case were not concerned with whether the distribution permits were limited to Indiana's citizens.[127] Rather, the plaintiffs were concerned with direct shipments from out-of-state sellers who did not have, or want, permits.[128] The court found, however, that all alcoholic beverages, whether in-state or not, had to pass through the system and be taxed.[129] Because this excise tax applied equally to in-state and out-of-state sellers, no discrimination existed.[130]

Therefore, the Seventh Circuit upheld the Indiana law because the regulatory scheme required that all alcohol—in-state and out-of-state—was required to pass through the system.[131] With the Seventh Circuit's ruling, and the conflicting decisions by the other four circuits, the direct shipment issue appeared ripe for the Supreme Court to grant writ of certiorari. However, the Court required yet another decision before doing so.

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[123] *Bridenbaugh*, 227 F.3d at 853 (construing IND. CODE § 7.1-5-11-1.5(a) (1998) and differentiating the Indiana law with the law in *Bacchus Imp.* by noting that § 2 of the Twenty-First Amendment authorizes this activity unless they favor in-state over out-of-state). *See Bacchus Imp.*, 468 U.S. at 265.

[124] *Bridenbaugh*, 227 F.3d at 853.

[125] *Id.*

[126] *Id.* at 854

[127] *Id.*

[128] *Id.*

[129] *Bridenbaugh*, 227 F.3d at 854.

[130] *Id.*

[131] *Id.*

IV. *Swedenburg v. Kelly*—Oenophiles possible answer to the direct shipment dilemma?

In *Swedenburg v. Kelly*, two out-of-state wineries and three consumers brought suit seeking a declaration that the New York direct shipment law was unconstitutional.[132] The New York statute allowed in-state wineries, but not out-of-state wineries, to ship directly to consumers.[133]

New York implemented a three-tier system similar to the majority of states.[134] A major policy objective for the law was that "[n]o person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license."[135] To obtain a winery license, a winery had to pay the fee set by the state and had to maintain an *in-state* branch, factory or warehouse.[136] A benefit of this license was that not only can the winery ship to another licensed winery, wholesaler or retailer, but it could also ship directly to consumers.[137] As the court noted, the New York law was unique because it permitted out-of-state wineries to distribute and sell alcohol in New York as long as they complied with the state's licensing requirements.[138]

The district court granted summary judgment in favor of the plaintiffs and held that it was unconstitutional to require an out-of-state winemaker to "become a resident in order to compete on equal terms."[139] On appeal, the Second Circuit recognized the preceding circuit court decisions and stated that all the cases had something in common: each involved a challenged state law that permitted in-state wineries and prohibited out-of-state wineries from shipping directly

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[132] Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004), *cert. granted*, 72 U.S.L.W. 3600, 72 U.S.L.W. 3722, 72 U.S.L.W. 3725 (U.S. May 24, 2004) (No. 03-1274).

[133] *Id.* at 228.

[134] *Id.*

[135] *Id.* (citing N.Y. ALCO. BEV. CONT. LAW § 102(1)(c) (2000)).

[136] *Swedenburg*, 358 F.3d at 228 (emphasis added) (construing N.Y. ALCO. BEV. CONT. LAW § 3(37) (2000)).

[137] *Swedenburg*, 358 F.3d at 229 (construing N.Y. ALCO. BEV. CONT. LAW §§ 76(4), 77(2) (2000)).

[138] *Swedenburg*, 358 F.3d at 229.

[139] *Id.* at 230 (quoting Swedenburg v. Kelly, 232 F.Supp.2d 135, 146 (S.D.N.Y. 2002)).

to consumers.[140] The court acknowledged that four circuit court cases used the *North Dakota* analytical framework and agreed that under this analysis, a state law is unconstitutional if it imposes burdens on interstate commerce that do not outweigh the local gains if non-discriminatory alternatives exist. [141] For the second step of the test, the traditional view is that a statute can be saved only if it furthers a core concern.[142] However, the Second Circuit declined to follow the framework established in the previous decisions and explained that "the two-tiered approach is flawed because it has the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language of Section Two."[143]

