

STATE POWER TO REGULATE ALCOHOL UNDER THE TWENTY-FIRST AMENDMENT: THE CONSTITUTIONAL IMPLICATIONS OF THE TWENTY-FIRST AMENDMENT ENFORCEMENT ACT

Abstract: *Over forty states have direct shipment laws prohibiting, or severely limiting, an individual's ability to purchase wine from outside of the state and have it shipped home via a common carrier. Congress recently proposed a bill entitled the Twenty-first Amendment Enforcement Act ("Enforcement Act") that would authorize State Attorneys General to bypass the state courts and bring action in the federal courts to enforce direct shipment laws. This Note argues that direct shipment laws are unconstitutional, and that the proposed Enforcement Act cannot enable states to enforce these unconstitutional state laws.*

INTRODUCTION

Before coming to law school, I spent five years in the wine business, during most of which I worked in California's Napa Valley. The small but famous winery where I worked is busy all year long with visitors who travel from around the world to visit the vineyards and taste hard-to-find wines. When a visitor would ask where she could find our famous estate-grown Cabernets Sauvignon back in her home state, I would explain that because of the limited production, most of the wines were not distributed outside of California. Smiling, the visitor would ask how much she could purchase and have shipped back home for her. "It depends," I would say; "where are you from?" Curious why I had asked, she would answer that she was from Florida, or Texas, or North Carolina. I would then be forced to explain that her home state, like many others, prohibits out-of-state wineries from shipping wine directly to a consumer in that state.¹

¹ See, e.g., FLA. STAT. ANN. § 561.545 (West Supp. 2000). The Florida law states:

Any person in the business of selling alcoholic beverages who knowingly and intentionally ships, or causes to be shipped, any alcoholic beverage from an out-of-state location directly to any person in this state who does not hold a valid manufacturer's or wholesaler's license or exporter's registration . . . or who is not a state-bonded warehouse is in violation of this statute.

The Florida law is a typical example of a direct shipment law.² These laws restrict the ability of an out-of-state party, such as a winery, to ship wine directly to a consumer in the state.³ Over forty states have similar laws prohibiting, or severely limiting, an individual's ability to purchase wine from outside of the state and have it shipped home via a common carrier.⁴ Furthermore, Congress recently proposed a bill entitled the Twenty-first Amendment Enforcement Act ("Enforcement Act") that would authorize State Attorneys General to bypass the state courts and bring action in the federal courts to enforce direct shipment laws.⁵ Nevertheless, in spite of new incentives encouraging states to enforce their direct shipment laws, the laws themselves may be constitutionally unenforceable.

The dormant Commerce Clause prohibits states from enacting legislation that discriminates against or unreasonably burdens interstate commerce.⁶ Under the dormant Commerce Clause, a court would almost certainly strike down a state law that prohibited the importation of an out-of-state product.⁷ Direct shipment laws, however, attempt to do just this with respect to alcoholic beverages. Proponents of the laws argue that because the Twenty-first Amendment grants the states wide authority to regulate intoxicating liquors, the otherwise-unconstitutional direct shipment laws survive dormant Commerce Clause scrutiny.⁸

Id. (1). See also, e.g., N.C. GEN. STAT. § 18B-102.1 (1999); TEX. ALCO. BEV. CODE ANN. § 107.07 (West Supp. 2000).

² See, e.g., FLA. STAT. ANN. § 561.545; see also FLA. STAT. ANN. § 562.15 (West 1987) (making it unlawful to possess wine that has been shipped into the state in violation of the direct shipment law).

³ See, e.g., FLA. STAT. ANN. § 516.545. See also *infra* notes 50-55 and accompanying text.

⁴ For a list of the thirty states with statutes expressly prohibiting direct shipments of wine, see *infra* note 53. For a list of the ten states with limited personal importation statutes, see *infra* note 54.

⁵ See Twenty-first Amendment Enforcement Act, S. 577, 106th Cong. (1999) (substantially similar to H.R. 2031, 106th Cong. (1999)); see also *infra* notes 69-81 and accompanying text.

⁶ For a complete discussion of the dormant Commerce Clause, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-1 to -2 (3rd ed. 2000). See also 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 11.1-.11 (2d ed. 1992); *infra* notes 82-118 and accompanying text.

⁷ See TRIBE, *supra* note 6, §§ 6-1 to -2; see also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-29 (1978) (striking down New Jersey ban on the importation of out-of-state waste).

⁸ See 145 CONG. REC. S2509 (daily ed. March 10, 1999) (*Introductory Remarks on Measure*, by Sen. Hatch); C. Boyden Gray, *Letters to the Editor: The Case Against Mail-Order Booze*, WALL ST. J., Sept. 8, 1999, at A27.

This Note argues that direct shipment laws are unconstitutional, and that the proposed Enforcement Act cannot enable states to enforce these unconstitutional state laws.⁹ Part I of this Note discusses the background behind direct shipment laws,¹⁰ the Supreme Court's framework of analysis under the dormant Commerce Clause,¹¹ and the current state of the law regarding the Twenty-first Amendment's affect on the dormant Commerce Clause.¹² Part II of this Note analyzes the constitutionality of direct shipment laws under both the dormant Commerce Clause and the Twenty-first Amendment.¹³ Further, at the end of Part II, this Note considers what affect, if any, the pending Enforcement Act will have on the constitutionality of direct shipment laws.¹⁴ Ultimately, this Note concludes that direct shipment laws are unconstitutional, and that the Enforcement Act is unable to help states enforce these unconstitutional laws.

I. BACKGROUND

A. *The Twenty-first Amendment Enforcement Act*

Unlike most articles of commerce, which tend to be regulated at the federal level, alcohol is regulated by the states.¹⁵ With the adoption of the Twenty-first Amendment, which repealed national prohibition, the federal government turned over the authority to regulate "intoxicating liquors" to the states.¹⁶ The result has been a virtual patchwork of local and state laws that restrict, regulate and tax the importation and transportation of alcoholic beverages.¹⁷ "Direct shipment" laws, which restrict or prohibit the shipment of wines directly from the producer to the consumer, are an example of state

⁹ See *infra* notes 197-264 and accompanying text.

¹⁰ See *infra* notes 15-81 and accompanying text.

¹¹ See *infra* notes 82-118 and accompanying text.

¹² See *infra* notes 119-96 and accompanying text.

¹³ See *infra* notes 197-242 and accompanying text.

¹⁴ See *infra* notes 243-56 and accompanying text.

¹⁵ See RICHARD MCGOWAN, *GOVERNMENT REGULATION OF THE ALCOHOL INDUSTRY* 4-5, 113 (1997). McGowan notes that as a result of the Twenty-first Amendment there are more than fifty-two different agencies that control and tax alcohol in the United States. This includes: the federal government (to a limited extent), the fifty states, the District of Columbia and a myriad of local and municipal agencies. See *id.*

¹⁶ See U.S. CONST. amend. XXI, § 2. The Twenty-first Amendment, ratified in 1933, repealed the Eighteenth Amendment and ended fourteen years of national Prohibition. See RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY 1880-1920*, at 26-27 (1997).

¹⁷ See MCGOWAN, *supra* note 15, at 4-5.

regulation unique to the field of alcoholic beverages.¹⁸ These direct shipment laws and their enforceability are currently the subject of pending Congressional legislation entitled the Twenty-first Amendment Enforcement Act ("Enforcement Act").¹⁹

The substance of the Enforcement Act is best understood when considered against the backdrop of the unique history of the distribution of state and federal power in the field of alcoholic beverage law.²⁰ Over the past 150 years, the authority to regulate alcohol has oscillated wildly between the federal government and the states.²¹ As early as 1847, in the *License Cases*, the Supreme Court recognized that in the absence of a conflicting federal statute, states had the authority to regulate intoxicating liquor.²² Less than forty-five years later in *Leisy v. Hardin*, however, the Court invalidated an Iowa law regulating alcohol shipped into Iowa from Illinois on Commerce Clause grounds.²³ Chief Justice Fuller's opinion in *Leisy* held that because alcohol was an arti-

¹⁸ See, e.g., FLA. STAT. ANN. § 561.545 (West Supp. 2000). For a more in-depth discussion and examples of direct shipment laws see *infra* notes 50–55 and accompanying text.

¹⁹ See S. 577, 106th Cong. (1999) (substantially similar to H.R. 2031, 106th Cong. (1999)). For a more detailed discussion of the Enforcement Act, see *infra* notes 69–81 and accompanying text.

²⁰ Indeed, the gloss of history is probably the only thing that could make sense of the unusual way in which alcohol is regulated as compared to other articles of commerce. See Note, *Economic Localism in State Alcohol Beverage Laws—Experience Under the Twenty-first Amendment*, 72 HARV. L. REV. 1145, 1146 (1959). In fact, one commentator has pointed out that among the usual suspects of firearms, narcotics, pharmaceuticals or pornography, alcohol is the only substance that was ever expressly prohibited by the Constitution. See Wine Institute, *Some Background on Anti-Direct Shipping Laws* (visited Nov. 6, 1999) <<http://www.wineinstitute.org/shipwine/backgrounder/backgrounder.html>>.

²¹ As the Fifth Circuit Court of Appeals once noted: "Since the founding of our Republic, power over regulation of liquor has ebbed and flowed between the federal government and the states." *Castelwood Int'l Corp. v. Simon*, 596 F.2d 638, 641 (5th Cir. 1979).

²² See, e.g., 46 U.S. (5 How.) 504, 579, 627 (1847). The three cases decided in 1847 as the *License Cases* all involved Commerce Clause challenges to state liquor regulations requiring the licensing of anyone selling intoxicating beverages brought into the state from without. Although the decision consisted of conflicting opinions by six different Justices, the gist of the holding sustained the constitutionality of state laws absent a conflicting act of Congress. See *id.*

²³ See 135 U.S. 100, 123–25 (1890). *Leisy* involved a challenge by Gus Leisy and Company, the largest brewer in Peoria and a major player in the original package trade, against an Iowa prohibition law. The Leisy Company argued that prohibition in Keokuk, Iowa, interfered with Congress' power over interstate commerce by prohibiting the sale of imported alcohol. See HAMM, *supra* note 16, at 66–68. The Supreme Court agreed. See *Leisy*, 135 U.S. at 125. The practical affect of *Leisy* was to reinstate the "original package" test from *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), by preventing states from interfering with commerce in alcohol until the liquor had been "mingled in the common mass of property" of the state through purchase. See *Leisy*, 135 U.S. at 124–25; HAMM, *supra* note 16, at 68–69.

cle of commerce it could not be regulated by the state in the absence of express congressional authorization.²⁴ Later that same year, in 1890, Congress responded by passing the Wilson Act, which provided that alcohol shipped from one state into another was subject to the laws of the receiving state regardless of packaging.²⁵ Although the Court soon ruled that the Wilson Act was constitutional,²⁶ it later held that the Act did not authorize states to prohibit individuals from ordering alcoholic beverages from out-of-state sources for personal consumption.²⁷ In 1898, in *Vance v. W.A. Vandercook Co.*, the Court even stated that "the right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States."²⁸ The alcohol industry used the Court's strong language in *Vance* to justify their burgeoning mail-order business, and the prohibitionists recognized the need for some way around the Constitution in order to achieve their temperance goals.²⁹

Responding to the difficulties in achieving their temperance goals, prohibition groups, such as the Women's Christian Temperance Union and the Anti-Saloon League, appealed to Congress, who responded in 1913 with a bill known as the Webb-Kenyon Act.³⁰ The Webb-Kenyon Act, originally entitled "[a]n Act divesting intoxicating

²⁴ See *Leisy*, 135 U.S. at 123-25.

²⁵ See Wilson Act, ch. 728, 26 Stat. 313 (Aug. 8, 1890) (current version at 27 U.S.C. § 121 (1994)). The text of the Wilson Act states:

All . . . intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory . . . , and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Id.

²⁶ See *In re Rahrer*, 140 U.S. 545, 264-65 (1891).

²⁷ See *Vance v. W.A. Vandercook Co.*, 170 U.S. 424, 455-56 (1898) (holding that the Wilson Act could not authorize a state to interfere with the interstate shipment of liquor for personal use); *Rhodes v. Iowa*, 170 U.S. 412, 421-23, 426 (1898) (interpreting the Wilson Act narrowly so that a state's power to regulate did not vest until the alcohol's arrival at its final point of destination). One author has noted that in the wake of *Rhodes*, "[m]ail-order booze . . . flourished." Sidney J. Spaeth, Note, *The Twenty-first Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 173 (1991).

²⁸ See *Vance*, 170 U.S. at 452.

