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Under The Influence: Why Alcohol Direct Shipment Laws Are a Violation of the Commerce Clause

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UNDER THE INFLUENCE: WHY ALCOHOL DIRECT SHIPMENT LAWS ARE A VIOLATION OF THE COMMERCE CLAUSE

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I.	INTRODUCTION	169
II.	DIRECT SHIPMENT LAWS	171
	A. <i>Background</i>	171
	B. <i>Why Direct Shipment Became an Issue</i>	172
	C. <i>The Liquor Wholesaler's Interests</i>	173
	D. <i>Vintner Interests</i>	174
	E. <i>Lobbying Legislatures</i>	175
	F. <i>Case Law</i>	177
	G. <i>Evaluating Wholesaler/State Arguments</i>	179
	H. <i>Conclusions</i>	180
III.	THE COMMERCE CLAUSE AND THE TWENTY-FIRST AMENDMENT	181
	A. <i>Prohibition Era Laws</i>	181
	B. <i>Reigning in State Power - Tension Develops</i>	182
	C. <i>A Time for Change</i>	184
	D. <i>How to Challenge the Seventh Circuit's Decision in Bridenbaugh</i>	189
IV.	CONCLUSION	190

I. INTRODUCTION

The great promise of America is freedom. Freedom of speech, freedom of association, freedom of religion, freedom from intrusions into privacy, and freedom of markets are the hallmarks of American liberty. With the advent of global trade and the Internet, Americans enjoy extraordinary access to a revolutionary marketplace. The Internet presents a new frontier for the free flow of products and ideas. As corporations and governments scramble to embrace this revolution, today's commerce is faster and freer than ever before. With a few clicks of a button a consumer in Florida could arrange a vacation in New York City complete with air travel, car rental, hotels and tickets to local attractions. With a few more clicks a consumer could buy a

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computer, buy a new car, and refinance his or her home from vendors scattered around the country, if not the world.

While the new national marketplace redefines interstate commerce and all-encompassing e-businesses propel a vibrant American economy, the promise of free trade and the Internet seems limitless. Yet, thirty states preclude their residents from participating in the promise of the new interstate marketplace with respect to one commodity: alcohol.¹ After the end of Prohibition in 1933, states created a three-tier distribution system requiring alcohol to pass from manufacturer to wholesaler to retailer.² According to Mimi Whitefield of the *Miami Herald*, “[t]he idea was to keep Prohibition-era gangsters from controlling the business.”³ States also created comprehensive laws to regulate the liquor industry that often limited or prohibited direct shipments of alcohol from outside the state. Historically, the enforcement of these laws has been lax.⁴ However, prompted by the growth of independent wineries that effectively bypassed wholesalers and online alcohol sales, the industry unleashed an aggressive lobbying campaign successfully pushing through laws that made direct shipment a felony.⁵ Powerful wholesalers utilized their well-developed lobbies to manipulate state legislatures to act under the guise of the public good and the Twenty-first Amendment. Ultimately, the wholesalers’ efforts promulgated more Byzantine liquor laws favorable to their own interests.⁶

To assess the validity of direct shipment laws under the Commerce Clause and Twenty-first Amendment, this article examines the history and development of such laws. It contends that anti-direct shipment laws are antiquated relics of Prohibition contrary to current Constitutional jurisprudence and representative of economic protectionism that detrimentally impacts interstate commerce, and thereby violate the Commerce Clause. Moreover, it contends that the Twenty-first Amendment cannot save these laws. Recent cases delineate the limits on state power under the Twenty-first Amendment and demonstrate that anti-

¹ See Alix M. Freedman & John R. Ernshwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking Its Very Private World*, WALL ST. J., Oct. 4, 1999, at A1; *Interstate Alcohol Sales and the 21st Amendment: Hearings on S. 577 Before Senate Judiciary Comm.*, 106th Cong. (1999) (statement of John A. DeLuca, President and Chief Executive Officer, Wine Institute) (hereinafter DeLuca).

² See Mimi Whitefield, *Wine Over State Lines*, MIAMI HERALD, Dec. 12, 1999, at E1 (describing the liquor distribution system).

³ *Id.*

⁴ *See id.*

⁵ *See id.*

⁶ *See id.*

direct shipment laws are not “central” Twenty-first Amendment powers granted to the states.⁷

II. DIRECT SHIPMENT LAWS

A. Background

Examining the history of alcohol in the United States conjures up images of the industry’s colorful past that has been glorified by popular culture in movies and television with gangsters like Al Capone. In 1933, ratification of the Twenty-first Amendment marked the end of Prohibition and the birth of the modern liquor-wholesaling system. This system, erected from the ruins of Prohibition, reflected concerns about the role of mob run liquor empires.⁸ Through a three-tier system, states maximized their control over the flow of alcohol and replaced the pre-Prohibition distribution system in which producers owned retail outlets.⁹ Proponents of the three-tier system pointed to problems with monopolistic sales practices and abusive patterns of alcohol consumption fostered by the pre-Prohibition system.¹⁰ Additionally, proponents claimed a three-tier system would facilitate collecting taxes and preventing underage purchases of alcohol.¹¹

Beyond the three-tier distribution system, states enacted comprehensive regulatory schemes to regulate liquor. Many of these regulatory schemes have yielded absurd results.¹² The city of Chicago once banned serving champagne to a dog, Utah bans restaurateurs from offering a customer a wine list, and Arkansas bans a barkeeper from offering a loyal patron a free lunch.¹³ Colorado’s laws may be the most revealing by banning the sale of spirits in bottles smaller than a fifth but requiring hotel mini-bars store

⁷ See *Dickerson v. Bailey*, 87 F. Supp. 2d 691 (S.D. Tex. 2000) (striking down a state anti-direct shipment statute as an unconstitutional violation of Commerce Clause); *Bridenbaugh v. O’Bannon*, 78 F. Supp. 2d 828 (N.D. Ind. 1999) (striking down a state anti-direct shipment statute as an unconstitutional violation of Commerce Clause), *overruled by* *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000).

⁸ See Freedman & Emshwiller, *supra* note 1.

⁹ See Kim Marcus, *When Winemakers Become Criminals*, WINE SPECTATOR, May 15, 1997, available at <http://www.winespectator.com/Wine/Spectator/Archives/19970515/5-15-97f4.html>.

¹⁰ See *id.*

¹¹ See *id.*; see also Christopher Lee, *Online Alcohol Sales Start Spirited Debate: Buyers, Sellers Oppose Texas Bill to Increase Penalties*, DALLAS MORNING NEWS, Apr. 12, 1999, at 19A (detailing tax and underage drinking issues with online sales).

¹² See Frank J. Prial, *Strange but True Peculiar Laws Demonstrate American Ambivalence About Booze*, CHI. TRIB., June 17, 1998, at 6 (outlining many absurd laws pertaining to alcohol).

¹³ See *id.*

nothing but miniatures.¹⁴ From this framework emerged direct shipment laws.

