CONTROL VERSUS COMPETITION: THE COURTS' ENIGMATIC JOURNEY IN THE OBSCURE BORDERLAND BETWEEN THE TWENTY-FIRST AMENDMENT AND COMMERCE CLAUSE

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I. INTRODUCTION

Since the dawn of recorded history, alcohol has enriched our culinary experiences, social gatherings, and lives. When abused, however, it has also occasioned great harm. According to the Centers for Disease Control and Prevention, alcohol contributes to over 88,000 deaths each year in this country, and the estimated economic cost of excessive drinking in the United States is over $224 billion annually.[1] Few, if any, products embody a similar potential to create such great societal harm.

Federal, state, and local governments have attempted to mitigate the detrimental impacts of alcohol abuse through regulation of the industry and the consumer. Alcohol has always been, and remains, one of the most heavily regulated products in the United States. It is unique in terms of its status in law. It is the only product that has been the subject of two constitutional amendments: the Eighteenth, which instituted the national Prohibition, and the

1. *Alcohol Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/features/alcohol-deaths/ [https://perma.cc/XQ2D-TFAL] (last updated Dec. 22, 2014).

Twenty-first, which repealed Prohibition and returned primary responsibility for alcohol regulation to the states.[2]

Minnesota has long been at the forefront of the public debate over how we regulate alcohol. The National Prohibition Act, passed in 1919 to effectuate the Eighteenth Amendment, is also known as the Volstead Act because it was sponsored and shepherded through Congress by Representative Volstead from Minnesota.[3] Currently, the Alcohol Epidemiology Program at the University of Minnesota's School of Public Health harbors some of the nation's foremost experts on alcohol control policies.[4] Nearly every year, the Minnesota state legislature considers some of the most controversial alcohol regulations and policies.[5]

Like the rest of the economy, the alcohol industry has experienced substantial consolidation in recent years.[6] In many states, Walmart, Costco, Total Wine, and other mega-retailers are assuming a dominant position at the retail tier.[7] Recently, Amazon acquired the Whole Foods national grocery chain.[8] A handful of other companies are also taking a dominant position at the supplier tier. For instance, Anheuser Busch InBev (ABI), the largest brewer in the world, currently accounts for approximately forty-seven percent of all U.S. beer sales.[9] In 2015, ABI acquired SABMiller plc

2. U.S. CONST. amends. XVIII, XXI.

3. *See* Rae Katherine Eighmey, *Minnesota's Gift to America: The Volstead Act*, MINNPOST (Nov. 17, 2015), https://www.minnpost.com/mnopedia/2015/11/minnesota-s-gift-america-volstead-act [https://perma.cc/U3C2-VYYR].

4. *See The Alcohol Epidemiology Program*, U. MINN., http://www.aep.umn.edu/ [https://perma.cc/G3H4-Q8FM] (last modified Aug. 26, 2010).

5. *See, e.g.*, Act of Mar. 7, 2017, ch. 6, 2017 Minn. Laws 1, 1 (codified as amended at MINN. STAT. § 340A.504 (2016 & Supp. 2017)) (expanding Sunday sales); Act of May 1, 2015, ch. 9, 2015 Minn. Laws 1, 1–2, 11 (codified as amended at MINN. STAT. § 340A.22 (2016)) (expanding brewer, brewpub, & distiller privileges); Act of May 24, 2011, ch. 55, 2011 Minn. Laws 1, 1–6 (codified as amended at MINN. STAT. § 340A.301 (2016)) (expanding brewer retail privileges, known as the "Surly Law").

6. *See* BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION 41 (2010).

7. *See, e.g.*, Jeanne Lang Jones, *Costco Stores Dominate Liquor Sales, but a Rival is No. 1*, PUGET SOUND BUS. J. (Mar. 29, 2013, 5:00 AM), https://www.bizjournals.com/seattle/print-edition/2013/03/29/costco-stores-dominate-liquor-sales.html [https://perma.cc/R34N-75H5].

