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NOTES

WEIGHING IN ON THE WINE WARS: WHAT THE EUROPEAN UNION CAN TEACH US ABOUT THE DIRECT SHIPMENT CONTROVERSY

INTRODUCTION

Suppose you run a small Virginia winery that produces a white wine that has long been the favorite of traveling oenophiles from Tennessee who annually make the trip to visit your winery and taste your product. You might believe the rising popularity of electronic commerce and mail-order shopping is a godsend, allowing you to increase the volume of orders received from your loyal Tennessee customers and their friends who have been clued in to your wine. Under Tennessee law,¹ however, and the law of six other states,² every time you ship an order of wine to a Tennessee buyer, you are committing a felony. Tennessee is one of twenty-six states³ that regulates the importation of alcohol into its borders by

1. TENN. CODE ANN. § 57-3-401(a) (2002) ("It is unlawful for any person ... to transport ... untaxed alcoholic beverages ... into ... the state of Tennessee, in quantities in excess of three gallons A violation of this subsection is a Class E felony.").

2. In addition to Tennessee, the states of Florida, Georgia, Indiana, Kentucky, Maryland, and Utah have all enacted felony direct-shipment laws. See Wine Inst., State-by-State Analysis: Summaries & Statutes (2002), at http://www.wineinstitute.org/shipwine/analysis/state_analysis.htm (last modified Aug. 17, 2004). Under Indiana law, it is a felony for a non-basic permit holder to ship directly to an Indiana consumer; the penalty for wineries is a misdemeanor charge. *Id.*

3. See Marcia Coyle, *Can This Wine Travel? State Trade Bans Could Be Headed for the Supreme Court*, NAT'L L.J., July 28, 2003, at 1.

prohibiting the direct shipment of alcohol to consumers by any supplier, retailer, or wholesaler, without a permit. These laws are commonly known as "direct shipment laws."⁴

This Note analyzes direct shipment laws in the United States by comparing them with the decisions of the European Court of Justice (ECJ) that have protected the European Union's (EU) common market by responding to EU member states' attempts to restrict the importation of alcoholic beverages into their borders. A comparison between the United States and the EU is particularly helpful, because the ECJ has been faced with a task analogous to that faced by U.S. courts—balancing an interest in free, unfettered trade among member states against the interest of those states in regulating alcohol. This Note argues that U.S. direct shipment laws create an impermissible barrier to interstate trade and are, therefore, per se infringements of the Commerce Clause. Furthermore, it contends that the Twenty-First Amendment's grant of alcohol regulation authority to the states does not validate the infringements of the Commerce Clause by these direct shipment laws.

Part I of this Note introduces the parties involved in direct shipment law litigation and outlines their general arguments. Part II describes the dormant Commerce Clause doctrine and provides a review of the history of state alcohol regulation that led to the the Twenty-First Amendment. Part III addresses the legislative intent behind the Twenty-First Amendment and the subsequent Supreme Court decisions interpreting Section 2 of the Amendment.⁵ Part IV examines the recent direct shipment law litigation. In particular, it analyzes the opposing decisions of the Seventh Circuit,⁶ which upheld Indiana's direct shipment prohibition, and the Fourth⁷ and

4. *Id.*

5. The first two sections of the Twenty-First Amendment state:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

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

U.S. CONST. amend. XXI.

6. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000).

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

Fifth Circuits,⁸ which struck down direct shipment prohibition laws. Part V of this Note considers EU free market regulations and the ECJ's decisions interpreting the EU member states' alcohol restrictions in light of the EU common market. Finally, in Part VI, this Note suggests that the EU's approach is a workable method in the United States that would strike a proper balance between the dormant Commerce Clause and the Twenty-First Amendment in direct shipment law litigation. The EU's prohibition on any obstacles to free movement that result from disparities between member state laws relating to the importation of alcohol is consistent with the Commerce Clause of the U.S. Constitution and is not barred by the Twenty-First Amendment.

I. THE INTERESTS INVOLVED IN DIRECT SHIPMENT LAW LITIGATION

States generally have one of three types of direct shipment laws. Thirteen states currently employ a reciprocity policy, in which the state allows direct shipments only from states that afford the same reciprocal privilege.⁹ These reciprocal agreements limit the amount of wine ordered per person and restrict the orders to purchases only for personal consumption.¹⁰ Sixteen states allow for limited direct shipping, with restrictions ranging from allowing only wine ordered on-site at an out-of-state winery to be shipped,¹¹ to permitting out-of-state wineries to ship a limited number of cases to in-state

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

9. See Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1648-49 n.135 (2000). Since the publication of Douglass's review of state direct shipment laws, Hawaii has amended its statute to reciprocate with states that utilize the same policy. See HAW. REV. STAT. § 281-33.5 (Supp. 2003).

10. See Wine Inst., *supra* note 2.

11. Three states—Arizona, Georgia, and Rhode Island—allow for a resident to ship back to their homes cases of wine that were purchased on-site at a winery. See ARIZ. REV. STAT. ANN. § 4-203.04.J (West Supp. 2003) (permitting shipment of up to two cases annually to an Arizona residential address if the person ordered the wine on-site at a winery); GA. CODE ANN. §§ 3-3-8, 3-6-32 (2000) (permitting up to five cases to be shipped to a Georgia resident who has ordered wine on the premises of a winery); R.I. GEN. LAWS § 3-4-8 (Supp. 2003) (permitting out-of-state wineries to ship wine orders that are "personally placed by the purchaser at the manufacturer's premises, for shipment to an address in Rhode Island for [a] nonbusiness purpose").

residents.¹² The remaining twenty-one states completely prohibit the direct shipment of alcohol to a consumer from an out-of-state seller.¹³

Rather than allow producers of wine to sell directly to consumers, most states regulate the sale and distribution of alcohol by private retailers through a three-tiered system of circulation.¹⁴ A producer

12. Alaska, Louisiana, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, South Carolina, Virginia, and Wyoming have all enacted legislation that allows for limited amounts of wine to be shipped directly from out-of-state wineries. See ALASKA STAT. §§ 4.11.060, 4.11.160; LA. REV. STAT. ANN. § 26:359 (West 2001 & Supp. 2004) (permitting a licensed manufacturer or retailer in another state to directly ship up to forty-eight 750 milliliter bottles of wine per year to an adult Louisiana resident, provided the shipper attains a direct shipping permit from Louisiana and pays all state liquor taxes); MONT. CODE ANN. §§ 16-4-901 to 16-4-903 (2003) (requiring an adult Montana resident to obtain a connoisseur's permit to receive up to twelve cases per year from an out-of-state winery, provided the shipper is registered with Montana and the recipient reports and files all taxes with the state); NEB. REV. STAT. § 53-194.03 (1998) (permitting Nebraska consumers to receive by direct shipment up to nine liters per month for personal use); NEV. REV. STAT. ANN. § 369.490 (Michie 1999) (allowing a Nevada resident to import directly from another state up to twelve cases of wine per year for personal consumption); N.H. REV. STAT. ANN. § 178:14-a (2001) (limiting a direct shipper to sixty individual containers of not more than one liter each to any consumer in New Hampshire in a calendar year); N.C. GEN. STAT. § 18B-1001.1 (2003) (allowing holders of a federal basic wine manufacturing permit to obtain a wine shipper permit and ship up to two cases of wine per month to any individual purchaser for personal use); N.D. CENT. CODE § 5-01-16 (1987 & Supp. 2003) (allowing direct shipments of up to nine liters of wine per month for personal use, provided the seller obtains a direct shipment permit); S.C. CODE ANN. § 61-4-747 (Law. Co-op. 1976 & Supp. 2003) (allowing holders of a wine shipper's license and permit to sell and ship up to twenty-four bottles of wine per month to a South Carolina resident); VA. CODE ANN. § 4.1-112.1 (West 2001 & Supp. 2004) (allowing up to two cases per month to be shipped by a holder of a wine shipper's license to any legal consumer in Virginia); WYO. STAT. ANN. § 12-2-204 (Michie 2003) (allowing licensed out-of-state shippers to import up to eighteen liters of wine to any one household within any twelve-month period).

13. Alabama, Arkansas, Connecticut, Delaware, Florida, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Vermont prohibit direct shipment of wine to consumers. Wine Inst., Direct Shipment Laws by State for Wineries (2004), at http://www.wineinstitute.org/shipwine/analysis/intro_analysis.htm (last modified Oct. 20, 2004). These laws "either explicitly criminalize direct shipment from producers to customers or do so implicitly by requiring that all commerce in alcoholic beverages be transacted through state-enforced distribution systems." Douglass, *supra* note 9, at 1649 n.136.

14. See Douglass, *supra* note 9, at 1621; Russ Miller, Note, *The Wine Is in the Mail: The Twenty-First Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND. L. REV. 2495, 2496-97 (2001); Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 355 (1999).

of wine¹⁵ must obtain a permit through the state to sell its product.¹⁶ The producer may sell only to a licensed wholesaler, who collects excise taxes from the producer and provides the state with information about the suppliers and the alcohol they import.¹⁷ The wholesaler then sells and delivers the wine to a retail outlet within the state, profiting by charging a higher price than they paid to the suppliers.¹⁸ The retailers, in turn, sell to the consumer and make a profit by charging a higher price than they paid to the wholesalers.¹⁹ By limiting the issuance of permits to producers and the issuance of licenses to wholesalers and retailers, the state is able to control the types, amounts, and producers of alcohol sold in its territory, and increase its tax revenue by collecting taxes on each sale of the alcohol.