All fifty states and the District of Columbia regulate interstate sales of alcohol in some capacity.¹⁵ The state laws can be characterized three ways: "reciprocity" states, limited shipment states, and anti-direct shipment states. The majority of states prohibit direct shipment.¹⁶ Anti-direct shipment laws typically forbid out-of-state producers and retailers from shipping alcohol directly to in-state consumers.¹⁷ Eight states make violations of these provisions a felony.¹⁸ Other states permit limited shipment severely curtailing the volume and manner of importation.¹⁹ The remaining states are "reciprocity" states. Generally, these states permit shipments from states that afford a reciprocal privilege.²⁰ Today there are roughly a dozen "reciprocity" states, but determining the exact number of such states is subject to interpretation and changes in state law.²¹

B. *Why Direct Shipment Became an Issue*

With the advent of e-commerce a new national marketplace emerged. Customers could connect with vendors scattered throughout the country. Wine collectors utilized the Internet as a new resource to access hard-to-find wines that the current distribution system failed to provide them.²² Moreover, the Internet coincided with two important events, massive consolidation in the liquor distribution industry and a boom in the wine industry resulting in many new small independent wineries.²³ These changes were significant because even as demand for these new wines increased,

¹⁴ See *id.*

¹⁵ See Wine Institute, *Direct Shipment Laws by State for Wineries*, at http://www.wineinstitute.org/shipwine/analysis/intro_analysis.htm (last modified June 30, 2000).

¹⁶ See *id.*; Freedman & Emshwiller, *supra* note 1; Phaedra Hise, *Grapes of Wrath One Web Site's Philosophy: Make it Simple, Make it a Gift and Make it Legal*, FORBES, May 31, 1999, at 35 (noting the direct shipment ban in 28 states).

¹⁷ See, e.g., FLA. STAT. § 561.545 (West 1999).

¹⁸ See FLA. STAT. § 561.545 (West 1999); MD. CODE ANN., Alcoholic Beverages § 16-506.1 (1999); KY. REV. STAT. ANN. § 244.165(2) (Michie 1996); GA. CODE ANN. § 3-3-32(b) (1999); N.C. GEN. STAT. § 18B-102.1 (1999); OKLA. STAT. ANN. tit. 37, § 505 (West 1999); TENN. CODE ANN. § 57-3-401 (1999); IND. CODE ANN. § 7.1-5-1-9.5 (West 2000).

¹⁹ See Wine Institute, *supra* note 15.

²⁰ See *id.*

²¹ See *id.*; see generally Carolyn Lochhead, *House Votes to Restrict Wine Sales*, S. F. CHRON., Aug. 4, 1999, at A1, available at 1999 WL 2692660 (outlining states' bans and distribution problems).

²² See Lochhead, *supra* note 21.

²³ See Freedman & Emshwiller, *supra* note 1; DeLuca, *supra* note 1; R.W. Apple Jr., *Order Wine on the Web? Check Laws*, SUN-SENTINEL (Ft. Lauderdale, Florida), May 27, 1999, at 9.

small wineries could not find a distributor willing to carry their wines because they did meet the distributor's production and volume requirements.²⁴ Hence, wineries and consumers turned to direct shipment. Simultaneously, the Internet allowed specialty beer and wine of the month clubs to cater to customers nationwide. The ensuing rise in direct shipment revenues prompted wholesalers to mobilize their powerful political lobbies to crackdown on direct sales. Consequently, wineries organized to oppose wholesaler efforts to prohibit lucrative direct sales and thwart consumer choice.

C. *The Liquor Wholesaler's Interests*

Liquor wholesaling and distribution is a multi-billion dollar business. The largest liquor wholesaler, Southern Wine & Spirits, controls 11.8% of domestic wine and liquor market with annual revenues approaching \$3 billion.²⁵ Starting with Florida, Miami-based Southern led the lobbying efforts to make direct shipments of alcohol a felony.²⁶ Since Florida changed its law in 1997, seven other states passed felony legislation.²⁷

The value of the direct sale of wine is estimated at \$500 million with some estimates as high as \$1 billion.²⁸ These sales effectively bypass wholesalers and represent a direct challenge to their unique monopolistic status.²⁹ The wholesaler's monopoly has flourished under the three-tier distribution system. Currently, fourteen states protect wholesalers through so-called franchise laws which make it all but impossible for liquor producers to terminate the wholesaler without legal repercussions.³⁰ Additionally, the number of wholesalers has dropped from 10,900 to 300 since 1963.³¹ The top five wholesalers now account for a third of the total market.³² As their market power increases, wholesalers can pressure suppliers for price reductions while commanding higher prices from liquor retailers. Thus, entrenched wholesalers seek to thwart any competition by promulgating more protectionist state laws that will increase their market power and profits. Consequently, the wholesaler's political lobby promotes the

²⁴ See Freedman & Emshwiller, *supra* note 1; DeLuca, *supra* note 1; R.W. Apple Jr., *supra* note 23.

²⁵ See Freedman & Emshwiller, *supra* note 1.

²⁶ See *id.*

²⁷ See statutes cited *supra* note 18.

²⁸ See Associated Press, *Congress Eyes Curb on Online Wine Sales*, ATLANTA J., Oct. 12, 1999, at D7; see also Apple, *supra* note 23.

²⁹ See Freedman & Emshwiller, *supra* note 1.

³⁰ See *id.*

³¹ See DeLuca, *supra* note 1.

³² See Freedman & Emshwiller, *supra* note 1.

protection of purported state interests through the expansion and enforcement of liquor laws.³³

D. *Vintner Interests*

While the number of liquor wholesalers fell to 300, the number of American wineries soared from 377 in 1963 to over 1700 today.³⁴ The vast majority of these new wineries are small family run operations with a median production of only 3500 cases of wine.³⁵ With such a small production these wineries do not produce the quantities required to accommodate distributors.³⁶ Further without economies of scale enjoyed by larger wineries, the added cost of utilizing a middleman substantially effects profits at small wineries.³⁷ Hence, without access to distribution and vast marketing resources, direct sales are integral to the success of small wineries.

Direct sales have mixed significance at larger wineries. With the top 100 wineries responsible for 95% of all U.S. wine production, the distribution system caters to their needs.³⁸ These wineries will face little difficulty in getting their wines to market. Therefore, they rely less on direct sales. Yet, direct sales can generate a substantial amount of business. At Joseph Phelps Vineyards, 12% of all revenues came from direct sales.³⁹ These sales generate the largest profits as the winery can keep the entire markup without sharing with wholesalers or retailers.⁴⁰ For large wineries with premium wines that retail anywhere from \$50 to over \$100, direct sales offer a clear pecuniary incentive, as most premium wines yield premium profits. Nevertheless, larger wineries may remain ambivalent or even oppose most direct sales because basic economic theory suggests that the failure of smaller wineries will yield market opportunities for the larger wineries.