8. *See* Abha Bhattarai, *Amazon to Buy Whole Foods Market in Deal Valued at $13.7 Billion*, WASH. POST (June 16, 2017), http://www.washingtonpost.com/news/business/wp/2017/06/16/amazon-to-buy-whole-foods-market-in-deal-valued-at-13-7-billion-2/ [https://perma.cc/XF46-PTLN].

9. Competitive Impact Statement at 4, United States v. Anheuser-Busch InBev

(SAB), the second largest brewer in the world.[10] The magnitude of that acquisition triggered the scrutiny of the Department of Justice under the Hart-Scott-Rodino Act, an anti-trust law.[11] Because of a concern that the proposed transaction would substantially reduce competition in the U.S. beer market, ABI was required to divest SAB's equity and ownership in MillerCoors, a joint venture through which SAB conducts its U.S. business.[12] MillerCoors' sales account for about twenty-five percent of all U.S. beer sales.[13] These global manufacturing and retail behemoths have often sought to deregulate the industry incrementally through the courts and state legislatures.[14] Recognizing that smaller retailers are unable to compete with their superior resources, large retailers have sought to eliminate laws that level the playing field in the industry by regulating the availability and price of alcohol.[15]

Beyond the negative impact on competition, entrepreneurialism, and innovation, deregulation will ultimately result in an increase in consumption patterns and abuse.[16] At the same time, craft suppliers have sought exemptions from state liquor laws in order to maximize their profits.[17] Year after year, these

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SA/NV, No. 1:16-cv-01483-EGS (D.D.C. Jul. 20, 2016), https://www.justice.gov/atr/file/877621/download [https://perma.cc/8J44-9TJN].

10. *Id.* at 1.

11. *See id.* at 25; 15 U.S.C. § 18a (2012). The Hart-Scott-Rodino Act allows "State attorneys general to recover monetary damages on behalf of State residents injured by violations of the antitrust laws. The [Act] is intended to compensate the victims of antitrust offenses, to prevent antitrust violators from being unjustly enriched, and to deter future antitrust violations." United States v. B. F. Goodrich Co., 619 F.2d 798, 800 (9th Cir. 1980) (citing H.R. Rep. No. 94-499, at 3 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2572, 2572)).

12. *See* Competitive Impact Statement, *supra* note 9, at 2.

13. *Id.* at 5.

14. *See, e.g.*, H.B. 2291, 85th Leg., Reg. Sess. (Tex. 2017) (proposing shipment to residents from out of state producers); Dan Adams, *For Total Wine, It's Total War Against Alcohol Regulations*, BOS. GLOBE (May 20, 2017), https://www.Bostonglobe.com/business/2017/05/20/for-total-wine-total-war-against-alcohol-regulations/lj09FZ4pg1oDEWJFqKuyZM/story.html [https://perma.cc/B4QT-M9WU] ("Total Wine & More is waging total war on the nation's alcohol laws—and Massachusetts is the new front line.").

15. *See* Adams, *supra* note 14. For example, Total Wine previously introduced bills to repeal the one license per municipality law and the central warehouse ban. *Id.*

16. *See, e.g.*, Toben F. Nelson et al., *Patterns of Change in Implementation of State Alcohol Control Policies in the United States, 1999-2011*, 100 ADDICTION 59, 59–68.

17. Historically, Minnesota law has mandated a three-tier system of alcohol distribution where each tier—manufacturing, distribution, and retailing—was

regulatory exemptions expand, leading us further down the slippery slope of deregulation. These exemptions often lead to constitutional challenges on the basis that the exemptions discriminate against out-of-state entities to the benefit of in-state entities and thereby burden interstate commerce.[18]