In addition to the increased tax burden levied on consumers by mandating the three-tiered wholesaler system, a recent report by the Federal Trade Commission (FTC) reveals a second hardship that direct shipping laws impose on consumers.²⁰ An empirical study conducted by the FTC concluded that wine consumers could save as much as twenty-one percent on wine purchases by shopping on the internet.²¹ Yet, this avenue is unavailable for those consumers who live in states that prohibit the direct shipment of alcohol to consumers. As the report states, "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine."²²

The report also provides evidence that counters two common justifications for direct shipment legislation. Although the report acknowledges that citizens are "concerned about the direct shipment

15. Direct shipment laws apply to all alcoholic beverages. Because of the sharp increase in the number of small wineries and the rising demand for limited-production wines, however, the wine sector of the alcohol industry is particularly affected by the prohibition of direct shipment sales by out-of-state producers. See Douglass, *supra* note 9, at 1619 n.1; James Molnar, Comment, *Under the Influence: Why Alcohol Direct Shipment Laws Are a Violation of the Commerce Clause*, 9 U. MIAMI BUS. L. REV. 169, 174 (2001).

16. Miller, *supra* note 14, at 2497.

17. *Id.*

18. *Id.*

19. *Id.*

20. Fed. Trade Comm'n, *E-commerce Lowers Prices, Increases Choices in Wine Market* (July 3, 2003), <http://www.ftc.gov/opa/2003/07/wine.htm>.

21. *Id.*

22. *Id.*

of wine to minors" and that states have responded "in part by banning direct shipment of wine to all consumers, or banning direct shipment from out-of-state sellers," the study's data reveals that "states that permit interstate direct shipping generally report few or no problems with shipments to minors."²³ Furthermore, the report indicates that states that do allow interstate direct shipping are able to collect taxes from out-of-state sellers by requiring these vendors to obtain permits and comply with their tax laws.²⁴ Thus, concerns by state legislators that out-of-state sellers will be out of their taxing reach, thereby putting in-state sellers at a competitive disadvantage and causing a significant loss in tax revenue to the state, can be mitigated by other measures.

Aside from preventing oenophiles the opportunity to purchase out-of-state wines that may not be carried by their states' wholesalers, the mandatory three-tier system particularly affects two types of wineries. Small, "mom-and-pop" wineries that lack the name recognition to get wholesalers to carry their labels are completely excluded from out-of-state sales if they fail to get distributorship of their product from a wholesaler.²⁵ Consequently, the existence of other opportunities for these wineries to reach customers is essential to their survival. This problem has only increased with time, as the number of wholesalers has shrunk from 10,900 to 300 since 1963, making it increasingly difficult for smaller wineries to get a wholesaler to carry its label.²⁶ A 2003 survey of Wine Institute members bears this problem out, as fifty-four percent of the wineries who responded declared that they were unable to gain access to another state's market due to an inability to find a wholesaler willing to carry their brands.²⁷

23. *Id.* To combat the possibility of minors obtaining alcohol through internet purchases, some states have required that package delivery companies get an adult's signature upon delivery. *Id.* States have also established penalty and enforcement systems to compel compliance with these safeguard requirements. *Id.*

24. *Id.* The report concludes that "[m]ost of these states report few, if any, problems with tax collection."

25. Coyle, *supra* note 3, at 1, 30.

26. Molnar, *supra* note 15, at 173.

27. News Release, Wine Institute, Wine Institute Statement (Oct. 29, 2003), at <http://www.wineinstitute.org/communications/statistics/dirship10.30.03.htm>. This statistic reveals an increasing inability on the part of wineries to have their brands carried by wholesalers. See Alix M. Freedman & John R. Emshwiller, *Vintage System: Big Liquor*

The direct shipment laws also adversely affect highly respected boutique wineries, which can sell all of their yearly production without the aid of the wholesalers.²⁸ Without the mandatory three-tier system, these producers could sell their wines at a higher price to consumers, rather than have the wholesalers and retailers increase transaction costs.

The constitutionality of direct shipment laws that prohibit the direct delivery to consumers from out-of-state producers has been challenged recently in twelve states.²⁹ Opponents of these laws—typically winery owners, oenophiles, and food critics—argue that the laws discriminate against out-of-state vintners and favor in-state producers, a violation of the Commerce Clause of the U.S. Constitution.³⁰ The challengers rely on the dormant Commerce Clause, contending that because many of the states that ban interstate direct shipping allow *intrastate* direct shipment of alcohol, the laws are prejudiced against out-of-state wineries.³¹ Thus, they argue that the basis for these laws is economic protectionism and that the Twenty-First Amendment cannot be used as a pretext for protectionism.³² Proponents of these laws—state legislatures and alcoholic beverage wholesalers—argue that the laws are a constitutional use of state power conferred upon the states by Section 2 of the Twenty-First Amendment of the U.S. Constitution.³³ They argue that although the dormant Commerce

Wholesaler Finds Change Stalking Its Very Private World, WALL ST. J., Oct. 4, 1999, at A1.

28. Coyle, *supra* note 3, at 30.

29. The direct shipment laws in the following states have been subject to recent decisions: Florida (Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002) (vacating the district court's decision in Bainbridge v. Bush, 148 F. Supp. 2d 1306 (N.D. Fla. 2001))); Indiana (Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000)); Kansas (Glazer's Wholesale Drug Co. v. Kansas, 145 F. Supp. 2d 1234 (D. Kan. 2001)); Michigan (Heald v. Engler, 342 F.3d 517 (6th Cir. 2003)), New York (Swedenburg v. Kelly, 358 F.3d 223 (2nd Cir. 2004)); North Carolina (Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003)); and Texas (Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003)). In addition, lawsuits have been filed in five other states – Arizona, New Jersey, Ohio, Rhode Island, and Washington. See Wine & Spirits Wholesalers of Am. Inc., *Direct Shipping Litigation*, at <http://www.wswa.org/public/legal/direct.html> (last modified July 29, 2004).

30. See, e.g., *Dickerson*, 336 F.3d at 392; *Bridenbaugh*, 227 F.3d at 848.

31. See, e.g., *Dickerson*, 336 F.3d at 393; *Bridenbaugh*, 227 F.3d at 851.

32. See, e.g., *Dickerson*, 336 F.3d at 393; *Beskind*, 325 F.3d at 5094; *Bridenbaugh*, 227 F.3d at 851; Coyle, *supra* note 3, at 1.

33. See, e.g., *Beskind*, 325 F.3d at 509; *Bridenbaugh*, 227 F.3d at 849.

Clause prohibits discriminatory practices against out-of-state producers, the Twenty-First Amendment is an exception to this general principle, and states have the right to regulate alcohol as they see fit.³⁴

II. THE DORMANT COMMERCE CLAUSE AND PRE-PROHIBITION STATE ALCOHOL REGULATION

A. *The Dormant Commerce Clause*

Article I, Section 8 of the U.S. Constitution grants Congress the power "[t]o regulate Commerce ... among the several States."³⁵ Along with its affirmative grant of power to Congress to regulate interstate commerce, the Commerce Clause also has a logical corollary, long recognized by the Supreme Court, that "imposes limitations on the States in the absence of congressional action."³⁶ The underlying principle behind this dormant Commerce Clause doctrine is that "one state in its dealings with another may not place itself in a position of economic isolation."³⁷ Thus, the dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."³⁸

The Supreme Court has identified and distinguished two types of state regulations that violate the dormant Commerce Clause. The first type of impermissible regulation is one that is nondiscriminatory against out-of-state interests on its face and is supported by a legitimate state interest, but that nonetheless incidentally burdens interstate commerce.³⁹ In assessing the constitutionality of such a

34. See, e.g., *Bridenbaugh*, 227 F.3d at 849. Of the five recent federal court of appeals decisions assessing the constitutionality of these direct shipment laws, only Judge Easterbrook's opinion in *Bridenbaugh* upholds a state's direct shipment law. See *Bridenbaugh*, 227 F.3d at 854.

35. U.S. CONST. art. I, § 8, cl. 3.

36. *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 401 (1994) (O'Connor, J., concurring).

37. *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538 (1949) (quoting *Buck v. Kuykendall*, 267 U.S. 307 (1925)).

38. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)).

39. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

state law, the Court will uphold the law unless the burden imposed on interstate commerce is clearly disproportionate to the local benefits.⁴⁰ The degree of proportionality depends on the nature of the local interest involved and on whether it could be promoted equally as well with a lesser impact on interstate commerce.⁴¹

The second way a state law can violate the dormant Commerce Clause is by clearly discriminating against interstate commerce, either facially or through the law's practical effect.⁴² To survive a constitutional challenge, the state must "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means."⁴³ This burden has proven difficult to meet. *Maine v. Taylor* presents the only example in which the Court has held that a state's discriminatory statute does not violate the dormant Commerce Clause.⁴⁴ As Justice Marshall summarized the Court's dormant Commerce Clause jurisprudence, "[w]hen a state statute directly ... discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."⁴⁵

40. *Id.* at 142.

41. *Id.* In *Pike*, the Court held that the Arizona Fruit and Vegetable Standardization Act, which prohibited the interstate shipment of cantaloupes not packaged in containers in a manner and of a kind approved by the government, violated the dormant Commerce Clause. The Court found that the burden on the out-of-state growers spending \$200,000 on a packing plant in lieu of sending their cantaloupes to nearby Blythe, California, for packaging—outweighed the legitimate state interest in promoting and preserving the reputation of Arizona growers. *See id.* at 142-46.