²⁹ See *id.*; HAMM, *supra* note 16, at 178-79. During the period that followed *Rhodes* and *Vance*, the "right" of citizens to import alcohol for personal use became a front for large scale liquor distributors whose flyers and circulars stocked the mailboxes of the dry areas. One such company, located in Kansas City, Missouri (Missouri was wet while Kansas was dry), advertised that they could "supply the wants of a thirsty Kansas." See *id.* at 179.

³⁰ See *id.* at 212-17.

liquors of their interstate character in certain cases" intended to place the power to regulate the transportation and sale of alcohol back into the hands of the states.³¹ President Taft recognized the constitutional dubiousness of an act that exempted an entire field of commerce from the federal control of Article 1, § 8, and vetoed the Webb-Kenyon Act as unconstitutional.³² Congress overturned the President's veto, however, and on March 1, 1913, the Webb-Kenyon Act became law.³³ The Supreme Court subsequently upheld the constitutionality of this Act.³⁴

In late 1917, Congress proposed the Eighteenth Amendment and by January of 1919, the Amendment was law.³⁵ That same year, Congress gave teeth to the Eighteenth Amendment by passing a national prohibition code called the Volstead Act over the veto of President

³¹ Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (current version at 27 U.S.C. § 122 (1994)).

³² See HAMM, *supra* note 16, at 218. Hamm points out that William Howard Taft was a lame-duck president with no political future and hence nothing to fear from the powerful supporters of the prohibition movement. Taft argued that although the Supreme Court had not expressly ruled on the subject, as the president he had the duty to exercise principles of "proper constitutional construction." *Id.* (quoting CONG. REC., 62d Cong., 3d Sess. 2903-11 (statement of President Taft)). Incidentally, Taft who sat as Chief Justice of the Supreme Court from 1921-1930 would never get the chance to rule on the interstate character of alcohol under the Constitution on account of the Eighteenth Amendment.

³³ See *id.* at 219.

³⁴ See *Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311, 330 (1915). Hamm mentions that the decision in *Clark* was interpreted differently by the "wets" and the "drys." The drys saw the decision as a sort of band-aide, a method that only postponed the national prohibition alcohol by lessening its need. The wets, however, were terrified that *Clark* signaled the beginning of the end, fearing that national prohibition loomed ominously in the horizon. See HAMM, *supra* note 16, at 225.

³⁵ See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. The Eighteenth Amendment, which brought thirteen years of prohibition to the United States, is almost universally seen as an embarrassment to the American Constitution in general and to the amendment process in particular. One commentator has alluded to the Eighteenth Amendment as an "exercise in Constitutional frivolity," emphasizing that regardless of the value of the goals of prohibition, they would have been better accomplished through federal legislation. See GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY* 199, 206 (1995). Furthermore, Laurence Tribe has pointed out that "[t]he Eighteenth Amendment . . . is nearly everybody's prime example of a constitutionally dumb idea. Dean John Hart Ely, for instance, uses it as Exhibit A in his case against constitutionalizing social or economic policies." See Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 217 (1995) (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST* 99-100 (Harvard U. Press, 1980)).

Woodrow Wilson.³⁶ For fourteen years, the production, sale, transportation and purchase of alcoholic beverages for consumption was illegal in the United States.³⁷ In 1932, Franklin Roosevelt won the presidency on a platform promising the repeal of prohibition.³⁸ Following the inauguration of President Roosevelt in 1933, Congress passed the Twenty-first Amendment to the Constitution.³⁹ The Amendment was ratified by the states and made law in December of that year.⁴⁰ Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment, while section 2 constitutionalized the substance of the Webb-Kenyon Act by stipulating that "the transportation or importation [of intoxicating liquors] into any state . . . in violation of the laws thereof, is hereby prohibited."⁴¹ Thus, the power to regulate alcohol was—at least ostensibly—back in the hands of the states.⁴²

After the repeal of prohibition, states began enacting alcoholic beverage laws under the authority of the Twenty-first Amendment and the Webb-Kenyon Act.⁴³ Armed with the experience of both the prohibition and pre-prohibition eras, the states sought to find legislative means by which to minimize the abuse of state law that had been so prevalent at the turn of the century.⁴⁴ Specifically, the states wanted to ensure that those localities that desired to remain dry after the repeal of national prohibition would be free from the infiltration of mail-order booze.⁴⁵ Moreover, even wet states were interested in legislation

³⁶ See Volstead Act, ch. 85, tit. I, 41 Stat. 305 (1919) (also known as the National Prohibition Act), *amended in part and repealed in part by* Liquor Law Repeal and Enforcement Act, ch. 740, 49 Stat. 872 (1935).

³⁷ See *supra* note 36.

³⁸ See HAMM, *supra* note 16, at 271.

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ U.S. CONST. amend. XXI, §§ 1, 2; accord Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (current version at 27 U.S.C. § 122 (1994)). The Twenty-first Amendment also set a seven-year time limit on ratification. See U.S. CONST. amend. XXI, § 3. For a discussion of the Supreme Court's analysis and interpretation of § 2, see *infra* notes 132–43 and accompanying text.

⁴² See HAMM, *supra* note 16, at 271. A complete discussion of the interpretation and history of § 2 will follow in the survey of Twenty-first Amendment jurisprudence *infra* notes 119–96 and accompanying text. At this stage it should suffice to say that the Amendment was originally interpreted at giving the states broad authority to regulate the subject of alcohol. See *infra* notes 132–38 and accompanying text.

⁴³ See MCGOWAN, *supra* note 15, at 52–54; Note, *supra* note 20, at 1148.

⁴⁴ See Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-first Amendment*, 85 VA. L. REV. 353, 355–56 (1999).

⁴⁵ See *id.* at 356.

that would help curtail the prevalence of the saloon and saloon-life that had been so common at the end of the nineteenth century.⁴⁶

Thus, the states passed "Tied-House Laws" that prohibited vertical integration between retailers and producers by holding that alcohol had to be distributed via a state-authorized wholesaler.⁴⁷ Some states chose to establish a state-run monopoly to control the distribution, whereby the state government acts as the wholesaler, distributor and retailer of alcoholic beverages.⁴⁸ Most states, however, chose the "three-tier system," which requires alcohol to be distributed to an authorized wholesaler, who may sell to an authorized retailer, who may then sell to a consumer.⁴⁹ In order to protect the integrity of the three-tier system, states enacted "direct-shipment laws" that prohibit or restrict the ability of a producer or a wholesaler from selling directly to a consumer.⁵⁰ Direct shipment laws affect the seller or carrier of the wine instead of the consumer.⁵¹ Generally, states that have enacted direct shipment legislation tend to fall within one of three categories⁵²: *express prohibition states* specifically deny the direct sale and

⁴⁶ See Spaeth, *supra* note 27, at 166 (discussing the nineteenth century "saloon image" problems associated with local regulation of alcohol).

⁴⁷ See MCGOWAN, *supra* note 15, at 101-02; Chris Knap, *Wine Wars*, ORANGE COUNTY REG., Oct. 23, 1997, at C1, available in 1997 WL 14880381. Although prohibitions on vertical integration have generally been removed for distilled liquor and beer, they still exist for wine which has a considerably smaller market share and hence minimum political influence. See MCGOWAN, *supra* note 15, at 101-02. Incidentally, "Tied-House Laws" were named for the distiller-owned taverns that would offer free sandwiches in order to entice customers into drinking during the middle of the day. See Knap, *supra*, at C1.

⁴⁸ See MCGOWAN, *supra* note 15, at 51-52, 101-02. Examples of states that utilize this system include: Alabama, Idaho, Maine, Michigan, Mississippi, Montana, New Hampshire, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming. See *id.* at 52.

⁴⁹ See *id.* at 102; Shanker, *supra* note 44, at 355-56. For the Supreme Court's description of the three-tier system, see *North Dakota v. United States*, 495 U.S. 423, 428 (1990). Supporters of the three-tier system claimed that it minimized the involvement of organized crime and decreased alcohol abuse. See Shanker, *supra* note 44, at 356. Furthermore, proponents of the three-tier system argued that it would be easier for the states to collect taxes on the alcohol sold within their borders. See *id.*

⁵⁰ See Shanker, *supra* note 44, at 356.

⁵¹ See *id.* at 355 n.8.

⁵² See *id.* at 356-57. Determining which category any given state would fit into by examining the applicable statutes can be difficult, because the statutes themselves can be deceptive. For example, although Massachusetts claims to allow direct shipment so long as a special permit is obtained from the Alcoholic Beverage Control Commission, no such permits are being issued. See Wine Institute, *Direct Shipment Laws by State for Wineries: Analysis of State Laws* (visited Nov. 6, 1999) <http://www.wineinstitute.org/shipwine/analysis/state_analysis.html> (citing M.G.L. § 2A, ¶ 7101).

shipment of wine to a consumer via a common carrier⁵³; *limited personal importation states* allow the limited sale and shipment of wine—usually by allotment based on volume—to a consumer for personal use⁵⁴; and *reciprocity states* allow the direct shipment of wine from those states that grant one another a reciprocal privilege.⁵⁵

⁵³ See Shanker, *supra* note 44, at 356–57. A good example of an express prohibition statute is from Texas:

A Texas resident may import for his own personal use not more than three gallons of wine A person importing wine or liquor under this subsection must personally accompany the wine or liquor as it enters the state. A person may not avail himself of the exceptions set forth in this subsection more than once every thirty days.

TEX. ALCO. BEV. CODE ANN. § 107.07(a) (West 1995).

There are thirty states that currently prohibit direct shipments of wine, these include: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Wyoming. See Wine Institute, *supra* note 52.

⁵⁴ See Shanker, *supra* note 44, at 356–57. A good example of a limited personal importation statute is from New Hampshire:

A direct shipper may ship directly to New Hampshire consumers over 21 years of age or licensees in packages clearly marked "Alcoholic Beverages, adult signature (over 21 years of age) required." All shipments from direct shippers into the state shall be made by a licensed carrier and such carriers are required to obtain an adult signature. Direct shippers or carriers shall not ship into areas of the state where alcohol beverages may not be lawfully sold No direct shipper may ship more than 60 individual containers of not more than one liter each of liquor and wine to any one licensee in New Hampshire or to any consumer or consumer or consumer's address in any calendar year.

N.H. REV. STAT. ANN. § 178:14-a (Supp. 1999).

There are ten states that currently allow the limited personal importation of wine, including: Alaska (reasonable amount); Connecticut (5 Gal./ 60 days, consumer must obtain permit); Louisiana (60 bottles/ year, taxes must be paid, permit required); Nebraska (1 case/ month, taxes must be paid, permit required); New Hampshire (60 cases/ year, taxes must be paid, license required); North Dakota (1 case/ month); Rhode Island (taxes must be paid, permit required); and the District of Columbia. See Wine Institute, *supra* note 52.

⁵⁵ See Shanker, *supra* note 44, at 356–57. A good example of a reciprocity statute is from New Mexico:

Any individual or licensee in a state which affords New Mexico licensees or individuals an equal reciprocal shipping privilege may ship for personal use and not for resale not more than two cases of wine, each case containing no more than nine liters, per month to any individual not a minor in this state.

N.M. STAT. ANN. § 60–7A–3 (Michie 1978).

There are currently twelve states that afford one another reciprocity privileges for direct shipments of wine, including: California, Colorado, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, Wisconsin and West Virginia. See Wine Institute, *supra* note 52.

Although most states have had direct shipment laws on the books since the repeal of prohibition, they only recently have begun actively to enforce them.⁵⁶ In part, this is because the wine industry, which suffered a near-death experience during prohibition, was so insignificant in the four decades that followed that the direct shipping of wine was a non-issue.⁵⁷ Between 1970 and 1990, however, the United States wine market more than doubled, and the number of bonded wineries increased from 441 to 1610.⁵⁸ At the same time, the wholesaler industry became increasingly consolidated, and the resulting oligopoly dedicated itself almost exclusively to the promotion of the major wine brands that account for the vast majority of the market.⁵⁹ In turn, small wineries looked toward mail-order and the Internet as a means of moving their product.⁶⁰ Thus, wholesalers and retailers have responded with lobbying efforts aimed at the enforcement of direct shipment laws.⁶¹

Although there is an increased demand to enforce the direct shipment laws, the states are unable to respond effectively because they lack an adequate remedy.⁶² One problem is that the states may lack the personal jurisdiction over the wineries necessary to enforce

⁵⁶ See Shanker, *supra* note 44, at 356.

⁵⁷ See McGOWAN, *supra* note 15, at 48-49. Although wine consumption in the United States has more than doubled since the 1950s, liquor sales still out-value wine over two to one (dollars sold) and beer and soft drinks over three to one. See *id.* at 103.