³³ See *id.*

³⁴ See DeLuca, *supra* note 1.

³⁵ See *Interstate Alcohol Sales and the 21st Amendment: Hearings on S. 577 Before Senate Judiciary Comm.*, 106th Cong. (1999) (statement of Michael Ballard, President, Savannah-Chanel Vineyards) (hereinafter Ballard).

³⁶ See DeLuca, *supra* note 1; Apple Jr., *supra* note 23.

³⁷ See Ballard, *supra* note 35.

³⁸ See *id.*

³⁹ See Carolyn Lochhead, *Vitners Make Last Stand in Fight for Net Sales, Liquor Lobby is Likely to Defeat Winemakers*, S. F. CHRON., Oct. 21, 1999, at A3.

⁴⁰ See *id.*

E. Lobbying Legislatures

In the late 1990s, led by Southern Wine & Spirits and The Wine and Spirits Wholesalers of America, liquor distributors organized their political lobby.⁴¹ For example, the front group Americans for Responsible Alcohol Access was formed to push for restrictive new state and federal legislation.⁴² In addition, wholesalers relied on the enormous political clout the industry developed at the state level.⁴³

The lobbying campaign began in earnest in the state of Florida, where Southern Wine and Spirits is headquartered. Southern made numerous contributions to candidates running for offices including: State Senator, State Representative, Secretary of State, Comptroller, State Treasurer, Insurance Commissioner, and Commissioner of Education.⁴⁴ Since 1996 there are 105 contributions from Southern Wine & Spirits on record for these positions.⁴⁵ Moreover, the bulk of Southern's contributions were for the \$500 maximum allowed under Florida law.⁴⁶ Premier Beverage Company, another large Florida wholesaler, also made significant contributions.⁴⁷ Southern's strategy also included hiring Don Tucker, a former speaker of the Florida House, as a lobbyist.⁴⁸ Ultimately, the wholesaler's contributions and lobbying efforts paid off when Florida made direct sales of alcohol a felony. During the eighteen months prior to passage of the felony law, Southern Wine and Spirits gave \$60,000 to Florida legislators and their political parties.⁴⁹ This amount is not surprising because the felony law represented a huge victory for wholesalers, as Florida is second only to California in terms of wine-consumption.⁵⁰ Florida's action also prompted other states to make direct shipment of alcohol a felony.⁵¹ After

⁴¹ See Freedman & Emshwiller, *supra* note 1.

⁴² See Lisa Greim Everitt, *Wine Online Direct Shipments On Web Spur 'Bootlegging Debate*, DENVER ROCKY MOUNTAIN NEWS, Sept. 27, 1999, at 1B (detailing laws and wholesaler tactics).

⁴³ See *id.*

⁴⁴ See Florida Division of Elections, *Campaign Finance Database*, at <http://election.dos.state.fl.us> (last visited Dec. 11, 1999).

⁴⁵ See *id.*

⁴⁶ See *id.*; FLA. STAT. § 106.08 (1999).

⁴⁷ See Florida Division of Elections, *supra* note 44.

⁴⁸ See Apple, *supra* note 23.

⁴⁹ See Freedman & Emshwiller, *supra* note 1.

⁵⁰ See John Kennedy, *Florida Ban has Vintners Whining Out-of-Staters Want Mail Orders Restored*, SUN-SENTINEL (Ft. Lauderdale, Florida), Mar. 16, 1998, at 1A (discussing the impact of the Florida felony law).

⁵¹ See statutes cited *supra* note 18.

losing Florida, vintners organized to oppose direct shipment laws and began a national debate.

Vintners supported organizations like The Wine Institute, American Vintners Association, Coalition for Free Trade, Family Winemakers of California and Free the Grapes to launch their lobbying campaign.⁵² Vintner's efforts yielded three significant victories in 1999 when Nevada, New Hampshire and North Dakota changed their laws to allow for direct shipment.⁵³ Prior to this, in 1997, Louisiana had also passed a law to permit direct shipment.⁵⁴ However, the vintners' victories may be short-lived given the powerful wholesalers' lobby.

The wholesalers have taken their cause to Congress. From 1987 through 1997, The National Beer Wholesalers Association and Wine & Spirits Wholesalers of America gave Congressional candidates over \$6 million in contributions.⁵⁵ Southern Wine & Spirits contributed over \$150,000.⁵⁶ In 1997 and 1998 the liquor distribution industry gave over \$3 million to federal candidates and political parties.⁵⁷ Since 1997, The Wine & Spirits Wholesalers of America Political Action Committee has contributed to hundreds of federal candidates and their political parties, including many congressional leaders.⁵⁸ Beyond financial resources, wholesalers maintain an obvious organizational advantage. While the number of wineries grew to over 1700, the number of liquor wholesalers fell 97% from over 10,000 to about 300 today.⁵⁹ Through The Wine and Spirits Wholesalers of America, the industry's national trade association, most of these wholesalers organized into one omnipotent lobby, which has formidable economic interests and resources in every state. With such national resources and economic impact in every state, the wholesalers' interests will trump winery interests in states

⁵² See Free the Grapes, *Background*, at <http://www.freethegrapes.org.html/bgnd.html> (last visited Oct. 1, 2000).

⁵³ See Freedman & Emshwiller, *supra* note 1; N.H. REV. STAT. ANN. § 175:6 (1999); N.D. CENT. CODE § 5-01-16 (1999).

⁵⁴ See Garry Boulard, *A Toast to Compromise*, THE GREATER BATON ROUGE BUS. REP., Jan. 6, 1998, at 28, available at 1998 WL 10297951 (outlining the parameters of the new Louisiana law).

⁵⁵ See Common Cause Report, *Under the Influence: Congress Backs Down to Big Booze*, at <http://www.commoncause.org/publications/boozech1.htm> (last visited Oct. 1, 2000).

⁵⁶ See *id.*

⁵⁷ See Nick Anderson, *California and the West Battle Brews Over Online Sales of Alcohol*, LOS ANGELES TIMES, June 14, 1999, at A3, available at 1999 WL 2168147 (detailing the legislative and lobbying efforts in Congress to regulate online alcohol sales).

⁵⁸ See Federal Election Commission, *FEC Disclosure Report for Wine and Spirits Wholesalers of America, Inc.*, at http://www.herndon1.sdrdc.com/cgi-bin/com_supopp/C00147173/ (last visited Oct. 1, 2000) (results on file with author).

⁵⁹ See DeLuca, *supra* note 1; Freedman & Emshwiller, *supra* note 1.

with little or no wine production. Local politicians are unlikely to favor out-of-state interests over a powerful local interest and industry.

