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WINE, COMMERCE, AND THE CONSTITUTION[†]

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Last December, the Supreme Court heard oral argument in three cases that will decide whether states can allow in-state wineries, but not out-of-state wineries, to ship wine directly to consumers. These cases raise thorny constitutional and policy issues. The plaintiffs, consumers and wineries, argue that the dormant Commerce Clause prevents states from discriminating against out-of-state residents through overtly protectionist regulation. They also argue that interstate direct shipping of wine, like e-commerce generally, benefits consumers. The defendants, states and wine wholesalers, counter that the Twenty-First Amendment specifically authorizes states to control alcohol distribution and even to discriminate against out-of-state residents. They also argue that states treat out-of-state wineries differently for valid policy reasons, including concerns about underage drinking and tax collection.

Both legal and policy considerations, however, strongly favor consumers and wineries. The Commerce Clause dictates that merchants located in one state should have free and full access to markets in other states. Moreover, despite some suggestions to the contrary, the Twenty-First Amendment's text, purpose, history, and surrounding case law indicate that it was enacted to *forbid* discrimination against alcohol vendors based on residency. The Amendment restored the constitu-

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[†] As this article was going to press, the Supreme Court, on May 16, 2005, issued its decision in *Granholm v. Heald*. The decision, which largely accords with the analysis set forth in this article, held that states may not allow intrastate direct shipping of wine while prohibiting interstate direct shipping.

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tional and legal balance that existed prior to the enactment of the 18th Amendment and federal Prohibition. Under that earlier regime, states could use their general police power to regulate the distribution and sale of alcohol within their borders. The states' police power, however, did not extend to interfering with or discriminating against interstate commerce. As a result, states could restrict the manufacture, sale, and consumption of alcohol, but only in an even-handed manner.

Policy considerations also favor free trade. Empirical evidence indicates that direct shipping benefits consumers through lower prices, greater selection, and increased convenience. In addition, as many states themselves have noted, states can satisfy their regulatory objectives through less restrictive alternatives than a complete ban on interstate direct shipping, such as by requiring an adult signature at the point of delivery. States that allow direct shipping report few or no problems with shipments to minors or tax collection.

Part I of this article discusses the dormant Commerce Clause, including its purposes, constitutional foundations, and impact on consumers and competition. Part II analyzes the ratification of the Twenty-First Amendment, and concludes that nothing in the Amendment's history or structure suggests that it permits states to erect discriminatory barriers to interstate commerce. Part III briefly discusses and debunks an alternative theory, that Congress "redelegated" its Commerce Clause authority to the states through the Twenty-First Amendment and subsequent statutory enactments, thereby enabling the states to discriminate. Part IV reviews the Supreme Court's jurisprudence regarding the Commerce Clause. As those decisions show, the Court has interpreted the 21st Amendment to be consistent with other provisions of the Constitution, including both the individual rights and structural provisions, such as the Commerce Clause and the Export-Import Clause. Part V discusses the states' policy considerations in administering their alcohol regulations, and shows that the states have not demonstrated a need to discriminate to effectuate their "core concerns" under the 21st Amendment. Part VI debunks a final theory, that the laws in question are not actually discriminatory. Part VII concludes.

I. The Commerce Clause

A. Purpose of Commerce Clause

A central purpose of the Constitution is to protect the free flow of goods among the states.[1] "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."[2] After the Revolutionary War, "a drift toward anarchy and commercial warfare between the states began" that ulti-

[1] *See* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, Social Science Research Network Electronic Library at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=588261 (2005).
[2] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J.).

mately "came 'to threaten at once the peace and safety of the Union.'"[3] These commercial differences were "the immediate cause that led to the forming of a [constitutional] convention."[4] The Founders believed that "to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[5] In arguing for the Constitution's ratification, Alexander Hamilton stated that "an unrestrained intercourse between the States themselves will advance the trade of each," but that without the Constitution, "this intercourse would be fettered, interrupted, and narrowed by a multiplicity of causes . . . ."[6]

The Commerce Clause enshrines the Founders' purpose by prohibiting protectionist state regulation.[7] The Commerce Clause provides, in part, that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States."[8] Although the Clause grants affirmative power to Congress, "It has long been accepted that the Commerce Clause . . . directly limits the power of the States to discriminate against interstate commerce. This 'negative' aspect of the Commerce Clause prohibits economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[9] In stressing this aspect of the Commerce Clause, James Madison wrote that it "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves."[10]

For over 175 years, the Supreme Court has consistently recognized that the Commerce Clause prohibits states from discriminating against out-of-state merchants absent a substantial, non-protectionist state interest.[11] Although the exact contours of the Commerce Clause remain unsettled, in recent years the Supreme Court has unanimously held that protectionist, discriminatory state laws violate the

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[3] H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 533 (1949) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 259-60 (1833)).
[4] *Gibbons*, 22 U.S. at 224.
[5] Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).
[6] THE FEDERALIST NO. 11 (Alexander Hamilton).
[7] *See generally* Denning, *supra* note 1.
[8] U.S. CONST. art. I, § 8, cl. 3.
[9] New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988) (citations omitted); *accord* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984) ("One of the fundamental purposes of the Clause 'was to insure . . . against discriminating State legislation.'") (quoting Welton v. Missouri, 91 U.S. 275, 280 (1876)); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935) ("[A] chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.'") (citing 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 308 (1911)).
[10] 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (1911), *cited in* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 n.9 (1994).
[11] *E.g.*, Healy v. Beer Inst. Inc., 491 U.S. 324, 340-43 (1989) (invalidating Connecticut's beer-price affirmation statute as facially discriminatory); *Baldwin*, 294 U.S. at 521-22 (invalidating New York price-control law that discriminated against out-of-state milk producers); Welton v. Missouri, 91 U.S. 275 (1875) (invalidating discriminatory Missouri license tax on importers of out-of-state products); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (Johnson, J.) (invalidating New York law granting monopoly for the navigation of state waters).

Commerce Clause.[12] This interpretation flows directly from the purpose of the Constitution and the intent of the Founders:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[13]

B. Benefits of Interstate Commerce in the Wine Market

As contemplated by the Framers, interstate commerce, including the interstate direct shipping of wine, offers substantial benefits to consumers. Economic studies have found that direct shipping allows consumers to find a greater variety of wines at lower prices.[14] For example, direct shipping allows consumers to purchase many wines that are not available in nearby bricks-and-mortar stores. An FTC staff study found that 15% of a sample of popular wines available online were not available from retail wine stores within ten miles of McLean, Virginia.[15] Direct shipping also gives consumers easier access to thousands of labels from smaller wineries.[16]

Moreover, depending on the wine's price, the quantity purchased, and the method of delivery, consumers can save money by having wine shipped directly to them. Because shipping costs do not vary with the wine's price, consumers can save more money on more expensive wines, while less expensive wines may be cheaper in bricks-and-mortar stores. The FTC staff study suggests that, if consumers use the least expensive shipping method, they could save an average of 8-13% on wines costing more than $20 per bottle, and an average of 20-21% on wines costing more than $40 per bottle.[17]

II. The Twenty-First Amendment

Consistent with the Commerce Clause, the text and history of the 21st Amendment indicate that it does not authorize states to discriminate against inter-

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[12] Fulton Corp. v. Faulkner, 516 U.S. 325, 345-46 (1996); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988) (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270-73 (1984)).
[13] H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).
[14] *See* FEDERAL TRADE COMMISSION, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE, A REPORT FROM THE STAFF OF THE FTC 3-4 (July 2003), http://www.ftc.gov/os/2003/07/winereport2.pdf (July 2003); Alan E. Wiseman & Jerry Ellig, *Market and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia*, 6 BUS. & POL. 2 (2004) *at* http://www.bepress.com/cgi/viewcontent.cgi?article=1070&context=bap.
[15] Wiseman, supra note 14, at 18.
[16] *Id.* at 22.
[17] *Id.* at 19-21.

state commerce.[18] Instead, Section 2 of the Amendment was intended to protect the states from having to discriminate *in favor of* interstate commerce, as the Court's Commerce Clause precedents then required. The historical record indicates that Section 2 was designed to assist dry states in the valid exercise of their police powers, not to empower wet states to engage in economic warfare against out-of-state liquor. "Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower states to favor local liquor industries by erecting barriers to competition."[19]

A. The Nineteenth Century Legal Landscape

> Prior to Prohibition, the states were free to regulate alcohol production within their own borders and even ban the manufacture and sale of alcohol produced within the State.[20] In 1847, in the *License Cases*, Chief Justice Taney wrote, "If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."[21] Forty years later, in *Mugler v. Kansas*, the Court reiterated that states had "the acknowledged right . . . to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government."[22]

Mugler held that a state could ban the manufacture of alcohol for purely personal use, as opposed to manufacture for sale or commerce:

> But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public. . . . Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.[23]

The Court, however, understood the Commerce Clause to prevent the states from regulating any aspect of the transportation of *imported* liquor into the state, or the sale of imported liquor in its original package.[24] As a result of the latter

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[18] *E.g.*, Healy v. Beer Inst., 491 U.S. 324, 341-42 (1989); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270-73 (1984).
[19] *Bacchus*, 468 U.S. at 276.
[20] *See* Thurlow v. Massachusetts (The License Cases), 46 U.S. (5 How.) 504, 570 (1847).
[21] *Id.* at 577.
[22] Mugler v. Kansas, 123 U.S. 623, 659 (1887).
[23] *Id.* at 660-61.
[24] Leisy v. Hardin, 135 U.S. 100, 110 (1890) (holding that "the power of the State" to regulate imports "commences . . . not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which

restriction, known as the Original Package doctrine, the states could not regulate imported alcohol until its first sale in the state or until it was removed from its original package. This created an anomaly, in that "states could forbid domestic production of alcoholic beverages but could not stop imports; the Constitution effectively favored out-of-state sellers."[25]

Quite aside from the Original Package doctrine, then (as now) the Commerce Clause was also understood to prohibit states from discriminating against alcohol manufactured in another state, even though the states could exercise their police power to control local matters concerning alcohol.[26] In other words, states could not exercise their police power in a discriminatory manner. In *Walling v. Michigan*, for instance, the Supreme Court invalidated a tax on out-of-state merchants:

> [T]he statute of 1875 . . . impose[s] a tax or duty on persons who, not having their principal place of business within the state, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the state. If this is not a discriminating tax leveled against persons for selling goods brought into the state from other states or countries, it is difficult to conceive of a tax that would be discriminating. It is clearly within the decision of Welton v. Missouri, 91 U. S. 275, where we held a law of the state of Missouri to be void which laid a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares, or merchandise, not the growth, product, or manufacture of that state, and which did not lay a like tax upon the sale of similar articles, the growth, product, or manufacture of Missouri . . . .
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> A discriminating tax imposed by a state, operating to the disadvantage of the products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the constitution upon the congress of the United States. . . . We have also repeatedly held that so long as congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that such commerce shall be free and untrammeled, and that any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom.[27]

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happens when the original package is no longer such in his hands"); Bowman v. Chicago & N.W. Ry., 125 U.S. 465, 479-80 (1888).

[25] Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 852 (7th Cir. 2000).

[26] *See* Walling v. Michigan, 116 U.S. 446, 460 (1886).

[27] *Id.* at 455 (emphasis added).

Using their police power, therefore, states could regulate the local manufacture and sale of alcohol, but could not use this power to engage in economic warfare against their neighbors.

B. The Wilson Act

Although states had no legitimate policy reason for discriminating against interstate commerce, the Original Package doctrine undermined their authority to prohibit alcohol consumption. In response to that problem, Congress passed the Wilson Act of 1890 (also known as the Original Package Act).[28] That Act provides that "[a]ll . . . intoxicating liquors or liquids transported into any State . . . or remaining therein for use, consumption, sale or storage . . . shall, upon arrival . . . be subject to . . . the laws of such State . . . enacted in the exercise of its police power to the same extent and in the same manner as though such liquids or liquors had been produced in such State . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."[29]

As a result of its language requiring states to regulate imported liquor "to the *same* extent and in the *same* manner" as domestic products, the Wilson Act retained the Commerce Clause's bar on state discrimination against interstate commerce. In *Scott v. Donald*, the Supreme Court held that under the Wilson Act courts must determine "whether a given state law is a *lawful* exercise of its police power . . . when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in and importing them from other states."[30]

In essence, *Scott* held that the purpose of the Wilson Act was to resolve the conflict between the federal Commerce Clause and the state's police power by overruling the Original Package doctrine.[31] The Wilson Act built upon the foundation of the state's police power to regulate alcohol, leaving alone both the state's police power to regulate local affairs and the traditional ban on using that police power to discriminate against interstate commerce. The *Scott* Court invalidated a state law because the law discriminated against interstate commerce, even though it did not completely prohibit the manufacture or sale of alcohol. Although *Scott* recognized that the state law "was passed in the bona fide exercise of the police power, the Court nevertheless invalidated the law because it discriminated against interstate commerce."[32]

In so doing, the Court specifically held that the Wilson Act did not authorize discrimination:

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[28] 26 Stat. 313 (1890) (current version at 27 U.S.C. § 121 (2003)).
[29] *Id.*
[30] 165 U.S. 58, 100-01 (1897).
[31] *Id.* at 98-99.
[32] *Id.* at 91.