The Second Circuit discussed why the dormant Commerce Clause should not be prioritized over the Twenty-First Amendment because the history of the amendment parallels the Webb-Kenyon Act.[144] Combined with the states' power to regulate shipments of alcohol granted by Section 2, the dormant Commerce Clause could not be used to invalidate shipment laws.[145] Therefore, the court rejected the argument that the statute must either regulate in a non-discriminatory manner or be without any non-discriminatory alternatives and advance a core concern of Section 2 in order to stand.[146]

The court then considered the impact of early Twenty-First Amendment cases where the states had the power to regulate the alcohol industry, even when those regulations "operated to the disadvantage of out-of-state interests."[147] The state laws could not violate the liberties of individuals protected by other portions of the Constitution[148] and could not strike down the Commerce Clause with

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[140] *Swedenburg*, 358 F.3d at 230-31 ("In each of the four circuit court cases, the regulatory scheme at issue was found to be facially discriminatory in violation of the dormant Commerce Clause.").

[141] *Swedenburg*, 358 F.3d at 230-31 (citing Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 208 (2d Cir. 2003)).

[142] *Swedenburg*, 358 F.3d at 231.

[143] *Id.*

[144] *Id.* at 232-33. *See* discussion *infra* Part II.B (discussing the transition from the Wilson Act to the Webb-Kenyon Act to the Twenty-First Amendment).

[145] *Swedenburg*, 358 F.3d at 232-33.

[146] *Id.*

[147] *Id.* at 234.

[148] *Id.*

respect to all alcohol transactions.[149] However, even though the court agreed with these precedents, the Second Circuit held that each case had "unequivocally reaffirmed" that Section 2 permits each state to regulate alcohol transportation *within its borders* and that this "created an exception to the Commerce Clause."[150]

The Second Circuit's analysis found the New York laws only regulated the importation and distribution of alcohol within the state of New York.[151] The circuit court noted that "New York treats wine importers the same as it treats internal sellers; all must either utilize the three-tier system or obtain a physical presence from which the state can monitor and control the flow of alcohol."[152] The Second Circuit conceded that this would cause dormant Commerce Clause problems if it involved some product other than alcohol with the potential to lead to efficiency problems.[153] Nevertheless, the Court held that the regulatory laws were "within the ambit of the powers granted to the states by the Twenty-First Amendment."[154]

V. Analysis of the Wine Debate

A. Second's Circuits Misapplication of the *Bridenbaugh* Formulation

The Second Circuit made a bold ruling in holding that New York's regulatory scheme was constitutional, contrary to four circuit court rulings. Specifically, the Second Circuit deviated from traditional jurisprudence on the conflict between the Twenty-First Amendment and the dormant Commerce Clause by not implementing the two-step approach.[155] In the prior five circuit decisions, four of the circuits had followed the approach by analyzing the state law under the dormant Commerce Clause and then determining whether

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[149] *Id.* at 235 (citing Hostetter v. Idlewild Bon Voyage, 377 U.S. 324, 331-32 (1964)).

[150] *Swedenburg*, 358 F.3d at 236 (citing Craig v. Boren, 429 U.S. 190, 206 (1976)) (emphasis added).

[151] *Swedenburg,* 358 F.3d at 237.

[152] *Id.* at 237-238.

[153] *Id.* at 238.

[154] *Id.* at 239.

[155] *Id.* at 230-31.

the statute could be saved under Section 2 of the Twenty-First Amendment.[156] The *Bridenbaugh* court did not directly perform a two-step analysis because the Seventh Circuit held that the Indiana law was not discriminatory and thus there was not a violation of the dormant Commerce Clause.[157] Unlike the Second Circuit, the *Bridenbaugh* court did not find the analysis "flawed," but rather failed to find that a conflict existed.[158]

Additionally, the Second Circuit held that judicial precedent established that each state has the unequivocal power to regulate alcohol within its borders.[159] While this is accepted by all jurisdictions,[160] the true conflict arises when the state regulations burdens *interstate* commerce. When state laws have placed out-of-state products at an economic disadvantage due to geographical origin, an analysis of the dormant Commerce Clause is required.[161]

Perhaps most importantly, the Second Circuit applies—or more accurately, misapplies—the *Bridenbaugh* analysis in their case. The court cites *Bridenbaugh* for the proposition that every use of Section 2 can be considered discriminatory.[162] However, this

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[156] *See Swedenburg*, 358 F.3d at 231 ("Four circuits have struck down the regulatory schemes in question, utilizing a two-step analytical framework, similar to that used by the district court here. . .").