Wholesaler's demonstrated their political power in the 106th Congress. Both the House and Senate have passed varying versions of the 21st Amendment Enforcement Act.⁶⁰ This act would permit states to ask for a federal court order blocking interstate sales of wine and spirits.⁶¹ Not surprisingly the bill's sponsor in the House, Representative Joe Scarborough, represents a district in Southern Wine & Spirits home state of Florida.⁶² The bill's sponsor in the Senate, Orrin Hatch, represents Utah, a state with some of the most austere liquor laws in the country.⁶³ As the legislation went to conference committee, the high-tech industry, fearing more e-commerce regulation, indicated its opposition to the law.⁶⁴ The Association for Interactive Media, representing Yahoo, America Online and other Internet companies, cautioned that the new law could invite both states and other nations to restrict e-commerce.⁶⁵ In addition, Mothers Against Drunk Driving withdrew support for the legislation, noting the dispute was between competing interests in the liquor business and not about sales to minors.⁶⁶ With mounting opposition and no position taken by the White House, the future of the 21st Amendment Enforcement Act remains uncertain.⁶⁷

F. Case Law

The 21st Amendment Enforcement Act is a product of the dilemma that has met state liquor enforcement efforts. States often lack personal jurisdiction over direct shippers in state courts and subject matter jurisdiction in federal courts.⁶⁸ For example, the Court of Appeals for the Eleventh

⁶⁰ See H.R. 2031, 106th Cong. (1999); S. 577, 106th Cong. (1999); see also Lochhead, *supra* note 21 (explaining the Senate and House proposals and reaction to them).

⁶¹ See Carl Hulse, *Wine Battle Looms Web Sales Restrictions Far-Reaching Foes Say*, PRESS DEMOCRAT, May 24, 1999, at B1, available at 1999 WL 5050314.

⁶² See Carolyn Lochhead, *Threat to Internet Sales Untorks a New Alliance*, SUN-SENTINEL (Fort Lauderdale, Florida), Nov. 7, 1999, at 18G, available at 1999 WL 29913048 (discussing high-tech industry's reaction to proposed law).

⁶³ See *id.*; see also Prial, *supra* note 12.

⁶⁴ See Lochhead, *supra* note 62.

⁶⁵ See *id.*

⁶⁶ See Hulse, *supra* note 61; see also Apple Jr., *supra* note 23.

⁶⁷ At the time of publication the 21st Amendment Enforcement Act had not become law.

⁶⁸ See *State v. Sam's Wines & Liquors*, 731 So. 2d 655, 655 (Fla. 1st DCA 1999) (affirming lower court dismissal of the charges); see also *Florida Dep't of Business Regulation v. Zachy's Wine & Liquor, Inc.*, 125 F.3d 1399, 1399 (11th Cir. 1997) (affirming district court decision to dismiss Florida action to enjoin four mail-order out-of-state wine distributors for lack of subject matter jurisdiction) *cert. denied*, 523 U.S. 1067 (1998).

Circuit heard a case where Florida sought to enjoin four out-of-state mail order wine distributors from violating Florida's direct shipment laws.⁶⁹ Without reaching any Twenty-first Amendment or Commerce Clause analysis, the Eleventh Circuit dismissed the case for lack of subject matter jurisdiction.⁷⁰ Furthermore, a Florida state court dismissed a similar action for lack of personal jurisdiction over an out-of-state shipper who did not ship sufficient quantities of alcohol to establish jurisdiction.⁷¹

The United States District Court for the District of Massachusetts also recently heard a civil case involving direct shipment.⁷² The Wine and Spirits Wholesalers of Massachusetts sued Virtual Vineyards and Federal Express Corporation for alleged tortious interference with business relations caused by direct shipment and sought injunctive relief.⁷³ In dismissing the case, the court noted the lack of any special legislative concern in protecting wholesalers from competition.⁷⁴ Furthermore, the court stated that the criminal statute did not confer the plaintiffs the right to restrain Virtual Vineyards business, even if Virtual Vineyards violated statutory provisions.⁷⁵

To date no Supreme Court case has addressed the validity of anti-direct shipment laws, but federal district courts have. One district court in New York heard a direct challenge to anti-direct shipment laws in 1970.⁷⁶ The court upheld a New York statute prohibiting direct shipment of alcohol.⁷⁷ In its ruling the court did not reach any Commerce Clause analysis because it found direct shippers conduct "resulted in an avoidance of New York state taxes" and adversely affected in-state businesses.⁷⁸ Consequently, the court found the Twenty-first Amendment "dispositive of the plaintiffs' claim."⁷⁹ However, it is important to note that this case was decided in 1970, before

⁶⁹ See *Zachy's Wine & Liquor*, 125 F.3d at 1402. Florida claimed an implied right of action under the Webb-Kenyon Act, 21 U.S.C. § 122 (1999), a 1913 precursor to the Twenty-first Amendment. The Act provides: "[t]he shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor . . . into any State . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State . . . is hereby prohibited." *Id.*

⁷⁰ See *Zachy's Wine & Liquor*, 125 F.3d at 1402.

⁷¹ See *Interstate Alcohol Sales and the 21st Amendment: Hearings on S. 577 Before Senate Judiciary Comm.*, 106th Cong. (1999) (statement of Wayne Klein, Assistant Attorney General State of Utah).

⁷² See *Wine & Spirits Wholesalers of Mass., Inc. v. Net Contents, Inc.*, 10 F. Supp. 2d 84 (D. Mass. 1998).

⁷³ See *id.* at 85.

⁷⁴ See *id.* at 87.

⁷⁵ See *id.* at 86-87.

⁷⁶ See *House of York, Ltd. v. Ring*, 322 F. Supp 530 (S.D.N.Y. 1970).

⁷⁷ See *id.* at 537.

⁷⁸ See *id.* at 533.

⁷⁹ *Id.*

Supreme Court decisions took a decidedly stricter view of the Twenty-first Amendment. Under a modern Commerce Clause analysis, these justifications are unlikely to pass constitutional muster. Recently, district courts in Texas and Indiana struck down anti-direct shipment laws as violations of the Commerce Clause.⁸⁰ A district court in Virginia will probably decide the next case challenging these laws this year.⁸¹

G. *Evaluating Wholesaler/State Arguments*

One argument posited by states and wholesalers is that direct shipments make underage purchases of alcohol easier.⁸² This emotionally charged argument is supported by reports of underage purchases and high profile sting operations.⁸³ Nevertheless, this argument has little merit. First, the stings were conducted mostly in states that ban direct shipment, where delivery people lack the training utilized in states where shipment is legal.⁸⁴ For instance, in California, which does not ban direct shipment, the Department of Alcoholic Beverage Control reported minimal complaints about minors buying alcohol through home delivery.⁸⁵ Additionally, Mothers Against Drunk Driving, a well-known organization opposed to under-aged drinking, withdrew its support from federal legislation proposing restrictions on Internet sales of alcohol.⁸⁶ The group's president said the fight was not about sales to minors, but rather factions in the alcohol industry fighting among themselves.⁸⁷ Secondly, with the average wine budget being \$7 to \$10, online wine marketers focus on selling value added and upscale

⁸⁰ See *Dickerson v. Bailey*, 87 F. Supp. 2d 691 (S.D. Tex. 2000); *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828 (N.D. Ind. 1999) *overruled by* *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000); see also *infra* Part III.D. discussing the proposition that Seventh Circuit Courts of Appeals decision was incorrect.