⁵⁸ See *id.* at 49; Wine Institute, *Key Facts: Bonded Winery Premises* (visited Nov. 6, 1999) <<http://www.wineinstitute.org/communications/statistics/bondedwinery.html>>.

⁵⁹ See Alex M. Freedman & John R. Emshwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking its Very Private World*, WALL ST. J., Oct. 4, 1999, at A1, available in 1999 WL-WJSJ 24916326 (stating that the number of wholesalers has decreased 97% since 1963, and today the top five control one third of the market); Knap, *supra* note 47, at C1 (noting that the top wholesalers prefer to deal with high-volume products which can establish brand loyalty and repeat sales, leaving small wineries with nowhere to go); Wine Institute, *supra* note 58 (indicating that the twenty-five largest wineries produce over 90% of the wine in the United States).

⁶⁰ See *Interstate Alcohol Sales and the Twenty-first Amendment: Hearing Before the Comm. on the Judiciary United States Senate*, 106th Cong. 141, at 20 (1999) [hereinafter *Interstate Alcohol Sales*] (statement of Mike Thompson, Representative for First Congressional District of California).

⁶¹ See, e.g., Freedman & Emshwiller, *supra* note 59, at A1. For an example of the result of this pressure to enforce direct shipment laws, see BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, INDUSTRY CIRCULAR: DIRECT SHIPMENT SALES OF ALCOHOL BEVERAGES (1997).

⁶² See 145 CONG. REC. H6,859-60 (daily ed. Aug. 3, 1999) (letters by assorted state attorneys general, stating that they are currently without the means to adequately enforce the direct shipping laws); Gray, *supra* note 8, at A27 (likening the wineries who break the unenforceable laws to "a gang of outlaws standing on one side of a river knowing the sheriff on the other side can't reach them").

their laws in a state court.⁶³ Furthermore, a legitimate cause of action does not exist under current federal law.⁶⁴ Neither the Twenty-first Amendment nor the Webb-Kenyon Act expressly created a federal cause of action for self-enforcement.⁶⁵ Additionally, in 1997, the Court of Appeals for the Eleventh Circuit held that a federal cause of action for the violation of state liquor laws could not be implied out of either the Twenty-first Amendment or the Webb-Kenyon Act.⁶⁶ Likewise, attempts by interested private parties, such as wholesalers, to enjoin direct shippers from violating state laws have been unsuccessful.⁶⁷ Faced with political pressure from wholesalers and distributors to enforce laws that were unenforceable as written, the states turned to Congress.⁶⁸

Introduced in 1999, the Twenty-first Amendment Enforcement Act would amend the Webb-Kenyon Act to authorize state attorneys general to use the federal courts as a forum for enforcing a state's di-

⁶³ See H.R. REP. NO. 106-265, at 5 (1999) (citing *Florida Dep't of Bus. Regulation v. Sam's Wines & Liquors*, No. 96-3602 (Fla. Cir. Ct. Sept. 3, 1997) (order granting motion to dismiss for lack of personal jurisdiction over the defendant)). It is important to note that personal jurisdiction in state courts is controlled by the state's own "long arm statute" which may extend as far as, but no further than, the constitutional requirements of minimum contacts. See generally *International Shoe v. Washington*, 326 U.S. 310 (1945), as interpreted by *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Florida's "long arm" statute, applicable in *Sam's Wines*, did not extend as far as the Constitution permits, but only to those persons "operating, conducting, engaging in, or carrying on a business venture in this state or having an office or agency in this state." See FLA. STAT. ANN. § 48.193 (West Supp. 2000). Thus, it is unresolved whether a state with a long arm statute with a broader swing would indeed have personal jurisdiction over a defendant winery under similar circumstances.

⁶⁴ See *Florida Dep't of Bus. Regulation v. Zachy's Wine and Liquor, Inc.*, 125 F.3d 1399, 1402 (11th Cir. 1997), cert. denied, 523 U.S. 1607 (1998); *Wine and Spirits Wholesalers, Inc. v. Net Contents, Inc.*, 10 F. Supp. 2d 84, 86 (D. Mass. 1998).

⁶⁵ See Tribe, *supra* note 35, at 219. Tribe notes that although a draft version of the Twenty-first Amendment contained an enforcement provision granting concurrent state and federal jurisdiction, the ratified version contains no such provision. See *id.* He also points out that the two federal laws that do purport to enforce the Twenty-first Amendment find their authority in the Commerce Clause. See *id.*

⁶⁶ See, e.g., *Zachy's Wine & Liquor*, 125 F.3d at 1402 (holding that neither the Twenty-first Amendment nor the Webb-Kenyon Act have an implied federal right of action).

⁶⁷ See *Net Contents*, 10 F. Supp. 2d at 85-87 (holding that a Massachusetts wholesaler could not assert a claim for tortious interference with business to enjoin California-based wine shipper Virtual Vineyards from violating Massachusetts direct shipment laws).

⁶⁸ See H.R. REP. NO. 106-265, at 5; Carolyn Lochhead, *House to Limit Wine Sales on Internet*, S.F. CHRON., Aug. 3, 1999, at A1, available in 1999 WL 2692540 (stating that wine-makers claim pressure from large wholesalers prompted legislation); Editorial, *Wine Wars*, WALL ST. J., Jul. 23, 1999, at A14, available in 1999 WL-WSJ 5461687 (stating that the legislation is the result of campaigns by wholesalers and distributors aimed at attorneys general and Congress).

rect shipping laws.⁶⁹ Specifically, the Enforcement Act provides that a state attorney general, who has reasonable cause to believe that a person is shipping wine into a state in violation of direct shipping laws, may bring a civil action for injunctive relief in a federal district court.⁷⁰ On August 3, 1999, the House of Representatives passed the Enforcement Act by a vote of 310 to 112, and subsequently referred it to the Senate Committee on the Judiciary.⁷¹ The proffered justification for the legislation is that it addresses the problem of underage access to alcohol over the internet.⁷² Proponents of the Enforcement Act claim that under current law minors may be able to order wine over the internet or telephone, and with the aid of a credit card, to have the contraband shipped directly to their home.⁷³ They argue that the Enforcement Act will help alleviate this problem by providing states with a powerful tool for enforcing direct shipment laws.⁷⁴

Dissenters to the Enforcement Act believe the proffered justification of reducing underage drinking to be purely pretextual.⁷⁵ They claim that the problem of underage access to alcohol over the internet is unsubstantiated and overstated.⁷⁶ They argue alternatively that even if such a problem did exist, it could be better addressed under current law, or—if necessary—by means less restrictive than the proposed legislation.⁷⁷ The dissenters also point out that a bipartisan substitute to the Enforcement Act that was narrowly tailored to serve

⁶⁹ See S. 577, 106th Cong. (1999) (text substantially similar to H.R. 2031, 106th Cong. (1999)); 145 CONG. REC. S2503 (daily ed. Mar. 10, 1999) (introducing S. 577 in Senate by Mr. Hatch (for himself and Mr. DeWine)); 145 CONG. REC. H3857 (daily ed. Jun. 8, 1999) (introducing H.R. 2031 in House by Mr. Scarborough (for himself, Mr. Sensenbrenner, Mr. Delahunt and Mr. Cannon)).

⁷⁰ See S. 577.

⁷¹ See 145 CONG. REC. H6,887 (daily ed. Aug. 3, 1999).

⁷² See 145 CONG. REC. S2509 (daily ed. March 10, 1999) (statement by Senator Hatch).

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See 145 CONG. REC. H6,861–62 (daily ed. Aug. 3, 1999) (statement of Representative Thompson); *id.* at H6,864–65 (statement of Representative Radanovich).

⁷⁶ See H.R. REP. NO. 106–265, at 18 (arguing that the only evidence of minors successfully obtaining alcohol over the internet comes from the anecdotes of the Enforcement Act's supporters). Additionally, opponents of the Enforcement Act argue that although telephone and internet wine sales have been legal in California since 1963, the State has not experienced this as an obstacle to enforcing laws against underage drinking. See *id.* at 18–19 & n.4 (citing a letter from Manuel R. Espinoza, Chief Deputy Director of California Dep't of Alcoholic Beverage Control, to Representatives Mike Thompson and George Radanovich (March 3, 1999)).

⁷⁷ See *id.* at 17.

its purported ends of limiting underage access to alcohol over the internet was quickly defeated.⁷⁸ Consequently, the opponents to the Enforcement Act believe the proffered justification is nothing more than a mere pretext under which to pass legislation intended to protect the oligopoly of liquor wholesalers.⁷⁹ These arguments regarding the legitimacy of the government's interests in the legislation are particularly important because they bear directly on the constitutionality of the Enforcement Act.⁸⁰ Opponents of the legislation argue that direct shipment laws, and therefore, by association, the Enforcement Act are unconstitutional because they discriminate against interstate commerce in a way that violates the dormant Commerce Clause of the United States Constitution.⁸¹

B. *The Dormant Commerce Clause*

Article I, section 8 of the Constitution grants Congress the power to regulate commerce among the several states.⁸² For more than 140 years, the Supreme Court has recognized that along with this positive grant of Congressional power, comes the negative implication that the states may not otherwise interfere with or burden interstate commerce.⁸³ This principle, known generally as the dormant Commerce Clause, is premised on the notion that Congress' power to regulate commerce is both plenary and exclusive.⁸⁴ Furthermore, even where Congress has not yet occupied a field within their jurisdiction of interstate commerce, a state is prohibited from entering into that field unless expressly authorized by Congress.⁸⁵ Thus, under the doctrine of

⁷⁸ See *id.* at 19. The proposed substitute, which was drafted by Representatives Gallegly and Lofgren, would have directly targeted the problem of underage access to alcohol by allowing state attorneys general access to federal courts solely for the purpose of enforcing state laws regarding the sale of alcohol to minors. See H.R. REP. NO. 106-265, at 19.

⁷⁹ See *id.* at 17.

⁸⁰ See *infra*, notes 254-56 and accompanying text.

⁸¹ See H.R. REP. NO. 106-265, at 19-21.

⁸² U.S. CONST. art. I, § 8, cl. 3 (stating that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

⁸³ This principle can be traced back to *Cooley v. Board of Port Wardens*, where the Court held that Congress has the exclusive power to regulate all commerce that was "national" in character. See 53 U.S. (12 How.) 299, 319-20 (1851). For a more complete discussion of the origins of the dormant Commerce Clause, see generally TRIBE, *supra* note 6, §§ 6-1 to -3.

⁸⁴ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 209 (1824) (Marshall, C.J.) (finding "great force" in the argument that the commerce power was exclusively federal and plenary).

⁸⁵ This principle is known generally as "Dowling's rule" after the professor who first articulated that which the Supreme Court had been doing since the Great Depression. In his

the dormant Commerce Clause, states are prohibited from enacting legislation that would unreasonably interfere with interstate commerce.⁸⁶

The theoretical underpinnings of the dormant Commerce Clause largely derive from concerns over the harms of interstate discrimination and economic balkanization.⁸⁷ Scholars generally cite to three basic arguments against economic protectionism that justify the prohibitions of the dormant Commerce Clause.⁸⁸ First, states should not be allowed to enact legislation that is protectionist in purpose because it can induce retaliation from fellow states and ultimately lead to balkanization.⁸⁹ Second, interference with interstate commerce obstructs free trade and may reduce national prosperity or the aggregate social welfare.⁹⁰ Third, discriminatory state laws offend the concept of representation-reinforcement because they disproportionately impact the interests of persons who are not politically represented within the forum.⁹¹ The Court looks suspiciously on state legislation

famous article, Professor Dowling noted that "in the absence of affirmative consent a Congressional negative will be presumed in the court against state action which in its effect upon interstate commerce constitutes an unreasonable interference with national interests, the presumption being rebuttable at the pleasure of Congress." See Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 20 (1940).

⁸⁶ See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-29 (1978) (finding that a New Jersey ban on the importation of out-of-state waste was an impermissible burden on interstate commerce); *TRIBE*, *supra* note 6, § 6-5, at 1050-51 & n.5.

⁸⁷ See GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 274-76 (13th ed. 1997).

⁸⁸ See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense out of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1112-13 (1986) (arguing that there are three objections to state protectionism: the "concept-of-union" objection; the "resentment/retaliation" objection; and the "efficiency" objection); see also *City of Philadelphia*, 437 U.S. at 629 (discussing the evils of protectionism and the threat of state retaliation).

It may also be worth noting that as far off as the notion of balkanization seems to us today, this very real threat was partially realized under the Articles of the Confederation, and is part of what prompted the Constitutional Congress to meet in 1787. See ANDREW C. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 137-47 (1936).