> That law was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are, therefore, the subjects of legitimate commerce . . . evidently equality or uniformity of treatiment [sic] under state laws was intended. The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid; or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the state cannot, under the congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful.[33]

As *Scott* indicated, therefore, a state's power to regulate alcohol remained grounded in its police power, and the Wilson Act was intended to plug a hole that had been caused by the Original Package doctrine. Nothing in the Wilson Act suggested that Congress intended to overturn the longstanding principle recognized in *Walling* or permit states to discriminate against out-of-state alcohol.[34]

Despite Congress's intent, however, subsequent court decisions undermined the Wilson Act by barring dry states from prohibiting the interstate shipment of alcohol directly to consumers, so long as the alcohol was in its original package and was intended for purely personal use, not resale.[35] Those decisions forced states to allow the entry of out-of-state alcohol products even if those products were illegal within the state,[36] seriously undermining state prohibition laws.[37] In particular, importers exploited the "personal use" loophole by using fictitious names and making orders far in excess of the reasonable amounts necessary for personal use, which ostentatiously arrived on railroad platforms, flouting state laws.[38]

C. The Webb-Kenyon Act

In 1913, Congress attempted to close this remaining gap in state enforcement power with the Webb-Kenyon Act. The Act prohibited, as a matter of federal law, "[t]he shipment or transportation" of alcohol into a State that "is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such

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[33] *Id.* at 100.

[34] Incidentally, the Wilson Act remains in effect today, and *Scott* has never been overturned or questioned. If Webb-Kenyon or the 21st Amendment were intended to overturn the nondiscrimination principle of the Wilson Act and *Scott*, one would expect to find some reference to that principle.

[35] Wilkerson v. Rahrer, 140 U.S. 545, 564-65 (1891); Rhodes v. Iowa, 170 U.S. 412, 420-26 (1898).

[36] *See* James Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311, 323 (1917).

[37] *See* 49 CONG. REC. 700 (Dec. 16, 1912); H.R. REP. NO. 1258-74, at 2-3 (1935).

[38] *See* 49 CONG. REC. 700 (daily ed. Dec. 16, 1912) (statement of Sen. McCumber) (stating that several large barrels of whisky were shipped to one Tennessee consignee, ostensibly for personal use).

State."[39] The statutory text nowhere suggests that Congress intended to authorize states to discriminate against out-of-state liquor products. To the contrary, the statute bars the transportation of liquor into a state only when the liquor would be "received, possessed, sold, or in any manner used" in violation of generally-applicable state laws.

The Act's history confirms that Congress "intended to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a State or Territory and intended to be used therein in violation of the law of such State or Territory."[40] As the Supreme Court noted in upholding its constitutionality, "Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court . . . there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act."[41] In particular, the Court held, the Act's purpose was "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught."[42]

Webb-Kenyon, therefore, was an enforcement law, not a substantive law, because its substance remained grounded in state laws enacted pursuant to their police power. A state law first had to be a valid substantive exercise of the state's police power before it was incorporated into Webb-Kenyon and could be applied to interstate shipments of liquor. There was no hint that Congress intended Webb-Kenyon to permit states to use their police power to discriminate against interstate commerce.[43]

As Senator Kenyon stated, the Act's purpose was to enable the states to better effectuate their police powers by eliminating the discrimination in favor of out-of-state sellers:

> This bill, if enacted would not be a law to bring about prohibition. It would not be a law to stop personal use of intoxicating liquors . . . . Its purpose, and its *only* purpose, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their own borders.[44]
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[39] Act of Mar. 1, 1913, ch. 90, §1, 37 Stat. 699, 700 (codified as reenacted by the Act of Aug. 27, 1935, ch. 740, § 202(b), 49 Stat. 877 (current version at 27 U.S.C. § 122 (2003))).
[40] H.R. REP. NO. 1461-62, pt. 1 (1913); *see* S. REP. NO. 1060-62 at 24-25 (1913).
[41] *Clark Distilling Co.*, 242 U.S. at 323-24.
[42] *Id*. at 324.
[43] McCormick & Co. v. Brown, 286 U.S. 131, 144-45 (1932).
[44] 49 CONG. REC. 707 (Dec. 16, 1912) (statement of Sen. Kenyon) (emphasis added).

> Every State in which the traffic of liquors has been prohibited by law is deluged with whisky sent in by people from other States under the shelter of the interstate-commerce law. There are daily trainloads of liquors in bottles, jugs, and other packages sent into the State consigned to persons, real and fictitious, and every railway station and every express company office in the State are converted into the most extensive and active whisky shops, from which whisky is openly distributed in great quantities. Liquor dealers in other States secure the names of all persons in a community, and through the mails flood them with advertisements of whisky, with the most liberal and attractive propositions for the sale and shipment of the same . . . . It is evident that under such circumstances the prohibition law of a State is practically nullified, and intoxicating liquors are imposed upon its people against the will of the majority.[45]

Kenyon's examples illustrate the problems caused by the Original Package doctrine, but nothing in his complaints suggests that he wanted to give states power to discriminate in favor of local merchants.

Other supporters of the Act echoed Senator Kenyon's views. Senator Sanders, for instance, indicated that the Act was designed to avoid the Court's precedents holding that a "State [could] regulate the quality of liquor sold within the State, but it [could] not regulate the quality of liquor sold from outside the State."[46] "As it is now," he observed, "no person in Tennessee can lawfully sell intoxicating liquor in Tennessee, but a person in Kentucky can sell in Tennessee. Should a citizen of Kentucky have more rights in Tennessee than a citizen of Tennessee? No man should have the personal liberty of violating the laws of any State."[47] The Act "*only* stops the business of selling liquor within dry territory by persons outside that territory in violation of law."[48]

Similarly, other legislative excerpts highlight the broad consensus surrounding Webb-Kenyon's purpose. For instance, Congressman Clayton focused on the need to restore the states' traditional police power:

> As I view this question the [Webb-Kenyon bill] is simply to allow the States to enforce their own police regulations. It is to go back to the ancient doctrine announced in Pierce versus New Hampshire more than 50 years ago, holding that under the police power of the State the State could regulate and control the matter of traffic in intoxicating liquors, according to the sovereign will of the State. That stood as the law of this country for nearly 50 years, and until the case of Leisy versus Hardin was decided, which specifically overruled it. That case led to the enactment of what is known as the Wilson law, and ever since the Wilson law was emasculated the effort has been made by the States, in furtherance of their police power,

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[45] 49 CONG. REC. 761 (Dec. 17, 1912) (statement of Sen. Kenyon).
[46] 49 CONG. REC. 700 (Dec. 16, 1912) (statement of Sen. Sanders).
[47] *Id.*
[48] *Id.* (emphasis added)

> to let the State have the right to control the liquor whenever it reached the boundary of the State.[49]

Senator Nelson, a member of the Senate Judiciary Sub-Committee, also stressed the need to prevent reverse discrimination:

> The police power of the State does not extend to all of these subjects [such as clothing and wheat]. It is only those that are considered detrimental to health and morals. There the police power of the State is complete; but the police power of the State would not extend to prevent the sale of flour or any wholesome commodity . . . . In the Mugler case . . . they passed upon the question of whether this commodity was within the police power of the State, and the question back of it all is the question that has not been discussed according to my mind, and that is this question: The Supreme Court has held that the State has complete police power over the sale and manufacture of liquor . . . . Now, if the people of Oklahoma have no right to engage in the manufacture and sale of intoxicating liquors in your State, why should I, as a citizen of Minnesota, have a greater right in your State than your own citizens?[50]

Senator McCumber added that Congress intended to limit its delegation of authority to the states to allow the effective enforcement of their police powers:

> Having power to prohibit interstate commerce in intoxicating liquors [Congress] has the lesser power, which must be included in the greater, of allowing interstate commerce in intoxicating liquors under certain conditions, and those conditions may be that the commodities shall be subjected to the police powers of a State the moment they cross the State line; not that the State law shall be the effective law and be approved by Congress, but Congress shall relinquish its hold upon the articles upon certain conditions when they arrive within a State. . . . That having the right to prohibit interstate commerce in intoxicating liquors [Congress] has the lesser right, which is included in the greater, of declaring as a condition for the allowance of the article to enter into interstate commerce that it shall be divested of its Federal protection as a commodity in interstate commerce whenever certain conditions arise, *and that the condition which will so divest it may be that it is intended to be used in violation of the police powers of the State*.[51]

Finally, Senator Borah echoed the sentiment that Webb-Kenyon simply allowed the state police power to attach to interstate alcohol:

> That having a right to prohibit interstate commerce in intoxicating liquors it has the lesser right, which is included in the greater, of declaring a condition for the allowance of the article to enter into interstate commerce that it shall be divested of its Federal protection as a commodity in interstate

[49] 49 CONG. REC. 4434 (Mar. 1, 1913)
[50] *Id.*
[51] 49 CONG. REC. 702 (daily ed. Dec. 16, 1912) (statement of Mr. McCumber) (emphasis added).

> commerce whenever conditions arise, and that the condition which will so divest it may be that it is intended to be used in violation of the police powers of the State.[52]

In contrast to these extensive statements, there is nothing in the Act's text, legislative history, or judicial interpretation even hinting that Congress intended to authorize the states to *discriminate* against imported liquor. Indeed, in *Brennen v. Southern Express Co.*, decided shortly after the Act's passage, the South Carolina Supreme Court confirmed that the Act was intended to authorize the states to regulate evenhandedly, not to discriminate:

> The act of Congress of March 1, 1913, known as the Webb-Kenyon Act, . . . does divest intoxicating liquors shipped into a state in violation of its laws of their interstate character and withdraw from them the protection of interstate commerce, [but] it evidently contemplated the violation of only *valid* state laws. *It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states which are recognized as subjects of lawful commerce by the law of the state making such discriminations*, nor the power to make unjust discriminations between its own citizens.[53]

Brennen and other cases simply reflected the consensus that Webb-Kenyon did not create a new power for states to discriminate against interstate commerce.[54]

In short, before the 18th Amendment, the state and federal governments had reached a general accommodation on the balance of authority between the state police power and national commerce power. The states had the authority to regulate purely local affairs, such as rules governing the manufacture and consumption of alcohol, especially with respect to bars and saloons where alcohol was sold and consumed on the premises. The federal government retained complete control over matters involving interstate commerce. Under the Wilson and Webb-Kenyon Acts, the federal government helped the states enforce their police powers by subjecting alcohol shipped in interstate commerce to the same rules as alcohol produced and sold locally—no better and no worse.

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[52] 76 CONG. REC. 4170 (Feb. 15, 1933) (statement of Sen. Borah).

[53] Brennen v. Southern Express Co., 90 S.E. 402, 404 (1916) (emphasis added). Because the enactment of the Webb-Kenyon Act in 1913 was followed so closely by the ratification of the 18th Amendment in 1919 there were only a few challenges to discriminatory state regulation of alcohol.

[54] *See* Howard S. Friedman, 21 CORNELL L.Q. 504, 509 (1935) ("The cases under the Webb-Kenyon Act uphold state prohibition and regulation in the exercise of the police power yet they clearly forbid laws which discriminate arbitrarily and unreasonably against liquor produced outside of the state."); Lindsay Rogers, *Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act*, 4 VA. L. REV. 174, 194-95 (1916); Note, 85 U. PA. L. REV. 322, 322-23 (1936) ("The aim of the legislation, culminating in the Webb-Kenyon Act, which preceded the Twenty-First Amendment was to prevent the exclusive power of Congress over interstate commerce from rendering nugatory state police regulation of the liquor traffic."); Note, 55 YALE L.J. 815, 817 (1945) (noting that under Webb-Kenyon "[i]t was successively reiterated that only uses specifically forbidden by state law were prohibited, that interference with interstate commerce was permissible only in the exercise of valid state police power, and that discriminatory state statutes did not represent proper exercises of such power").

D. Prohibition

The ratification of the 18th Amendment and the enactment of the National Prohibition Act upset this balance. Although the 18th Amendment technically gave the state and federal governments concurrent power to regulate alcohol, because of the Supremacy Clause, it essentially gave the federal government absolute authority to regulate all aspects of alcohol, including purely local matters traditionally regulated by the states pursuant to their police powers, such as closing times of saloons and conditions of sale. More precisely, the states could impose stricter regulations pertaining to alcohol, but not weaker or different penalties that conflicted with the National Prohibition Act.[55] The Eighteenth Amendment itself removed the Commerce Clause limitations on the exercise of federal power as it pertained to the "manufacture, sale, or transportation of intoxicating liquors . . . for beverage purposes," thereby enabling the federal government to regulate local activity of manufacture and sale that would have otherwise fallen outside of Congress's jurisdiction.

"The United States learned a hard lesson from Prohibition."[56] Wet communities resisted national efforts to impose Prohibition. As one Congressman noted,

> If prohibition can only be enforced by the use of sawed-off shotguns in the hands of irresponsible Government agents, then indeed, we have reached the high tide of fanaticism and bigotry in this matter. We have reached a point where responsible citizens have not only the right but the duty to replace prohibition with some method of Government control under which law and order will prevail.[57]

Where Prohibition was unwanted, the federal government's efforts to enforce it spawned violence, bloodshed, and corruption. For precisely this reason, police power issues involving moral issues were traditionally local matters. Because of diverging local views, it was thought that state and local governments were uniquely well-suited to exercise police power authority. Indeed, prior to the Eighteenth Amendment, many dry states simply gave communities a "local option" to go dry, ensuring that prohibition was rooted in truly local morals and authority. But "The enforcement of Prohibition represented the nadir of government regulation of liquor."[58]

Even federal enforcement officials agreed that Prohibition overextended federal authority. As Secretary of the Treasury Andrew Mellon noted in his 1926 report:

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[55] Volstead Act, ch. 85, 41 Stat. 305 (1919) (repealed 1933).
[56] Sidney J. Spaeth, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 162 (1991).
[57] 71 CONG. REC. 2671 (1929) (statement of Rep. Pittenger).
[58] Spaeth, *supra* note 56.