[157] *Bridenbaugh*, 227 F.3d at 853-54.

[158] *Swedenburg*, 358 F.3d at 231 ("We think this two-step approach is flawed because it has the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language of Section 2.").

[159] *Id.* at 236-37.

[160] *See Heald* 342 F.3d at 522 (recognizing that states can regulate alcohol within their borders "unfettered" by the Commerce Clause." (quoting Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939)); *Bainbridge*, 311 F.3d at 1112 (maintaining that the "Twenty-First Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders." (quoting Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996)); *Beskind* 325 F.3d at 513 (holding that the passing of the Twenty-First Amendment did take away some commerce clause power and let the states regulate the alcohol industry within their borders); *Dickerson*, 336 F.3d at 404 (holding that the passage of the Twenty-First Amendment did remove some power of Commerce Clause from regulating the state alcohol industry.).

[161] *See e.g., Beskind*, 325 F.3d at 514 ("As prohibited by the 'dormant' Commerce Clause, discrimination means simply "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." (citing *Or. Waste Sys., Inc.*, 511 U.S. at 99)).

[162] *Swedenburg*, 358 F.3d at 233 ("[E]very use of § 2 could be called 'discriminatory' in the sense that . . . every statute limiting [interstate] importation

statement was made by the Seventh Circuit in defense of the regulation of alcohol within state borders.[163] As a clarification, the *Bridenbaugh* court held that the Twenty-First Amendment could not be used to discriminate against out-of-state alcohol producers.[164] As the Fifth Circuit noted in *Dickerson,* "[t]he dispositive fact in *Bridenbaugh* was Indiana's *equal application* of its three-tier system to all alcoholic beverages, regardless of where such beverages were produced."[165] Moreover, the plaintiffs in the *Bridenbaugh* case were consumers—not out-of-state wineries.[166] This changed the analysis from analyzing discrimination to the out-of-state wineries, which the court did not address, to whether there was any consumer discrimination.[167] Furthermore, the statute in Indiana required that "every drop of liquor" pass through the three-tier structure.[168] In New York, the exemption permitted in-state wineries to bypass the three-tier process while out-of-state wineries were still required to follow the scheme.[169] As the court noted in *Heald,* this provided the in-state wineries with a competitive advantage that out-of-state wineries could not obtain.[170]

The Second Circuit was misguided when it contended that out-of-state wineries could obtain this benefit.[171] The district court correctly asserted that it would require the out-of-state winery to become an in-state resident by having a branch, factory or warehouse

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leaves intrastate commerce unaffected." (citing *Bridenbaugh,* 227 F.3d at 853)).

[163] *See Swedenburg,* 358 F.3d at 233 (discussing how § 2 of the Twenty-First Amendment gives states "virtually complete control" of the liquor distribution scheme); *See also* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980) (holding that states control the structure of its liquor distribution).

[164] *Bridenbaugh,* 227 F.3d at 853 ("[T]he central purpose of [§ 2] was not to empower States to favor local liquor industries by erecting barriers to competition." (quoting *Bacchus Imp.,* 468 U.S. 263, 267)); Miller, *supra* note 8, at 2540.

[165] *Dickerson,* 336 F.3d at 401 (emphasis added).

[166] *Bridenbaugh,* 227 F.3d at 849-50.

[167] *Id.*

[168] *Id.* at 853.

[169] *Swedenburg,* 358 F.3d at 229 (construing N.Y. ALCO. BEV. CONT. LAW §§ 76(4), 77(2)) (2000)).

[170] *See Heald,* 342 F.3d at 521 ("In-state wineries can, for example, bypass the price mark-ups of a wholesaler and retailer, making in-state wines relatively cheaper to the consumer and allowing them to realize more profit per bottle.").