42. *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994). *Carbone* involved a "flow control ordinance" that required all solid waste to be processed at a designated transfer station before leaving the town of Clarkstown. The statute was held to violate the Commerce Clause, because it deprived out-of-state competitors access to a local market. *Id.* at 386.

43. *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 332, 336 (1979)). This test has been identified as a type of strict scrutiny analysis. *See Wyoming v. Oklahoma*, 502 U.S. 437, 455 n.12 (1992).

44. *Miller, supra* note 14, at 2501 n.35. The Maine statute challenged in *Maine v. Taylor*, which banned the importation of live baitfish from outside the state because of the harmful effects that baitfish parasites would have on the state's population of wild fish, survived strict scrutiny analysis. The Court reasoned that Maine had a legitimate purpose to treat out-of-state baitfish differently, and noted that the district court had found that scientific techniques to sample and inspect live baitfish had not been developed. The Court concluded, therefore, that there were no alternative means to promote the state's interest without discriminating against interstate commerce. *Maine*, 477 U.S. at 146-52.

45. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

Direct shipment laws that discriminate against out-of-state sellers by prohibiting interstate sales directly to consumers, while allowing in-state wineries to ship directly to in-state consumers,⁴⁶ are challenged under the *per se* analysis; that is, opponents of these laws claim that the statutes are impermissibly protectionist on their face.⁴⁷ These state direct shipment laws, it is therefore claimed, must be examined under a strict scrutiny analysis.⁴⁸

B. Pre-Prohibition State Regulation of Alcohol

State regulation of the sale of alcohol has a long history in the United States. The first challenge to state regulation of alcohol on dormant Commerce Clause grounds came in 1847, when Massachusetts, Rhode Island, and New Hampshire enacted laws requiring its citizens to obtain a license to sell alcohol within their respective borders.⁴⁹ Through six separate opinions in the *License Cases*, the Supreme Court conveyed a position that supported broad state power to regulate the sale of alcohol relatively unobstructed by the dormant Commerce Clause.⁵⁰ As Chief Justice Taney wrote in his majority opinion, "I see nothing in the constitution of the United States to prevent [states] from regulating and restraining the traffic, or from prohibiting [the sale of alcohol] altogether, if [the state] thinks proper."⁵¹ The Court later held that this broad state authority includes the power to forbid the in-state production and distribution of alcoholic beverages.⁵²

46. States with such discriminatory laws are: Alabama, Arkansas, Connecticut, Delaware, Florida, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Vermont. See *supra* note 13.

47. See, e.g., *Dickerson v. Bailey*, 336 F.3d 388, 397-98 (5th Cir. 2003) ("The challenged provisions of the [statute] facially discriminate against out-of-state economic interests.").

48. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("[F]acial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of [sic] the absence of nondiscriminatory alternatives.").

49. See *Miller*, *supra* note 14, at 2503.

50. See *id.* (citing *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847)). *Thurlow* incorporated challenges to all three state statutes. The cases were argued together and were commonly known as the "License Cases." *Id.*

51. *Thurlow*, 46 U.S. at 577.

52. See *Mugler v. Kansas*, 123 U.S. 623, 659 (1887) ("[A] State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution

The era of the Court's recognition of broad state authority to regulate alcohol ended as the dawn of the twentieth century drew near. In *Bowman v. Chicago & Northwestern Railway Co.*, the Court struck down an Iowa law that forbade any common carrier from importing into the state any intoxicating liquors without a permit.⁵³ The Court found that the Iowa statute was an improper use of the state's police power, as it regulated interstate commerce "before the merchandise is brought to its border," an impermissible regulation in violation of the dormant Commerce Clause.⁵⁴ The Court thus abolished any notion that state power to control alcohol was unfettered by the dormant Commerce Clause.

Iowa responded by passing a law that banned the sale of liquor produced both inside and outside the state.⁵⁵ The law was challenged by John Leisy, who received sealed kegs and cases of beer from Peoria, Illinois, and sold them in Iowa without removing the alcohol from their original sealed packages.⁵⁶ The Court ruled the police seizure of Leisy's alcohol invalid, holding that the beer remained an article of interstate commerce, and thus out of the state's reach, as long as it remained in its original package.⁵⁷ To the *Leisy* Court, to grant the state of Iowa the ability to exclude articles of interstate commerce would be granting a state the "power to regulate commercial intercourse between the States," a power expressly conferred to Congress in the Commerce Clause.⁵⁸

The decision by the *Leisy* Court mandating that the importation of alcohol not be prohibited by any state, coupled with the *Mugler* decision upholding the rights of states to regulate alcohol by requiring that in-state producers have a license to manufacture alcohol or to forbid the in-state production of alcohol altogether, produced a curious loophole that was recognized by the *Leisy* Court

of the United States." (quoting *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877)).

53. 125 U.S. 465 (1888).

54. *Id.* at 498.

55. See Matthew J. Patterson, Note, *A Brewing Debate: Alcohol Direct Shipment Laws and the Twenty-First Amendment*, 2002 U. ILL. L. REV. 761, 766 (citing IOWA CODE §§ 1523, 1540-1555 (1873)); see also Miller, *supra* note 14, at 2505-06.

56. *Leisy v. Hardin*, 135 U.S. 100, 100 (1890).

57. *Id.* at 124-25.

58. *Id.* at 125.

itself.⁵⁹ As the Seventh Circuit recently noted, “[T]he combination of *Leisy* and *Mugler* meant that states could forbid domestic production of alcoholic beverages but could not stop imports; the Constitution effectively favored out-of-state sellers.”⁶⁰

Congress responded to the Court’s prodding in *Leisy* by passing the Wilson Act in 1890. The Wilson Act gave states the authority to regulate liquor shipped into the state “to the same extent and in the same manner” as liquor produced in-state.⁶¹ The Wilson Act further eliminated the significance of retaining the alcohol in its original packaging.⁶² Although the Wilson Act was effectively a states’ rights bill, giving states the authority to regulate alcohol as they saw fit, it stopped short of allowing state control of alcohol to be an exception to the dormant Commerce Clause. The Act forbade states from discriminating against out-of-state sellers, as out-of-state liquor was subject to the same laws as in-state liquor and was to be regulated in the same manner and to the same extent as liquor produced in-state.⁶³

Though the Wilson Act effectively closed the “*Leisy* loophole,”⁶⁴ it allowed out-of-state sellers to bypass state regulation by selling liquor directly to consumers through mail order.⁶⁵ Congress closed this loophole in 1913 with the passage of the Webb-Kenyon Act, which provided that “[t]he shipment or transportation ... of any ...

59. The Court urged Congress to use its authority to regulate interstate commerce to correct the loophole. See *id.* at 123-24 (“[T]he responsibility is upon Congress ... to remove the restriction upon the State in dealing with imported articles of trade within its limits”). *Id.*

60. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 852 (7th Cir. 2000).

61. 27 U.S.C. § 121 (2004).

All ... intoxicating liquors ... transported into any State ... shall upon arrival in such State ... be subject to the operation and effect of the laws of such State ... to the same extent and in the same manner as though such ... liquors had been produced in such State ... and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Id.

62. *Id.*

63. *Id.* For a discussion of the legislative intent behind the Wilson Act, see Miller, *supra* note 14, at 2507-08 (noting that the Wilson Act was not designed “to further temperance objectives, but rather to give states the power ‘to do as they please in regard to the liquor question’”).

64. See Patterson, *supra* note 55, at 767.

65. *Rhodes v. Iowa*, 170 U.S. 412 (1898) (holding that Iowa’s prohibition on shipping alcohol violates the Commerce Clause when applied to delivery of an unopened box of liquor bottles received from an out-of-state shipper).

intoxicating liquor ... into any State ... in violation of any law of such State ... is hereby prohibited.”⁶⁶ The combination of the Wilson Act and the Webb-Kenyon Act “authorized States to apply their State laws governing alcoholic beverages within the State to alcoholic beverages that originated outside the State.”⁶⁷ Although Congress had conferred upon the states the power to regulate the sale of alcoholic beverages that were imported from out-of-state, the prohibitionists’ push for a Constitutional amendment to ban alcohol nationally ended the movement toward state and local regulation of liquor.⁶⁸

III. LEGISLATIVE HISTORY AND EARLY SUPREME COURT INTERPRETATION OF THE TWENTY-FIRST AMENDMENT

A. Textual and Legislative History

An analysis of the interplay between the Twenty-First Amendment and the dormant Commerce Clause must begin with an examination of the Amendment’s text.⁶⁹ The text sheds little light on how the framers intended the Amendment to relate to the Commerce Clause, however, as the wording of the Amendment suggests two equally valid interpretations.⁷⁰ One interpretation, labeled the “unconditional grant” theory,⁷¹ is that the Amendment should be read as completely exempting state regulation of alcohol from other constitutional restrictions such as those found in the Commerce Clause.⁷² The Court has expressly rejected this interpretation,⁷³ as its analysis of Section 2 has made it clear that the

66. 27 U.S.C. § 122 (2004).

67. *Beskind v. Easley*, 325 F.3d 506, 513 (4th Cir. 2003).

68. See *Patterson*, *supra* note 55, at 768.

69. See *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840) (“In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning”); see also *Wright v. United States*, 302 U.S. 583, 588 (1938); *Douglass*, *supra* note 9, at 1629 n.50.

70. See *Douglass*, *supra* note 9, at 1629.

71. See *Patterson*, *supra* note 55, at 771-72.

72. *Id.*

73. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984) (“It is by now clear that the [Twenty-First] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause.”).