> The Treasury felt with respect to local law enforcement that too much responsibility had been placed upon the Federal Government. Even in those States which already had satisfactory State laws, and in which local machinery for enforcement had been provided, citizens and officials were looking to the Federal forces for the performance of police duties which were purely local. This misinterpretation of jurisdiction, while perhaps natural and for that reason excusable, proved a serious hindrance to the successful enforcement of the national prohibition law. Were the Federal Government to accept this responsibility, it must organize large police forces in the various communities, and, in addition, must provide adequate judicial machinery for the disposition of the local cases—an interference by the Federal Government with local government which could not be other than obnoxious to every right-thinking citizen.[59]

In short, Prohibition failed because it forced the federal government to meddle in a matter that traditionally fell under the state police power. Nothing in Prohibition's history or repeal, however, suggests that the states needed additional interstate commerce powers to enforce their local prohibition regimes after the enactment of the Wilson and Webb-Kenyon Acts.

E. Section 2 of the Twenty-First Amendment

Although the 18th Amendment briefly mooted questions concerning the states' authority, the movement to repeal Prohibition in the 1930s re-opened the debate. Many prohibitionists feared that states desiring to remain dry would lack the authority to prevent alcohol imports. Though the Court had upheld the constitutionality of Webb-Kenyon in *Clark Distilling*, at the time of its enactment there were serious questions about its validity. Indeed, President Taft initially vetoed the law because he considered it unconstitutional,[60] a view that Attorney General Wickersham shared.[61] Moreover, *Clark Distilling* was a "divided opinion" and the Court's membership had changed – as a Senator, Justice Sutherland had argued that Webb-Kenyon was unconstitutional.[62]

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[59] Spaeth, *supra* note 56, at 176 (quoting L. SCHMECKEBIER, THE BUREAU OF PROHIBITION: ITS HISTORY, ACTIVITIES AND ORGANIZATION 12 (1929) (quoting 1926 Sec'y of Treas. Ann. Rep. 139-40)).

[60] 49 CONG. REC. 4291-92 (1913) (letter of President Taft).

[61] 30 Op. Att'y Gen. 88 (1913), *reprinted in* 49 CONG. REC. 4292-96 (daily ed. Feb. 28, 1913), (letter of Att'y Gen. Wickersham).

[62] *See* 49 CONG. REC. 4297-98 (daily ed. Feb. 28, 1913) (statements of Sen. Sutherland); *see also* 76 CONG. REC. 4170 (Feb. 15, 1933) (statement of Sen. Borah) (expressing dry states' fear that Webb-Kenyon "might very well be held unconstitutional upon a re-presentation of it"). The doubts about the constitutionality of Webb-Kenyon arose from its peculiar language divesting alcohol of its interstate commerce character in certain cases covered by state law, which arguably improperly ceded Congress's exclusive Commerce Clause authority to the states. *See* 49 CONG. REC. 4291-92 (daily ed. Feb. 28, 1913) (letter of President Taft); *Id.* at 4292-96 (letter of Att'y Gen. Wickersham); 49 CONG. REC. 2916-17 (daily ed. Feb. 10, 1913) (statement of Sen. Root).

Several senators expressed such concerns. Senator Borah noted that, from its very inception, there had been aggressive legislative and litigation efforts to overturn Webb-Kenyon.[63] Senator Blaine expressed nearly identical sentiments:

> In [*Clark*] there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.[64]

For these reasons, Senator Borah explained that he was "rather uneasy about leaving the Webb-Kenyon Act to the protection of the Supreme Court of the United States,"[65] and uncomfortable "rely[ing] upon the Congress . . . to maintain indefinitely the Webb-Kenyon law."[66] In particular, revenue helped to motivate the repeal of Prohibition: the desire to reinstate alcohol as a legal—and taxable—commodity, in light of the plummeting income and corporate tax revenues during the Great Depression.[67] These revenue issues raised concerns in dry states that Congress would seek to enlarge commerce in alcohol, so as to increase the revenue stream. Given the momentum against Prohibition in many parts of the country, dry states had legitimate reasons to worry that Congress and the Supreme Court would resurrect the Original Package doctrine.

To remove these constitutional and political uncertainties, Senator Borah, the Amendment's sponsor, explained that Section 2 would "incorporat[e] [Webb-Kenyon] permanently in the Constitution of the United States."[68] The text of the Webb-Kenyon Act, by and large, became Section 2 of the 21st Amendment. As Senator Blaine observed, the purpose of Section 2 was "to write permanently into the Constitution a prohibition along th[e] line [of the Webb-Kenyon Act,] . . . to assure the so-called dry States against the importation of intoxicating liquor into those States."[69] Indeed, the Supreme Court has observed that, because the language of Section 2 so "closely follows the Webb-Kenyon and Wilson Acts, [it] express[es] the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes."[70] As the Seventh Circuit explained in *Bridenbaugh*, "Like the Wilson Act and the Webb-Kenyon Act before Prohibition, § 2 enables a state to do to importation of liquor–including direct deliveries to consum-

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[63] 76 CONG. REC. 4171 (Feb. 15, 1933) (statement of Sen. Borah).
[64] 76 CONG. REC. 4141 (Feb. 15, 1933) (statement of Sen. Blaine).
[65] 76 CONG. REC. 4171 (Feb. 15, 1933) (statement of Sen. Borah).
[66] 76 CONG. REC. 4170 (Feb. 15, 1933) (statement of Sen. Borah).
[67] *See* Donald J. Boudreaux & A.C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1 (1994). Alcohol, of course, has long been the subject of pervasive and steep excise and "sin" taxes. *See* discussion *infra* notes 198-202 and accompanying text (discussing tax collection issues regarding interstate direct shipment of wine).
[68] 76 CONG. REC. 4172 (Feb. 15, 1933) (statement of Sen. Borah).
[69] *See* 76 CONG. REC. 4141 (Feb. 15, 1933) (statement of Sen. Blaine).
[70] Craig v. Boren, 429 U.S. 190, 205-06 (1976).

ers in original packages–what it chooses to do to internal sales of liquor, but nothing more."[71]

Accordingly, Section 2 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."[72] By its terms, Section 2 preserves the police power of the states to regulate the "delivery or use" of alcoholic beverages within their borders.[73] It also allows a state to bar "the transportation or importation of" intoxicating liquor within its borders but only when the ultimate delivery or use of that alcohol in the state would be "in violation of the laws thereof." Thus, under Section 2, a state could probably ban all alcohol sales within the state, may ban the sale of all hard alcohol, may limit the alcoholic content of all liquors, and may prohibit the transportation or importation into the state of intoxicating liquors violating such generally-applicable laws.

Nothing in Section 2, however, suggests that it confers a new and quite different power on states to prohibit only out-of-state alcohol. If alcohol is legal, the delivery or use of imported liquors would not be "in violation of the laws thereof" and thus would not supply the predicate for triggering the 21st Amendment's bar on "transportation or importation." It was well-established by 1933 that the state police power did not provide a license to discriminate, and there is no indication that Section 2 was intended to give wet states new, unprecedented, unmentioned, and illogical powers to erect protectionist barriers against other states' products.

In short, the 21st Amendment restored the constitutional balance upset by the 18th Amendment. Its legislative history demonstrates that the Amendment's framers wanted to allow states to use their police power. Borah states, for instance:

> We hear a great deal in these days about the eighteenth Amendment destroying the police powers of the states. I venture to say that anyone who has taken the trouble to familiarize himself with the destruction of the police powers of the States relative to the liquor question will have to conclude that the police powers had been destroyed prior to the adoption of the eighteenth amendment, taken away from the States prior to that time through the decisions of the Supreme Court of the United States [i.e., the Original Package cases] and the constant and persistent attack of the liquor

[71] Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000).
[72] U.S. CONST. amend. XXI, § 2.
[73] Indeed, the specific reference to "delivery and use" suggests the police power roots of Section 2, as the Amendment itself does not specifically refer to "sale" or "commerce" in intoxicating liquors. Thus, read in its historical context, the plain language of Section 2 may be read to incorporate the police power conception described in this article, rather than the extreme plain language view articulated by those who believe that Section 2 permits protectionism.

> interests upon the rights of the States to be dry and to exercise their police powers to the end that they might be dry.[74]

Finally, even after enactment of the 21st Amendment, there was some concern that the enactment of the National Prohibition Act had implicitly repealed Webb-Kenyon. For instance, some thought that the National Prohibition Act eliminated the states' police power authority to define the term "liquor," a challenge raised expressly in *McCormick v. Brown*. Although "[m]ost congressmen seem to have believed that the Webb-Kenyon Act was still in effect, [ ] to make certain, it was reenacted in 1935.'[75]

F. The defeat of proposed Section 3

The contemporaneous congressional debates over the proposed but never enacted Section 3 of the 21st Amendment further indicate that the purpose of Section 2 was to reinforce the states' authority to enact valid intrastate laws in furtherance of their police power, but not to grant to the states new powers to interfere with federal authority over interstate commerce. Defenders of state alcohol protectionism have relied heavily on the defeated Section 3 to suggest that Congress intended to give states "plenary" authority over alcohol sales. As a result, that section remains an important part of the 21st Amendment's history.

Many of Section 3's supporters feared that legalizing alcohol sales would lead to the flourishing of the "saloon" and its accompanying public and private vice, including organized crime. In order to regulate saloons, they proposed to add a Section 3 to the 21st Amendment, providing "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold."[76] This provision would have given the federal government concurrent power with the states to regulate saloons.[77] In the early 1930s, the federal government's Commerce Clause power was not yet understood to extend to intrastate retail sales of liquor, as the Supreme Court did not recognize the expansive reach of the Commerce Clause until *A.L.A. Schechter Poultry* in 1935.[78] Thus, if Congress sought to maintain jurisdiction over purely local alcohol sales at saloons, a provision like Section 3 was necessary to create a federal quasi-police power arising from outside the Commerce Clause.

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[74] 76 CONG. REC. 4170 (Feb. 15, 1933) (statement of Sen. Borah). It is often argued that the purpose of the 21st Amendment was to allow "dry states to stay dry." This analysis, however, does not fully capture the Amendment's purpose, because the Amendment allows wet states to regulate other aspects of alcohol pursuant to its police power, and to impose those same requirements on out-of-state sellers as well. For example, a state could establish a minimum age for purchasing alcohol and apply that in an even-handed fashion to both in-state and out-of-state sellers.

[75] Ralph L. Wiser & Richard F. Arledge, Note, *Does the Repeal Amendment Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislating on Intoxicating Liquors in Interstate Commerce?*, 7 GEO. WASH. L. REV. 402, 406 (1938-39).

[76] 76 CONG. REC. 4141 (Feb. 15, 1933).

[77] *Id.* (statement of Sen. Blaine).

[78] 324 Liquor Corp. v. Duffy, 479 U.S. 335, 347 n.10 (1987).

Notwithstanding this enumeration of "concurrent" power, however, the Supremacy Clause meant that federal law would prevail in the event of conflict.[79] Critics of Section 3 objected that this intermingling of state and national authority exactly recreated the fundamental problems that plagued effective enforcement of national Prohibition, in that it encouraged federal meddling in wholly local affairs. As Senator Wagner observed,

> The real cause of the failure of the eighteenth amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits. Section 3 of the pending joint resolution proposes to condemn the new amendment to a similar fate of failure and futility. No law can live unless it finds lodgment in the public conscience and is nourished by public support.[80]

Senator Wagner continued to criticize the proposed Section 3 by noting that the purpose of the 21st Amendment was to "*restore the constitutional balance of power and authority* in our Federal system which had been upset by national prohibition. That equilibrium which prior to the eighteenth amendment was one of the functional marvels of our system of government is not restored by the pending resolution."[81] Section 3 would have effectively granted the federal government a general police power to regulate the local activities of saloons, a power it generally lacks,[82] particularly under the Commerce Clause jurisprudence of that era. Senator Wagner noted that while the 21st Amendment as proposed "pretends to . . . restore to the States responsibility for their local liquor problems," because of proposed Section 3, it "does not in fact repeal the inherently false philosophy of the eighteenth amendment. It does not correct the central error of national prohibition. It does not restore to the States responsibility for their local liquor problems. *It does not withdraw the Federal Government from the field of local police regulation into which it has trespassed*."[83] As a result of Section 3, the 21st Amendment would "expel[] the system of national control through the front door of section 1 and readmit[] it forthwith through the back door of section 3."[84] Not only would Section 3 have empowered Congress to regulate the purely local activities of saloons, such as operating hours and drinking ages, but conceivably could have allowed Congress to reinstate federal prohibition.[85]

Congress rejected the proposed Section 3 because it conflicted with the goal of restoring the pre-18th Amendment constitutional balance between the state and federal governments. Because of the limited nature of Congress's Commerce Clause

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[79] 76 CONG. REC. 4143 (Feb. 15, 1933) (statement of Sen. Wagner).
[80] 76 CONG. REC. 4146 (Feb. 15, 1933) (statement of Sen. Wagner).
[81] 76 CONG. REC. 4144 (statement of Sen. Wagner) (emphasis added).
[82] United States v. Lopez, 514 U.S. 549, 566-67 (1995).
[83] 76 CONG. REC. 4144 (Feb. 15, 1933) (statement of Sen. Wagner) (emphasis added).
[84] 76 CONG. REC. 4147 (Feb. 15, 1933) (statement of Sen. Wagner).
[85] *Id.* (noting that Section 3 could enable Congress to comprehensively regulate local issues related to saloons, such as closing times and other police power regulations).

authority, the deletion of Section 3 sufficed to remove the federal government from potential conflict with the states' intrastate police power, thereby withdrawing the federal government from the regulation of purely intrastate activities.