[171] *Swedenburg,* 358 F.3d at 238.

within the state.[172] Despite New York providing an out-of-state winery the opportunity to ship directly to consumers, this opportunity comes at the high price of requiring an out-of-state winery to become an in-state winery.[173] The circuit court rationalized its view by holding "[w]hile it may be an additional expense for out-of-state wineries to be present in New York, they gain access to a market not available to others—direct sales to consumers."[174] This is discrimination based on geographical origin and satisfies the definition of facial discrimination according to the dormant Commerce Clause.[175]

B. Impact on Consumers

The regulatory schemes created by the states have caused consumers to bear the burden of higher prices. When the out-of-state winery ships to the wholesaler, the wholesaler adds its shipping cost and profit margin to the product before selling this to the retailer.[176] Sometimes the markups by wholesalers take as much as eighteen to twenty percent of their selling price on wine as profit.[177] Additionally, the retailer must add its markup to turn a profit, which is often as high as twenty-five percent.[178] Prohibiting out-of-state wineries from shipping directly to consumers and forcing them to go through a three-tier system is causing the profit margins and shipping costs of the wholesaler and retailer to be passed on to the consumer.[179]

Additionally, the circuit courts have offered alternatives that

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[172] *Swedenburg*, 358 F.3d at 229-30.

[173] *Swedenburg*, 358 F.3d at 237 ("All wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state.").

[174] *Id.* at 238.

[175] *See Beskind*, 325 F.3d at 514 ("[a]s prohibited by the 'dormant' Commerce Clause, discrimination means simply differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." (quoting *Or. Waste Sys, Inc.*, 511 U.S. at 99)).

[176] Lorde Martin, *supra* note 30, at 64.

[177] Stephanie Athrens Waller, *Bacchus Rules: Recent Court Decisions on the Direct Shipment of Wine*, 40 HOUS. L. REV. 1111, 1122 (2003).

[178] *Id.*

[179] *See* Lorde Martin, *supra* note 30, at 64 (stating that "the overhead imposed by the three-tier system is too expensive.").

may prove more costly to consumers.[180] In *Beskind*, the court noted that one way for the states to ensure the constitutionality of their regulatory schemes would be to require the in-state wineries to be regulated under the three-tier system.[181] However, the ultimate effect of this rationale would result in increased costs for in-state wines with consumers bearing the burden of the additional costs. Out-of-state wineries continue to battle with states over the depth of the exemptions from the dormant Commerce Clause as each state highly values its autonomy in regulating the alcohol industry within its borders. However, history has established that Congress and the federal judiciary play a critical part in resolving conflict whenever states step outside of their boundaries and burden interstate commerce.[182]

The circuit court cases illustrate the uncertainty surrounding the clash of these provisions. The United States has a history of free market economics, traditionally permitting natural supply-demand principles to control the price and flow of goods within our country's borders.[183] The ambit of the Commerce Clause cannot be questioned regarding the regulation of such commerce. However, the state does possess justifiable reasons to keep alcohol regulation within their power, such as safety, taxes, temperance and uniformity.[184] Yet, when such statutory schemes infringe on the rights of consumers and constitutionally guaranteed authority, the schemes must be found unconstitutional.

Moreover, the burden on consumers may have indirect effects on other markets as a result of the Internet revolution. Each year, more individuals turn to e-commerce to make purchases in an easier

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[180] *See, e.g., Beskind*, 325 F.3d at 515 (stating that there were at least two non-discriminatory alternatives to the discriminatory measures used by North Carolina).

[181] *Id.*

[182] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) (holding that the "negative aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.").

[183] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 803 (1976) (determining that "the premise, well established by the history of the Commerce Clause," is that "this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand.").