Amendment must be read in light of the rest of the Constitution.⁷⁴ A more restrictive reading of Section 2 interprets it as merely reverting the responsibility to regulate alcohol back to the states, thus presuming that state laws will not offend the Commerce Clause or any other constitutional power of the federal government.⁷⁵ This interpretation is also known as the "conditional grant" theory.⁷⁶

The legislative history behind the passage of the Twenty-First Amendment is similarly ambiguous.⁷⁷ Statements by supporters of Senate Joint Resolution 211, the original bill that later became the Twenty-First Amendment, support both interpretations.⁷⁸ In addition, the legislative history reveals a third interpretation of Section 2—that it was included purely to protect the rights of states who wished to remain dry after the repeal of the Eighteenth Amendment. Senator Blaine, the Senate sponsor of the Amendment resolution, remarked that "[t]he [Senate Judiciary] [C]ommittee felt ... that we could well afford to guarantee to the so-called dry States the protection designed by section two."⁷⁹ Ultimately, the legislative history behind the passage of Section 2 of the Twenty-First Amendment sheds little light on the ambiguous language of its text.

74. See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) (stating that "[b]oth the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in the light of the other").

75. See Douglass, *supra* note 9, at 1630 (arguing that Section 2 of the Commerce Clause does not expand the powers of the states to regulate alcohol beyond the authority they had before the passage of the Eighteenth Amendment).

76. See Patterson, *supra* note 55, at 771.

77. Justice Powell argued that the Court has focused on the text of the Amendment rather than its legislative history in large part due to "sketchy records of the state conventions" and contradictory statements by the Amendment's framers in support of the Amendment. See *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-07 n.10 (1980).

78. Douglass, *supra* note 9, at 1631-36. Conflicting remarks by Senator Blaine illustrate the cloudy legislative history behind the passage of the Amendment. At one time Senator Blaine said the purpose of Section 2 was "to restore to the States ... absolute control in effect over interstate commerce affecting intoxicating liquors." *Midcal Aluminum*, 445 U.S. at 106-07 n.10 (quoting 76 CONG. REC. 4143 (1933) (remarks of Sen. Blaine)). He also remarked, however, that Section 2 was necessary to include in the amendment "to assure the so-called dry States against the importation of intoxicating liquor into those States." 76 CONG. REC. 4141 (1933) (statement of Sen. Blaine).

79. Douglass, *supra* note 9, at 1632 n.61 (quoting 76 CONG. REC. 4141 (1933) (statement of Sen. Blaine)).

Perhaps the most informative source of the framers' intent in the passage of the Twenty-First Amendment is found in the language of the Wilson and Webb-Kenyon Acts. As both commentators and courts have observed,⁸⁰ the language of Section 2 closely follows that of these pre-prohibition Acts.⁸¹ If the framers were seeking to incorporate the Wilson and Webb-Kenyon Acts into the Amendment, this implies that they were seeking to return to the pre-prohibition relationship between the state alcohol regulatory laws and the dormant Commerce Clause. The Court addressed this implication in *Craig v. Boren* when it noted the "framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes."⁸² It is thus reasonable to conclude that the framers of the Twenty-First Amendment intended for states to be able to regulate alcoholic beverages that originated from out-of-state sources, but only to the same extent and in the same manner as state regulation of alcoholic beverages produced in-state. Consequently, under this interpretation, the framers intended that states could not discriminate against out-of-state sellers.

B. Early Twenty-First Amendment Interpretations

Faced with the three possible readings of Section 2's text, the Supreme Court clearly embraced the unconditional grant theory in its first interpretation of the Twenty-First Amendment. In *State Board of Equalization v. Young's Market*, the Court sustained a California law that imposed a license fee of \$500 for the right to

80. See *Craig v. Boren*, 429 U.S. 190, 205-06 (1976) ("The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts"); see also *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000) ("Section 2 tracks the Webb-Kenyon Act and effectively incorporates its approach into the Constitution."); Patterson, *supra* note 55, at 767-68.

81. Compare 27 U.S.C. § 121 (2004) ("All ... intoxicating liquors ... transported into any State or Territory ... 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 27 U.S.C. § 122 (2004) ("The shipment or transportation ... of any ... intoxicating liquor of any kind ... into any State, Territory, or District of the United States ... in violation of any law of such State ... is prohibited."), with U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

82. *Craig*, 429 U.S. at 205-06.

import beer into the state but that exempted in-state beer producers from the fee, holding that the Twenty-First Amendment completely exempted states from dormant Commerce Clause restrictions.⁸³ The *Young's Market* plaintiffs argued for the conditional grant reading of Section 2, but the Court explicitly denounced such an interpretation:

[The plaintiffs] 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.⁸⁴

The view espoused in *Young's Market* and its progeny⁸⁵ governed Twenty-First Amendment jurisprudence until 1964, when the Court held for the first time since *Young's Market* that the Commerce Clause prohibited certain state regulation of alcohol.⁸⁶ In *Hostetter*, the Court held that a state could not constitutionally regulate the sale of alcoholic beverages destined for foreign countries, as the Commerce Clause explicitly granted the federal government the power to regulate commerce with foreign nations.⁸⁷

Writing for the majority, Justice Stewart acknowledged that the Court's early decisions interpreting the Twenty-First Amendment "made clear" that "a State is totally unconfined by traditional Commerce Clause limitations" when it regulated the importation of alcohol into its borders.⁸⁸ Yet, Justice Stewart criticized as an "absurd oversimplification" the conclusion that the Twenty-First Amendment "repeal[ed]" the Commerce Clause as to state regula-

83. *State Bd. of Equalization of Cal. v. Young's Mkt. Co.*, 299 U.S. 59, 63 (1936).

84. *Id.* at 62.

85. For example, in *Indianapolis Brewing Co. v. Liquor Control Commission*, the Court reiterated its interpretation that the Commerce Clause did not impede a state's ability to regulate alcohol under the Twenty-First Amendment. As Justice Brandeis wrote, "[s]ince the Twenty-first Amendment, as held in the [*Young's Market*] case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939).

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

87. *Id.* at 329-34.

88. *Id.* at 330.

tion of alcohol.⁸⁹ Rather, Justice Stewart viewed the Commerce Clause and the Twenty-First Amendment as two “parts of the same Constitution.”⁹⁰ Although not expressly overruling *Young’s Market*, the decision in *Hostetter* signaled an unmistakable shift in the Court’s interpretation of the Twenty-First Amendment. No longer would the Court simply defer to the Twenty-First Amendment, and ignore the Commerce Clause, when faced with state regulation of the importation of alcohol. Following *Hostetter*, each provision of the Constitution would be “considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.”⁹¹

C. Developing a Balancing Test

Since *Hostetter*, the Court has developed a balancing test to address challenges to state alcohol regulations on Commerce Clause grounds. The Court’s two-pronged test balances the state’s interest in regulating alcohol against the federal interest in regulating interstate commerce. The Court first addresses whether the state statute contravenes either an affirmative exercise of the Commerce Clause⁹² or the dormant Commerce Clause doctrine.⁹³ If the Court deems that there is no conflict between the state statute and the Commerce Clause, then the statute will be upheld.

If the statute does conflict with federal law, the Court considers the second prong of the test—whether the Twenty-First Amendment “saves” the state regulation.⁹⁴ Commonly known as the “core

89. *Id.* at 331-32. Justice Stewart cited as support the Court’s rejection of the unconditional grant theory in *Jameson & Co. v. Morgenthau*, 307 U.S. 171, 172-73 (1939). *Hostetter*, 377 U.S. at 332. In *Jameson*, the Court had stated that they saw “no substance in th[e] contention” that the Twenty-First Amendment “gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause” *Jameson*, 307 U.S. at 173 (emphasis added).

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

91. *Id.*

92. Miller, *supra* note 14, at 2523 (citing Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 103 (1980) (asserting that a state cannot pass a law that prevents actions allowed by federal law)).

93. Miller, *supra* note 14, at 2523 (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984)).

94. See Miller, *supra* note 14, at 2523-24.

concerns" test,⁹⁵ the Court assesses the weight of the state interest by examining whether the state regulation was passed pursuant to the central purpose of Section 2 of the Twenty-First Amendment.⁹⁶ Generally, the Supreme Court and lower courts have understood the central purpose behind the passage of the Twenty-First Amendment to be the promotion of temperance.⁹⁷ Consequently, for the Twenty-First Amendment to "save" a state statute that violates the dormant Commerce Clause, the statute must be passed and enforced to promote temperance and not to promote economic discrimination against out-of-state interests.⁹⁸

IV. RECENT DIRECT SHIPMENT DECISIONS

The conflict between the Commerce Clause and the Twenty-First Amendment has given rise to a wave of challenges to state direct shipment laws in recent years. Since 2000, six federal courts of appeals have weighed in on the constitutionality of these state alcohol regulations. The majority of courts have concluded that state alcohol laws that discriminate against out-of-state interests cannot be saved by the Twenty-First Amendment because they are not sufficiently narrowly tailored to promote the core concern of temperance.⁹⁹

95. See *Dickerson v. Bailey*, 336 F.3d 388, 403-04 (5th Cir. 2003).

96. See *Bacchus Imports*, 468 U.S. at 276 ("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."); *Quality Brands, Inc. v. Barry*, 715 F. Supp. 1138 (D.D.C. 1989); Shanker, *supra* note 14, at 375.