⁸¹ See *Bolick v. Roberts*, No. 3:99CV755 (E.D. Va. Nov. 15, 1999); see also Tom Campbell, *Wine-Shipment Law Challenged Individuals, Wineries are Suing ABC Board*, RICHMOND TIMES-DISPATCH, Nov. 18, 1999, at B1 (discussing two Virginians' and three out-of-state wineries' action against alcoholic beverage board in a constitutional challenge to laws prohibiting direct shipment of wine).

⁸² See Hulse, *supra* note 61; see also Lee, *supra* note 11; David Judson, *Hatch Hopes To Bottle Up Wine Sales Via Internet*, SALT LAKE TRIB., Mar. 23, 1999, at A12 (depicting Senator Hatch's battle to curtail sales of wine over the Internet).

⁸³ See Associated Press, *Group Agitating For End to Internet Beer Sales*, MODERN BREWERY AGE, Jan. 5, 1998, at 1, available at 1998 WL 10247843 (discussing cyber liquor issues); see also Anderson, *supra* note 57; DeLuca, *supra* note 1.

⁸⁴ See DeLuca, *supra* note 1.

⁸⁵ See Anderson, *supra* note 57.

⁸⁶ See Apple Jr., *supra* note 23.

⁸⁷ See *id.*

products in order to make a profit.⁸⁸ Thus, online merchants target wine collectors, gift purchasers, and upper income wine consumers.⁸⁹ These customers are willing to spend more.⁹⁰ It seems unlikely that a teen will seek out that highly recommended red Burgundy or a rare Rochioli Pinot Noir. Third, one online merchant described what a teen ordering online faces as: higher cost, a long wait, a credit card and “lying multiple times.”⁹¹ A local liquor store only requires a teen to lie once, if the teen is carded.

Another argument posited by states and wholesalers is that direct shippers do not pay state taxes. This argument has many flaws. First, it is self-serving because a state stands to lose money, a prospect few states like. Texas, for instance, collected almost \$1 billion in alcoholic beverage taxes last year,⁹² and Virginia collected \$19 million in wine taxes.⁹³ Yet, even in a large state like Texas, tax revenues lost to direct shipments are estimated at a mere \$300,000 because most direct shippers pay state taxes and the majority of wine is still sold through the three-tier system.⁹⁴ With such small sums at stake, this does not appear to be a strong state interest. Second, the tax revenue argument fails to consider that many other products are shipped interstate tax-free. Third, many direct shipment states require payment of local taxes.⁹⁵ The wine industry’s own code for direct shipping supports paying local taxes.⁹⁶ Finally, the forgone revenue will be minimal in states that do not have sales taxes.

H. Conclusions

It seems clear that legislators are under the influence of a powerful liquor wholesalers lobby, which represents significant contributions and in-state interests. Hence, the wholesaler’s combined organizational, political and historical advantages will likely trump out-of-state winery’s interests. Florida’s Attorney General aptly described the situation when he said, “the current bill (banning shipments) has harmed so many people for the benefit of a powerful few.”⁹⁷ Particularly revealing is that few states have banned

⁸⁸ See Hise, *supra* note 16; Everitt, *supra* note 42.

⁸⁹ See Hise, *supra* note 16; Everitt, *supra* note 42.

⁹⁰ See Hise, *supra* note 16.

⁹¹ See Everitt, *supra* note 42.

⁹² See Lee, *supra* note 11.

⁹³ See Campbell, *supra* note 81.

⁹⁴ See Lee, *supra* note 11.

⁹⁵ See Boulard, *supra* note 54; see also DeLuca, *supra* note 1.

⁹⁶ See Free the Grapes, *Direct Shipping Code of Practices for the Wine Industry* at <http://www.freethegrapes.org/html/news.html> (last visited Sept. 30, 2000).

⁹⁷ See Jim Scott, *Adventures in Wine, State Wine Shipping Law Benefits Special Interest*, FLA. TODAY,

intra-state direct shipments of alcohol. By failing to do so, states undermine any argument about underage drinking. It is also clear that state interests can be adequately protected by direct shipment legislation that mirrors the laws of states like Louisiana and New Hampshire or the wine industry's own code on direct shipping.⁹⁸ Ultimately, this debate may be decided in the courts, where the varying degrees of power wielded by interested parties should be a relevant consideration in assessing the validity of anti-direct shipment laws.

III. THE COMMERCE CLAUSE AND THE TWENTY-FIRST AMENDMENT

The Commerce Clause and the Twenty-first Amendment have an uneasy coexistence. The Supreme Court recognized that the Twenty-first Amendment grants the states broad regulatory power over the interstate commerce of liquor.⁹⁹ However, the Supreme Court stated that this regulatory power is not absolute and can be limited by the Commerce Clause in appropriate situations.¹⁰⁰ As Internet and other direct sales of wine flourish, anti-direct shipment laws play into the heart of this controversy.

A. Prohibition Era Laws

With the end of Prohibition in 1933, many states adopted new liquor laws. Section 2 of the Twenty-first Amendment provides 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."¹⁰¹ In the early years, the Supreme Court regarded the Twenty-first Amendment essentially as an exception to the dormant commerce clause leaving the states with sweeping powers to regulate alcohol.¹⁰² With regard to these powers the Supreme Court stated this segment of commerce is "unfettered by the Commerce Clause."¹⁰³ The Court espoused this view of the Twenty-first Amendment when it upheld a California law that imposed a licensing fee on imported beers, without imposing any fees on domestic beers, because of the Twenty-first

May 28, 1998, at 1E, available at 1998 WL 11935060.

⁹⁸ See Boulard, *supra* note 54; N.H. REV. STAT. ANN. § 175:6 (2000).

⁹⁹ See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964).

¹⁰⁰ *Id.* at 332.

¹⁰¹ U.S. CONST. amend. XXI, §2.

¹⁰² See generally *Hostetter*, 377 U.S. 324 (detailing the history of Twenty-first Amendment jurisprudence).

¹⁰³ See *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939).

Amendment.¹⁰⁴ This Prohibition era jurisprudence prevailed until the 1960s when the Supreme Court began to express its doubts about the states broad powers to regulate alcohol.