⁸⁹ See Regan, *supra* note 88, at 1114.

⁹⁰ See GUNTHER & SULLIVAN, *supra* note 87, at 275. This idea is based on the notion that free trade is essential to the social well-being of the nation and that the interference of state regulation would hinder the production of the free market. See *id.* Professor Tribe refers to this interpretation of the dormant Commerce Clause as "Madisonian." See *TRIBE*, *supra* note 6, § 6-3, at 1044.

⁹¹ See *TRIBE*, *supra* note 6, § 6-5, at 1052; see also GUNTHER & SULLIVAN, *supra* note 87, at 275. The concept of representation re-enforcement is frequently associated with John Hart Ely's process-based model of Constitutional interpretation discussed in his book, *DEMOCRACY AND DISTRUST*, *supra* note 35, at ch. 4. Furthermore, the concept of representation-reinforcement also is referred to as a *Carolene Products* analysis because of Justice Stone's famous footnote from that case. See *United States v. Carolene Products Co.*, 304 U.S. 144,

that primarily burdens out-of-state interests because the political process can not be trusted to protect adequately these underrepresented interests.⁹²

There is much scholarly disagreement over the exact analysis the Supreme Court uses to evaluate a state regulation that burdens interstate commerce.⁹³ Nevertheless, the Court's current dormant Commerce Clause analysis first separates regulations that burden interstate commerce into two basic groups: regulations that discriminate against out-of-state interests and regulations that do not.⁹⁴ A discriminatory regulation is one that primarily burdens out-of-state interests, while primarily benefiting in-state interests.⁹⁵ The Court analyzes such discriminatory state laws under the strict-scrutiny standard of review, which—like its analog in Equal Protection analysis—is “strict in theory fatal in fact.”⁹⁶ Non-discriminatory laws that have only an incidental

152-53 n.4 (1938). Finally, I should mention that the concept of representation-reinforcement as a principle for judicial review harks all the way back to Chief Justice John Marshall's decision in *McCulloch v. Maryland*. See 17 U.S. (4 Wheat.) 316, 428 (1819) (stating: “[i]n imposing a tax the legislature act upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation”).

⁹² See TRIBE, *supra* note 6, §6-5, at 1052.

⁹³ See generally Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMM. 395 (1986); Regan, *supra* note 88; Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

⁹⁴ See, e.g., *City of Philadelphia*, 437 U.S. at 623-24. In *City of Philadelphia*, the Court articulated the difference in the treatment of discriminatory and non-discriminatory state laws by stating:

The opinions of the Court throughout the years have reflected an alertness to the evils of “economic isolation” and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtual *per se* rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach . . .

See *id.* (internal citations omitted).

⁹⁵ See Eule, *supra* note 93, at 460-68. Although Professor Eule refers to this phenomenon as “disproportionalism” rather than discrimination, the effect is the same. See *id.*; see also Tushnet, *supra* note 93, at 133-41. Another definition of discrimination in the Commerce Clause context is: “Any disparity in the treatment of in-state and out-of-state interests—whether business, users, or products . . . even if the disparity is slight.” See TRIBE, *supra* note 6, §6-6, at 1059-60.

⁹⁶ See Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Indeed, *Maine v. Taylor*

burden on interstate commerce, however, receive a more deferential standard of review and are struck down "only if the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits.'"⁹⁷

When it engages in strict scrutiny review of discriminatory state laws, the Supreme Court upholds the laws only if they serve "'a legitimate local purpose' [that] could not be served as well by nondiscriminatory means."⁹⁸ This is no easy task since the legitimate local purposes must be something more than mere economic protectionism.⁹⁹ Secondly, the legitimate state interests promoted by the law must be real and not simply illusory or hypothetical.¹⁰⁰ Finally, even when the state successfully demonstrates that the legitimate interests outweigh the burden on interstate commerce, they still must show that the same benefits could not have been achieved by other less-discriminatory means.¹⁰¹ Thus, the Court strikes down any discrimina-

stands as the only example of a state regulation that survived strict scrutiny. See 477 U.S. 131, 151-52 (1986).

⁹⁷ See *Taylor*, 447 U.S. at 138 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). For cases applying a more deferential standard of review—a standard of review akin to rational basis in the Equal Protection context—to uphold non-discriminatory state laws, see *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471-72 (1981) (applying rational-basis to uphold a non-discriminatory Minnesota law that prohibited the sale of milk in disposable plastic cartons); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-29 (1978) (applying rational-basis to uphold a non-discriminatory Maryland law that prohibited producers and refiners of petroleum products from operating retail stations in the state); but see *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959) (applying rational-basis to strike down a non-discriminatory Illinois law that required all transport tractor-trailers to use curved mudflaps on state highways).

⁹⁸ See *Taylor*, 477 U.S. at 138 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)); see also *Pike*, 397 U.S. at 142.

⁹⁹ See *City of Philadelphia*, 437 U.S. at 624 (stating: "The crucial inquiry, therefore, must be directed to determining whether [the state law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns").

¹⁰⁰ See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (stating that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause."); see also *City of Philadelphia*, 437 U.S. at 625 (striking down a New Jersey ban on out-of-state garbage in spite of a claim that the law was motivated by environmental concerns); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 352 (1977) (striking down a North Carolina apple labeling law in spite of a claim that the law was designed to promote the quality of apples and reduce consumer confusion).

¹⁰¹ See *Taylor*, 477 U.S. at 138 (stating that the burden is on the state to show that their legitimate purpose "could not be served as well by available nondiscriminatory means"); *Pike*, 397 U.S. at 142 (stating: "the extent of the burden that will be tolerated will of course depend on . . . whether [the local interest] could be promoted as well with a lesser impact

tory law that either fails to serve a legitimate local purpose, or serves a legitimate local purpose that could have been equally served by other nondiscriminatory means.¹⁰²

Traditional dormant Commerce Clause doctrine holds that Congress has the authority to consent to what would otherwise amount to an impermissible burden on interstate commerce, for "Congress has undoubted power to redefine the distribution of power over interstate commerce" and may "permit the States to regulate the commerce in a manner which would otherwise not be permissible."¹⁰³ This power of Congress to consent to a violation of the dormant Commerce Clause is based on the notion that the Constitution does not actually forbid states from regulating interstate commerce, but merely restrains them from doing so until authorized by Congress.¹⁰⁴ There are, however, some limitations on the scope of Congress' authority to authorize a state's discrimination against interstate commerce.¹⁰⁵ First, in order for it to be valid, congressional consent must be "expressly stated," or "unmistakably clear."¹⁰⁶ In other words, the Court is unwilling to find

on interstate activities"); see also *City of Philadelphia*, 437 U.S. at 626-27 (suggesting that the New Jersey law would have been constitutional if it had banned the processing of all garbage, and not just that which had originated from out of state).

¹⁰² See *Taylor*, 477 U.S. at 138.

¹⁰³ *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945) (Stone, J.). In the revised version of his landmark article, *Interstate Commerce and State Power*, Professor Dowling notes that Justice Stone had a certain history regarding the issue of Congressional power to consent to a dormant Commerce Clause violation. Dowling tells a story from the days when Mr. Stone was Dean of the Columbia Law School, in which the later-to-be Justice directed Professor Dowling to "find out all you can about just how it is that Congress can enable the states to do something which the Court already has held the states could not do." See Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547, 552-53 & n.19 (1947). Much of Dowling's findings on this issue were later published in a particularly relevant article: Noel T. Dowling & F. Morse Hubbard, *Divesting an Article of its Interstate Character: An Examination of the Doctrine Underlying the Webb-Kenyon Act*, 5 MINN. L. REV. 100 (1921).

For a general discussion of the doctrine of congressional consent, see TRIBE, *supra* note 6, § 6-35, at 1242-45; and William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387 (*passim*) (1983).

¹⁰⁴ See *Rahrer*, 140 U.S. at 561-64; William Cohen, *Congressional Power to Define State Power to Regulate Commerce: Consent and Pre-emption*, in 2 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 523, 527 (Terrence Sandalow & Eric Stein eds. 1982).

¹⁰⁵ See TRIBE, *supra* note 6, § 6-35, at 1243 (stating: "The principle of [congressional consent] cannot be extended to a conclusion that Congress has limitless power to authorize state discrimination against out-of-state [interests]"); see also GUNTHER & SULLIVAN, *supra* note 87, at 344-49 (offering a brief survey of the differences in opinion regarding congressional consent); Dowling, *supra* note 103, at 556.

¹⁰⁶ See *South Cent. Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 90-91 (1984) (overruling the appeals court's holding that Congress had consented to a discriminatory

consent unless Congress has been absolutely explicit in its intent to authorize state interference with interstate commerce, so that out-of-state interests burdened by the legislation will have been adequately represented in the political process.¹⁰⁷ Second, even where consent is valid, the Court has found other constitutional means for striking down state laws that are repugnant to the principles protected by the dormant Commerce Clause.¹⁰⁸ Thus, although Congress technically has the power to authorize discriminatory state legislation, the Court only rarely has relied on such consent to uphold legislation that violates the dormant Commerce Clause.¹⁰⁹

Alaskan local processing requirement by "consistently endorsing primary-manufacture requirements on timber taken from *federal land*"; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958-59 (1982) (declining to find congressional authorization for state-imposed burdens on interstate commerce regarding ground water, despite thirty-seven federal statutes that demonstrated Congress' deference to state water law).

¹⁰⁷ See *South Cent. Timber*, 467 U.S. at 91-92 (stating: "The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying the dormant Commerce Clause doctrine [and] ensures that there is . . . a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce").

¹⁰⁸ In addition to the dormant Commerce Clause, there are two alternate means used in the past by the Court to strike down discriminatory state legislation: the Privileges and Immunities Clause of Article IV, § 2; and the Equal Protection Clause. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 337-40 (3rd ed. 1996) (discussing the Privileges and Immunities Clause); *TRIBE*, *supra* note 6, § 6-35, at 1243 (discussing the Due Process and the Privileges and Immunities Clauses). In situations where the dormant Commerce Clause has been unavailable, either because of congressional consent or the market-participation exception, the Court has applied the Privileges and Immunities Clause and the Equal Protection Clause in a way that mirrors traditional Commerce Clause analysis. See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (using the Equal Protection Clause to strike down a statute that discriminated against out-of-state interests but had been expressly authorized by Congress); *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 221-23 (1984) (holding that the Privileges and Immunities Clause could be used to strike down a discriminatory local-preference hiring policy, even though the dormant Commerce Clause was inapplicable because of the market participation doctrine); see also STONE ET AL., *supra*, at 338 (stating: "[i]n many ways the modern function of [the Privileges and Immunities Clause of] article IV, section 2 appears to be that of carving out an exception to the market participation exception to the [dormant] commerce clause"); William Cohen, *Federalism in Equality Clothing: A Comment on Metropolitan Life Insurance Company v. Ward*, 38 STAN. L. REV. 1 (1995) (arguing that the only explicable purpose for applying Equal Protection analysis in *Metropolitan Life* was to strike down discriminatory state legislation that could not have been struck down under the Commerce Clause because of congressional authorization).

¹⁰⁹ In fact, the last Supreme Court case to rely on congressional consent to uphold a discriminatory state law was in 1963, in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 429-30 (1936). See Cohen, *supra* note 104, at 529 (stating: "Unfortunately, the Prudential case is also the Supreme Court's last treatment of the subject [of congressional consent]"). In *Prudential*, the Court held that the McCarran-Ferguson Act, which limited the applicability of anti-trust laws on the insurance business and provided that "silence on the part of

Perhaps nowhere else is the scope of congressional authority to consent to discriminatory state laws more relevant than in the context of intoxicating liquors.¹¹⁰ In 1890, in *Leisy v. Hardin*, the Court struck down an Iowa law prohibiting the importation of intoxicating liquor from Illinois on dormant Commerce Clause grounds.¹¹¹ Within a few months after the case was decided, Congress responded by passing the Wilson Act, which held that alcohol shipped from one state into another would be subject to the laws of the receiving state.¹¹² The Court upheld the constitutionality of the Wilson Act in 1891, in *In re Rahrer*, stating that Congress had "divested" liquor of its interstate character through the Act.¹¹³ Congress read Chief Justice Fuller's language in *In re Rahrer* as a recognition of their authority to exempt certain articles of commerce from the application of the dormant Commerce Clause,¹¹⁴ and later passed the Webb-Kenyon Act.¹¹⁵ In 1995, in *Clark Distilling Co. v. Western Maryland Railway Co.*, the Court upheld the constitutionality of the Webb-Kenyon Act as a valid use of congressional power to authorize state laws prohibiting the importation of alcohol into the state.¹¹⁶ Thus, by the Court's holding in *Clark*, the

the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States," authorized a discriminatory South Carolina law that imposed a 3% tax on profits made by out-of-state businesses. See 408 U.S. at 429-30. The Court later struck down the discriminatory laws authorized in *Prudential* on Equal Protection grounds in 1985, in *Metropolitan Life*. See 470 U.S. at 883; Cohen, *supra* note 108, at 10-11.