97. See, e.g., *Bacchus Imports*, 468 U.S. at 276 ("[T]he 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"); *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 861 (S.D.N.Y. 1985) ("[W]hat is to be balanced is the state interest in promoting 'temperance' with the federal constitutional interest in free trade across state lines. Only those state restrictions which directly promote temperance may now be said to be permissible under Section 2 of the Twenty-first Amendment."). Other courts have identified the "collection of taxes" and "the prevention of monopolies or organized crime from (re)gaining control of the alcohol industry" as concerns of the Amendment. See *Dickerson*, 336 F.3d at 404 & n.71.

98. See *Bacchus Imports*, 468 U.S. at 276; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984) (identifying the "state's central power under the Twenty-first Amendment" as the power to "regulat[e] the times, places, and manner under which liquor may be imported and sold").

99. See *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003).

A. Decisions Upholding Direct Shipment Laws

The first challenge to state direct shipment laws to be reviewed by a federal court of appeals resulted in the state statute being upheld. In *Bridenbaugh v. Freeman-Wilson*,¹⁰⁰ the Seventh Circuit held that an Indiana statute prohibiting direct shipments from out-of-state producers to Indiana consumers¹⁰¹ was authorized by the Twenty-First Amendment.¹⁰² The Indiana statute at issue in *Bridenbaugh* establishes the common three-tiered regulatory scheme that requires different permits for manufacturers, distributors, and retailers.¹⁰³ The *Bridenbaugh* plaintiffs, Indiana oenophiles, challenged the state regulation because it permitted Indiana wineries to ship directly to Indiana consumers while forbidding out-of-state wineries from doing so.¹⁰⁴

Judge Easterbrook's opinion explicitly disavowed any consideration of whether the Indiana regulatory scheme furthered a "core concern" authorized by the Twenty-First Amendment.¹⁰⁵ Rather, using the "text and history of the Constitution" as its "guide," the court concluded that the history behind the Twenty-First Amendment reveals that it "enables a state to do to importation of liquor—including direct deliveries to consumers in original packages—what it chooses to do to internal sales of liquor, but nothing more."¹⁰⁶ Using nondiscrimination against out-of-state interests as the litmus test for upholding the state regulatory scheme, the court determined that the Indiana statute did not favor Indiana sources of alcoholic beverages over outside sources. "Indiana insists that every drop of liquor pass through its three-tiered system and be subjected to taxation. Wine originating in California, France, Australia, or Indiana passes through the same three tiers and is subjected to the same taxes. Where's the functional discrimination?" asked the court.¹⁰⁷

100. 227 F.3d 848 (7th Cir. 2000).

101. IND. CODE ANN. § 7.1-5-11-1.5(a) (2001).

102. *Bridenbaugh*, 227 F.3d at 854.

103. *Id.* at 851; see generally *supra* text accompanying notes 14-19.

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

105. *Id.* at 851.

106. *Id.* at 851, 853.

107. *Id.* at 853.

The most recent federal circuit court to weigh in on the direct shipment controversy also upheld the state statute at issue. In *Swedenburg v. Kelly*,¹⁰⁸ the Court of Appeals for the Second Circuit upheld a New York Alcoholic Beverage Control Law (ABC Law) that required all wineries who sell to New York consumers to obtain a license and otherwise participate in the three-tiered system.¹⁰⁹ As the court pointed out, the New York statute differed from those statutes challenged in the Fifth, Sixth, and Eleventh Circuits, as out-of-state wineries were not wholly prevented from obtaining a license.¹¹⁰ Rather, the *Swedenburg* plaintiffs complained that the ABC Law's licensing requirement that wineries establish and maintain a physical presence in New York provided an unconstitutional advantage to in-state wineries.¹¹¹ Like the *Bridenbaugh* court, the Second Circuit in *Swedenburg* expressly bypassed a "core concern" analysis, and instead construed Section 2 of the Twenty-First Amendment as an exception to the dormant Commerce Clause.

B. Decisions Invalidating Direct Shipment Laws

Since 2002, the federal courts of appeals for the Fourth,¹¹² Fifth,¹¹³ Sixth,¹¹⁴ and Eleventh¹¹⁵ Circuits have struck down state direct shipment laws as violative of the dormant Commerce Clause. All four cases involved state statutes that prohibited direct shipment to in-state consumers from out-of-state sellers yet provided exceptions that allowed in-state wineries to ship directly to in-state consumers.¹¹⁶ With the exception of the Eleventh Circuit in *Bain*

108. *Swedenburg v. Kelly*, 358 F.3d 223 (2nd Cir. 2004).

109. N.Y. ALCO. BEV. CONT. LAW § 100(1) (2004).

110. *See Swedenburg*, 358 F.3d at 229 n.3.

111. *Id.* at 229-30.

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

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

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

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

116. *Heald*, 342 F.3d at 521 (citing MICH. COMP. LAWS § 436.1113(9), which permitted licensed Michigan winemakers to deliver wine directly to Michigan consumers); *Dickerson*, 336 F.3d at 393 & n.3 (citing TEX. ALCO. BEV. CODE ANN. § 16.01(a)(4), which permitted in-state wineries to sell and ship "directly to Texas consumers up to 25,000 gallons" per year); *Beskind*, 325 F.3d at 510 (citing N.C. GEN. STAT. § 18B-1101(3), amended in 1981 to authorize in-state wineries to sell and ship wine directly to consumers); *Bainbridge*, 311 F.3d at 1106-07 (citing FLA. STAT. ANN. § 561.221(1)(a), which allowed in-state wineries to receive vendors'

bridge v. Turner,¹¹⁷ each of these courts declared invalid the state alcohol distribution statute.

The Fifth Circuit's analysis in *Dickerson v. Bailey* is representative of a court's approach under current dormant Commerce Clause and Twenty-First Amendment frameworks when invalidating direct shipment laws. The court began its examination by determining whether the challenged provisions of the Texas Alcoholic Beverage Code (TABC) violated the dormant Commerce Clause.¹¹⁸ After noting that the challenged statute allows in-state wineries to circumvent Texas's three-tiered regulatory system and sell their product directly to in-state consumers without the mark-up costs associated with selling to a wholesaler and retailer,¹¹⁹ and after discussing the Texas legislature's expressed intent to promote and market Texas wines,¹²⁰ the court concluded that the challenged statute discriminated against out-of-state interests and thus violated the dormant Commerce Clause.¹²¹

The court then moved to the second prong of its analysis, determining whether the Twenty-First Amendment "saved" the dormant Commerce Clause violation.¹²² To make this determination, the court used the "core concerns" test, analyzing whether the Texas statute was passed in furtherance of the core concern of the Twenty-First Amendment—temperance.¹²³ The court found that the expressed intent of the Texas legislature—to promote Texas's wine industry—in passing the challenged statute revealed that the regulation was not passed in furtherance of the recognized core concern of the Twenty-First Amendment, the promotion of temperance.¹²⁴ Rather, the challenged regulations were "nothing but a

permits).

117. 311 F.3d 1104, 1109, 1115-16 (11th Cir. 2002) (concluding that Florida's alcohol distribution statutes' differentiation between in-state and out-of-state wineries facially discriminates against interstate commerce, but remanding for further factfinding as to whether Florida's statutory scheme was "necessary to effectuate the ... core concern [of revenue raising] in a way that justifies treating out-of-state firms differently from in-state firms").

118. *Dickerson*, 336 F.3d at 395-403.

119. *Id.* at 397-99.

120. *Id.* at 399-400.

121. *Id.* at 400-03.

122. *Id.* at 403-07.

123. *Id.* at 404.

124. *Id.* at 404, 406-07.

pretextual rational ... for economic protectionism,"¹²⁵ a purpose absolutely proscribed by the Commerce Clause.¹²⁶ The court concluded that the Twenty-First Amendment could not "save" the discriminatory direct shipment law, and declared the challenged statute unconstitutional.

In its *Dickerson* opinion, the Fifth Circuit specifically addressed the Seventh Circuit's decision in *Bridenbaugh*. Although the court in *Bridenbaugh* upheld Indiana's alcohol regulatory statute, the *Dickerson* court noted several factual differences between the cases that accounted for the different results.¹²⁷ Indeed, there were factual anomalies in *Bridenbaugh* that differentiated it from the direct shipment cases evaluated by the Fourth, Fifth, Sixth, and Eleventh Circuits.

The primary factual difference was in the regulatory scheme itself. While the *Bridenbaugh* court found that "Indiana insists that every drop of liquor pass through its three-tiered system and be subject to taxation,"¹²⁸ the Michigan, Texas, North Carolina, and Florida statutes allowed in-state wineries to circumvent the three-tiered structure.¹²⁹ In these states, therefore, the in-state wineries were not subject to the same taxes as out-of-state wineries.

The plaintiffs in *Bridenbaugh*, unlike those in the *Heald*, *Beskind*, and *Bainbridge* cases, consisted solely of oenophiles who had no intention of acquiring a vendor's permit; no out-of-state wineries

125. *Id.* at 406-07 (quoting *Quality Brands v. Barry*, 715 F. Supp. 1138, 1143 (D.D.C. 1989)).

126. *Dickerson*, 336 F.3d at 407.

127. *Id.* at 400-01.

128. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000).