B. *Reigning in State Power - Tension Develops*

The turning point in Twenty-first Amendment jurisprudence arose in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*¹⁰⁵ where the Supreme Court held that the state of New York could not interfere with sales of alcohol to departing international airline passengers because of the Commerce Clause.¹⁰⁶ The Court defined the contours of commerce power by concluding that interpreting the Twenty-first Amendment to somehow repeal the Commerce Clause with respect to regulating alcohol would be an "absurd oversimplification" and that such a conclusion would be "patently bizarre."¹⁰⁷ The Court also added that both the Commerce Clause and Twenty-first Amendment are part of the same Constitution and should be consider in light of each other.¹⁰⁸ Finally, the Court noted that after careful scrutiny federal and state interests can be reconciled by balancing the weight behind the interests at stake.¹⁰⁹

After *Hostetter*, the once unfettered power of the states to regulate alcohol began to erode. Supreme Court decisions indicated that the Twenty-first Amendment could not save every state liquor law. The Court affirmed a California decision that struck down a law regulating wine prices.¹¹⁰ Shortly thereafter, the Court struck down a Hawaiian law that exempted certain locally produced wine from an excise tax as a violation of the Commerce Clause.¹¹¹ The Court characterized Twenty-first Amendment jurisprudence as a "pragmatic effort to harmonize state and federal powers."¹¹² Additionally, the Court noted that the "federal government retains some Commerce Clause authority over liquor."¹¹³

These cases also recognized the ambiguity underlying the Twenty-first Amendment. The Court stated that despite the broad language of some

¹⁰⁴ See *State Board v. Young's Market Co.*, 299 U.S. 59, 60-62 (1936).

¹⁰⁵ 377 U.S. 324 (1964).

¹⁰⁶ See *id.* at 325.

¹⁰⁷ See *id.* at 331-32.

¹⁰⁸ See *id.* at 332.

¹⁰⁹ See *id.*

¹¹⁰ See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

¹¹¹ See *Bacchus Imp., Ltd. v. Dias*, 468 U.S. 263 (1984).

¹¹² See *Midcal Aluminum*, 445 U.S. at 109; see also *Bacchus Imp.*, 468 U.S. at 275 (outlining the Twenty-first Amendment and commerce power).

¹¹³ *Midcal Aluminum*, 445 U.S. at 108.

opinions written after ratification of the Twenty-first Amendment, the legislative history was obscure.¹¹⁴ Apparently the Senator sponsoring the Twenty-first Amendment supported varying interpretations of its meaning. Once, the Senator stated that the Amendment's purpose was to restore to the States absolute control over the interstate commerce of liquor.¹¹⁵ On another occasion, he stated this Constitutional Amendment would assure dry states of the ability to prohibit the importation of alcohol.¹¹⁶ Ultimately, in evaluating this checkered past, the Supreme Court stated, "[i]t is by now clear that the Twenty-first Amendment did not entirely remove state regulation of alcohol from the ambit of the Commerce Clause."¹¹⁷

To effect harmony between state and federal interests, the Supreme Court utilized a balancing process. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*,¹¹⁸ the Court weighed the competing federal interest of a competitive economy against the state interests of temperance and protecting small retailers.¹¹⁹ The Court found the state concerns were "not of the same stature" as the federal interest in competition.¹²⁰ The question left unresolved by *Midcal* was what interests were "appropriate situations" for federal commerce power to be applied.

In *Bacchus Imports, Ltd. v. Dias*,¹²¹ the Supreme Court conducted a two-part analysis asking whether the state law resulted in a Commerce Clause violation and whether the violation is permissible under the Twenty-first Amendment.¹²² To assess whether there was a Commerce Clause violation, the Court evaluated whether the purposes underlying the state law were discriminatory and if the law would have a discriminatory effect.¹²³ A finding may be made that the state legislation constitutes "economic protectionism," and therefore likely violates the Commerce Clause if either the purpose or effect of a law is discriminatory.¹²⁴ In *Bacchus*, the Court decided that favorable treatment of locally produced goods that compete with goods from outside the state constituted discrimination.¹²⁵ Additionally, the Court noted

¹¹⁴ See *Bacchus Imp.*, 468 U.S. at 274.

¹¹⁵ See *id.* at 275.

¹¹⁶ See *id.*

¹¹⁷ *Id.*

¹¹⁸ 445 U.S. 97 (1980).

¹¹⁹ See *id.* at 113-14.

¹²⁰ See *id.* at 114.

¹²¹ 468 U.S. 263 (1984).

¹²² See *id.* at 274.

¹²³ *Id.*

¹²⁴ *Id.* at 270.

¹²⁵ See *id.* at 271.

that states could not bolster local commerce through "unequal and oppressive burdens" on the industry of other states.¹²⁶

In *Bacchus*, the Court also rejected the argument that the Twenty-first Amendment could save discriminatory liquor laws from a Commerce Clause violation.¹²⁷ The Court said, "[o]ne thing is certain: The central purpose of the [Amendment] was not to empower states to favor local liquor industries by erecting barriers to competition."¹²⁸ The Court emphasized the importance of using the Commerce Clause to prevent economic Balkanization.¹²⁹ Furthermore, the Court stated that laws which constitute economic protectionism are not entitled to the same deference as laws enacted "to combat the perceived evils of an unrestricted traffic in liquor."¹³⁰ Finally, the Court reiterated that both Commerce Clause and Twenty-first Amendment should be considered in light of the other, while noting the trend toward harmonizing federal and state powers in this area.¹³¹

Later that year, the Court defined the fundamental question as "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."¹³² In the same opinion, the Court stated that a state's central powers under the Twenty-first Amendment were "regulating the times, places, and manner under which liquor may be imported and sold."¹³³

C. *A Time for Change*

A challenge to anti-direct shipment laws would require a court to conduct a Commerce Clause analysis and determine whether any state law violations are permitted under the Twenty-first Amendment. This note contends that the anti-direct shipment laws are unconstitutional.

The value of total sales of wine shipped directly is estimated at \$500 million annually.¹³⁴ Many small wineries rely on direct sales because they cannot get a distributor to handle their products and many consumers rely

¹²⁶ See *id.* at 272 (quoting *Guy v. Baltimore*, 100 U.S. 434 (1880)).

¹²⁷ See *id.* at 276.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.* at 275.

¹³¹ See *id.*

¹³² *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984).

¹³³ *Id.* at 716.

¹³⁴ Freedman & Emshwiller, *supra* note 1.

on the Internet to get their favorite wines.¹³⁵ Fueled by a growing independent wine industry and burgeoning Internet retail sales this market can only grow.¹³⁶ These facts and the above analysis¹³⁷ demonstrate the commercial importance of direct shipment. However, states that ban direct shipment contend that their interest in maintaining the three-tier system, to prevent underage drinking and secure tax revenues, is permitted under the Twenty-first Amendment.¹³⁸ Consequently, the battle lines are drawn.