Those arguments against the proposed Section 3 do not, however, suggest an intent in Section 2 to repeal the negative Commerce Clause with respect to alcohol, especially not its long-settled bar on discriminating against interstate commerce. To the contrary, those arguments relate only to the exercise of a new, specially-conferred federal power over what were regarded as purely local decisions about alcohol sales and consumption. Just as the grant of a new police power to Congress to regulate saloons was considered an undesirable departure from the pre-Prohibition constitutional balance, so too would be an unprecedented grant of plenary power to the states to impose discriminatory barriers to interstate commerce. In fact, if it were true that Section 2 gave the states plenary power over interstate commerce in alcohol, then Section 3 (if enacted) would have created a peculiar regime: the states could regulate interstate commerce in alcohol, and the federal government could regulate *only* the local operations of saloons (due to its primacy under the Supremacy Clause). More plausibly, the framers of Section 3 intended to preserve the full scope of Congress's Commerce power implicit in Section 2, and then to augment it through Section 3 to reach the particular problem of saloons. The protectionist interpretation of Section 2 would require inferring that the drafters of the original 21st Amendment (including Section 3) intended to reverse the standard allocation of power between the federal and state governments. Strikingly, no member of the Senate even attempted to justify or explain such a surprising and illogical inversion of power. It is far more logical to interpret Section 2 as restoring the traditional constitutional balance between the state and federal governments, and Section 3 as conflicting with that goal.

Nevertheless, some have suggested that the defeat of the proposed Section 3 was intended to give the states "absolute control" over alcohol, unfettered by the negative Commerce Clause.[86] In her dissent to *324 Liquor*, Justice O'Connor takes a few isolated snippets out of some floor speeches on the 21st Amendment, strips them of both historical and rhetorical context, ignores the qualifications intended to limit them, and then concludes that they reflect the will of Congress.[87] For example, O'Connor writes, "When the Senate began its deliberations on the Twenty-first Amendment, the proposed Amendment included a § 3 not present in the adopted Amendment. This section granted the Federal Government concurrent authority over some limited aspects of the commerce of liquor."[88] O'Connor's characterization of Section 3 as affecting "limited aspects" of commerce in liquor is incorrect. Section 3 was anything but limited; it struck at the very heart of the problem with Prohibi-

[86] *See* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 354-56 (1987) (O'Connor, J., dissenting).
[87] Interestingly, none of the briefs in *324 Liquor* addressed Justice O'Connor's arguments about legislative history. Accordingly, it appears that the issue was not fully briefed before the Court at that time.
[88] *Id.* at 354.

tion—the unworkable system of concurrent authority over local affairs governing liquor, and the fear that the federal government could actually reimpose Prohibition or otherwise meddle in local affairs.

The key to understanding the rejection of Section 3 is to remember that Section 1 embodies the real purpose of the 21st Amendment—to repeal the 18th Amendment and thereby prevent the federal government from regulating alcohol.[89] The central purpose of the Amendment, therefore, was to reinstate the pre-Eighteenth Amendment constitutional limits on the federal government, and in particular to restore state police power over alcohol. But there is no reason to think that it was intended to grant the states a novel and wholly unnecessary power to invade Congress's power over interstate commerce.

In short, the primary purpose of the 21st Amendment was to restore the constitutional balance that prevailed prior to the enactment of the 18th Amendment, by simply repealing Prohibition in Section 1. Under this regime, the states had exclusive control over local police power matters and the federal government controlled interstate commerce matters. Section 2 buttressed this traditional balance by constitutionalizing Webb-Kenyon, thereby protecting the ability of the dry states to enforce their police powers by preventing the resurrection of the Original Package doctrine. But the police power, of course, was subject to its traditional and constitutional limits: that any regulation relate to the protection of health, safety, or morals and not discriminate against interstate commerce.

In fact, when the statements Justice O'Connor relies on are placed in their proper historical context, it is evident that they not only fail to support her interpretation, but actually stand for the *opposite*. Each statement refers to the impropriety of reinstating the powers disastrously exercised by the federal government during Prohibition. None support the view that Section 2 was intended to give the states anything more than the constitutional and statutory powers they held prior to the enactment of the 18th Amendment.

1. Senator Blaine's Statement

Justice O'Connor relies heavily on a statement by Senator Blaine, the floor manager of the 21st Amendment. In *324 Liquor*, O'Connor writes:

> Even Senator Blaine, the Chairman of the Senate Subcommittee that had held hearings on the proposed Amendment, opposed the limited grant of authority to the Federal Government in § 3. According to Senator Blaine, when the Federal Government was organized by the Constitution the States had "surrendered control over and regulation of interstate commerce." 76 Cong.Rec. 4141 (1933). He viewed § 2 of the Amendment as a

[89] *See supra* notes 55-59 and accompanying text (discussing failure of federal Prohibition under the 18th Amendment).

> restoration of the power surrendered by the States when they joined the Union. Section 2 "restor[ed] to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." Ibid. In his view, the grant of authority to Congress in § 3 undercut the import of § 2: "Mr. President, my own personal viewpoint upon section 3 is that it is contrary to section 2 of the resolution. I am now endeavoring to give my personal views. The purpose of section 2 is to restore to the States by constitutional amendment *absolute control* in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States. The State under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. Thus the States are granted larger power in effect and are given greater protection, while under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment." Id. at 4143.[90]

This quote does not support Justice O'Connor's conclusion. Read in context, Senator Blaine's comments actually are consistent with the general view that the 21st Amendment restored the pre-18th Amendment constitutional balance, thereby enabling the states to fashion local rules regarding alcohol and apply those same rules in a non-discriminatory fashion to imported alcohol.

Although Justice O'Connor adds emphasis to the phrase "absolute control," read in context, Blaine is expressly saying that the purpose of Webb-Kenyon was not to delegate Congress's interstate commerce power to the states, but rather to enable the states to regulate imported alcohol on the same terms as domestically-produced alcohol once it enters "the confines of the State." Consider the following exchange between Senators Blaine and Wagner, which interrupted the remarks quoted by Justice O'Connor:

> SEN. BLAINE: "Then came an amendment of the Wilson Act known as the Webb-Kenyon Act . . . . The language of the Webb-Kenyon Act was designed to give the State in effect power of regulation over intoxicating liquor from the time it actually entered the confines of the State . . . ."
>
> SEN. WAGNER: "Mr. President, will the Senator yield?"
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> SEN. BLAINE: "I see my able friend from New York shaking his head. I yield to him."

[90] *324 Liquor*, 479 U.S. at 354-55 (O'Connor, J., dissenting) (emphasis added).

> SEN. WAGNER: "I do not want to enter into a controversy, because it really is not very important, but I do not think the Senator meant to say that by this act [Webb-Kenyon] Congress delegated to the States the power to regulate interstate commerce; Congress itself regulated interstate commerce to the point of removing all immunities of liquor in interstate commerce."
>
> SEN. BLAINE: "I thank the Senator. I think he has given the correct statement of the doctrine. My understanding of the question was identically the same—that it was the action of the Congress of the United States in regulating intoxicating liquor that protected the dry State within the terms of the law passed by the Congress."[91]

This exchange plainly colors the whole tenor of Blaine's remarks. Blaine did not intend to say that the states were actually being given "absolute control" over interstate commerce in alcohol—indeed, his use of this phrase is consistently qualified by noting that it was "absolute control *in effect*." As his exchange with Wagner further indicates, this qualification is important, in that he did not really believe that the states were being given the power to regulate interstate commerce. Rather, Section 2 simply constitutionalized Congress's prior exercise of its Commerce Clause authority to allow states to apply their police powers to interstate alcohol on the same terms as domestic alcohol.

Moreover, in the full passage, Blaine treats the 21st Amendment as the culmination of the long history of state regulation of alcohol. He summarizes the history starting with the Wilson Act, the "original package doctrine," and Webb-Kenyon and its aftermath. As he explains, the 21st Amendment is merely the latest step in this process. Following his historical recitation, Blaine notes the tenuous constitutional and political foundation of Webb-Kenyon:

> In the case of Clark against Maryland Railway Co. there was a divided opinion. There has been a divided opinion in respect to the earlier cases and that division of opinion seems to have come down to a very late day. So to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.
>
> Mr. President, the pending proposal will give the State that guarantee.[92]

He then states the passage that O'Connor quotes about restoring liquor to its pre-Constitutional status, but in so doing uses the same language that Wagner clarified

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[91] 76 CONG. REC. 4140-41 (Feb. 15, 1933).
[92] 76 CONG. REC. 4141 (Feb. 15, 1933) (statement of Sen. Blaine).

a moment ago: that Section 2 would "in effect" give the states power over interstate commerce in liquor, and that "in effect" meant that Congress was exercising its power to help the states enforce their laws.[93]

Furthermore, O'Connor ignores the remainder of Blaine's remarks on the most important purpose of the 21st Amendment, namely, to repeal the 18th Amendment. Blaine states:

> The eighteenth amendment is an inflexible police regulation which might be appropriate in a municipal ordinance in those sections of our country where the people desire a bone-dry local regime. The eighteenth amendment does not give to the Congress a general grant of power to regulate. It is strictly a prohibition, a mandate. It is specifically a prohibitive provision of the Constitution.
>
> Surely, Mr. President, it was never designed that our Constitution would be a compilation of local ordinances regulating the lives, the customs, and the habits of our people. But that is exactly the character of the eighteenth amendment. It has no place in the Constitution.[94]

He then adds that he would support any and all versions of sections 2 or 3 so long as they ended Prohibition. "My object is to take the eighteenth amendment out of the Constitution."[95]

Finally, in his concluding passage, Blaine states that "I am opposed to the dry States interfering with the so-called wet States in connection with this question of intoxicating liquors; and so, by the same token, I am willing to grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors."[96] In this crucial passage, Blaine clearly expresses his belief that Section 2 returns control over "internal affairs" to the states.

Considered in context, Blaine's remarks show that he, like everyone else at the time, recognized that the primary purpose of the 21st Amendment was to repeal the 18th Amendment and thereby restore the pre-18th Amendment constitutional balance, while constitutionalizing the Wilson and Webb-Kenyon Act and assuring the dry states that the "original package" doctrine was a dead letter. There is no indication that Blaine believed that Section 2 repealed the longstanding nondiscrimination requirement on state exercise of the police power. Indeed, as Wagner clarified, Blaine recognized that the Wilson and Webb-Kenyon Acts were based on the Congressional commerce clause authority, and did not cede that authority to the states.

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[93] *Id.*
[94] *Id.* at 4143
[95] *Id.* at 4143-44.
[96] *Id.* at 4141.

By contrast, to interpret Senator Blaine's words literally, as meaning that states exercise completely unchecked, "absolute control" over alcohol, would lead to an absurd view of the 21st Amendment.[97] Taken to its logical conclusion, that would mean that Congress cannot exercise authority over any interstate aspect of alcohol commerce, thereby invalidating the Sherman Act and other federal laws with respect to alcohol regulation.[98] For example, a federal provision passed after the attacks on September 11, 2001, intended to reduce the number of bulky packages on airlines, permits wineries to ship wine directly to consumers if the wine purchaser "was physically present at the winery" at the time of purchase, is "of legal age to purchase alcohol," and "could have carried the wine lawfully into the State . . . to which the wine is shipped."[99] Consistent with the 21st Amendment, this law respects state decisions about purely local alcohol issues, but regulates the manner in which otherwise lawful alcohol imports can be shipped through interstate commerce in the interest of national security. In an era in which the states were not understood to have power over interstate transport at all, a divestiture of federal authority over such matters surely would have been unforeseen to even the most ardent supporters of the 21st Amendment.