129. *Heald v. Engler*, 342 F.3d 517, 525 (6th Cir. 2003) (concluding that the Michigan regulatory scheme benefits in-state wineries by giving them greater access to consumers and exempting them from the three-tier system); *Dickerson*, 336 F.3d at 397 (noting that the Texas statutes allowed in-state wineries to sell and ship directly to in-state consumers, thereby exempting in-state producers from operating solely within the three-tiered structure); *Beskind v. Easley*, 325 F.3d 506, 510 (4th Cir. 2003) (citing a North Carolina provision which "authorized in-state wine manufacturers to sell and ship their products directly to consumers"). The Florida regulation challenged in *Bainbridge v. Turner* regulated direct shipments by requiring wineries to obtain a vendor's license; this regulation, however, allowed in-state wineries to bypass the three-tiered system, exempting them from the mark-ups of selling to wholesalers and retailers. *Bainbridge v. Turner*, 311 F.3d 1104, 1106-07 (11th Cir. 2002).

were parties.¹³⁰ The *Bridenbaugh* plaintiffs were “concerned only with direct shipments from out-of-state sellers who lack *and do not want* Indiana permits.”¹³¹ Consequently, the plaintiffs were attempting to access out-of-state wineries who could sell to Indiana consumers without the burden and costs of obtaining an Indiana license. In short, the plaintiffs were seeking preferential treatment for out-of-state sellers.¹³² The out-of-state winery plaintiffs in *Heald*, *Beskind*, and *Bainbridge*, meanwhile, were all willing to pay license fees and taxes for the right to ship directly to consumers.¹³³

Though the factual distinctions may account for the different result in *Bridenbaugh*, Judge Easterbrook’s analysis should also be questioned. Judge Easterbrook expressly abandoned any “core concern” analysis, deriding such an inspection as an “unilluminating” speculation into the “mental processes” of the framers of the Twenty-First Amendment.¹³⁴ Yet, although Judge Easterbrook is not alone in his concern about the ambiguous nature of the legislative history behind the passage of Section 2,¹³⁵ the “core concern” analytical framework was nonetheless announced by the Court as the appropriate mode of examination for determining a state statute’s constitutionality under the Twenty-First Amendment in light of the dormant Commerce Clause.¹³⁶ Regardless of his

130. *Bridenbaugh*, 227 F.3d at 849. The *Dickerson* plaintiffs also consisted solely of oenophiles. The *Dickerson* & *Bridenbaugh* opinions can be distinguished by the statutes at issue. Whereas the Indiana statutes challenged in *Bridenbaugh* required “every drop of liquor [to] pass through its three-tiered system,” The Texas statutes challenged in *Dickerson* provided several exceptions to Texas wineries that allowed these in-state wineries to avoid the three-tier system. *Dickerson*, 336 F.3d at 400.

131. *Bridenbaugh*, 227 F.3d at 854.

132. The Wilson Act gave states the power to prohibit such a result. See *supra* text accompanying notes 64-66.

133. *Heald*, 342 F.3d at 520-21; *Beskind*, 325 F.3d at 510-11; *Bainbridge*, 311 F.3d at 1114 n.15.

134. *Bridenbaugh*, 227 F.3d at 851.

135. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-75 (1984) (“No clear consensus concerning the meaning of [Section 2 of the Twenty-First Amendment] is apparent.”); *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 n.10 (1980) (“The sketchy records of the state conventions reflect no consensus on the thrust of § 2” of the Twenty-First Amendment).

136. See *Bacchus Imports*, 468 U.S. at 275 (“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.”) (emphasis added); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984) (“[T]he central question ... is ... whether the interests implicated by a state

misgivings, Judge Easterbrook was obligated by *stare decisis* principles to follow the constitutional standards detailed in *Bacchus* and its progeny, something he clearly failed to do.¹³⁷

The court's conclusion in *Bridenbaugh* that the Indiana regulatory statute did not discriminate against out-of-state wineries is also questionable. Though the court admits that the Indiana statute permits in-state wineries, but forbids those wineries "in the business of selling ... in another state or country," to ship directly to Indiana consumers,¹³⁸ it sidesteps this issue by pointing out that permit holders may ship wine produced from any state directly to consumers.¹³⁹ This conclusion misses the point. An Indiana winery can obtain a permit that allows it to sell directly to in-state consumers, thus allowing it to receive greater profit from its sale by avoiding the mark-up costs of going through the three-tiered system. An out-of-state winery, however, does not have this option.¹⁴⁰

The analytical framework adopted by the Second Circuit in *Swedenburg* must also be questioned. Following Judge Easterbrook's lead in *Bridenbaugh*, the Court dismissed the "core concern" analysis, concluding that it was "hard pressed to find any mandate from the [Supreme] Court directing [it] to utilize [the "core concern" analysis] as a template in analyzing the New York statute"¹⁴¹ To the Second Circuit, the core concern analysis used in *Dickerson*, *Heald*, and *Bainbridge* was improperly "transpose[d]" from the Supreme Court's opinion in *Bacchus Imports*; the court argued that the analytical framework used in *Bacchus* should be limited to the facts and arguments offered in that case.¹⁴²

Yet the core concern test itself did not originate with *Bacchus Imports*. In *Capital Cities Cable v. Crisp*,¹⁴³ the Court considered an Oklahoma prohibition that barred cable television operators in the

regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.") (emphasis added).

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

138. *Bridenbaugh*, 227 F.3d at 851 (quoting IND. CODE § 7.1-5-11-1.5(a) (2004)).

139. *Bridenbaugh*, 227 F.3d at 853-54.

140. See *Bainbridge v. Turner*, 311 F.3d 1104, 1114 n.15 (11th Cir. 2002).

141. *Swedenburg v. Kelly*, 358 F.3d 223, 236 n.10 (2d Cir. 2004).

142. *Id.*

143. 467 U.S. 691 (1984).

state from airing advertisements of alcoholic beverages contained in the cable signals that originated out of state. Regulations of the Federal Communications Commission conflicted with the Oklahoma statute. The Court inquired “whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-First Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.”¹⁴⁴ The Court struck down the Oklahoma statute, as its ban of alcohol advertising did not relate to the core concerns of the Twenty-First Amendment:

the application of Oklahoma’s advertising ban to the importation of distant signals by cable television operators engages only indirectly the central power reserved by [section] 2 of the Twenty-first Amendment—that of exercising “control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.”¹⁴⁵

Thus, contrary to the Second Circuit’s claim, the core concern analysis has not been, and should not be, limited to the facts of *Bacchus*; rather, it has been applied repeatedly when a state regulation of alcohol, based on Section 2 of the Twenty-First Amendment, conflicts with federal authority.

V. A COMPARATIVE LOOK TO EUROPEAN UNION LAW

As one federal court of appeals has recently pointed out, the Supreme Court has been “less than prolific” in expounding on its analysis of the Twenty-First Amendment’s “core concerns” since its 1984 decision in *Bacchus*.¹⁴⁶ This lack of clarity has led not only to confusion among courts in determining what is a “core concern” of the Twenty-First Amendment—aside from temperance—but has also led to confusion regarding the necessity of engaging in “core

144. *Id.* at 714.

145. *Id.* at 715 (quoting *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980)); see also *Heald v. Engler*, 342 F.3d 517, 523 (2003) (tracing the Court’s use of the core concern test to *Capital Cities*).

146. *Heald v. Engler*, 342 F.3d 517, 523 (6th Cir. 2003).

concerns" analysis.¹⁴⁷ In the absence of a clear standard set by the Court to determine the appropriate constitutional balance between the rights of states to regulate the shipment of alcohol to consumers and the federal interest in maintaining a free market interstate economy, consideration of another court system's attempt to strike a balance between these two interests is illuminating. The EU provides a particularly useful comparative study because its competing interests in this area are quite analogous to those in the United States.

A. Why Look to the European Union?

The essential dilemma of the "wine wars"¹⁴⁸—protecting state sovereignty with respect to alcohol regulation while also maintaining a free market economy that prohibits discrimination between states—is not unique to the United States. The EU, whose Treaty of the European Economic Community (EEC) provides for a common market and prohibits discrimination in the free movement of goods between member states, has had much litigation over its member states' ability to set standards and guidelines in their regulation of the movement of alcohol.¹⁴⁹ In fact, much of the ECJ's case law interpreting the Treaty's provisions regarding free movement of goods has arisen from alcohol importation-related litigation.¹⁵⁰

The European Union of today is the result of a series of treaties ratified among the Member States since 1951. The Treaty of Paris,

147. *Compare* Dickerson v. Bailey, 336 F.3d 388, 406 (5th Cir. 2003) 227 F.3d at 851 (abandoning "core concern" analysis), *with* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000), 336 F.3d at 406 (concluding that the court is obligated to follow the *Bacchus* "core concern" standard).

148. The term "wine wars" was used in Susan Lorde Martin's review of direct shipment litigation in state courts. See Susan Lorde Martin, *Wine Wars—Direct Shipment of Wine: The Twenty-First Amendment, the Commerce Clause, and Consumers' Rights*, 38 AM. BUS. L.J. 1 (2000); see also Susan Lorde Martin, *Changing the Law: Update from the Wine War*, 17 J.L. & POL. 63 (2001).

149. See, e.g., Case 178/84, Commission v. Federal Republic of Germany, 1987 E.C.R. 1227 [1988] 1 C.M.L.R. 780 (1987) (reviewing German beer purity requirements); Case 176/84, Commission v. Hellenic Republic, 1987 E.C.R. 1193, [1988] 1 C.M.L.R. 813 (1987) (reviewing Greek beer purity standards); Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 (1979) [hereinafter *Cassis de Dijon*] (reviewing a minimum alcoholic strength requirement).