All alcohol regulation fundamentally represents a balance between unfettered competition and availability, on the one hand, and strict control, on the other.[19] Courts have often assumed a policymaking role under the guise of judicial review and the "balancing" of state and federal interests.[20] An oft-cited federal interest is promoting competition under the Sherman Act.[21] Too often, the courts largely ignore the states' interest in moderating the sale, promotion, and consumption of alcohol under the Twenty-first

limited to its service function. *See* MINN. STAT. § 340.301 (2016). In 1987, a three-tier, tied-house exemption was created for brewpubs enabling a specialty retailer to brew up to 2,000 barrels of beer a year for consumption solely on the premises. Act of May 26, 1987, ch. 249, 1987 Minn. Laws 888, 888–89. This consumption limit was later expanded to 3,500 barrels for on-premise consumption and 500 barrels of growlers for off-premise consumption. Act of May 9, 1994, ch. 611, 1994 Minn. Laws 1291, 1291–98. In 1990, production brewers producing 25,000 barrels or less were permitted to self-distribute. Act of May 4, 1990, ch. 554, 1990 Minn. Laws 1546, 1551. In 2005, production brewers who produced under 3,500 barrels were permitted to sell growlers from the brewery premises for off-premise consumption. Act of April 22, 2005, ch. 25, 2005 Minn. Laws 279, 280. This limit was later raised to 20,000 barrels. Act of July 1, 2013, ch. 42, 2013 Minn. Laws 1, 2, 4. Finally, a tax credit was created for Minnesota brewers producing less than 250,000 barrels. Act of July 1, 2013, ch. 143, 2013 Minn. Laws 1, 60 (codified as amended at MINN. STAT. § 297G.04, subdiv. 2 (2016)). Minnesota has well over a hundred production brewers. *See generally* Jerard Fagerberg, *Is Minnesota Brewing a Craft Beer Bubble?*, CITY PAGES (Oct. 5, 2016), http://www.citypages.com/restaurants/is-minnesota-brewing-a-craft-beer-bubble/395859051 [https://perma.cc/AK6H-JBFW]. All but five or six of the brewers produce under 20,000 barrels of beer per year and approximately ninety percent of these brewers produce under 5,000 barrels a year. *See id.* Accordingly, the vast majority of Minnesota brewers receive significant tax breaks for beer. There are similar three-tier, tied-house exemptions for wineries and distilleries but not for distributors or retailers.

18. *See infra* Part V.

19. *See generally* Paul Crampton, *Striking the Right Balance Between Competition and Regulation: The Key is Learning from Our Mistakes*, OECD (Oct. 2002), https://www.oecd.org/regreform/2503205.pdf [https://perma.cc/J344-WF85] (discussing how to create effective competitive balance through regulation).

20. *See generally* Sidney J. Spaeth, *The Twenty-first Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 194 (1991) (stating that when the article was written, courts showed little tolerance for anticompetitive pricing agreements that exist outside the core power purposes).

21. *See, e.g.*, TFWS, Inc. v. Schaefer, 242 F.3d 198, 213 (4th Cir. 2001).

Amendment and summarily deem the federal Sherman Act interest as paramount as the "Magna Carta of free enterprise."[22]

Courts should exercise caution in the exercise of judicial review of alcohol regulation. Local, elected representatives, sensitive to the differing norms and standards of their constituencies, should determine how to balance competition versus control of alcohol. Indeed, one of the great lessons of the Prohibition was that the nation was "too diverse to accept a single standard" of regulatory control.[23] Courts should accord great deference to the state's regulatory authority under the Twenty-first Amendment, particularly when measured against a federal interest arising under the Sherman Act.