2. Representative Lea's Statement

Justice O'Connor also relies on other congressional statements. In pointing to a floor statement by Rep. Lea of California, O'Connor writes, "neither the House of Representatives nor the state ratifying conventions deliberated long on the powers conferred on the States by § 2, but see 76 Cong.Rec. 2776 (1933) (statement of Rep. Lea of Cal. that the section was 'the extreme of State rights' because it obligated the Federal Government to assist the enforcement of state laws 'however unwise or improvident')."[100]

Rep. Lea's statement, however, is part of the Congressional Record of January 28, 1933. If the statement in question was actually uttered on the floor of the House, it was not during the general debate over the 21st Amendment, which occurred primarily in February. Instead, Lea's statement is inserted into the middle of the debates over the "Departments of State, Justice, Commerce, and Labor Appropriate Bill, Fiscal Year 1934" in a Section of the Congressional Record entitled "Extension of Remarks." Rep. Lea's statement occurs immediately after Rep. Kerr gave remarks on the funding request of the Department of Commerce as it concerned the commodity division of the Department, praising the commodity division for its efforts in promoting peanut and tobacco growers. The final sentence before Congressman Lea's remarks by Congressman Kerr were, "To destroy the tobacco industry or even neglect it would imperil the greatest tax-producing commodity of this

[97] *See* United States v. Frankfort Distilleries, 324 U.S. 293, 299 (1945); William Jameson & Co. v. Morgenthau, 307 U.S. 171, 172-73 (1939).
[98] *But see Frankfort Distilleries*, 324 U.S. at 299.
[99] 27 U.S.C. § 124(a).
[100] *324 Liquor*, 479 U.S. at 353-54 (O'Connor, J. dissenting).

nation."[101] Then, with no warning or context, Lea supposedly took the floor and uttered the remarks in question. Immediately following Lea's remarks, Mr. Gibson "rose" to address the question of the funding request of the Labor Department covering the Bureau of Immigration and the financial difficulties of the Immigration Bureau caused by an unusually large number of alien deportations during the prior year. This placement suggests that Lea's words were merely inserted into the record, but were neither spoken nor heard by anyone. Moreover, Lea's comments, if uttered at all, came at a completely incongruous time, when Congress was not even specifically debating the 21st Amendment. They are quite obviously one man's view, uttered at a time when no one was paying attention. There is no indication that anyone heard or considered Lea's comments as an authoritative pronouncement on the 21st Amendment.

In any event, Lea's comments do not support O'Connor's interpretation. Like his contemporaries, Lea believed that the actual purpose of the 21st Amendment was to restore the pre-18th Amendment constitutional balance. It is true that he feared that Section 2 would force the federal government to help enforce state laws, no matter how "unwise or improvident." The purpose of all preceding legislation was to help the states to enforce their laws against interstate alcohol, which clearly differs from enabling states to flaunt the nondiscrimination principle of the dormant commerce clause. Nothing indicates that Lea thought that the 21st Amendment would validate otherwise invalid state laws.

Moreover, Lea's full statement actually undermines O'Connor's analysis:

> No one could anticipate the many varied, and perhaps unwise, provisions that might be written by the various States of the country. In this way their mere legislative action would compel this action of the Federal Government without the approval and even against the will of Congress.
>
> That proposal, on principle, is the extreme of State rights.[102]

In that last phrase, Lea is criticizing, not endorsing, the view that the 21st Amendment furthers "the extreme of State rights." In other words, Lea opposes Section 2 because it might be read to embody the "extreme of State rights." Justice O'Connor, of course, mistakenly suggests that he endorsed this reading. Moreover, Lea also notes that although this provision is illogical, it is "unimportant in its practical effects."[103] As he explains, this provision is "unimportant" because even with Section 2, Congress retained its power over interstate commerce in alcohol and could refuse to enforce unwise state laws.[104]

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[101] 76 CONG. REC. 2774 (Jan. 28, 1933).
[102] 76 CONG. REC. 2776 (Jan. 28, 1933) (statement of Rep. Lea).
[103] *Id.*
[104] *Id.*

At no point did Lea mention granting the states any new substantive constitutional powers to erect protectionist barriers against interstate commerce. Instead, he criticized Section 2 on policy grounds because it committed the federal government to assist enforcement of even "unwise and improvident" state laws. But there is no indication that he believed that it would bless otherwise *unconstitutional* state laws. And like other members of Congress, he criticized Section 3 for retaining the real problem with Prohibition—the federal intervention in local affairs. Section 3, he observed, would essentially give the federal government a *de facto* police power to regulate all aspects of liquor sales, including a back-door reinstatement of Prohibition:

> This provision would give the Congress power to enforce prohibition on a State against its will and also to provide regulatory provisions in favor of the liquor traffic in opposition to the laws of dry or semidry States. The wildest friend of centralized government could scarcely approve of Congress enforcing the sale of liquors on dry States over the opposition of their laws and perhaps of their Constitution. I do not anticipate that this provision, if enacted, would in practice be so applied. The fact that such a power is seriously proposed to be placed in the Constitution should excite the opposition of all.[105]

He added, "It seems especially designed to preserve the obnoxious and unworkable features of Federal prohibition."[106] Overall, then, Lea's comments undermine, rather than support, O'Connor's view of the framers' intent.

3. Senator Wagner's Statements

Justice O'Connor also quotes Senator Wagner at length. Senator Wagner of New York was an especially vigorous opponent of the proposed Section 3. In his view, it failed to "correct the central error of national prohibition. It does not restore to the States responsibility for their local liquor problems. It does not withdraw the Federal Government from the field of local police regulation into which it has trespassed."[107] In Senator Wagner's view, the danger of Section 3 was that even its limited grant of authority to the Federal Government would result in federal control of the liquor trade, and infringe on traditional state police powers:

> If Congress may regulate the sale of intoxicating liquors where they are to be drunk on premises where sold, then we shall probably see Congress attempt to declare during what hours such premises may be open, where they shall be located, how they shall be operated, the sex and age of the purchasers, the price at which the beverages are to be sold . . . . It is entirely conceivable that in order to protect such a prohibition the courts might sustain the prohibition or regulation of all sales of beverages

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[105] *Id.*
[106] *Id.*
[107] 76 CONG. REC. 4144 (Feb. 15, 1933) (statement of Sen. Wagner).

> whether intended to be drunk on the premises or not. And if sales may be regulated, so may transportation and manufacture . . . . If that is to be the history of the proposed amendment--and there is every reason to expect it--then obviously we have expelled the system of national control through the front door of section 1 and readmitted it forthwith through the back door of section 3.[108]

Obviously, this speech proves the opposite of what Justice O'Connor suggests. As the quote clearly indicates, Senator Wagner opposed Section 3 because it would have given Congress the power to meddle in the regulation of local affairs traditionally governed by the states under their police power. In expressing his desire to restore to the states their control over these local affairs by deleting Section 3, he does not suggest that Section 2 gave the states Congress's power to regulate interstate commerce. Moreover, unlike O'Connor, Wagner did not consider Section 3 to be a "limited grant of authority," but rather thought that it undermined the essential purpose of the 21st Amendment.

Wagner's other statements accord with this analysis. Immediately before the above-quoted passage, Wagner states:

> Mr. President, the pending joint resolution tendered to the Senate and the country is called a proposal to repeal the eighteenth amendment, and because artfully it employs the word "repeal" in its first section, it pretends to fulfill the wish overwhelmingly expressed by the American people in the last election. But I submit that the pending resolution does not in fact repeal the inherently false philosophy of the eighteenth amendment. It does not correct the central error of national prohibition. It does not restore to the States responsibility for their local liquor problems.[109]

As Wagner clarifies, the 21st Amendment did not empower the states to control interstate commerce in alcohol. Rather, Wagner plainly states that it was intended to restore to the states control over their *local* affairs governing liquor:

> I have many times declared and I now repeat that the question which has troubled the American people since the eighteenth amendment was added to the Constitution was not at all concerned with liquor. *It was a question of government: how to restore the constitutional balance of power and authority in our Federal system which had been upset by national prohibition.* That equilibrium which prior to the eighteenth amendment was one of the functional marvels of our system of government is not restored by the pending resolution. On the contrary, it perpetuates the lack of balance, the absence of symmetry, the confusion and overlapping of Federal and local authority.[110]

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[108] *Id.* at 4147.
[109] *Id.* at 4144.
[110] *Id.* (emphasis added).

Elsewhere, Wagner elaborates on the problems that this concurrent authority inevitably would cause, in that the operation of the Supremacy Clause would inevitably mean that federal law would override local regulation:

> The real cause of the failure of the eighteenth amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits. Section 3 of the pending joint resolution proposes to condemn the new amendment to a similar fate of failure and futility.[111]

Read in context, therefore, Wagner clearly was arguing for a restoration of the pre-18th Amendment legal and constitutional regime.

4. Other Senators' Statements

Finally, Justice O'Connor cites a litany of other Senators who she believes support her interpretation. For example, she writes that

> Still others emphasized the plenary power granted the States by § 2. Senator Walsh, a member of the Subcommittee that had held hearings on the Amendment, said: "The purpose of the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter."[112]

This specific mention of the "consignee as well as thereafter," refers to the precise language used in the Supreme Court's "original package" earlier commerce clause decision in *Rhodes*,[113] so this comment is quite clearly narrowly targeted at that interpretation of the commerce clause. It suggests nothing about giving the states power to discriminate.

Similarly, O'Connor also quotes comments by Senator Robinson:

> In response to a question from Senator Swanson, Senator Robinson of Arkansas affirmed that "it is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported." Id., at 4225. Thus, upon the motion of Senator Robinson, the Senate voted to strike § 3 from the proposed Amendment.[114]

Again, the import of this passage is quite clear and quite the opposite of Justice O'Connor's belief. Under the 21st Amendment, as under Webb-Kenyon, the states' police power gave them the authority to define "intoxicating liquors" and the manner of their sale and transport within a state. The federal authority incorporated

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[111] *Id.* at 4146.
[112] *Id.* at 4219.
[113] Rhodes v. Iowa, 170 U.S. 412 (1898).
[114] 76 CONG. REC. 4179.

these state laws into the Webb-Kenyon Act for purposes of assisting enforcement against interstate shippers. As Senator Robinson explains, Section 3 failed to withdraw the federal government from local activities: "The issue here is whether the federal Government is going to take away from the States all power after repealing the eighteenth amendment, in the event the repeal shall be ratified."[115] He then discussed his desire to prevent the return of the saloon, but said that Section 3 was not the way to do it.[116] In this effort to withdraw the federal government from local affairs, nothing implies that Section 2 was intended to allow the states to invade the federal government's commerce power.

Speaking immediately after Senator Robinson, Senator Tydings elaborated on the point. After reciting the abysmal failure of federal prohibition, he stated:

> I say that we never should have taken this question [regulation of the saloon] from the States. It is not a national question. It is a local question, and it can be solved best in the communities that have to deal with it. This government never was conceived with the idea that we would reach out into every community and govern the habits and the morals and the religion of people in those communities. We were to deal with national questions only—the Army and the Navy, interstate and foreign commerce, post offices and post roads, and the rest of the 18 powers govern to us by the Constitution. We had no right at all except by turning our backs upon the philosophy of the Constitution, to go out in the States and assume this power and this control. The sooner we give it back to the States the sooner we shall establish law and order and decency and some respect for government.[117]

Senator Bingham immediately followed Senator Tydings. He explained that the framers of the original Constitution specifically considered and rejected a general federal police power to enact "sumptuary legislation . . . which would deal with the habits of the people, with what they ate, drank, and wore," and recognized that this moral regulation was properly a matter for local communities.[118] He then added, "In adopting the eighteenth amendment we interfered with the growth of temperance" by trying to impose a uniform national standard of morality on the country.[119] Again, his remarks make no reference to giving the states new powers to regulate interstate commerce, but focus solely on the failure of national prohibition and federal meddling in local affairs.

5. Summary of Debates on Section 3

In short, by relying on isolated snippets of legislative history, Justice O'Connor's dissent fails to grasp the problem that the 21st Amendment sought to

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[115] 76 CONG. REC. 4226 (daily ed. Feb. 16, 1933) (statement of Sen. Robinson).
[116] *Id.*
[117] *Id.* (statement of Sen. Tydings).
[118] *Id.* at 4227 (Feb. 16, 1933) (statement of Sen. Bingham).
[119] *Id.*

address, namely, that the 18th Amendment unwisely gave the federal government the power to regulate wholly local affairs regarding alcohol in order to impose national prohibition. Because of the 18th Amendment's failures, the framers of the 21st Amendment restored to the states the power to exercise their police power over local affairs, and restored the Wilson Act and Webb-Kenyon to allow the states to apply their police power to imported alcohol. There is no indication that Section 2 was intended to give the states a new power to regulate interstate commerce. Rather, it simply constitutionalized the Wilson and Webb-Kenyon Acts. Similarly, the 18th Amendment had nothing to do with issues involving interstate commerce, but rather sought to impose federal regulation on local liquor sales—i.e., saloons. In other words, proponents of Section 3 wanted to prevent the reestablishment of the saloon, and opponents like Wagner and others wanted to terminate federal involvement in local liquor regulation.

Justice O'Connor, by contrast, seems to believe that the framers of the 21st Amendment sought to address the states' lack of power over interstate commerce, rather than the federal government's overarching power to regulate local affairs. There is simply no credible basis for this belief. Moreover, it is completely illogical—giving the states a new power over interstate commerce could not have corrected the real problem that animated Prohibition's repeal, which was the federal regulation of local affairs under the 18th Amendment. Justice O'Connor characterizes Section 3 as a mere "limited grant of authority to the Federal Government," and implies that the refusal to adopt it evidences a desire to cede every last vestige of federal authority to the states. But as the framers of the 21st Amendment recognized, Section 3 was anything but a "limited grant of authority"—it would have defeated the fundamental purpose of the 21st Amendment itself. Indeed, the framers recognized that granting the federal government a de facto police power could have led to the reinstatement of national prohibition. In other words, Justice O'Connor has essentially turned the entire debate upside down. Congress debated *withdrawing* the federal government from the regulation of local liquor affairs, *not* giving the states new power to regulate interstate commerce. The purpose of the 21st Amendment was to end federal involvement in local liquor regulation, not to begin state invasion of the federal interstate commerce power.