¹¹⁰ It was actually in this context that the Court first articulated the concept of Congress's authority to override the dormant Commerce Clause. See *Rahrer*, 140 U.S. at 562 (stating: "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate character shall be governed by a rule which *divests* them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."); Cohen, *supra* note 104, at 525-26.

¹¹¹ See 135 U.S. at 124-25. For a discussion of this case in the context of national prohibition, see *supra* notes 22-34 and accompanying text.

¹¹² See Wilson Act, ch. 728, 26 Stat. 313 (Aug. 8, 1890) (current version at 27 U.S.C. § 121 (1994)). For the relevant text of the Act, see *supra* note 25.

¹¹³ 140 U.S. at 562, 565.

¹¹⁴ See Cohen, *supra* note 104, at 526-27; Dowling & Hubbard, *supra* note 103, at 106-12.

¹¹⁵ Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (current version at 27 U.S.C. § 122 (1994)).

¹¹⁶ 242 U.S. at 332; Dowling & Hubbard, *supra* note 103, at 113 & n.27. In his 1920 article discussing the implications of the Court's holding in *Clark*, Professor Dowling referred to "the doctrine of divesting an article of its interstate character." Dowling & Hubbard, *supra* note 103, at 101. He stated:

Congress has the power under the commerce clause, [according to *Clark*], to divest intoxicating liquor of its interstate character—to strip it of that something which gives it immunity from the operation of state laws—and the

Webb-Kenyon Act exempted the importation and transportation of intoxicating liquors from the reach of the dormant Commerce Clause.¹¹⁷ This is particularly important because the substance of the Webb-Kenyon Act was later constitutionalized into the text of the Twenty-first Amendment.¹¹⁸

C. *Twenty-first Amendment Jurisprudence*

In addition to repealing national prohibition, the Twenty-first Amendment of the Constitution grants the states broad authority to regulate the subject of alcoholic beverages.¹¹⁹ The second section of the Amendment states, in its relevant part, that: "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."¹²⁰ Determining just exactly what this language says can be frustratingly unrewarding.¹²¹ The legislative history of the Amendment fails to offer much insight into the purpose of section 2, and what little evidence does exist is contradictory.¹²² Senator Blain, the sponsor for the Amendment, once suggested that "[t]he purpose of section 2 is to restore to the states by constitutional amendment absolute control in effect over interstate commerce effecting intoxicating liquors."¹²³ The same Senator, however, also offered a contrary view on another occasion, stating: "[the purpose of the proposed amendment is] to assure the so-called dry States against the importation of intoxicating liquors into those States."¹²⁴ Although it seems likely that the purpose of section 2 was to allow the states to choose to continue to remain prohibitionist on an

liquor, after being thus divested, is subject to state laws in the same way that it would be if it were a domestic article and not one of interstate commerce. This, in short, is the doctrine of divesting an article of its interstate character.

Id.

Twenty-seven years later, however, in his seminal article *Interstate Commerce and State Power—Revised Version*, Professor Dowling called this doctrine the name by which we know it today: "[T]he doctrine of congressional consent to state action." See Dowling, *supra* note 103, at 547.

¹¹⁷ See Clark, 242 U.S. at 332; Dowling & Hubbard, *supra* note 103, at 113–16.

¹¹⁸ See GUNTHER & SULLIVAN, *supra* note 87, at 346 n.1.

¹¹⁹ See U.S. CONST. amend. XXI, § 1 (repealing U.S. CONST. amend. XVIII).

¹²⁰ *Id.* § 2.

¹²¹ See Tribe, *supra* note 35, at 218–19.

¹²² See *infra* notes 123–24 and accompanying text.

¹²³ 76 CONG. REC. 4143 (1933) (statement of Sen. Blaine).

¹²⁴ *Id.* at 4141.

individual basis,¹²⁵ the Amendment has not always been interpreted as such.¹²⁶

Not long after the ratification of the Twenty-first Amendment, two major schools of interpretation emerged.¹²⁷ One group took what might be called an "historical" approach to interpreting the Amendment—that is, interpreting it as it was apparently intended, despite its vague and overbroad language.¹²⁸ This group took the narrow view that the Amendment granted the states a sort-of *qualified* exception to the Commerce Clause—qualified because it did not allow the states to place any restrictions on imported liquors that did not also apply to domestic liquors.¹²⁹ The other group took a more "textual" interpretation of the Amendment, arguing that it granted the states complete constitutional immunity for laws regulating alcohol.¹³⁰ For almost twenty years following the ratification of the Twenty-first Amendment, this broad textual interpretation prevailed.¹³¹

The Supreme Court's early decisions interpreting the scope of the second section of the Twenty-first Amendment are characterized by their acceptance of the textual approach granting broad deference

¹²⁵ See TRIBE, *supra* note 6, § 6-27, at 1167; Note, *supra* note 20, at 1146-49.

¹²⁶ See *infra* notes 133-39 and accompanying text.

¹²⁷ See Note, *supra* note 20, at 1148.

¹²⁸ See *id.* See generally, e.g., Comment, *The Twenty-first Amendment Versus the Interstate Commerce Clause*, 55 Yale L. J. 815 (1946) (for a survey of those arguing for this historical interpretation). To support the proposition that the language of the Amendment is vague and overbroad, see Tribe, *supra* note 35, at 219 (stating: "This wasn't the first time an amendment's text missed its mark. But this miss is a doozy. The text actually forbids the private conduct it identifies, rather than conferring power on the States as such."). Professor Tribe gives us a colorful example of the Amendment's poor draftsmanship, using *reductio ad absurdum*:

The upshot is that there are two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under no color of law, can violate the United States Constitution. One is to enslave somebody, a suitably hellish act. The other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws—an act that might have been thought juvenile, and perhaps even lawless, but unconstitutional?

Id. at 220.

¹²⁹ See Note, *supra* note 20, at 1148.

¹³⁰ See generally Joseph E. Kallenbach, *Interstate Commerce in Intoxicating Liquors under the Twenty-first Amendment*, 14 TEMP. U. L.Q. 474, 480-82 (1940). See also Note, *supra* note 20, at 1148.

¹³¹ See *infra* notes 132-40 and accompanying text. This twenty year period spanned from the ratification of the Amendment in 1933, until the Court's decision in *Hostetter v. Idlewild Bon Voyage Liquor Corp.* See generally 377 U.S. 324 (1940).

to state laws regulating alcohol.¹³² In 1936, in *State Board of Equalization of California v. Young's Market*, Justice Brandeis, writing for the Court, upheld a discriminatory licensing statute against both a dormant Commerce Clause attack and an Equal Protection challenge.¹³³ At issue was a California statute that imposed a \$500 licensing fee for the privilege of importing beer into the state—a clear attempt to discourage out-of-state competition in the local liquor market.¹³⁴ That the statute unreasonably burdened interstate commerce was a given, and the venerable Justice Brandeis acknowledged as much, stating that “[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for the privilege [of importing liquor].”¹³⁵ Nevertheless, the Court upheld the statute, finding that the Twenty-first Amendment abrogated both the dormant Commerce Clause and the Equal Protection Clause when the subject matter of the regulation was alcoholic beverages.¹³⁶ The Court expressly rejected the narrower “historical” interpretation of the Amendment, stating:

The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the amendment, but a rewriting of it.¹³⁷

¹³² See *Joseph Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 404 (1938); *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59, 62–64 (1936).

¹³³ 299 U.S. at 61–64.

¹³⁴ See *id.* at 60.

¹³⁵ *Id.* at 62.

¹³⁶ See *id.* at 63. With regard to the Commerce Clause, Justice Brandeis wrote: “The [Twenty-first] amendment . . . abrogated the right to import free, so far as intoxicating liquors are concerned.” *Id.* at 62 (emphasis added). Referring to the Equal Protection Clause, he stated: “A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth.” *Id.*, 299 U.S. at 64.

¹³⁷ *Id.* at 62.

Cases decided by the Court throughout the 1930s and 1940s affirmed Justice Brandeis' holding in various settings.¹³⁸

This broad interpretation of the Twenty-first Amendment lasted only another thirty-five years.¹³⁹ In 1964, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Court struck down a New York law that attempted to regulate the sale of alcohol to international travelers departing from John F. Kennedy Airport.¹⁴⁰ The Court in *Idlewild* acknowledged the precedent of *Young's Market* and its progeny, but expressly denounced the notion that the Twenty-first Amendment should be interpreted to grant the states such broad authority.¹⁴¹ Referring to the earlier cases, Justice Stewart stated:

To draw a conclusion from this line of cases that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause whenever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been pro tanto "repealed," then Congress would be left with no regulatory power of the interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and demonstrably incorrect.¹⁴²

Thus, the Court determined that even where a state was enacting regulation under the power granted to it by the Twenty-first Amendment, it was still subject to the authority of the Commerce Clause.¹⁴³

The threshold issue in *Idlewild* concerned whether the state alcohol regulation conflicted with federal law.¹⁴⁴ After finding that such a conflict existed, the next step was to accommodate the state's interest under the Twenty-first Amendment with the federal interest under

¹³⁸ See *Joseph Finch & Co.*, 305 U.S. at 397-98 (upholding a Missouri statute prohibiting the importation of alcohol from Indiana, Pennsylvania, Michigan and Massachusetts); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) (upholding a Michigan statute prohibiting the sale of any beer brewed in a state which similarly discriminated against Michigan); *Joseph Triner Corp.*, 304 U.S. at 403 (upholding a Minnesota statute that prohibited the importation of beverages containing more than 25% alcohol, unless they had been properly registered with the state patent office).

¹³⁹ See *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 275 (1984); *Craig v. Boren*, 429 U.S. 190, 205 (1976); *Idlewild*, 377 U.S. at 331-32.

¹⁴⁰ 377 U.S. at 333-35.

¹⁴¹ See *id.* at 331-32.

¹⁴² *Id.*

¹⁴³ See *id.*

¹⁴⁴ See *id.* at 329.

the Commerce Clause.¹⁴⁵ The Court suggested a balancing of the conflicting state and federal interests, stating: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case."¹⁴⁶ Applying this accommodation test, the Court found that because New York had not enacted the law to prevent the dissemination of alcohol into her territory, the state interests were easily outweighed by the federal interests in regulating commerce.¹⁴⁷ Thus, *Idlewild* stands for the principle that where a state alcohol regulation unreasonably interferes with an expressed federal policy, that regulation can be struck down for being outside the scope of the state's constitutional authority.¹⁴⁸

In the wake of *Idlewild*, the Supreme Court invalidated a series of unconstitutional state laws that purported to rest on the authority of the Twenty-first Amendment.¹⁴⁹ The Court's analysis of the effect of the Twenty-first Amendment on interstate commerce first began to take on its present form in the case of *Bacchus Imports Ltd. v. Dias*.¹⁵⁰ In 1984, in *Bacchus*, the Court struck down a discriminatory Hawaiian alcohol tax law on dormant Commerce Clause grounds.¹⁵¹ Hawaiian law imposed an excise tax on all imported alcoholic beverages, but exempted from the tax locally produced okolehao and pineapple wine.¹⁵² Although this was a facially discriminatory law that would trigger "a virtual per se rule of invalidity"¹⁵³ under traditional dormant Commerce Clause analysis, Hawaii argued that the otherwise unconstitutional law could be "saved by the Twenty-first Amendment."¹⁵⁴

¹⁴⁵ See *Idlewild*, 377 U.S. at 332.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 333-34.

¹⁴⁸ See *id.*

¹⁴⁹ See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 114 (1980) (invalidating a California state wine pricing system that violated the Sherman Act); *Craig*, 429 U.S. at 204-09 (striking down, on Equal Protection grounds, an Oklahoma law which allowed for the sale of 3.2 beer to 18-year-old women but not men); *United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 381 (1973) (striking down an attempt by Mississippi to prevent a U.S. military base within its borders from obtaining cheaper alcohol out-of-state).

¹⁵⁰ See generally 468 U.S. 263 (1984). See also *TRIBE*, *supra* note 6, § 6-27, at 1170 (calling *Bacchus*: "Perhaps the most important of the contemporary cases on the scope of the Twenty-first Amendment.").