This Article focuses on the evolving jurisprudence concerning the Twenty-first Amendment and the Commerce Clause.[24] It analyzes the Supreme Court's attempt to reconcile the states' primary authority to regulate and control alcohol under the Twenty-first Amendment with the federal interest to promote competition and interstate commerce under the Commerce Clause.[25] The Article asserts that the current analytical framework adopted in *Capital Cities Cable, Inc. v. Crisp*,[26] which summarily requires lower courts to balance state and federal interests with little appellate guidance,[27] has subsequently lured Courts into the treacherous waters of judicial legislation.[28] The framework has also imposed upon the states a near impossible burden of proving that a challenged alcohol regulation, to the exclusion of all other factors, promotes temperance or serves other Twenty-first Amendment goals.[29] Guided by other Supreme Court precedent, the author suggests an alternative interpretation of *Capital Cities* that provides proper deference to the state's constitutional authority while preserving the Court's role to resolve conflicts between state and federal interests.[30]

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22. *See* 15 U.S.C. §§ 1–7 (2012); United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

23. *See* PA. LIQUOR CONTROL BD., PARTNERS IN PREVENTION: STATE ALCOHOL AGENCIES' APPROACH TO UNDERAGE DRINKING PREVENTION 10.2 (2002).

24. *See infra* Parts V, VI, VII.

25. *See infra* Parts V, VI, VII.

26. 467 U.S. 691, 694 (1984).

27. *See id.* at 712–13.

28. *See infra* Parts VII, VIII.

29. *See infra* Parts VII, VIII.

30. *See infra* Parts VII, VIII, IX.

II. THE PUBLIC POLICY UNDERLYING ALCOHOL REGULATION

All state alcohol regulatory systems strive to achieve moderation in both the consumption and sale of intoxicating liquor. The ultimate goal of state liquor regulation is to create an "orderly" market that balances robust competition with appropriate control.[31] The keystones of alcohol regulation in this country are three-tier and tied-house laws. Pursuant to their plenary authority under the Twenty-first Amendment, states regulate alcohol within their respective borders through a three-tier system with licensed and structurally separate producers, distributors, and retailers.[32] "Tied-house" laws support a three-tier system and prohibit suppliers and distributors from extending value in order to unduly influence the marketing practices of retailers.[33] The purpose of the system is, in part, to avoid the harmful effects of vertical integration in the industry by restricting these market participants to their respective service functions.[34]

Prior to Prohibition, vertical integration of the industry led to excessive retail capacity, overstimulated sales, intemperate consumption, and alcohol abuse.[35] These conditions arose

> in part [owing] to the failure to recognize the effects of industrial organization on the manufacture and sale of intoxicating liquor. With the rise of the large distilling and brewing corporations seeking new markets through high-pressure sales organizations, the independent tavern keeper, theretofore subject to the restraints imposed by local legislation and local public opinion, ceased to exist.[36]

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31. *See* Susan Cagann & Rick Van Duzer, *75 Years After Prohibition: The Regulatory Hangover Remains*, 18 BUS. L. TODAY 45, 45 (2009).

32. *See* Granholm v. Heald, 544 U.S. 460, 466 (2005); *see also* North Dakota v. United States, 495 U.S. 423, 432 (1990).

33. *See* Brian D. Anhalt, Comment, *Crafting a Model State Law for Today's Beer Industry*, 21 ROGER WILLIAMS U. L. REV. 162, 163–64 (2016).

34. *See Three-Tier System*, MINN. BEER WHOLESALERS ASS'N, http://www.mnbwa.com/government-affairs/three-tier-system [https://perma.cc/V9UT-JXNH] (last visited March 20, 2018).

35. *Id. See generally* Cal. Beer Wholesalers Ass'n. v. Alcoholic Beverage Control Appeals Bd., 487 P.2d 745, 748 (Cal. 1971) (describing the industry prior to prohibition as "the generation of such evils and excesses as intemperance and disorderly marketing conditions that had plagued the public and the alcoholic beverage industry").