[184] *North Dakota*, 495 U.S. at 432.

and more efficient manner.[185] The Internet connects consumers from across the United States, presenting both companies and consumers alike with more choices.[186] By increasing the supply available to consumers of products, this creates a natural market reaction of reduced prices.[187] Additionally, companies will be able to benefit from cross country sales through cost efficient measures such as more productivity, less advertising and fewer personnel.[188] The flow of goods purchased on the Internet across state borders will continue to provide more options to both consumers and companies, resulting in a mutually beneficial system to both sides.[189]

C. Potential Solutions

The first alternative is to forbid the direct shipment of all wine, which will prevent some consumers from having access to their favorite products.[190] However, this will result in the in-state wineries being subject to the heightened costs out-of-state producers currently

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[185] Douglass, *supra* note 6, at 1619 (stating that "[g]rowth in mail-order and electronic commerce, however, has provided new channels through which consumers and producers or retailers can reach each other.").

[186] Robert E. Litan, *Law and Policy in the Age of the Internet,* 50 DUKE L.J. 1045, 1053 (2001) (determining that "[t]he Internet allows consumers greater choice in products and services—a positive impact that is difficult, if not impossible, to quantify—as well as the ability to find the least expensive and most suitable products and services.").

[187] *See* Litan, *supra* note 186, at 1049 (discussing that "[t]here is a remarkable consensus among economists about the virtues of unrestricted trade—namely, that it will lead to lower prices, improved quality, and higher overall wages (due to enhanced productivity.")).

[188] *See generally id.* at 1052 (reasoning that "[t]here is a widespread consensus among economists that advances in high technology—especially computers, the prices of which have been falling at an annual clip of roughly thirty percent per year—have been a major reason why productivity has increased rapidly.").

[189] *See id.* at 1053 (stating that "commercial activity using the Internet is widely expected to be counted in the trillions of dollars, here and worldwide, in just a few years.").

[190] *See* Douglass, *supra* note 6 at 1652 ("State laws that absolutely prohibit direct shipment from both in-state and out-of-state producers to consumers require close scrutiny in balancing the states' exercise of core Twenty-first Amendment powers with the primary purpose of the dormant Commerce Clause. States insist that Prohibition of direct shipments is necessary to prevent minors from accessing alcoholic beverages, to maintain an orderly alcoholic beverage distribution system, and to promote temperance.").

bear, resulting in an overwhelming negative effect on consumers. The more reasonable alternative for consumers and states is to permit the direct shipment of wine from both in-state and out-of-state wineries.

Permitting direct shipment to consumers will provide the most economically productive option. This process will eliminate the discriminatory treatment, satisfy the consumers by eliminating the expense-adding middle-men and continue to permit the states to regulate the industry. However, states are almost certain to balk at the total exclusion of wine from their three tier regulatory scheme, given how much they rely on the system for tax revenue and regulatory compliance.[191] However, permitting in-state and out-of-state wineries a small, uniform exception will benefit both parties. This exception will help to subsidize the small market businesses in the alcohol industry. To avoid a decrease in tax revenue, the states may tax the wineries on the direct shipment amounts that are in excess of the permitted exception. This option would most likely be supported because states have the power to tax; because it would not be facially discriminatory, the tax would most likely be upheld under the balancing test analysis.[192] In addition, this small exception will not result in significant backlash from wholesalers because the wineries will not be selling on a large scale. Moreover, and perhaps most importantly, this exception will still permit states to maintain control over the alcohol industry within their borders while avoiding a dormant Commerce Clause violation.

VI. Will The Supreme Court Come To The *Wine*rs' Aid?

The Supreme Court, sensing that this conflict may continue without a final ruling, granted writ of certiorari in the *Swedenburg* case.[193] The state legislators contend that by prohibiting the direct

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[191] *See* Sana Loue, *The Criminalization of Addictions*, 24 J. LEGAL MED. 281, 298-99 (2003) (finding that almost three percent of the United States' disposable income went towards alcohol spending. In addition, Loue notes that "[a]ccordingly, excise tax revenues have risen consistently from approximately $7.7 billion in 1970 for the beer, wine, and distilled spirits industries combined, to approximately $16 billion in 1995."). Given the amount of money spent on alcohol, the states ability to tax this measure results in significant tax revenue for each state.

[192] *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 602 (discussing how taxes that are not facially discriminatory but have incidental effects on interstate commerce are analyzed under the more lenient balancing standard).