III. Subsequent Congressional Action

Some have argued that, even if the 21st Amendment does not transfer Congress's commerce clause authority to the states, Congress essentially reconveyed its commerce clause power to the states legislatively through the Webb-Kenyon Act and subsequent laws. According to this argument, the dormant Commerce Clause is irrelevant to the issue, because states enacted protectionist laws pursuant to an affirmative exercise of Congress's Commerce Clause power. This argument, however, ignores the clear purpose of the Webb-Kenyon Act, which was to allow the states to apply their police powers to liquor shipped in interstate commerce on the same basis as domestically-produced liquor. As the Court stated in *Clark Distilling*,

"there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act."[120]

Others have argued that the Twenty-First Amendment Enforcement Act, enacted in 2000 as an amendment to Webb-Kenyon, is further evidence of this re-conveyance.[121] By its own terms, however, that Act applies only to a state law "that is a valid exercise of power vested in the States"[122] under the 21st Amendment, and further provides that it "shall not be construed to grant the States any additional power."[123] This language was designed precisely to preclude the argument that the Act could be used to enforce discriminatory state laws, and was a more general statement of the original "Goodlatte" amendment, which had passed the House. That amendment provided, "No State may enforce under this Act a law regulating the importation or transportation of any intoxicating liquor that unconstitutionally discriminates against interstate commerce by out-of-State sellers by favoring local industries, thus erecting barriers to competition and constituting mere economic protectionism."[124]

Legislative history demonstrates that both the Goodlatte Amendment and the final bill were designed specifically to reject the idea that protectionist state laws are consistent with Webb-Kenyon and the 21st Amendment. Congressman Cox, for instance, stated, "In vindicating the purposes of the 21st Amendment, a State cannot discriminate as mere economic protectionism against other sellers, other producers in the rest of the United States."[125] Similarly, Congressman Conyers stated, "[The amendment] will make it clear that neither this act nor Webb Kenyon are in anyway designed to supersede any other provision of the Constitution, such as the first amendment or the Commerce clause (including the so-called 'dormant' Commerce Clause)."[126] Congressman Kolbe placed the bill in historical context: "The 21st Amendment was designed to give States the power to regulate alcohol sales within their States, and to ban it altogether, if they choose. It was not designed to give States the power to keep the wine sales of some distributors out while allowing others in."[127] And other senators offered similar comments in support of the language eventually enacted.[128]

IV. Supreme Court Precedent

After some early confusion, over the past forty years the Supreme Court has consistently held that the 21st Amendment does not allow states to discriminate

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[120] James Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311, 324 (1917).
[121] 27 U.S.C. §122a (2000).
[122] § 122a(e).
[123] § 122a(e)(2).
[124] 145 CONG. REC. 6868-69 (1999).
[125] *Id.* at 6871.
[126] *Id.* at 6873.
[127] *Id.*
[128] Statement of Sen. Feinstein, S. Hrg. 106-41 (March 9, 1999).

against out-of-state merchants in violation of the Commerce Clause.[129] In the mid-1930s, shortly after the Amendment's ratification, the Court actually did uphold facially discriminatory state liquor laws against various Commerce Clause and Equal Protection challenges. In those early decisions, the Court concluded that the Amendment's supposedly plain language permitted states to ban imported alcohol for any reason and tax it in a discriminatory fashion. According to those decisions, "[a] classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."[130] Those early decisions, however, carry little precedential value. The first one, *Young's Market*, expressly disclaimed any reliance on the 21st Amendment's intent or history[131] and summarily concluded that the Amendment, on its face, authorizes such state laws.[132] Subsequent decisions merely followed suit and concluded, again without analysis of the Amendment's text or history, that "the equal protection clause is not applicable to imported intoxicating liquor,"[133] and that the Commerce Clause does not limit "the right of a state to prohibit or regulate the importation of intoxicating liquor."[134]

Not surprisingly, the Court undermined, and then rejected, those early cases. Just months after holding that states were "not limited by the commerce clause" when enacting liquor laws,[135] the Court upheld federal liquor laws enacted pursuant to the Commerce Clause. The Court rejected the argument that the 21st Amendment gives states control over alcohol "unlimited by the Commerce Clause."[136] Later, the Court clarified that "the Twenty-first Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision 'be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.'"[137]

In 1984, the Court set aside its early decisions in *Bacchus Imports, Ltd. v. Dias*. In *Bacchus*, the Court struck down discriminatory state alcohol laws under the Commerce Clause.[138] The Court held that a Hawaii law exempting local fruit wines from the state's liquor tax violated the dormant Commerce Clause.[139] Such an exemption, the Court explained, discriminated on its face "against interstate com-

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[129] Many excellent law review articles and comments analyze the various Supreme Court precedents on point. Rather than restate them, this article will briefly discuss the relation of the cases in question to the original meaning and purposes of the 21st Amendment.
[130] Bd. of Equalization of California v. Young's Mkt. Co., 299 U.S. 59, 64 (1936).
[131] *See id.* at 63-64.
[132] *See id.*
[133] Mahoney v. Joseph Triner Corp., 304 U.S. 401, 403 (1938).
[134] Indianapolis Brewing Co. v. Liquor Control Comm'n of Michigan, 305 U.S. 391, 394 (1939).
[135] *Id.*
[136] *See* United States v. Frankfort Distilleries, 324 U.S. 293, 299 (1945); William Jameson & Co. v. Morgenthau, 307 U.S. 171, 173 (1939).
[137] *See* Craig v. Boren, 429 U.S. 190, 206 (1976) (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964); *See also* Eisner v. Macomber, 252 U.S. 189, 205 (1920) (courts should harmonize constitutional provisions.).
[138] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 274–76 (1984).
[139] *Id.* at 271.

merce by bestowing a commercial advantage on okolehao and pineapple wine."[140] Because it was "undisputed that the purpose of the exemption was to aid [local] industry," the Court held that no legitimate purpose justified the discriminatory exemption.[141] Moreover, *Bacchus* applied standard Commerce Clause principles to discriminatory regulation of alcohol, as with any other product. In the later case of *West Lynn Creamery*, for instance, the Court relied extensively on *Bacchus*'s Commerce Clause analysis in invalidating a discriminatory state regulation of dairy products.[142] In other words, the identical Commerce Clause analysis applies to discriminatory regulation of grapes, grape jam, or grape wine.

In expounding upon its constitutional analysis, *Bacchus* stressed that the 21st Amendment "did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause."[143] The Court reasoned that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [, and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case."[144] As a result, the Court explained, where a state alcohol law discriminates against interstate commerce, the issue is "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the [discriminatory state law] to outweigh the Commerce Clause principles that would otherwise be offended."[145] Applying that analysis, the Court concluded that the state's "discriminatory tax cannot stand,"[146] because no core principle of the 21st Amendment was implicated by a provision designed simply "to empower States to favor local liquor industries by erecting barriers to competition."[147] In light of the "strong" national interest "in preventing economic Balkanization," the Court reasoned, "State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."[148]

The Court affirmed this principle in *Healy v. Beer Institute*.[149] In that case, Connecticut's beer-price affirmation statute required out-of-state shippers to affirm that their posted prices were no higher than prices in border states at the time of posting. In holding that the statute violated the Commerce Clause,[150] the Court reasoned that the statute, "[o]n its face, . . . discriminate[d] against brewers and shippers of beer engaged in interstate commerce" and "establishe[d] a substantial disincentive for companies doing business in Connecticut to engage in interstate com-

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[140] *Id.* at 268.
[141] *Id.* at 271.
[142] West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194, 196-97, 199, 203, 205 (relying on *Bacchus*).
[143] *Bacchus*, 468 U.S. at 275.
[144] *Id.* (quoting *Hostetter*, 377 U.S. at 332).
[145] *Id.*
[146] *Id.* at 276.
[147] *Id.*
[148] *Id.*
[149] 491 U.S. 324 (1989).
[150] *Id.* at 337.

merce . . . ."[151] Because the Court could "perceive no neutral justification for this patent discrimination," it concluded that the statute violated the Commerce Clause.[152] Following its decision in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[153] the Court further held that the 21st Amendment did not save the state law because it had the practical effect of regulating liquor sales in other states.[154]

These and other decisions reject the argument, accepted in *Young's Market*, that the 21st Amendment gives states "plenary" or "absolute" power to regulate alcohol.[155] Rather, as the Court has repeatedly recognized, states must continue to respect constitutional requirements, such as the constraints imposed by the Export-Import Clause,[156] Equal Protection Clause,[157] Establishment Clause,[158] First Amendment,[159] and Due Process Clause.[160] Similarly, the Court has explained why the Commerce Clause must limit, at least somewhat, the 21st Amendment:

> To [conclude] . . . that the Twenty-[F]irst Amendmex`nt has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.[161]

That is especially so with respect to the Commerce Clause's core ban on state laws that discriminate against interstate commerce.[162]

The rationale for limiting the text of Section 2 is evident. The relevant language of Section 2 is unqualified—it neither specifically mentions the dormant Commerce Clause nor is specifically limited to the dormant Commerce Clause. In-

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[151] *Id.* at 340-41.
[152] *Id.* at 341.
[153] 476 U.S. 573 (1986).
[154] *Healy*, 491 U.S. at 341-43. It is clear from the opinion that the Court relied on both of these equal and alternative grounds to support its holding. Some have suggested that the foundation of *Healy* was the extraterritorial effect of the law, thereby distinguishing that law from those in question in the wine direct shipping cases. Even if this were true (it is by no means clear that the prohibitions in the wine cases do not have an extraterritorial effect), it is clear in *Healy* that the Court found the discriminatory nature of the law to violate the dormant Commerce Clause, in addition to the alternative and independent ground that it had an improper extraterritorial effect.
[155] *See* North Dakota v. United States, 495 U.S. 423, 467-68 (1990) (stating that the Section 2 "power of States over liquor transactions is not plenary, even when the State is attempting to regulate liquor importation") (Brennan, J., concurring in part and dissenting in part).
[156] *See* Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 344-45 (1964).
[157] *See* Craig v. Boren, 429 U.S. 190, 204-05 (1976).
[158] *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 120 (1982).
[159] *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).
[160] *See* Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).
[161] Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 331-32 (1964) (emphasis added).
[162] *Bacchus*, 468 U.S. 263, at 276 (1984).

deed, *Young's Market* itself held that "[a] classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."[163] Thus, if one seeks to apply Section 2 according to its terms, it must sweep aside all other limitations on state power. For instance, a state could pass a law that prohibited the importation of kosher or sacramental wine, or permit only white people or to those who sign a pledge not to criticize the government to import or transport alcohol. It would permit a "red" state that supported President Bush in the 2004 Presidential election to enact laws that permitted alcohol importation from other red states, but not from "blue" states that supported Senator Kerry. Indeed, the expansive interpretation of the plain language would arguably permit a state to enslave its citizens and make them drive beer trucks without violating the Thirteenth Amendment. Perhaps because these absurd but logical consequences flow from an expansive interpretation of the 21st Amendment, the Supreme Court has interpreted the plain language of Section 2 with reference to the history and purposes of the 21st Amendment. In other words, because the final clause of Section 2 refers to "in violation of the laws thereof," Section 2 should be read as in violation of *otherwise valid* laws, subject to all other relevant Constitutional doctrines.

Nevertheless, perhaps in an effort to avoid some of these absurd results, or out of an overzealous adherence to a "plain language" analysis, the Second Circuit in *Swedenburg v. Kelly* suggested that the 21st Amendment may repeal only the commercial provisions of the Constitution, and not individual liberties protections.[164] There is no support for this view. Section 2 by its own terms neither specifically mentions the Commerce Clause nor is it specifically limited to the Commerce Clause. Thus, no distinguishing principle in the text of Section 2 justifies a partial repeal of the Commerce Clause but no modification of any other provision of the Constitution, such as the First Amendment, Equal Protection Clause, or Due Process Clause. Accordingly, any support for such a "plain language" analysis must rely at least in part on the historical record surrounding the 21st Amendment, and nothing in that record indicates that the Amendment's framers intended to empower states to discriminate against out-of-state merchants. Moreover, the Supreme Court has repeatedly held that Section 2 does not repeal commercial provisions of the Constitution, such as the "Import-Export" Clause.[165]

In a variation of the "plain language" analysis, some commentators, particularly conservatives, have argued that the 21st Amendment should not be limited by the dormant Commerce Clause, because it is an extratextual creation of the Supreme Court which does not appear "in" the Constitution. For example, the opening line of Judge Easterbrook's opinion in *Bridenbaugh v. Freeman-Wilson* states that "This case pits the twenty-first amendment, which appears in the Constitution,

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[163] *Young's Market*, 299 U.S. at 64.
[164] Swedenburg v. Kelly, 358 F.3d 223, 234 (2d Cir. 2004).
[165] *James B. Beam Distilling Co.*, 377 U.S. 341, at 345-46 (1964).

against the 'dormant commerce clause,' which does not."[166] Some have interpreted this to mean that Judge Easterbrook believes that the text of the 21st Amendment renders the dormant Commerce Clause invalid.