¹⁵¹ See *Bacchus*, 468 U.S. at 273-76.

¹⁵² See *id.* at 265.

¹⁵³ *City of Philadelphia*, 437 U.S. at 624.

¹⁵⁴ See *Bacchus*, 468 U.S. at 274.

The *Bacchus* Court ruled that the Hawaiian tax violated the Commerce Clause by discriminating against interstate commerce.¹⁵⁵ Turning to whether the unconstitutional law could be saved by the Twenty-first Amendment, the Court expressly rejected the notion that the Amendment somehow served to remove state alcohol regulation from the ambit of the Commerce Clause.¹⁵⁶ The Court reasoned that their proper role was to accommodate or balance the federal government's interest in prohibiting discrimination against interstate commerce with any legitimate interest the state might have under the Twenty-first Amendment.¹⁵⁷ Justice White, writing for the Court, stated:

The question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended. Or as we recently asked in a slightly different way, "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, not withstanding that its requirements directly conflict with express federal policies."¹⁵⁸

In other words, for a state to have a legitimate interest under the Twenty-first Amendment that justifies their discrimination against interstate commerce, the state must be acting to promote the 's "central purpose."¹⁵⁹

The Court in *Bacchus* went on to hold that the Hawaiian regulation, which was admittedly intended only as a means to advantage local industry, was not designed to promote the central purpose of the Twenty-first Amendment.¹⁶⁰ The Court stated:

[O]ne thing is certain: The central purpose of [section 2 of the Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Bal-

¹⁵⁵ See *id.* at 270-73.

¹⁵⁶ See *id.* at 275.

¹⁵⁷ See *id.* at 275-76.

¹⁵⁸ *Id.* (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)).

¹⁵⁹ See *Bacchus*, 468 U.S. at 275-276.

¹⁶⁰ See *id.* at 276.

kanization. State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.¹⁶¹

Although nowhere in *Bacchus* does the Court explicitly state what the central purpose or core power¹⁶² of the Amendment is, the language implies that the only legitimate purpose would be "temperance" or other means of controlling the "evils" of alcohol.¹⁶³ There is even language in the opinion suggesting that had the law been designed to promote interests in temperance and not economic protectionism, it might have fallen within the ambit of the Twenty-first Amendment.¹⁶⁴ Thus, state alcohol regulations that are not enacted under the core power of the Amendment, but are designed to favor local economic interests, cannot be justified by the Twenty-first Amendment.¹⁶⁵

Two other cases decided not long before the Court's decision in *Bacchus*, help shed light on the scope of the Twenty-first Amendment's core section 2 powers.¹⁶⁶ In 1980, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, the Court applied a balancing test to strike down a state alcohol regulation that interfered with the federal government's interests under the Commerce Clause.¹⁶⁷ The Court characterized this balancing approach as a "pragmatic effort to harmonize state and federal powers."¹⁶⁸ At issue in *Midcal* was a complicated wine pricing scheme, which the Court held violated portions of the federal anti-trust law—the Sherman Act.¹⁶⁹ Applying the balancing test, the Court first considered whether the state had any legitimate interest under the core power of the Twenty-first Amend-

¹⁶¹ See *id.* (internal citations omitted).

¹⁶² The terms central power, central purpose and core power are used interchangeably throughout Twenty-first Amendment jurisprudence. Compare *id.* ("central purpose"), with *Capital Cities*, 467 U.S. at 713 ("core § 2 power"), 715 ("central power").

¹⁶³ See *Bacchus*, 468 U.S. at 276.

¹⁶⁴ See *id.* (stating: "Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment Consequently, . . . we reject the State's belated claim on the Amendment").

¹⁶⁵ See *id.* at 274–76; see also *Midcal Aluminum*, 445 U.S. at 112–14 (holding that a California wine pricing scheme was not protected by the Twenty-first Amendment); *Capital Cities*, 467 U.S. at 716 (holding that an Oklahoma statute prohibiting the advertising of alcoholic beverages on cable television was not protected by the Twenty-first Amendment).

¹⁶⁶ See generally *Midcal Aluminum*, 445 U.S. at 97; *Capital Cities*, 467 U.S. at 691.

¹⁶⁷ See *Midcal Aluminum*, 445 U.S. at 112–14.

¹⁶⁸ See *id.* at 109.

¹⁶⁹ See *id.* at 103, 114.

ment.¹⁷⁰ Findings by the California Supreme Court indicated that there were two interests the law was designed to promote: "temperance" and "orderly market conditions."¹⁷¹ The Court further considered findings by the California court that undermined the legitimacy of temperance as one of the law's purposes by raising serious doubts about its ability to affect temperance.¹⁷² Thus, the Court held that the federal interests outweighed those of the state, while declining to consider what the outcome would have been had the state interests in temperance been legitimate.¹⁷³

In 1984, in *Capital Cities Cable, Inc. v. Crisp*, the Supreme Court followed *Midcal* and struck down an Oklahoma prohibition against the broadcasting of advertisements for alcoholic beverages.¹⁷⁴ Federal Communication Commission ("FCC") regulations clearly pre-empted the Oklahoma law.¹⁷⁵ Moving on to the balance of state and federal interests, the Court considered whether the "Twenty-first Amendment rescues the statute from pre-emption."¹⁷⁶ Although noting that the Oklahoma law was purportedly designed to promote temperance, the Court stressed the de minimus impact the law would have on achieving this otherwise laudable goal when compared to the obvious burden on out-of-state industries.¹⁷⁷ For example, the ban was not directed at the advertisement of all alcoholic beverages on all fronts, but rather, was directed only at wine advertisements on television that occasionally appeared by way of out-of-state signals.¹⁷⁸ The Court stated:

Although a state regulatory scheme obviously need not amount to a comprehensive attack on the problems of alcohol consumption in order to constitute a valid exercise of state power under the Twenty-first Amendment, the selective approach Oklahoma has taken toward liquor advertising suggests limits on the substantiality of the interests it asserts here.¹⁷⁹

¹⁷⁰ See *id.* at 112.

¹⁷¹ See *id.* (quoting *Rice v. Alcoholic Beverage Control App. Bd.*, 579 P.2d 476, 490 (1978)).

¹⁷² See *Midcal Aluminum*, 445 U.S. at 112 (citing *Rice*, 579 P.2d at 490).

¹⁷³ See *id.* at 113-14.

¹⁷⁴ See *Capital Cities*, 467 U.S. at 716.

¹⁷⁵ See *id.* at 705.

¹⁷⁶ See *id.* at 711-12.

¹⁷⁷ See *id.* at 715-16.

¹⁷⁸ See *id.*

¹⁷⁹ *Capital Cities*, 467 U.S. at 715.

Because the state's temperance goals were not seriously promoted by the advertisement ban, the Court found that it only indirectly engaged the core powers of the .¹⁸⁰ Thus, the "balance between state and federal power tip[ped] decisively in favor of the federal law," and the Court struck down the Oklahoma law.¹⁸¹

Since *Bacchus*, *Midcal* and *Capital Cities*, the Court has continued to invalidate state alcohol laws that interfere with express federal policies.¹⁸² The Court, however, has not been any more explicit in defining exactly what state interests are considered to fall within the scope of a state's core power under the Twenty-first Amendment.¹⁸³ In spite of the Court's occasional broad language, their decisions indicate that the actual scope of the section 2 core powers is relatively narrow.¹⁸⁴ Ultimately, the Court's decisions in *Idlewild*, *Midcal*, *Capital Cities* and *Bacchus* can be distilled into two basic points regarding the

¹⁸⁰ See *id.* at 715-16 (stating that "the application of Oklahoma's ban . . . engages only indirectly the central power reserved by § 2 of the Twenty-first Amendment").

¹⁸¹ See *id.* at 716.

¹⁸² See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (invalidating Rhode Island prohibition on advertisement of liquor prices that violated the First Amendment freedom of speech); *Healy v. Beer Institute*, 491 U.S. 324, 341-43 (1989) (invalidating a Connecticut Liquor Control Act that violated the Commerce Clause); 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 351-52 (1987) (invalidating a New York statutory scheme regulating liquor prices that conflicted with federal antitrust law); *Brown-Forman Distillers Corp. v. New York Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (invalidating parts of New York Alcohol Beverage Control Law that were in violation of the Commerce Clause).

¹⁸³ See generally *Rhode Island*, 517 U.S. 484; *Healy*, 491 U.S. 324; *Duffy*, 479 U.S. 335; *Brown-Forman*, 476 U.S. 573.

¹⁸⁴ There has occasionally been language in the Court's dicta broadly defining this core power. For example, in *Capital Cities*, the Court broadly defined the "central power" of § 2 as "regulating the times, places, and manner under which liquor may be imported and sold," and as "control over whether to permit importation or sale of liquor and how to structure the distribution system." See 467 U.S. at 715-16. Yet that definition simply does not square with the Court's own analysis and results. Such a broad definition of the amendment's core powers would have required the Court to have upheld the discriminatory state laws struck down in *Idlewild*, *Midcal Aluminum* and *Bacchus*. See *Bacchus*, 468 U.S. at 265, 275-77 (striking down a discriminatory Hawaiian liquor tax); *Midcal Aluminum*, 445 U.S. at 109, 14 (striking down a California comprehensive wine-pricing scheme); *Idlewild*, 377 U.S. at 324, 331-32 (striking down a New York prohibition on the sale of alcohol at J.F.K. Airport).

In fact, it would seem that the only cases that would not contradict this broad definition of core powers are those cases where the regulation struck down did not violate the Commerce Clause but some other federal law such as the First Amendment. See *Rhode Island*, 517 U.S. at 516 (invalidating Rhode Island law that violated the First Amendment's freedom of speech); *Capital Cities*, 467 U.S. at 715 (invalidating Oklahoma law that was preempted by FCC regulation); *Craig*, 429 U.S. at 204-05 (invalidating Oklahoma law that violated the Fourteenth Amendment's Equal Protection Clause).

substance of the Twenty-first Amendment's core powers: first, temperance is the 's sole central purpose; and second, the goal of temperance must be a serious and realistic one.¹⁸⁵ Stated differently, for a state's interest in regulating alcohol under the Twenty-first Amendment to outweigh conflicting federal interests, the state law must be designed to promote temperance, and it must be realistically designed to achieve that goal.¹⁸⁶ Lower court decisions reflect such an interpretation of the Supreme Court's decisions regarding the ability of the Twenty-first Amendment to save a state law that would otherwise amount to an invalid interference with federal policy.¹⁸⁷ One Federal District Court stated that "[o]nly those state restrictions which directly promote temperance may now be said to be permissible under Section 2 of the Twenty-first Amendment,"¹⁸⁸ while another claimed that "[t]his Court does not believe that a statute which ensures orderly market conditions but fails to promote temperance falls within core Twenty-first Amendment regulations."¹⁸⁹ Thus, unconstitutional state alcohol regulation only survive judicial scrutiny if the temperance

¹⁸⁵ See generally *Bacchus*, 468 U.S. 263; *Capital Cities*, 467 U.S. 691; *Midcal Aluminum*, 445 U.S. at 109-14; *Idlewild*, 377 U.S. 324.

¹⁸⁶ See generally *Idlewild*, 377 U.S. 324; *Bacchus*, 468 U.S. 263.

¹⁸⁷ See *Dickerson v. Bailey*, 87 F. Supp. 2d 691, 710 (S.D. Tex. 2000) (striking down discriminatory Texas direct shipment law because law failed to promote temperance); *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828, 837 (N.D. Ind. 1999) (striking down Indiana direct shipment law because law failed to promote temperance); *Pete's Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1017-20 (W.D. Mo. 1998) (striking down Missouri labeling requirement on beer containers because law failed to promote temperance); *Quality Brands v. Barry*, 715 F. Supp. 1138, 1138, 1143 (D.D.C. 1989) (striking down a discriminatory District of Columbia law requiring alcoholic beverage licensees to store beverages within the District because law failed to promote temperance), *aff'd*, 901 F.2d 1130 (D.C. Cir. 1990); *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 852, 861 (S.D.N.Y. 1985) (striking down discriminatory New York law that permitted wine coolers made from local grapes to be sold in retail grocery stores because law failed to promote temperance); *accord Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994) (striking down discriminatory Texas residency requirement on alcohol permit holders because law failed to promote a "core concern" of the Twenty-first Amendment), *cert. denied*, 512 U.S. 1205 (1994); *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844, 865-66 (N.D. Ill. 2000) (holding that plaintiff winery showed "strong likelihood" of succeeding on claim that provisions of Illinois Fair Dealing Act limiting out-of-state liquor supplier's ability to terminate contracts with in-state distributor were unconstitutional because provisions failed to promote a "central purpose" of the Twenty-first Amendment). But see *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 196, 203-04 (D.C. Cir. 1996) (upholding the same District of Columbia Storage Act that was struck down in *Quality Brands*).