The first question to consider is whether anti-direct shipment laws violate the Commerce Clause. The Supreme Court has recognized that the Commerce Clause limits state power to discriminate against interstate commerce and that this “negative” aspect of Commerce power prohibits “measures designed to benefit in-state economic interests by burdening out-of-state competitors.”¹³⁹ The Court has also distinguished between laws that affirmatively discriminate against interstate commerce and those that burden such transactions only incidentally.¹⁴⁰ Laws that discriminate incidentally are subject to the balancing approach delineated in *Pike v. Bruce Church, Inc.*¹⁴¹ However, where a law affirmatively discriminates against interstate commerce the burden is on the state to show that the statute serves a legitimate local purpose and that this purpose could not be achieved through available nondiscriminatory means.¹⁴² The Court noted that, “state statutes that clearly discriminate against interstate commerce are routinely struck down.”¹⁴³

The Supreme Court explained that a state law could affirmatively discriminate against interstate commerce “either on its face or in practical effect.”¹⁴⁴ The Florida Statute bans direct shipment of alcoholic beverages by out-of-state persons in the business of selling such beverages to any Florida resident who is not a liquor wholesaler.¹⁴⁵ The statute also indicates that the law’s underlying purpose is to mitigate threats to public health and state

¹³⁵ See *id.*; see also Lochhead, *supra* note 21 (explaining the difficulty for small wineries to deal with distributors).

¹³⁶ See Campbell, *supra* note 81.

¹³⁷ See *supra* Part II.

¹³⁸ See FLA. STAT. § 561.545 (1999); Campbell, *supra* note 81.

¹³⁹ See *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988).

¹⁴⁰ See *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

¹⁴¹ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (stating the burdens on commerce are clearly excessive in relation to putative local benefits).

¹⁴² See *Taylor*, 477 U.S. at 138.

¹⁴³ *Limbach*, 486 U.S. at 274.

¹⁴⁴ See *Taylor*, 477 U.S. at 138 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

¹⁴⁵ See FLA. STAT. § 561.545 (2000).

revenue collection.¹⁴⁶ Many other states have similar statutes.¹⁴⁷ As the Florida law does not ban intrastate shipments of alcohol, it is evident that the law is specifically designed to halt interstate commerce.¹⁴⁸ Thus, it seems clear that these laws are discriminatory both facially and practically against out-of-state interests constituting a *per se* violation of the Commerce Clause.

Additionally, anti-direct shipment laws place substantial burdens on interstate commerce that are inimical to established constitutional principles.¹⁴⁹ In *Midcal*, the Supreme Court said, "[t]he federal interest in enforcing the national policy in favor of competition is both familiar and substantial."¹⁵⁰ In another alcohol case, the Court stated that discrimination between in-state and out-of-state was a violation of the Commerce Clause.¹⁵¹ Furthermore, the Court stated, "[t]he [C]ommerce [C]lause forbids discrimination whether forthright or ingenious."¹⁵²

In *Exxon Corp. v. Maryland*,¹⁵³ the Supreme Court evaluated whether the effects of a state law were discriminatory and burdensome on interstate commerce.¹⁵⁴ In *Exxon*, the Court examined whether the state law prohibited the flow of interstate commerce, added costs to out-of-state goods, and distinguished between in-state and out-of-state companies.¹⁵⁵ Additionally, the Court considered whether the state law caused local goods to constitute a larger share of the market and out-of-state goods to constitute a smaller share.¹⁵⁶ Anti-direct shipment laws fail all of the criteria utilized in *Exxon*.

The express purpose of anti-direct shipment laws is to stop the flow of interstate commerce by prohibiting direct interstate shipments of alcohol.¹⁵⁷ Utilizing the three-tier distribution system inherently adds costs to out-of-state goods, by involving a middleman, in what has been characterized as the "most expensive distribution system of any packaged good."¹⁵⁸ The chief executive of the world's largest distiller called for changes to the industry's

¹⁴⁶ See *id.*

¹⁴⁷ See Wine Institute, *supra* note 15.

¹⁴⁸ See generally FLA. STAT. § 561.545 (1999).

¹⁴⁹ See *supra* Part II.

¹⁵⁰ California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc., 445 U.S. 97, 110 (1980).

¹⁵¹ See Bacchus Imp., Ltd. v. Dias, 468 U.S. 263, 268-69 (1984).

¹⁵² See West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994) (quoting Best & Co. v. Maxwell, 311 U.S. 454, 455-56 (1940)).

¹⁵³ 437 U.S. 117 (1978).

¹⁵⁴ See generally *id.* (describing what effects of a state law are discriminatory and burdensome on interstate commerce).

¹⁵⁵ See *id.* at 126.

¹⁵⁶ *Id.*

¹⁵⁷ See FLA. STAT. § 561.545 (1999); Wine Institute, *supra* note 15.

¹⁵⁸ See Freedman & Ermswiller, *supra* note 1.

antiquated prohibition era laws and regulations.¹⁵⁹ Additionally, prohibiting direct sales from out-of-state companies distinguishes in-state liquor retailers by protecting them from out-of-state competition and increasing the pricing power of the biggest wholesalers.¹⁶⁰ Finally, these prohibitions will affect the market share controlled by local industry. Precluding outside competitors will enable established local distributors to retain their monopolistic powers and out-of-state retailers will have no share of the local retail market. Consequently, anti-direct shipment laws violate the Commerce Clause by discriminating against interstate commerce.

Where discrimination against interstate commerce is demonstrated, the Supreme Court placed the burden on the state to justify the local benefits derived from the statute and the unavailability of nondiscriminatory alternatives sufficient to preserve local interests.¹⁶¹ The first argument posited by proponents of anti-direct shipment laws is that direct shipment fosters underage drinking. However, as previously noted, these arguments contain little merit.¹⁶² Merchants who sell alcohol over the Internet target consumers who are willing to spend more money than the average consumer.¹⁶³ Hence, their products cost more. Additionally, Internet sales involve lengthy delivery times and require a credit card.¹⁶⁴ Underage purchasers also face the inherent deterrents of higher costs and delivery delays as well as an increased risk of getting caught. An underage purchaser must lie when placing an order and lie to the delivery person, while providing a credit card and delivery address through which the person can be tracked down. Thus, it seems unlikely that Internet retailers provide a convenient mechanism for underage people to purchase alcohol.

The other argument posited by proponents of anti-direct shipment laws is that direct shippers do not pay state taxes. However, there appears to be no strong state interest underlying the tax argument.¹⁶⁵ First, many out-of-state products are shipped into every state tax-free. Second, the lost tax revenue is small. Third, the industry is willing to pay the taxes.¹⁶⁶ Finally,

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977); see also *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (saying cannot impose burden on interstate commerce where reasonable nondiscriminatory alternatives adequate to protect local interests are available).

¹⁶² See *supra* Part II.G.

¹⁶³ See *Hise*, *supra* note 16.

¹⁶⁴ See *supra* note 88 - 91, and accompanying text.

¹⁶⁵ See *supra* Part II.G.