This view is incorrect on many grounds. First, it proves too much, in that it would repeal any supposedly nontextual right or power, regardless of its history or foundation in the structure of the Constitution. If this were so, then it would mean, for instance, that the 21st Amendment would repeal the incorporation doctrine, or the so-called "reverse incorporation" doctrine of *Bolling v. Sharpe*. Indeed, it would mean that the 21st Amendment also repeals cases such as *McCullough v. Maryland* or even *Marbury v. Madison* in the context of alcohol. In fact, the dormant Commerce Clause originally was recognized in constitutional law at roughly the same time as these cases. There is no indication that the framers of the 21st Amendment intended these absurd results, which would contradict all accepted principles of constitutional interpretation. In fact, as Justice Brennan observed in *North Dakota*, the Court has "never held" that regulations affecting the importation and transportation of alcohol "[are] insulated from review under the federal immunity doctrine [as established in *McCullough*] or any other constitutional ground, including the dormant Commerce Clause."[167]

Second, this view conflates two different prongs of the dormant Commerce Clause: the well-established nondiscrimination principle and the more controversial balancing test of *Pike v. Bruce Church*. Under *Pike*, the Court weighs the benefits of the state regulation against the costs it imposes on interstate commerce. Justice Scalia has properly criticized the *Pike* doctrine as lacking intellectual coherence and turning the court into a super-legislature second-guessing the policy wisdom of state law. In contrast, both Justices Scalia and Thomas have consistently voted to strike down state laws that facially discriminate against interstate commerce. For example, in *New Energy v. Limbach*, Scalia wrote, "It has long been accepted that the Commerce Clause . . . directly limits the power of the States to discriminate against interstate commerce. This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[168] Moreover, Scalia concurred in *Healy*, noting that the 21st Amendment did not save a price scheme that dealt with alcoholic beverages "since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment."[169]

Similarly, although Justice Thomas has also questioned the textual foundation of the dormant Commerce Clause, he has endorsed the constitutional foundation of the nondiscrimination principle. In *Camps Newfound*, for instance, he criti-

[166] Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849 (7th Cir. 2000).
[167] *North Dakota*, 495 U.S. at 450 (opinion of Brennan, J.).
[168] New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988) (citations omitted).
[169] *Healy*, 491 U.S. at 344 (Scalia, J., concurring in part and concurring in the judgment).

cized the derivation of a nondiscrimination principle from the Commerce Clause, but clearly stated that he would still apply the principles behind the dormant Commerce Clause through the Import-Export Clause, which he would apply to interstate commerce as well as foreign trade: "our rule that state taxes that discriminate against interstate commerce are virtually per se invalid under the negative Commerce Clause may well approximate the apparent prohibition of the Import-Export Clause itself."[170] Thus, although Scalia and Thomas would both abandon the *Pike* balancing test, both have written that the ban on protectionism is well-grounded in the Constitution.[171] It is thus important to note in this context that Easterbrook's opinion in *Bridenbaugh* expressly rests on the determination that the law in question was not discriminatory when applied to the plaintiffs in that case.[172]

In short, although "plain language" analysis has much to commend it, the historical record of both the 21st Amendment and the Commerce Clause, as well as the text of the Constitution, are needed to interpret the 21st Amendment in a way that is consistent with its original purpose.

V. Policy Considerations and "Core Concerns"

In the direct shipping context, constitutional issues are closely intertwined with policy arguments. As explained in Part I, the Commerce Clause prohibits states from discriminating against out-of-state merchants absent a substantial, non-protectionist state interest. The Court has "followed a consistent practice of striking down state statutes that clearly discriminate against interstate commerce, unless that discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[173] In analyzing a potentially problematic state law, "'the first step . . . is to determine whether it 'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.'"[174] As the Court has explained, "State laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'"[175] "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."[176]

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[170] Camps Newfound / Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 636 (1996) (Thomas, J., dissenting).

[171] As an aside, Cass Sunstein offers an interesting and persuasive defense of the *Pike* test, rooted in the nondiscrimination principle. Sunstein argues that where the burden on interstate commerce of a regulation manifestly outweigh the benefits, this supports an inference that the real intent of the law is protectionism and thus unconstitutional. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689-92 (1984).

[172] *See infra* notes 230-231 and accompanying text.

[173] *Healy*, 491 U.S. at 340-41 (citations omitted).

[174] Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996) (quoting Oregon Waste Sys. Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)).

[175] *Id.*

[176] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

If a state statute discriminates against interstate commerce, the Court's cases "leave open the possibility that a State may validate [it] by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[177] In this situation, the state's burden is high: a discriminatory statute "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."[178] Indeed, the "State's burden of justification is so heavy that 'facial discrimination by itself may be a fatal defect.'"[179]

The same restrictions apply to state alcohol regulations.[180] As the Court has explained, "State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."[181] Instead, a regulation's validity depends on "'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.'"[182] The Court has identified the 21st Amendment's "core concerns" as including some or all of the following: "promoting temperance," collecting excise taxes, and "ensuring orderly market[s]."[183]

Even if the state identifies a valid core concern, the state still must show that any discrimination "is *demonstrably justified* by a valid factor unrelated to economic protectionism,"[184] and that the discrimination itself, rather than the overall regulatory scheme, is necessary to satisfy the legitimate purposes[185]. The Court has required states to provide at least credible empirical evidence showing the state needs to discriminate to effectuate the regulatory regime.[186] Courts must rigorously analyze the justification for the discrimination, as well as the lack of nondiscrimina-

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[177] *New Energy Co.*, 486 U.S. at 278.
[178] *Hughes*, 441 U.S. at 337.
[179] *Oregon Waste Systems*, 511 U.S. at 101 (quoting *Hughes*, 441 U.S. at 337).
[180] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 275 (1984).
[181] *Id.* at 276.
[182] *Bacchus*, 468 U.S. at 275-76 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).
[183] *See North Dakota*, 495 U.S. at 432 (Stevens, J., plurality opinion); *accord* Capital Cities Cable v. Crisp, 467 U.S. 691 (1984).
[184] *Healy*, 491 U.S. at 340-41 (citing Maine v. Taylor, 477 U.S. 131, 106 (1986)) (emphasis added).
[185] *New Energy Co.*, 486 U.S. at 278; Hughes v. Oklahoma, 441 U.S. 322, 337 (1979); *see also* Heald v. Engler, 342 F.3d 517, 526 (6th Cir. 2003).
[186] *See, e.g.*, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 112-14 (1980) (questioning empirical basis for avowed "temperance" justification); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 487 (1996); Maine v. Taylor, 477 U.S. 131, 145-46 (1986) (applying rigorous analysis of state's justification for ban on importation of baitfish); *Healy*, 491 U.S. at 341 (questioning state's asserted rationale for exempting domestic brewers and shippers from state price affirmation statute); *cf.* Walling v. Michigan, 116 U.S. 446, 460 (1886); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951); *Maine*, 477 U.S. at 153 ("[T]he invocation of environmental protection or public health has never been thought to confer some kind of special dispensation from the general principle of nondiscrimination in interstate commerce."). In fact, in *Swedenburg*, the New York Attorney General admitted during oral argument in the Federal District Court that the purpose of the New York law was economic protectionism, not to further a legitimate core concern. Swedenburg v. Kelly, 232 F. Supp. 2d 135, 144 (S.D.N.Y. 2002).

tory alternatives, because a failure to do so would effectively strip the Commerce Clause of any limit on state action, "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."[187] Finally, any justification must have animated the regulatory regime, and not serve as simply a "'*post hoc* rationalization'" for the discrimination.[188]

In the direct shipping cases, the policy considerations all weigh against discriminatory regulation. States that allow interstate direct shipping report few or no problems with shipments to minors or tax collection. By contrast, states that discriminate have produced no evidence that discrimination is necessary to effectuate their regulatory schemes.

A. Underage Drinking

The principal temperance concern has been the prevention of sales to minors. Preventing underage drinking and promoting temperance generally are core concerns of the 21st Amendment. Nevertheless, states do not advance the avowed goal of preventing underage access to alcohol by letting in-state wineries ship to consumers while prohibiting out-of-state wineries from doing so. As one district court has observed,

> The Court finds that there is no temperance goal served by the statute since Texas residents can become as drunk on local wines or on wines of large out-of-state suppliers able to pass into the state through its [three-tier] distribution system, and available in unrestricted quantities, as those that, because of their sellers' size of Texas wholesalers or retailers' constraints, are in practical effect kept out of state by the statute.[189]

According to a comprehensive study by the Federal Trade Commission's staff, discriminatory bans on interstate direct shipping of alcohol do little to further the public goal of preventing underage access to alcohol.[190] The empirical evidence shows that consumers can purchase less expensive wines at lower prices offline, and that, due to shipping costs, consumers can save money through direct shipping only on more expensive wines. Price-sensitive minors would have to pay a hefty premium of 33-83% to purchase a bottle of wine costing less than $20 online and have it delivered to them via 2nd Day Air.[191]

The states, on the other hand, present little credible data to justify discrimination. The data from state "stings" and other empirical studies "provides little information upon which to assess the impact of interstate direct shipping on under-

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[187] *Dean Milk Co.*, 340 U.S. at 354; *see also Taylor*, 477 U.S. at 144-45.
[188] *Taylor*, 477 U.S. at 149 (quoting *Hughes*, 441 U.S. at 338, n.20).
[189] Dickerson v. Bailey, 87 F. Supp. 2d 691, 710 (S.D. Tex. 2000), *aff'd*, Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003).
[190] *See* FEDERAL TRADE COMMISSION, *supra* note 14, at 26-40.
[191] *Id.* at 33.

age drinking."[192] Moreover, the concerns of New York and Michigan regarding underage drinking and diversion are undercut by the fact that both states permit intrastate direct shipping.[193] Where a state fails to carry its heavy burden of justifying discrimination, the Court has rejected the defense.[194]

Finally, discriminatory bans are unnecessary to advance the legitimate aim of preventing alcohol sales to minors. Non-discriminatory safeguards unrelated to the geographic origin of alcohol, such as requiring an adult signature at the point of delivery, can prevent minors from receiving direct shipments of wines,[195] and empirical data demonstrate that discriminatory bans on direct alcohol shipments do not further the public goal of preventing underage access to alcohol.[196] Underage drinkers, indeed, are "much more likely to buy alcohol through offline sources than over the Internet."[197]

B. Tax Collection

Similarly, the states have not met their burden of demonstrating that they have to discriminate against interstate commerce to collect taxes. Many states that allow interstate direct shipping require out-of-state wineries to collect and remit taxes. Many of those states "report few, if any, problems with tax collection.[198] The FTC staff's *E-Commerce Report* contains no evidence indicating that states have experienced problems with tax collection. This argument appears to be a simple red-herring contrived to justify protectionist laws.

Moreover, some states also have adopted less restrictive means of protecting tax revenues while permitting direct shipping, such as by requiring out-of-state suppliers to obtain permits and to collect and remit taxes.[199] Of these states, most report few, if any, problems with tax collection. Nebraska, for example, reports that they "have also not, as yet, had any problems with the collection of excise tax[es]."[200] North Dakota reports that "Taxes are collected. No problems to date that we are aware of."[201]

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[192] *Id.* at 38 (discussing data).
[193] *See id.* at 32 n.141 (citing *Dickerson v. Bailey*, 212 F.Supp.2d 673 (S.D. Tex. 2002), *incorporating* Dickerson v. Bailey, 87 F.Supp.2d 691, 710 (S.D. Tex. 2000), *aff'd*, 336 F.3d 388 (5th Cir. 2003)) ("The Court finds that there is no temperance goal served by the statute since Texas residents can become as drunk on local wines or on wines of large out-of-state suppliers").
[194] *Cf. Taylor*, 477 U.S. 152.
[195] *E.g.*, MICH. COMP. LAWS § 436.1203(3) (1998).
[196] *See* FEDERAL TRADE COMMISSION, *supra* note 14, at 26-40.
[197] *Id.* at 34.
[198] *See id.* at 38-40.
[199] *See, e.g.*, LA. REV. STAT. ANN. § 26:359(B)(1); N.H. REV. STAT. ANN. § 178:14-a(V); NEV. REV. STAT. § 369.462.
[200] *See* FEDERAL TRADE COMMISSION, *supra* note 14, at 120 (Nebraska letter).
[201] *See id.* at 126 (North Dakota letter).

To the extent that states have problems with out-of-state suppliers, they have addressed the problem in less restrictive ways than banning all interstate direct shipping. New Hampshire, for example, works with out-of-state suppliers:

> [T]he State of New Hampshire Liquor Commission collects an 8% fee on all shipments into the State of New Hampshire. When the NH Liquor Commission discovers an improper shipment we contact the company and inform them of the laws in NH. Once the company learns of NH laws they normally get a permit or stop shipping into NH. The NH Liquor Commission is working with out-of-state supplier[s] and encouraging them to obtain a permit.[202]

Furthermore, to the extent that out-of-state suppliers fail to comply voluntarily, states can report problems to the federal Tax and Trade Bureau or other states, or use the Twenty-First Amendment Enforcement Act. On the other hand, there is no evidence that states must ban interstate direct shipping, rather than adopting a less restrictive alternative, to raise revenue.