¹⁸⁸ *Loretto Winery*, 601 F. Supp. at 861.

¹⁸⁹ *Pete's Brewing Co.*, 19 F. Supp. 2d at 1020.

goals promoted by the law sufficiently outweigh the burden on interstate commerce.¹⁹⁰

In summary, the Supreme Court's analysis of the constitutionality of a state alcohol law that affects interstate commerce has two basic parts.¹⁹¹ First, as a threshold matter, the Court applies a traditional dormant Commerce Clause analysis to determine whether the law would constitute an impermissible burden on interstate commerce if the subject were something other than alcohol.¹⁹² Second, the Court considers whether the otherwise unconstitutional state law nevertheless can be saved by the Twenty-first Amendment.¹⁹³ Under this step of the analysis, the Court questions whether the law was designed to promote a legitimate state interest in temperance.¹⁹⁴ Where the law was not designed to promote a legitimate temperance goal, but was designed to achieve mere economic protectionism, the law will be struck down as unconstitutional.¹⁹⁵ Where the law was designed to promote temperance, however, the Court applies a balancing test to determine whether the state's interest in temperance outweighs the burden on interstate commerce.¹⁹⁶

II. ANALYSIS

The constitutional implications of the Twenty-first Amendment Enforcement Act cannot be divorced from the goals the proposed law was designed to affect.¹⁹⁷ The purpose and effect of the Act would be to allow state attorneys general to sue in Federal District Court to enforce a state's direct shipment laws.¹⁹⁸ Because there is currently no federal cause-of-action for violating direct shipment laws, and because actions in state courts have largely been ineffectual, the Enforcement

¹⁹⁰ See *Capital Cities*, 467 U.S. at 715-16; *Midcal Aluminum*, 445 U.S. at 113-14.

¹⁹¹ See *supra* notes 144-48 and accompanying text.

¹⁹² See *Midcal Aluminum*, 445 U.S. at 102 (stating that "the threshold question is whether California's plan for wine pricing violates [federal law]"); accord *Bacchus*, 468 U.S. at 273 (finding as a threshold matter that the protectionist Hawaiian liquor tax violated the dormant Commerce Clause); *Capital Cities*, 467 U.S. at 705 (finding as a threshold matter that the Oklahoma advertising ban on wine commercials conflicted with federal law).

¹⁹³ See *supra* notes 145 & 156 and accompanying text.

¹⁹⁴ See *supra* notes 159-65 and accompanying text.

¹⁹⁵ See *supra* notes 159-65 and accompanying text.

¹⁹⁶ See *supra* notes 167-73 and accompanying text.

¹⁹⁷ See S. 577, 106th Cong. (1999) (substantially similar to H.R. 2031, 106th Cong. (1999)).

¹⁹⁸ See *id.*; H.R. REP. NO. 106-265, at 3 (1999). For a definition and examples of direct shipment legislation, see *supra* notes 50-55 and accompanying text.

Act will provide the states with the necessary forum to prevent the on-line and mail-order sale of wine.¹⁹⁹ To what extent the Act actually can achieve this purpose is entirely contingent on whether the state laws it seeks to help enforce are constitutionally permissible ends.²⁰⁰ Thus, to analyze the constitutional implications of the Twenty-first Amendment Enforcement Act, it is necessary to discuss first the constitutionality of state direct shipment regulations under current law.²⁰¹

As with any state alcohol regulation, a court must first determine whether direct shipment laws would constitute an impermissible burden on interstate commerce if the subject of the laws were something other than intoxicating liquors.²⁰² Under traditional dormant Commerce Clause analysis, a court would apply strict scrutiny because direct shipment laws discriminate against interstate commerce.²⁰³ This is because the burdens of the laws fall primarily on out-of-state interests such as small wineries, while in-state interests, such as local wholesalers and retailers, retain the benefits of the legislation.²⁰⁴ Small wineries, many of whom produce quantities too small for the large wholesalers to bother distributing, rely on direct sales via the internet or mail-order as the only realistic means of moving their product.²⁰⁵ By prohibiting wineries from shipping wine directly to out-of-state consumers, direct shipment laws seriously burden the wineries' ability to compete on a national level. Furthermore, while direct shipment laws burden out-of-state interests, such as small wineries, they do not burden in-state interests.²⁰⁶

¹⁹⁹ See H.R. REP. NO. 106-265, at 5; 145 CONG. REC. H6,859-60 (daily ed. Aug. 3, 1999) (letters from assorted state attorneys general, stating that without the proposed legislation, they are unable to enforce the direct shipment laws).

²⁰⁰ This is to say that if the direct shipment laws were found to be unconstitutional, the issue would shift to whether the Enforcement Act authorized the federal courts to enforce otherwise invalid laws. See *infra* notes 243-56 and accompanying text.

²⁰¹ For a recent Note that deals only with the constitutionality of direct shipment laws, see generally Shanker, *supra* note 44, at 377 (arguing that direct shipment laws are the kind of protectionist legislation affecting interstate commerce that are *per se* unconstitutional).

²⁰² See *supra* note 192 and accompanying text; see also *supra* notes 144, 155, 175 and accompanying text.

²⁰³ See *supra* notes 95-102 and accompanying text.

²⁰⁴ See H.R. REP. NO. 106-265, at 18; *Interstate Alcohol Sales*, *supra* note 60, at 21.

²⁰⁵ See *Interstate Alcohol Sales*, *supra* note 60, at 20 (stating that: "For the majority of wineries . . . direct shipping is the only viable means to fill customer orders").

²⁰⁶ See Shanker, *supra* note 44, at 366-67. The one exception here would be the wine consumers who frequently read about but are unable to buy many hard-to-find labels. Consumers, however, are not an effective check against discriminatory legislation, since they

Additionally, in-state interests, such as local liquor wholesale suppliers and retailers, retain the benefits of the direct shipment legislation.²⁰⁷ The three-tier system of alcohol distribution protected by the direct shipment legislation promotes monopolistic conditions for the wholesalers and retailers by forcing each bottle of wine sold to pass directly through their channels.²⁰⁸ Finally, if there is any doubt at all that the liquor wholesalers and retailers are benefited by direct shipment legislation, this is dispelled by the fact that they are frequently the authors of and driving forces behind the legislation.²⁰⁹ Thus, the courts should consider direct shipment laws to be discriminatory laws that are subject to the strict-scrutiny standard of review.²¹⁰

For a state direct shipment regulation to survive strict scrutiny, the state must prove that the law serves a legitimate local purpose that could not be served as well by non-discriminatory means.²¹¹ States generally offer two justifications for direct shipping legislation: the laws help prevent access to alcohol by minors, and they allow for more efficient tax collection.²¹² Although these justifications are facially legitimate local interests, the courts should question the reality of the benefits achieved through the legislation.²¹³ First, the evidence suggesting there is a risk that minors will have greater access to alcohol via direct shipment is simply not that significant under the circumstances.²¹⁴ In a day where almost every teenager has a friend with phony identification, there is little incentive for minors to order expensive wines over the internet and wait five business days to enjoy the fruits of their labor.²¹⁵ The illegitimacy of the state's interest in protecting minors may be evidenced by the fact that Mothers Against Drunk Driving (MADD), the nation's preeminent crusader against underage drinking, had refused to endorse the legislation for having

are plagued by what some commentators describe as organizational disadvantages. See Tushnet, *supra* note 93, at 133; Shanker, *supra* note 44, at 367.

²⁰⁷ See Freedman & Emshwiller, *supra* note 59, at A1; Knap, *supra* note 47, at C1.

²⁰⁸ See Shanker, *supra* note 44, at 362; Freedman & Emshwiller, *supra* note 59, at A1; Knap, *supra* note 47, at C1.

²⁰⁹ See Shanker, *supra* note 44, at 363; Freedman & Emshwiller, *supra* note 59, at A1; Knap, *supra* note 47, at C1.

²¹⁰ See *supra* notes 95-102 and accompanying text.

²¹¹ See *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)); see also *supra* notes 98-102 and accompanying text.

²¹² See Shanker, *supra* note 44, at 357-58.

²¹³ See H.R. REP. NO. 106-265, at 18-19 (1999).

²¹⁴ See *id.* at 18.

²¹⁵ See *In Vino Veritas: Suspend the Constitution?*, WALL ST. J., Aug. 12, 1999, available in 1999 WL-WSJ 5464288.

"implications far beyond [MADD's] concerns [being] a battle between various elements within the alcohol beverages industry."²¹⁶ Regarding the taxation justification, there are no logical reasons why states are any more entitled to sales revenues on out-of-state purchases of wine than any other article of commerce.²¹⁷ Furthermore, the Internet Tax Freedom Act currently prohibits multiple or discriminatory taxes on electronic commerce generally.²¹⁸

Second, notwithstanding the legitimate state interests, there are other less restrictive means by which a state could more effectively advance their otherwise laudable goals.²¹⁹ For one, states can require adult signatures upon delivery of the wine.²²⁰ Also, regulations could be implemented that require each purchaser to obtain pre-authorization by providing a drivers license number which could then be checked for consistency against the information on the credit card issuing payment. Similarly less restrictive means could be used to deal with the problem of lost sales tax.²²¹ For example, states could require direct shippers to apply for permits under which they would be required to reimburse the state for the proper amount of sales tax.²²² Indeed, many direct shippers already have expressed a willingness to conform with such requirements.²²³

After finding that direct shipment laws impermissibly burden interstate commerce, a court must then determine whether the otherwise unconstitutional legislation nevertheless can be saved by the Twenty-first Amendment.²²⁴ Under the Supreme Court's current definition of core powers, direct shipment laws would not invoke the protection of the Twenty-first Amendment because they are not realis-

²¹⁶ See H.R. REP. NO. 106-265 (citing a letter from Carolyn V. Nunnallee, MADD National President, to Senator Diane Feinstein (May 13, 1999)).

²¹⁷ See Shanker, *supra* note 44, at 358.

²¹⁸ See Internet Tax Freedom Act, 14 U.S.C.A. § 151 (1999).

²¹⁹ See H.R. REP. NO. 106-265, at 19.

²²⁰ See Shanker, *supra* note 44, at 358-59. Indeed, in states where mail-order sale of alcohol is allowed this is precisely what is done.

²²¹ See *id.*

²²² See *id.* For an example of a similar state law, see N.H. REV. STAT. ANN. § 178:14-a (Supp. 1999) (stating: "[Direct] shippers shall file invoices for each shipment with the liquor commission . . . and shall pay a fee of 8 percent of the price of the product").

²²³ See Clint Bolick, *Wine Wars: Lift the Ban on Out-of-State Sales*, WALL ST. J., Feb. 7, 2000, at A39, available in 2000 WL-WSJ 3016914 (stating: "Trade associations representing wineries have agreed to submit to state licensing and tax-collection requirements. States are actually foregoing tax revenues they could be receiving by permitting direct wine shipments.").

²²⁴ See *supra* notes 156-59, 176-81 and accompanying text.

tically designed to promote temperance.²²⁵ Although state legislatures frequently justify direct shipment laws as intended to reduce access to alcohol by minors, the laws are simply not realistically designed to achieve this goal.²²⁶ First, there is evidence that direct shipping of wine does not pose a problem for enforcing laws against underage drinking.²²⁷ A recent letter from the Chief Deputy Director of the California Department of Alcoholic Beverage Control stated that although telephone and mail-ordered deliveries of wine have been legal in California since 1963, they have posed no additional problem for law enforcement.²²⁸

Second, even if minors' access to fine wine via direct shipment were a serious concern, evidence shows that direct shipment laws do not realistically affect this goal.²²⁹ For example, notwithstanding the direct shipment laws, most states do allow for the mail-order purchase of wine—but only through the proper in-state channels.²³⁰ The evidence overwhelmingly suggests that the laws are designed not to further any temperance goals, but to protect in-state business interests favored by the three-tier system of distribution.²³¹ On the role of economic protectionism, the Court has been exceptionally clear: "the central purpose of [the Twenty-first Amendment] was not to empower states to favor local liquor industries by erecting barriers to competition."²³² Thus, because direct shipment laws do not directly promote temperance, but are designed to protect a local industry, they fail to invoke the protection of the Twenty-first Amendment.

There is a possibility that a court would apply a broader definition of the Twenty-first Amendment's core powers to yield a contrary result.²³³ By defining the Amendment's core powers to include not only laws promoting temperance, but also "laws enacted to

²²⁵ For a discussion of the Supreme Court's current analysis of the scope of the core powers of the Twenty-first Amendment, see *supra*, notes 162-96 and accompanying text.