150. See, e.g., *Hellenic Republic*, 1987 E.C.R. at 1193; *Cassis de Dijon*, 1979 E.C.R. at 649; Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837 (1974).

to which France, Italy, West Germany, and the Benelux countries consented, created the European Coal and Steel Community in 1951.¹⁵¹ The next move toward the “federation of Europe” occurred in 1957 with the two Treaties of Rome, establishing the European Atomic Energy Community (Euratom) and the European Economic Community (EEC).¹⁵² Since its establishment in 1957, the principal concern of the EEC has been to establish an internal free trade area between member states.¹⁵³ To accomplish this objective, the Treaties of Rome eliminated customs duties on imports and exports between the Member States and abolished obstacles to freedom of movement between Member States for persons, services, and capital.¹⁵⁴ Although the Treaties of Rome went a long way in setting the framework for a single European market, they were less than exhaustive.

The objective of the single market and the method by which the European Community would reach this goal was set out in the European Commission’s 1985 White Paper.¹⁵⁵ This report contained nearly 300 proposals to remove physical, technical, and fiscal barriers to trade throughout the European Community.¹⁵⁶ The Single European Act, implemented in 1987, amended the treaties on which the European Community was based to incorporate these proposals, and it established the goal of completing the single market by 1992.¹⁵⁷

The process toward a single European market took a dramatic step forward in 1992 with the ratification of the Treaty on European Union (TEU or Maastricht Treaty). The Maastricht Treaty revamped the EEC Treaty by transforming it into one of three “pillars” that make up the broader EU.¹⁵⁸ The Maastricht Treaty continued the path towards a single market by ensuring “more open borders for Member States in the movement of goods, labor, and

151. Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1623 (2002).

152. *Id.* at 1623-24.

153. See KAREN V. KOLE & ANTHON D’AMATO, EUROPEAN UNION LAW ANTHOLOGY 9 (1998).

154. See LUCIE A. CARSWELL & XAVIER DE SARRAU, LAW & BUSINESS IN THE EUROPEAN SINGLE MARKET § 1.02 (1st ed. 1993).

155. *See id.*

156. *See* KOLE & D’AMATO, *supra* note 153, at 10.

157. *See id.*

158. Young, *supra* note 151, at 1624.

capital.”¹⁵⁹ Most notably, it provided for a single institutional framework for the Member States and set the time table for establishing a common monetary policy for all Member States, including a single European currency and a central European bank.¹⁶⁰

As the goal of establishing a single European market has developed, the powers of the EU have expanded into areas once controlled solely by Member States. Much like how Article I of the U.S. Constitution delegates powers to Congress to regulate certain matters, the treaties of the European Union specifically assign “competence,” or power, to Community institutions to regulate specific areas.¹⁶¹ Beyond these explicitly listed competences, Article 235 of the Treaty of Rome contains a “necessary and proper” provision that allows the Community institutions to regulate other areas.¹⁶²

Concurrent with the Treaties’ explicit grant of competences to Community institutions, the European Court of Justice (ECJ) has been aggressive in expanding and solidifying the EU’s power to regulate activities in Member States. Despite the absence of any “supremacy clause” in the EU treaties, the ECJ has asserted the supremacy of Community law over national legal norms.¹⁶³ In addition, the ECJ has held that some Community law has “direct effect” to Member State law—that is, legislation and regulations passed by the Community do not need to be drafted into the laws of the individual Member States but instead apply directly to these States once the Community passes the regulation.¹⁶⁴ Finally, the ECJ has also developed an “implied powers” doctrine, which holds that Community competence is exclusive in certain areas, thus prohibiting Member State legislation in areas where the Community itself has not acted.¹⁶⁵

159. KOLE & D’AMATO, *supra* note 153, at 654.

160. *See id.* at 10-11.

161. Young, *supra* note 151, at 1633.

162. *Id.* at 1633-34.

163. *Id.* at 1634.

164. *Id.* at 1634 (citing Case 26/62, *Algemene Transport-en Expeditie Onderneming van Gend en Loos NV v. Nederlands Administratie der Belastingen*, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105 (1963)).

165. Young, *supra* note 151, at 1635.

The ECJ's aggressive expansion of Community power at the expense of Member State autonomy has not gone unnoticed. The Community responded in 1992 by including in the Maastricht Treaty the principle of "subsidiarity."¹⁶⁶ This concept is based on the principle that the lowest level of government possible should take action.¹⁶⁷ Thus, "the Community shall take action ... only if ... the objectives of the proposed action cannot be sufficiently achieved by the Member States and therefore by reason of the scale or effects of the proposed action, be better achieved by the Community."¹⁶⁸ Yet the introduction of this principle into the Maastricht Treaty has not quieted Member States' fears that their autonomy has been usurped by the expansion of the EU. Recently, the British Minister of Europe complained of the "creeping federalism" taking effect in the EU, noting that "[t]he powers have all been going towards Brussels and away from nation states."¹⁶⁹

These federalism concerns make the ECJ's jurisprudence regarding Member State alcohol regulation particularly analogous to the direct shipment "wine wars" being fought in U.S. courts. While the U.S. courts are concerned about states' rights to regulate the importation of alcohol under the Twenty-First Amendment in light of the dormant Commerce Clause, the ECJ must balance the Community's interest in maintaining a free market economy against the powers traditionally afforded Member States to regulate alcohol for the purpose of protecting the health and lives of its citizens.¹⁷⁰ Furthermore, a closer look at ECJ jurisprudence regarding the authority of Member States to regulate the importation of alcohol reveals that the arguments offered by Member States in defense of their alcohol regulations mirror those asserted in support of American states' alcohol regulations. In the face of European Commission challenges to Member State alcohol regulations on the grounds of impermissible restrictions to free trade, Member States

166. *Id.* at 1636.

167. See KOLE & D'AMATO, *supra* note 153, at 67.

168. Young, *supra* note 151, at 1636 (quoting Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 3b, 298 U.N.T.S. 11 (as in effect in 1957) (now article 5) [hereinafter EC Treaty]).

169. Young, *supra* note 151, at 1614 (quoting Andrew Grice, *Hain Warns of "Creeping Federalism" in EU*, INDEP., July 22, 2002, at 1).

170. See Case 178/84, *Commission v. Federal Republic of Germany*, 1987 E.C.R. 1227, [1988] 1 C.M.L.R. 780 (1987).

cite their inherent police powers as the justification for their alcohol regulations.¹⁷¹ In the United States, the Supreme Court has identified “temperance” as the primary legitimate basis for alcohol regulations under the Twenty-First Amendment.¹⁷² The basis for the state’s authority to regulate alcohol prior to the passage of the Twenty-First Amendment was the state’s inherent police power. Thus, the root of both EU Member States and American states’ desire to engage in alcohol regulation is the same—the need to use their inherent police powers to protect the health of their citizens.

A comparative look to the ECJ’s jurisprudence is also appropriate, because it has been given the Supreme Court’s imprimatur. As recently as the 2003 decision in *Lawrence v. Texas*,¹⁷³ and often in habeas corpus petitions regarding the imposition of the death penalty,¹⁷⁴ the Court has looked to foreign courts, such as the European Court of Human Rights and the Supreme Court of Canada, to help guide its decisions. Although the Court’s use of foreign jurisprudence generally occurs in cases involving questions of human rights, at least one Justice has looked to the European Community to guide his construction of an American regulatory statute.¹⁷⁵ It is evident, then, that the Supreme Court has found comparisons with foreign courts’ jurisprudence regarding an analogous issue to be instructive and helpful in certain cases.

B. How the ECJ Addresses Member State Alcohol Regulations

In its free movement of goods jurisprudence, the ECJ looks to Treaty Articles 28 through 36 for guidance on the EU’s interest in regulating inter-Member State commerce. To create a common market, the European Community sought to strike down all tariffs and customs that restricted trade. Article 30 achieved this goal, as it prohibits “quantitative restrictions on imports and all measures

171. See *id.*; Case 176/84, *Commission v. Hellenic Republic*, 1987 E.C.R. 1193, [1988] 1 C.M.L.R. 813 (1987).

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

173. 539 U.S. 558 (2003).

174. See, e.g., *Foster v. Florida*, 537 U.S. 990, 992-93 (2002) (Breyer, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 & n.31 (1988).

175. See *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 557-59 (2002) (Breyer, J., dissenting) (concluding that the drafters of the Telecommunications Act of 1996 intended a system similar to the European “play it by ear” system).

having equivalent effect ... between Member States.”¹⁷⁶ The ECJ construed this provision broadly in *Procureur du Roi v. Dassonville*.¹⁷⁷ The court held that “[a]ll trading rules enacted by member-States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”¹⁷⁸

Because the EU is composed of nations with long histories, distinct cultures, and independent legislatures, the greatest obstacles to trade between Member States have been due to disparities in national legislation regarding the characteristics of goods.¹⁷⁹ Initially, most believed that Article 30 merely prohibited discriminatory measures against imports; that is, as long as Member States applied their legislation without distinction between national goods and imports, they would not violate Article 30.¹⁸⁰ In 1976, the ECJ dispelled that belief with its *Cassis de Dijon* decision.¹⁸¹

Cassis de Dijon involved German legislation that set a minimum alcoholic strength of twenty-five percent for fruit wines, which led the Federal Monopoly Administration for Spirits to refuse import authorization.¹⁸² The German government argued that the legislation was intended to prevent alcoholism by reducing the availability of drinks with a low alcohol content that could lead to alcohol tolerance.¹⁸³ In response, the ECJ noted that Member States have the power to regulate alcohol:

In the absence of common rules ... relating to the production and marketing of alcohol ... it is for the Member State to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the

176. EEC Treaty art. 30 (as in effect in 1957) (now article 28).

177. Case 8/74, *Procureur du Roi v. Dassonville*, 14 C.M.L.R. 436 (1974).

178. *See id.*

179. KOLE & D'AMATO, *supra* note 153, at 105.

180. *See id.* at 106.