C. "Orderly Market Conditions"

The same holds true for "orderly market conditions." Although it is not entirely clear what the phrase "orderly market conditions" means,[203] some language suggests that the phrase means protecting small vendors. The Fifth Circuit, for example, noted that some courts have equated "orderly market conditions" with "the prevention of monopolies or organized crime from (re)gaining control of the alcohol industry."[204] Unless "orderly market conditions" means preserving the privileged status of in-state producers, however, no interpretation justifies discriminating against out-of-state competitors. Small wineries nationwide benefit substantially from interstate direct shipping, as direct shipping is often their only feasible means of distributing their product to some markets.[205]

It has also been recognized that preventing the diversion of alcohol from authorized channels of sale is a core concern of the 21st Amendment and a proper exercise of the state's police power. Although arising under the Supremacy Clause, not the Commerce Clause, the "core concerns" analysis was also applied in *North Dakota v. United States*.[206] In that case, North Dakota required out-of-state distillers, but not in-state distillers, to label each item sold directly to a federal military enclave. The United States sued to invalidate the regulations. A plurality opinion of the Court upheld the regulations as a valid exercise of the state's power to regulate

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[202] *See id.* at 123 (New Hampshire letter).
[203] *See* Bainbridge v. Turner, 311 F.3d 1104, 1114-15 (11th Cir. 2002).
[204] Dickerson v. Bailey, 336 F.3d 388, 404 (5th Cir. 2003).
[205] *See* FEDERAL TRADE COMMISSION, *supra* note 14, at 14-16.
[206] North Dakota v. United States, 495 U.S. 423, 424 (1990) (Stevens J., joined by Rehnquist, O'Connor, and White, with Scalia concurring separately).

alcohol in furtherance of the "core concerns" of the 21st Amendment.[207] In particular, the Court drew on a long line of case that recognized the improper "diversion" of alcohol from authorized outlets as both a core concern of the 21st Amendment and a valid exercise of the state's police power.[208] The Court also looked beyond the state's mere assertion of the need for the regulation, finding that "[t]he risk of diversion into the retail market and disruption of the liquor distribution system is thus *both substantial and real*" in terms of tracking and monitoring the distribution of liquor within the regulated system.[209] Based on this finding, as well as the conclusion that the state regime did not discriminate against the federal government, the Court upheld the state requirements. However, as stressed by Justice Brennan in his opinion for four Justices, the Court's acceptance of the diversion rationale did not relieve the states of their need to comply with the requirements of the federal Constitution, including the dormant Commerce Clause, nor did it relieve the states of their duty to justify any discriminatory burdens.[210]

In the wine direct-shipment cases, the states have provided no evidence that discrimination is necessary to prevent diversion of alcohol in transit. Whether the seller is in-state or out-of-state, the proposed method of transport is by common carrier, such as UPS or FedEx. There is no discernible threat of diversion of these shipments, and the states have offered no reasons to explain why shipment by common carrier would be safe from diversion for in-state sellers but not out-of-state sellers.[211] Thus, although the fear of diversion can theoretically serve as a core concern, there is no evidence that this fear justifies the discriminatory regulatory regimes in the direct shipment cases, nor is any such evidence likely.

In short, permitting direct shipment by in-state, but not out-of-state, wineries is completely arbitrary and unnecessary. All attempts to justify it are little more than post hoc rationalization of protectionism. The states have offered no empirical basis to justify the distinction, just the bald assertion that they can better regulate in-state sellers as opposed to out-of-state sellers, a rationale that could apply to any product, including milk,[212] peddlers,[213] or virtually any other good or service. As the Supreme Court has consistently recognized, a state's mere assertion that a law is related to alcohol does not insulate it from searching inquiry under the Commerce Clause, especially when the law is facially discriminatory.

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[207] *Id.* at 432-33.
[208] *See* United States v. Mississippi Tax Comm'n, 412 U.S. 363, 373 (1973); *Hostetter*, 377 U.S. at 333; Carter v. Virginia, 321 U.S. 131, 135-36 (1944); Duckworth v. Arkansas, 314 U.S. 390, 399 (1941).
[209] *North Dakota*, 495 U.S. at 433 (emphasis added).
[210] *Id.* at 450-51.
[211] In fact, the New York regime even discriminates regarding the nature of delivery, as it permits in-state farm wineries to ship via common carriers, but would require those hypothetical sellers that could qualify under its "physical presence" exception to deliver via proprietary trucks.
[212] *Dean Milk*, 340 U.S. at 353-54.
[213] *Welton*, 91 U.S. at 278.

VI. "Physical Presence" Requirements

Although it seems quite obvious that these "direct shipment" regulatory schemes are discriminatory in effect, even if not intent, in *Swedenburg v. Kelly*[214] the Second Circuit nonetheless held that the New York scheme was not discriminatory because it only required a merchant to establish a "physical presence" in the state in order to sell alcohol. But the belief that a law does not discriminate against out-of-state sellers simply because they could become in-state sellers fundamentally misunderstands the restrictions imposed by the dormant Commerce Clause and centuries of Supreme Court precedent.

A state statute discriminates whenever it provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[215] In *Oregon Waste Systems*, for example, the Court found that Oregon's surcharge on out-of-state solid waste was facially discriminatory because the "geographic distinction . . . patently discriminates against interstate commerce."[216] The surcharge gave "those who handle domestic articles of commerce a cost advantage over their competitors handling similar items produced elsewhere."[217] Similarly, in *New Energy Co. of Indiana*, the Court struck down an Ohio statute regulating ethanol production that "explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States."[218]

Applying these standards, "physical presence requirements" overtly discriminate against out-of-state products. According to the Second Circuit, because out-of-state wineries may ship wine directly to consumers in New York if those wineries establish an in-state "physical presence," New York's regulatory scheme is "non-discriminatory" and not protectionist, although "the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol."[219] In its petition for certiorari, the state of Michigan similarly argued that "requiring a local presence has been upheld in the tobacco sales context based on police power authority alone."[220]

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[214] 358 F.3d 223 (2nd Cir. 2004).
[215] Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994).
[216] *Id.* at 100.
[217] *Id.* at 106.
[218] *New Energy Co. of Indiana*, 486 U.S. at 274, 280; *accord* Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (citing Welton v. Missouri, 91 U.S. 275 (1876)); Nippert v. City of Richmond, 327 U.S. 416, 435 n.25 (1946).
[219] Swedenburg v. Kelly, 358 F.3d 223, 237-39 (2nd Cir. 2004). The Second Circuit's opinion does not indicate whether any out-of-state winery has ever used these procedures to establish a physical presence and ship wine directly to consumers. Moreover, it is unclear whether an out-of-state winery, after establishing an in-state physical presence, could then ship wine directly to consumers from the winery, or only from the in-state location.
[220] Mich. Cert. Pet. 10 (citing Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200 (2d Cir. 2003)).

Despite these arguments, Supreme Court precedent demonstrates that states may not require companies to establish an in-state physical presence in order to receive equal treatment under state law.[221] The Court "'has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal . . . .'"[222] For instance, there is "no authority" for the proposition that a discriminatory tax "may be upheld if a taxpayer could avoid that discrimination by changing the domicile of the corporations through which it conducts its business."[223]

As the Court has explained, such "physical presence" requirements could seriously impair interstate commerce.[224] In *Halliburton*, for example, Louisiana taxed labor and overhead for units assembled out of state, but would not have taxed those units had they been assembled in the state. In striking down the tax, the Court noted that "a tax which is 'discriminatory in favor of the local merchant' also encourages an out-of-state operator to become a resident in order to compete on equal terms."[225] The Court then explained that such incentives could harm the economy:

> If similar unequal tax structures were adopted in other States, a not unlikely result of affirming here, the effects would be more widespread. The economic advantages of a single assembly plant for the appellant's multistate activities would be decreased for units sent to every State other than the State of residence. At best, this would encourage the appellant to locate his assembly operations in the State of the largest use for the units. At worst, it would encourage their actual fractionalization or discontinuance.[226]

For similar reasons, New York's physical presence requirement could impair the free flow of goods and services across state lines, especially given the prevalence of mail order and internet commerce. State physical presence laws "deprive online suppliers of one of the main efficiency benefits of e-commerce, the ability to provide goods and services over large distances without the need for a substantial, far-flung physical presence."[227] If extended to industries other than wine,[228]

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[221] *E.g.*, Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 72 (1962); Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951).
[222] South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 84-85 (1984) (emphasis added) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).
[223] Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 78 (1992).
[224] *Halliburton*, 373 U.S. at 67.
[225] *Id.* at 72 (citations omitted) (quoting Nippert v. Richmond, 327 U.S. 416, 431 (1946)).
[226] *Id.* at 72; *accord* Best & Co. v. Maxwell, 311 U.S. 454, 456 (1940) ("Interstate commerce can hardly survive in so hostile an atmosphere.").
[227] Letter from FTC Staff, to William McGee, Chairman, New York Assembly Agriculture Committee 13-14 (Mar. 29, 2004); *accord* FEDERAL TRADE COMMISSION, *supra* note 14, at 14-16.
[228] *Cf. Brown & Williamson*, 320 F.3d. at 200 (tobacco).

physical presence requirements could force online companies like Amazon.com, or catalogue retailers like L.L. Bean, to establish and maintain offices in all fifty states, and as *Halliburton* explains, upholding the Second Circuit's decision could encourage other states to adopt such requirements. In short, if upheld, physical presence requirements would represent a substantial step toward economic balkanization.

Alternatively, the Second Circuit may have believed that the 21st Amendment relaxed the traditional standard of review for state alcohol regulations. Whether or not the Second Circuit adopted this reading, it is implausible. It is possible to read the 21st Amendment as permitting discriminatory state regulations of alcohol that would be unconstitutional if applied to any other economic product, although as mentioned, such a reading is inconsistent with the history of the 21st Amendment and applicable Supreme Court precedent. However, this analysis is at least consistent with the canonical, two-step dormant Commerce Clause analysis: first, determine whether a law is discriminatory (and therefore subject to greater scrutiny); and second, determine whether some compelling state purpose saves the law from invalidation (in the current case, the 21st Amendment). But the 21st Amendment cannot affect the threshold question of whether the law is discriminatory. Thus, the 21st Amendment cannot make a physical presence requirement nondiscriminatory.

In fact, no federal appellate court has held that the 21st Amendment can save a discriminatory regulation. In *Swedenburg*, the Second Circuit inexplicably held that the law was nondiscriminatory, without providing a clear basis for this decision, which was incorrect under prevailing Supreme Court jurisprudence. And this threshold determination that the law was nondiscriminatory was essential. Second Circuit precedent states that state laws that discriminate against out-of-state sellers of alcohol violate the dormant Commerce Clause, notwithstanding the 21st Amendment.[229]

Similarly, the Seventh Circuit's holding in *Bridenbaugh* was predicated on a threshold determination that an Indiana regulatory regime was not discriminatory as applied to the plaintiffs in question, in-state consumers seeking to receive direct shipments of wine from out-of-state sellers.[230] Although the Seventh Circuit's

[229] Loretto Winery Ltd. v. Duffy, 761 F.2d 140, 141 (2d Cir. 1985). In fact, the District Court in *Swedenburg* held the New York regime to be discriminatory and held that it unconstitutionally discriminated against interstate commerce and was not saved by the twenty-first amendment. Swedenburg v. Kelly, 232 F. Supp. 2d. 135, 151-52 (S.D. N.Y. 2002).

[230] The determination in *Bridenbaugh* that the regime was nondiscriminatory as to the particular plaintiffs in the case turns on the unique status of the plaintiffs as in-state consumers. No injured out-of-state sellers were parties to the case. *See Bridenbaugh*, 227 F.3d at 854. All of the plaintiffs were consumers who sought to purchase out-of-state wines, but there was no evidence that any sellers actually sought to sell those wines to the consumers. Absent willing sellers unable to sell to the plaintiff consumers, the law was not shown to have a discriminatory effect. As the opinion states, "Plaintiffs do not complain about the statute that apparently limits distribution permits to Indiana's citizens. These plaintiffs are concerned only with direct shipments from out-of-state sellers who lack *and do not want* Indiana permits." *Id*. Moreover, the Seventh Circuit further found an absence of discrimination because the Indiana regime

threshold finding of fact may have been inaccurate, that does not affect the legal issue. It is clear from Judge Easterbrook's opinion that if the court had found the law discriminatory, the regulatory regime would have been illegal.[231]

Conclusion

The framers of the 21st Amendment, like the framers of the Commerce Clause, sought to create a national market free from partial restraints based solely on geography. They sought to restore the states' police power but insisted that if a state chose to exercise that power it do so without discriminating against interstate commerce. Recent empirical evidence confirms the wisdom of these principles, as free trade benefits both consumers and merchants alike.

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required "*every* drop of liquor pass through its three-tiered system and be subjected to taxation." *Id.* These particular facts, that *all* liquor was required to pass through the three-tier system and that there were no out-of-state sellers who were discriminated against from getting permits, distinguishes *Bridenbaugh* from the situation in the current cases, where out-of-state sellers have been injured by their inability to obtain direct-shipping permits on the same terms as in-state sellers. *See Heald*, 342 F.3d at 527.

[231] Indeed, as a practicing lawyer Easterbrook authored a brief in the *Bacchus* case, where he argued that the 21st Amendment did not save the discriminatory regime in question there. Although it is obviously difficult to infer a judge's position from his prior positions taken as an advocate, it is interesting to note in this case that Easterbrook's opinion in *Bridenbaugh* follows the reasoning of his *Bacchus* brief quite closely. The difference between the two is that in *Bacchus* Easterbrook argued in his brief that the state law was discriminatory and thus was invalid, whereas in *Bridenbaugh* he held that the law was nondiscriminatory as applied to the plaintiffs in that case and thus was permitted.