²²⁶ See H.R. REP. NO. 106-265, at 18-19 (1999); see also Shanker, *supra* note 44, at 358-59.

²²⁷ See H.R. REP. NO. 106-265, at 18-19.

²²⁸ See *id.* at 18-19 & n.4 (citing a letter from Manuel R Espinoza, Chief Deputy Dir. of Cal. Dep't of Alcoholic Beverage Control, to Representatives Mike Thompson and George Radanovich).

²²⁹ See Shanker, *supra* note 44, at 358-59.

²³⁰ See, e.g., Bolick, *supra* note 223, at A39.

²³¹ The fact that the legislation is supported, funded, and frequently drafted by liquor wholesalers and retailers goes a long way to prove this point. See *supra* notes 207-09 and accompanying text.

²³² See *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

²³³ See *supra* note 184 and accompanying text.

combat the perceived evils of an unrestricted traffic in liquor," a court might find that the direct shipment laws invoke the protection of the Twenty-first Amendment.²³⁴ This would mean that even if the direct shipment laws were designed to do no more than protect the three-tier distribution system, they nevertheless would fall within the Amendment's core powers.²³⁵ Such a broad construction of core powers, however, is entirely unprecedented and patently wrong.²³⁶ Moreover, even if this broad formulation could successfully invoke the Twenty-first Amendment, it is unlikely that these interests in regulation would carry as much weight in an accommodation test as a law designed to promote temperance.²³⁷

Finally, even if direct shipment legislation can successfully invoke the protection of the Twenty-first Amendment, the states still must convince the court that its interests promoted by direct shipment legislation outweigh the strong federal constitutional interest in prohibiting discrimination against interstate commerce, and preventing the economic balkanization of the states.²³⁸ Interstate trade over the internet commonly is considered to be the most important economic avenue in the coming century.²³⁹ One can imagine that state laws inhibiting the progress of electronic trade will meet the same fate as laws inhibiting national transportation did earlier this century.²⁴⁰ Because of the strong federal interests involved, direct shipment laws must promote some hefty state interests under the Twenty-first Amendment to overcome this balance. In the unlikely event that a state could convince a court that its direct shipment laws were de-

²³⁴ See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984) (language indicating that the regulation of "the sale or use of liquor within [state] borders" could fall within the Amendment's core power); see also *Bacchus*, 468 U.S. at 276-77 (language indicating that "laws enacted to combat the perceived evils of an unrestricted traffic in liquor" could fall within the Amendment's core power).

²³⁵ See *supra* note 184.

²³⁶ For examples of cases where the court struck down laws which regulated the sale of alcohol but failed to promote temperance, see *Bacchus*, 468 U.S. at 276 (striking down a Hawaiian excise tax that restricted the sale of alcohol, and was not designed to promote temperance); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 113-14 (striking down California wine pricing scheme that regulated the sale of alcohol, but was not designed to promote temperance).

²³⁷ See *supra* note 184.

²³⁸ See *supra* note 190 and accompanying text.

²³⁹ See generally Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: the Transportation Analogy*, 32 GA. L. REV. 889, 925-26 (1998); Charles R. Topping, Note, *The Surf Is Up, But Who Is on the Beach? Who Should Regulate Commerce on the Internet?*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 179, 192-94 (1999).

²⁴⁰ See Bassinger, *supra* note 239, at 926.

signed to promote temperance, the state would have an easier time arguing that this legitimate interest outweighed the burden on interstate commerce.²⁴¹ On the other hand, if the law only can be justified as a regulation designed to "combat the perceived evils of an unrestricted traffic in liquor," it is unlikely to justify such a serious burden on federal interests.²⁴²

Although direct shipment laws violate the dormant commerce clause and cannot be saved by the Twenty-first Amendment, states might argue that the Enforcement Act equals congressional consent to the unconstitutional state laws.²⁴³ In other words, if the Enforcement Act is passed into law, proponents of direct shipping laws will likely argue that by authorizing state Attorneys General to use the federal courts to enforce their laws, Congress has consented to the discriminatory state legislation.²⁴⁴ This argument, however, is flawed because the Enforcement Act does not consent to direct shipment laws in a way that is "unmistakably clear."²⁴⁵ First, the Enforcement Act does not expressly state anywhere in its text that it is intended to authorize states to discriminate against interstate commerce by prohibiting the direct shipment of wines.²⁴⁶ Second, there is nothing in the legislative history of the Enforcement Act "evincing 'a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause.'"²⁴⁷ Third, the mere fact that the Enforcement Act appears to contemplate, and thus implicitly approve of, state direct shipment laws, does not make it an act of valid congressional consent.²⁴⁸ The Court consistently has struck down discriminatory state laws that were within the contemplation of Congress and consistent

²⁴¹ See *supra* notes 162-96 and accompanying text.

²⁴² See *supra* notes 162-96 and accompanying text.

²⁴³ See *supra* notes 103-18 and accompanying text.

²⁴⁴ It is relatively common for states to try and defend against dormant Commerce Clause attacks by arguing congressional consent, especially where there is a federal statute which appears to endorse the discriminatory state laws. See *Taylor*, 477 U.S. at 138; *South Cent. Timber Development v. Wunnicke*, 467 U.S. 82, 88 (1984).

²⁴⁵ See *South Cent. Timber*, 467 U.S. at 91 (stating that "for a state regulation to removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear"); see also *supra* notes 105-07 and accompanying text.

²⁴⁶ See S. 577 (substantially similar to H.R. 2031); see also *South Cent. Timber*, 467 U.S. at 90 (stating that "on those occasions in which consent has been found, congressional intent and policy to insulate state legislation from Commerce Clause attack have been 'expressly stated'" (quoting *Sporhase v. Nebraska ex rel. Douglas*, 548 U.S. 941, 960 (1982))).

²⁴⁷ See *South Cent. Timber*, 467 U.S. at 90 (quoting *United States v. Public Utilities Comm'n of California*, 345 U.S. 295, 304 (1953)); see also *supra* notes 16-81 and accompanying text for a discussion of the legislative history of the Enforcement Act.

²⁴⁸ See *South Cent. Timber*, 467 U.S. at 92.

with federal policy.²⁴⁹ Finally, a court could not find that the Enforcement Act was valid congressional consent to discriminatory state alcohol regulation because the Supreme Court has failed to find the same under either the Webb-Kenyon Act or the Twenty-first Amendment.²⁵⁰ Both these federal laws are better examples of congressional intent to authorize discriminatory state alcohol regulation than is the Enforcement Act,²⁵¹ yet the Court no longer holds that they are valid acts of congressional consent.²⁵² The Court is unwilling to interpret either the Webb-Kenyon Act or the Twenty-first Amendment as having exempted discriminatory state alcohol regulations from the reach of the dormant Commerce Clause, and it is therefore unlikely to hold any differently under the vague language of the Enforcement Act.²⁵³

If the Enforcement Act does not authorize direct shipment laws, then what affect does the proposed legislation have on the unconstitutional state laws? The answer, it seems, is none at all. Short of granting unmistakably clear consent, there is nothing that Congress may do to affect the constitutionality of an unconstitutional state law.²⁵⁴ Thus, it is apodictic that the Enforcement Act may not be used to enforce

²⁴⁹ See *Taylor*, 477 U.S. at 139 (declining to find congressional consent to a discriminatory Maine ban on out-of-state bait-fish, despite portions of the 1981 Amendments to the Lacey Act that clearly provided for federal enforcement of state wildlife laws); *South Cent. Timber*, 467 U.S. at 92-93 (declining to find congressional consent for a discriminatory Alaskan local processing requirement even though Congress had "consistently endors[ed] primary-manufacture requirements on timber taken from federal land"); *Sporhase*, 458 U.S. at 959-60 (declining to find congressional authorization for state-imposed burdens on interstate commerce regarding ground water, despite thirty-seven federal statutes that demonstrated Congress' deference to state water law).

²⁵⁰ See U.S. CONST. amend. XXI; accord Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (current version at 27 U.S.C. § 122 (1994)); see also *supra* notes 64-65 and accompanying text.

²⁵¹ See U.S. CONST. amend. XXI; accord Webb-Kenyon Act, ch. 90, 37 Stat. 699. The original Webb-Kenyon Act, entitled: "An Act divesting intoxicating liquors of their interstate character in certain cases," is a textbook example of a statute intended as a congressional authorization of a violation of the dormant Commerce Clause. See Dowling & Hubbard, *supra* note 103, at 100-01 (crediting the Webb-Kenyon Act as interpreted by the case *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917), as having created the doctrine of congressional consent). By passing the Webb-Kenyon Act, Congress clearly intended to authorize states to prohibit the importation and transportation of alcoholic beverages within their borders without being restricted by the dormant Commerce Clause. See Cohen, *supra* note 104, at 523, 526-27. Congress was less explicit, however, regarding their intentions behind the Twenty-first Amendment. See *supra* notes 119-26 and accompanying text.

²⁵² See *supra* notes 139-96 and accompanying text.

²⁵³ See *supra* notes 139-96 and accompanying text.

²⁵⁴ See *Taylor*, 477 U.S. at 139; Cohen, *supra* note 104, at 537.

state direct shipment laws, should they be found unconstitutional.²⁵⁵ This, however, should not affect the constitutionality of the Enforcement Act itself. Although an analysis of Congress' constitutional authority to pass the Enforcement Act is beyond the scope of this Note, there is presumably nothing to prevent state Attorneys General from using the Act to enforce other legitimate restrictions on the importation or transportation of alcoholic beverages.²⁵⁶ Nevertheless, if direct shipment laws are unconstitutional, the Enforcement Act would be powerless to enforce the unconstitutional state laws.

CONCLUSION

State direct Shipment laws prohibit in-state citizens from purchasing wine over the internet directly from an out-of-state winery.²⁵⁷ The evidence clearly indicates that the purpose of these laws is to protect the economic interests of in-state liquor wholesalers and retailers from being bypassed by out-of-state wineries who have turned to the internet to sell their wines.²⁵⁸ This is precisely the kind of discriminatory state legislation that the dormant Commerce Clause was intended to prevent. First, direct shipment laws are likely to induce retaliation from the states burdened by the discriminatory legislation—ultimately posing a threat of economic balkanization.²⁵⁹ Second, direct shipment laws obstruct electronic commerce and the progress of free trade, and therefore unilaterally may affect national economic welfare.²⁶⁰ Finally, direct shipment laws are procedurally unjust in that they disproportionately harm out-of-state parties who are not represented in the local political process.²⁶¹

Direct shipment laws must not be allowed to discriminate against interstate commerce simply because they regulate intoxicating liq-

²⁵⁵ One can only assume that if direct shipment laws were found to be unconstitutional, they would be no more enforceable by the federal district courts than by the state courts.

²⁵⁶ Under *Bacchus* and its progeny, any state alcohol regulation realistically designed to promote temperance would appear to be constitutionally enforceable. See *supra* notes 154–90.

²⁵⁷ See *supra* notes 50–55 and accompanying text.

²⁵⁸ See *supra* notes 75–81 and accompanying text.

²⁵⁹ See GUNTHER & SULLIVAN, *supra* note 87, at 274; see also *supra* note 89 and accompanying text.

²⁶⁰ See GUNTHER & SULLIVAN, *supra* note 87, at 275; see also *supra* note 90 and accompanying text.

²⁶¹ See GUNTHER & SULLIVAN, *supra* note 87, at 275; see also *supra* note 91 and accompanying text.

uors.²⁶² It is now clear that discriminatory alcohol laws not realistically designed to promote the goal of temperance must suffer the same fate as any other state law that severely burdens interstate commerce.²⁶³ Consequently, the courts must strike down the direct shipment laws for unconstitutionally burdening interstate commerce.²⁶⁴ Additionally, because direct shipment laws are unconstitutional, they cannot be enforced by the federal courts under the proposed Twenty-first Amendment Enforcement Act. Thus, although the Enforcement Act is not itself unconstitutional, it is impotent inasmuch as it seeks to provide states with a forum by which to enforce their unconstitutional direct shipment laws.

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²⁶² See *supra* notes 143–44 and accompanying text.

²⁶³ See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (striking down discriminatory Hawaiian liquor tax that failed to promote temperance); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715–16 (1984) (striking down Oklahoma ban on wine advertisements that failed to realistically promote temperance); *California Retail Liquor Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 113–14 (1980) (striking down a discriminatory California wine-pricing scheme that failed to realistically promote temperance).

²⁶⁴ See *supra* notes 224–32 and accompanying text.