¹⁶⁶ See *Free the Grapes*, *supra* note 52.

states that permit direct shipment generally require payment of local taxes. Thus, the tax argument contains little merit.¹⁶⁷

The industry has also proposed comprehensive regulations that accommodate state interests and mirror the laws of states which permit direct shipment.¹⁶⁸ These regulations are guided by three principles. First, that all state taxes be paid.¹⁶⁹ Second, that sales to minors be restricted.¹⁷⁰ Third, that state and local prohibition or "dry" laws be respected.¹⁷¹ The regulations provide common sense solutions to achieve these goals including: 1) that wine shipped directly be for personal use only, 2) that no shipments go to "dry" localities, 3) the cartons be labeled "signature of person age 21 or older required for delivery," 4) direct shippers verify the age of any purchaser, 5) training for sellers, shippers, and purchasers to effect compliance, and 6) reporting requirement to state authorities.¹⁷²

New Hampshire and Louisiana recently passed laws that reflect the goals outlined in these regulations.¹⁷³ The New Hampshire statute limits the quantities that may be shipped, requires shippers to get a license, and has comprehensive labeling requirements.¹⁷⁴ New Hampshire also requires that sellers make any products sold directly available to the New Hampshire State Liquor Commission in equal quantities and at the same price.¹⁷⁵ Ultimately, this provision will benefit consumers as popular and hard to find products may become available at state liquor stores. Consequently, consumers benefit from the convenience and expanded choice, while sellers benefit from broader market exposure and increased sales.

Another factor considered in *Exxon* was universality.¹⁷⁶ The Court upheld a Maryland statute prohibiting oil refiners from operating retail outlets.¹⁷⁷ The Court reasoned that absent any local oil refiners there was no disparate treatment between local and interstate commerce.¹⁷⁸ In doing so the Court refused to evaluate the economic wisdom or consequences of the

¹⁶⁷ See *supra* notes 93 - 97, and accompanying text.

¹⁶⁸ See *Free the Grapes*, *supra* note 52.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See Boulard, *supra* note 54; N.H. REV. STAT. ANN. § 178:14-a (2000).

¹⁷⁴ See N.H. REV. STAT. ANN. § 178:14-a (2000).

¹⁷⁵ See *id.*

¹⁷⁶ See *Exxon Corp. v. Maryland*, 437 U.S. 117, 125 (1978) (finding no discrimination against out-of-state goods because where there are no local producers there is no disparate treatment between local and interstate commerce).

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 124.

state's action.¹⁷⁹ Instead, the Court upheld the statute by concluding that the law would not affect the supply or demand for petroleum products.¹⁸⁰ States with little or no wine production similarly may argue that their anti-direct shipment statutes treat all commerce in alcohol equally and therefore do not discriminate against interstate commerce. This argument should fail for several reasons. First, it is apparent that anti-direct shipment laws do affect supply and demand by restricting small wineries from various markets.¹⁸¹ When a winery cannot market its goods through a distributor or ship directly to certain states, supply is restricted. With supply being restricted, demand for the winery's products will not grow. Second, the Court's analysis in *Exxon* is a departure from prior cases where the court intervened after careful economic analysis.¹⁸² In *Katzenbach*, for example, the Court found that the purchase of \$69,683 of meat from out-of-state suppliers had a substantial impact on interstate commerce.¹⁸³ The Court examined economic factors including per capita spending, income differences, effects on general business, demand and burdens placed on interstate commerce.¹⁸⁴ Third, it is well established that our system, guided by the vision of the Founders, promotes free access to every market.¹⁸⁵ Fourth, the Court has recognized the strong federal interest in preventing economic Balkanization.¹⁸⁶ Finally, the Court has noted that advances in the mobility of people, goods, and services give discriminatory practices a far larger impact on interstate commerce.¹⁸⁷

D. How to Challenge the Seventh Circuit's Decision in *Bridenbaugh*

The Seventh Circuit Court of Appeals' decision in *Bridenbaugh v. Freeman-Wilson*¹⁸⁸ failed to evaluate the scope of the injury imposed by anti-direct shipment laws.¹⁸⁹ Instead, the court reasoned that Congress intended to incorporate the Webb-Kenyon Act into Section 2 of the Twenty-first Amendment, thereby preventing application of the dormant commerce

¹⁷⁹ See *id.* at 127.

¹⁸⁰ See *id.* at 126.

¹⁸¹ See Freedman & Emshwiller, *supra* note 1.

¹⁸² See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (finding that the purchase of \$69,683 in meat from out-of-state has a substantial effect on interstate commerce).

¹⁸³ See *id.*

¹⁸⁴ See *id.* at 299.

¹⁸⁵ See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

¹⁸⁶ See *Bacchus Imp., Ltd. v. Dias*, 468 U.S. 263, 267 (1984).

¹⁸⁷ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 251 (1964).

¹⁸⁸ 227 F.3d 848 (7th Cir. 2000).

¹⁸⁹ See generally *id.*

clause.¹⁹⁰ However, the Supreme Court has noted that legislative history of the Twenty-first Amendment was obscure.¹⁹¹ The Seventh Circuit's decision assumed that because Section 2 of the Twenty-first Amendment "tracks" the Webb-Kenyon Act, it demonstrates Congress' intent to permit state direct shipment prohibitions.¹⁹² Beyond this "tracking" argument the court provides no further justification for its view of the Twenty-first Amendment's legislative history.

IV. CONCLUSION

If states enacted laws to protect local commerce and discriminate against out-of-state commerce such laws would violate the Commerce Clause. Yet, anti-direct shipment laws endure because alcohol has been distinguished from other commodities. Legislators under the influence of omnipotent political lobbies have encumbered interstate commerce to protect the monopolistic power of in-state liquor wholesalers to the detriment of out-of-state suppliers. The proponents of anti-direct shipment justify their decisions with "boilerplate" appeals to temperance and public good. As these laws are challenged, courts should recognize these arguments as mere pretexts. Political convenience, powerful lobbies, and slick packaging are not justifications for laws that benefit a select few and injure many. Moreover, they are not justifications for laws that unconstitutionally interfere with interstate commerce.

Modern Constitutional jurisprudence places the burden on states to show legitimate purposes behind discriminatory statutes and why local purposes cannot be achieved through non-discriminatory means.¹⁹³ Restricting direct sales of alcohol serves only to protect local wholesalers at the expense of consumers, small wineries, specialty alcohol producers, and national competition. States can effectively secure tax revenues and prevent underage purchases through the simple mechanisms already in place. In an age of unprecedented mobility of goods and services the public interest is served by promoting a competitive national economy, an interest that the Supreme Court recognized characterized as both "familiar and substantial."¹⁹⁴ Consequently, courts should apply the modern Commerce Clause analysis

¹⁹⁰ See *id.* at 853.

¹⁹¹ See *Bacchus Imp.*, 468 U.S. at 274.

¹⁹² See *Bridenbaugh*, 227 F.3d at 853.

¹⁹³ See *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

¹⁹⁴ See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

utilized in this article and the *Dickerson*¹⁹⁵ summary judgment order to find that direct shipment laws are unconstitutional.¹⁹⁶

¹⁹⁵ 87 F. Supp. 2d 691 (S.D. Tex. 2000).

¹⁹⁶ See *id.* at 710 (striking down state anti-direct shipment statute as unconstitutional violation of commerce clause).