181. *Id.* (citing Case 120/78, *Cassis de Dijon*, 1979 E.C.R. 649 (1979)).

182. KOLE & D'AMATO, *supra* note 153, at 116.

183. *See* CARSWELL & DE SARRAU, *supra* note 154, § 6.05[5].

products in question must be accepted in so far as those provisions may be recognised as being *necessary* in order to satisfy mandatory requirements relating in particular to the effectiveness of ... the protection of public health ... and the defence of the consumer.¹⁸⁴

The ECJ then applied a strict scrutiny-like test and held that the legislation was invalid under any of these "mandatory requirement" grounds, because consumer protection could have been achieved by less discriminatory means.¹⁸⁵

The ECJ's recognition of the "mandatory requirements" that Member States can use as a legitimate basis to create an obstacle to trade is analogous to U.S. courts recognition that states have the right to impede the interstate movement of alcohol when the regulation is constructed and implemented, in the least discriminatory way possible, for the purpose of temperance. Just as Section 2 of the Twenty-First Amendment explicitly confers to states this regulatory power, Article 36 of the Maastricht Treaty allows EU Member States to restrict trade for the purposes of, among others, public morality and the protection of health.¹⁸⁶

The ECJ has limited the ability of Member States to justify their import restrictions on the basis of Article 36. In two cases involving beer purity standards that the ECJ decided on the same day,¹⁸⁷ the court struck down the Member State laws as invalid under Article 30. Both cases involved national laws that rigorously controlled the ingredients for beer and prohibited the importation of all beers that did not meet this standard. The court noted that the laws were "out of proportion with the aim pursued"—protecting the health of the Member States' citizens.¹⁸⁸ Consequently, the court concluded that the laws prohibiting the import of beer could not be justified under Article 36 of the Treaty.¹⁸⁹

184. *Id.* (citing *Cassis de Dijon*, 1979 E.C.R. 649, 662 (1979)) (emphasis added).

185. CARSWELL & DE SARRAU, *supra* note 154, § 6.05[5].

186. See KOLE & D'AMATO, *supra* note 153, at 119.

187. Case 178/84, *Commission v. Federal Republic of Germany*, 1987 E.C.R. 1227, [1988] 1 C.M.L.R. 780 (1987) (German beer purity case); Case 176/84, *Commission v. Hellenic Republic*, 1987 E.C.R. 1193, [1988] 1 C.M.L.R. 813 (1987) (Greek beer purity case).

188. See *Hellenic Republic*, 1987 E.C.R. at 1193.

189. *Id.*

While *Cassis de Dijon* and the beer purity cases involved import prohibitions based on the characteristics of the alcohol rather than on the manner in which alcohol was prohibited, Article 95 of the Maastricht Treaty addresses how the ECJ should handle a direct shipment law case in which an outside winery is forced to pay more taxes and more mark-up fees. Article 95 provides two bases for assessing the discriminatory element in taxation systems.¹⁹⁰ It provides:

No Member States shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.¹⁹¹

In applying this provision of the Treaty, the court has not demanded statistical proof that the taxation violates Article 95. Rather, the Member State challenging another's taxation must "show[] that a given tax mechanism is likely ... to bring about the protective effect referred to by the Treaty."¹⁹² For a Member State to demonstrate such a protective effect, the tax must merely be "capable of influencing consumer choice and reducing potential consumption of the imported products."¹⁹³

An example of the ECJ's interpretation of Article 95 is found in a 1980 case involving a United Kingdom tax statute that subjected wine to a higher excise duty than beer.¹⁹⁴ To determine whether the tax on wine offended section 2 of Article 95 required the court to determine whether wine and beer had a competitive relationship, such that a tax on wine would "afford indirect protection" to beer producers.¹⁹⁵ The court defined a competitive relationship as one that allows for a "degree of substitution" between the products, and it held that beer and wine held similar roles, consequently striking

190. See KOLE & D'AMATO, *supra* note 153, at 147.

191. *Id.* at 147-48.

192. CARSWELL & DE SARRAU, *supra* note 154, at § 6.04[3].

193. *Id.*

194. Case 170/78, *Commission v. United Kingdom*, 1980 E.C.R. 417 (1980).

195. *Id.* at 418.

down the law.¹⁹⁶ Thus, the ECJ again strictly curtailed Member States' ability to restrict the free trade of alcohol in the name of protecting the citizens of the Member State.

C. Analogizing ECJ Analytical Structure to Direct Shipment Law Framework

In evaluating whether an import restriction violates the Maastricht Treaty, the ECJ undergoes an analytical approach that is analogous to that used by U.S. courts in addressing a direct shipment law. First, the ECJ questions whether the challenged statute violates Community law mandating the free movement of goods. If the court determines that the Member State regulation restricts the quantity of the applicable goods coming into the Member State, either through a regulation of the manufacturing of the good or through a tax that produces a protective effect for a similar domestic product, then a *per se* violation is found.¹⁹⁷ This analysis is similar to the U.S. approach, which finds a *per se* violation of the Commerce Clause if a state statute discriminates on its face or in effect against out-of-state economic interests.¹⁹⁸

After determining that the challenged statute violates the Maastricht Treaty's provisions for the free movement of goods, the ECJ then examines whether the "mandatory provisions" of Article 36 "save" the regulation.¹⁹⁹ The ECJ applies a strict scrutiny test to this examination: "in view of the principle of proportionality underlying the last sentence of Article 36 of the Treaty, [Member States must] restrict themselves to *what is actually necessary to secure the protection of public health*."²⁰⁰ This approach mirrors the U.S. courts' examination of whether the Twenty-First Amendment "saves" a state alcohol regulation that violates the Commerce Clause.²⁰¹ To conclude that the state statute is saved by the Twenty-

196. *Id.* at 434. The court concluded that "it is impossible to restrict oneself to consumer habits in a Member State" to appropriately judge substitutability, since the tax laws of a Member State could "crystallize given consumer habits." *Id.*

197. *See, e.g.*, Case 176/84, *Commission v. Hellenic Republic*, 1987 E.C.R. 1193, [1988] 1 C.M.L.R. 813 (1987).

198. *See, e.g.*, *Dickerson v. Bailey*, 336 F.3d 388, 402-03 (5th Cir. 2003).

199. *See, e.g.*, *Hellenic Republic*, 1987 E.C.R. at 1194.

200. *Id.* (emphasis added).

201. *See Bainbridge v. Turner*, 311 F.3d 1104, 1109-10 (11th Cir. 2002).

First Amendment, the statute must advance “a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”²⁰² Thus, in both the EU and the United States, a regulation that restricts the sale of alcohol between states can only be justified as an effort to promote temperance and should only be upheld if it is so narrowly written that it in fact works to promote temperance while having a minimal effect on interstate commerce.

CONCLUSION

It is evident that the European Court of Justice and the U.S. courts must address a similar problem—balancing the federal interest in regulating interstate commerce against states’ autonomy interests in regulating alcohol. This Note contends that U.S. courts can learn from the European Union, specifically in the application of Article 95. That provision expressly prohibits any taxation that may give indirect protection to local Member State economic interests. That principle is also represented in the Twenty-First Amendment, which gives states the right to regulate alcohol but only to the extent that it does not prejudice out-of-state interests.²⁰³ The Court recognized this principle in *Craig v. Boren*, when it noted the framers’ “clear intention of constitutionalizing the Commerce Clause framework” of nondiscrimination that was formed in the Webb-Kenyon and Wilson Acts.²⁰⁴

U.S. courts can learn from the ECJ’s interpretation of Article 95. A tax need not be overtly discriminatory or oppressive to be invalid; instead, the ECJ has held that a challenged statute is invalid simply if it influences consumer choice and may potentially reduce consumption of imported products.²⁰⁵ Using the ECJ’s broader definition of “discrimination” in deciding *Bridenbaugh* may have produced a very different outcome in that case. Though the *Bridenbaugh* court conceded that the challenged Indiana statute allows in-state wineries to ship directly to consumers while forbidding out-of-state wineries to do the same, it held that there

202. *Id.*

203. See discussion *supra* Part III.A.

204. *Craig v. Boren*, 429 U.S. 190, 205-06 (1976).

205. See generally CARSWELL & DE SARRAU, *supra* note 154, § 6.04.

was no functional discrimination in the Indiana system because *all* wine, whether produced in-state or out-of-state, is regulated and taxed.²⁰⁶ Yet, viewed through the ECJ lens, the Indiana statute cannot stand. Because only in-state wineries have the opportunity to ship directly to consumers, consumers who prefer directly-shipped wines are limited to selecting only Indiana wines. If enough Indiana consumers limit their wine purchases to those that can be directly shipped, the potential consumption of out-of-state wines drops dramatically. Under the ECJ's interpretation of its free trade law, this impact on out-of-state wines is sufficient to demonstrate a prohibited protective effect.

The dormant Commerce Clause, like Article 95, prohibits state laws that produce such protective effects, and the Twenty-First Amendment limits state regulation of alcohol to nondiscriminatory measures, much as the Maastricht Treaty does. As a result, U.S. courts should follow the lead of their European counterparts and construe "discrimination" in a similar manner in direct shipment cases.

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206. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000).