[193] Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004), *cert. granted*, 72

shipment of alcohol, they can protect the integrity of their state distribution systems and regulate first hand within their borders.[194] Congress believes these regulations have effects on interstate commerce, an area which no party will argue is solely within their power to regulate.[195] Given the notable conflict presented by recent jurisprudence, the Supreme Court will likely resolve this issue once and for all.

Although some believe that the Supreme Court may pursue multiple avenues in its decision,[196] the Court will essentially be forced to choose between permitting the exclusion to in-state wineries and finding the schemes unconstitutional. Based on the case history of this conflict, the Supreme Court will likely find these state regulatory schemes unconstitutional. The Second Circuit was the first court to challenge the traditional view of the conflict between the Twenty-First Amendment and the dormant Commerce Clause. While the amendment gives states the autonomy to regulate the alcohol industry within their borders,[197] the state regulatory schemes favoring in-state wineries are facially discriminatory. Article I, Section 8 of the Constitution provides specifically enumerated powers to the federal government that are solely within their province to

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U.S.L.W. 3600, 72 U.S.L.W 3722, 72 U.S.L.W. 3725 (U.S. May 24, 2004) (No. 03-1274).

[194] *See* John Foust, *State Power to Regulate Alcohol under the Twenty-First Amendment: The Constitutional Implications of the Twenty-First Amendment Enforcement Act*, 41 B.C. L. REV. 659, 665-66 (discussing history of states desires to regulate the alcohol industry).

[195] U.S. CONST. art. I, § 8, cl. 3.

[196] *See generally* Eng, *supra* note 63, at 1890 (stating that the U.S. Supreme Court has four approaches they can take to their decision: (1) The *Bridenbaugh* approach where Judge Easterbrook concluded that § 2 of the Twenty-First Amendment was designed to provide relief to the states and the proper guide to use is *not* core concerns, but the history of the Constitution. *Bridenbaugh* ultimately did not have to address this issue as Indiana required all alcohol to pass through their system, (2) The *Bolick* (and *Beskind*) approach, which explicitly rejected the *Bridenbaugh* view and applied the traditional dormant Commerce Clause analysis, (3) *Bainbridge* district court analysis, where the court applied the two-tier test, but determined whether the discriminatory impact by a state scheme is authorized under the Twenty-First Amendment (this approach was vacated by *Bainbridge* above), and (4) The *Heald* district court approach where the court held that even if there was a violation of the dormant Commerce Clause, the Twenty-First Amendment would offer enough protection to uphold the state regulation).

[197] U.S. CONST. amend. XXI, § 2.

perform.[198] This power was not removed due to the passage of the Twenty-First Amendment.[199] Moreover, given that the amendment only permits regulation within a state's borders, when the effects of a state's regulatory scheme go beyond their boundary, the law is, in effect, regulating a different state's business. This thrusts at the heart of the original rationale Justice Johnson alluded to in *Gibbons v. Ogden* for the inclusion of the Commerce Clause in the first place: to harmonize the economy of the nation.[200]

VII. Conclusion

The circuit courts have failed to reach a consensus in solving the debate over the direct shipment of wine. With the Supreme Court granting writ of certiorari in the *Swedenburg* case, the circuits will finally have a definite ruling on the direct shipment of wine from out-of-state wineries. Although the Second Circuit's view of the New York's statutory scheme deviated from five prior circuit court cases and thus marked a departure from traditional jurisprudence, the Supreme Court will likely reinstate the two-step analysis applied above. A major concern that will remain after this anticipated ruling is the impact of the Court's decision on consumers, and whether states will amend their regulatory schemes to either the benefit or detriment of their citizens.

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[198] U.S. CONST. art. I, § 8, cl. 3.

[199] *See* Douglass, *supra* note 6, at 1630 (discussing the plain meaning of Section 2). There is no explicit Constitutional language repealing the power of Congress to regulate commerce in § 2.

[200] *Dickerson*, 336 F.3d at 395 ("If there was any one object riding over every other in the adoption of the [C]onstitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." (quoting Justice Johnson in *Gibbons*, 22 U.S. at 231)).

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