36. Joe de Ganahl, *Trade Practice and Price Control in the Alcoholic Beverage Industry*, 12 L. & CONTEMP. PROBS. 665, 665 (1940) (citing NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, REPORT ON THE PROHIBITION LAWS OF THE UNITED STATES 6–7

Large retailers were also responsible for the excessive marketing and promotion of alcohol. In support of what would become Section 205 of the Federal Alcohol Administration Act,[37] the House Ways and Means Committee noted:

> It has been brought to the attention of the committee that certain large buyers are in such a strategic position with respect to sellers that they often have sufficient economic power to compel the sellers to deal with them on a consignment or return basis. Buyers less powerful are unable to exact such terms from the seller. Such situations are in practical effect not essentially different from the exaction of price discriminations in favor of the large trade buyer.[38]

In recognizing the problem, President Franklin D. Roosevelt stated, "I ask especially that no State shall by law or otherwise authorize the return of the saloon in its old form or in some modern guise."[39] States and Congress all agreed that restrictions on payments between tiers was necessary to prevent the return of the tied-house saloon.[40]

The judicial branch has recognized the government's interest in a three-tier system. In *Granholm v. Heald*, the United States Supreme Court characterized the three-tier system as "unquestionably legitimate."[41] In the subsequent case of *Manuel v. State*, the Louisiana Court of Appeals articulated the following rationale for the system:

> Under the three-tier system, the industry is divided into three tiers, each with its own service focus. No one tier controls another. Further, individual firms do not grow so powerful in practice that they can out-muscle regulators. In addition, because of the very nature of their operations, firms in the wholesaling tier and the retailing tier have a local presence, which makes them more amenable to regulation and naturally keeps them accountable. Further, by separating the tiers, competition, a diversity of products,

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(1931)).

37. 27 U.S.C § 205 (2012).

38. *See* FED. ALCOHOL CONTROL ADMIN., LEGISLATIVE HISTORY OF THE FEDERAL ALCOHOL ADMINISTRATION ACT 1, 64 (1935).

39. Proclamation No. 2065, 48 Stat. 1721 (Dec. 5, 1933).

40. *See* Nat'l Distrib. Co. v. U.S. Treasury Dep't, 626 F.2d 997, 1008 (D.C. Cir. 1980).

41. 544 U.S. 460, 489 (2005) (citing North Dakota v. United States, 495 U.S. 423, 432 (1990)).

> and availability of products are enhanced as the economic incentives are removed that encourage wholesalers and retailers to favor the products of a particular supplier (to which wholesaler or retailer might be tied) to the exclusion of products from other suppliers.[42]

Recently, the rise of e-commerce and other developments within the industry have caused some to question the necessity of three-tier and tied house laws.[43] Every tier of the industry has experienced significant consolidation.[44] Large suppliers and retailers, in particular, have sought to deregulate the industry incrementally. The number of small craft brewers, distillers, and wineries has exploded in the last decade.[45] Most would argue that state regulatory schemes that guaranteed access to the market and a relatively level playing field facilitated, at least in part, this incubation of small suppliers.[46] Ironically, in many states, these new small-scale industry members have successfully sought exemptions from existing regulations, including three-tier and tied house laws, which threaten to lead us down the slippery slope of deregulation.[47] These developments have generated a dramatic increase in legislative amendments, ballot initiatives, and legal challenges to state liquor laws.

State regulatory systems have achieved many benefits for the American public. American consumers enjoy great choice and variety. As evidenced by the explosion of craft distilleries, wineries, breweries, and the existence of a strong, independent middle tier, the system nurtures small, family-owned businesses and provides a level playing field on which they can fairly compete. The industry remains one of the last mainstays of family-owned businesses. As a result, alcohol vendors are rooted in their community, more likely

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42. 982 So. 2d 316, 330 (La. Ct. App. 2008).

43. *See, e.g.*, Sharon Bailey, *Alcoholic Beverage Industry is Reluctant to Embrace E-Commerce*, MKT. REALIST (May 29, 2015, 2:41 PM), http://www.marketrealist.com/2015/05/alcoholic-beverage-industry-reluctant-embrace-e-commerce/ [https://perma. cc/2DZS-6VAH].

44. *See* LYNN, *supra* note 6.

45. *See, e.g.*, *Small and Independent Brewers Continue to Grow Double Digits*, BREWERS ASS'N (Mar. 22, 2016), http://www.brewersassociation.org/press-releases/small-independent-brewers-continue-grow-double-digits [https://perma.cc/6FQK-WR6Z].

46. *See, e.g.*, LYNN, *supra* note 6.

47. *See, e.g.*, Eric Roper, *"Surly Bill" Becomes Law*, STAR TRIB. (May 24, 2011), http://www.startribune.com/dayton-signs-law-allowing-beer-sales-at-breweries/122536608/ [https://perma.cc/X2S3-SFK5]. For a list of some exemptions in Minnesota, see *infra* note 17.

to be sensitive to local norms and standards, more likely to be compliant with existing regulations, and more vulnerable to effective enforcement.[48] In this way, state regulatory structures promote an alcohol market that is orderly, open, transparent, and accountable.

III. THE EIGHTEENTH AMENDMENT

Alcohol regulation was minimal at best in the nineteenth century.[49] In that era, America was characterized as "a nation of drunkards."[50] Temperance movements, such as the Woman's Christian Temperance Union and Anti-Saloon League, arose to address the problem.[51] Initially, these prohibition advocates pursued local option laws that permitted localities to ban the sale of alcohol and close tied-house saloons.[52] Thereafter, they sought similar measures in the entire state.[53] By the end of 1916, twenty-three states banned the sale of alcohol.[54]

As the nation grew, companies engaged in interstate commerce began challenging state statutes that barred the sale of alcohol. In the late nineteenth century, the United States Supreme Court substantially limited the authority of states to regulate liquor importation under the Dormant Commerce Clause.[55]

These decisions frustrated the efforts of prohibition advocates and prompted a petition to Congress.[56] In response, Congress passed the Wilson Act[57] in order to safeguard the state's right to regulate

48. *See* Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DEPAUL BUS. & COMM. L.J. 209, 218–19. (2015).

49. *See* Jane O'Brien, *The Time When Americans Drank All Day Long*, BBC NEWS (Mar. 9, 2015), http://www.bbc.com/news/magazine-31741615 [https://perma.cc/MF5J-QB9X].

50. W.J. RORABAUGH, THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION 5 (1979).

51. *See* GARRETT PECK, THE PROHIBITION HANGOVER 9–10 (2009).

52. *Id.* at 10.

53. *Id.*

54. NORMAN H. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION 97 (1976).

55. *See, e.g.*, Leisy v. Hardin, 135 U.S. 100, 159–60 (1890) (holding that intoxicating liquor shipped into the state remained an article of "interstate commerce" immune from state regulation if it remained in its original package); Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465, 507–09 (1888) (striking down a state law that restricted the importation of intoxicating liquor to those who possess a permit).

56. *See* PECK, *supra* note 51.

57. 27 U.S.C. § 121 (1890).

alcohol, including the importation of alcohol into the state.[58] The Wilson Act provided that state law applied to the sale, distribution, and transportation of intoxicating liquor upon its arrival in the state.[59] In *Rhodes v. Iowa*, however, the Supreme Court held that the Dormant Commerce Clause prohibited state regulation of direct shipments of alcohol to in-state consumers by out-of-state distributors, effectively gutting the Wilson Act.[60] As a result, train stations began to function as retail outlets.[61] In response, Congress passed the Webb-Kenyon Act,[62] which authorized states to prohibit the sale, distribution, transportation, or importation of alcohol into the state in violation of its laws.[63] Congress passed these two acts in direct response to the Supreme Court decisions that purported to limit state authority to regulate liquor.[64] This unequivocally demonstrated the intent of Congress to make state law primary regarding the regulation of alcohol.[65] The risk that state legislation may burden interstate commerce was overridden by the desire to respect local standards and ensure effective state regulation of liquor.[66] The constitutionality of the Webb-Kenyon Act was upheld in 1917 in *Clark Distilling Co. v. Western Maryland Railway Co.*[67]

With success in the states and the Webb-Kenyon Act, temperance advocates then focused their efforts on a nationwide ban on the sale of alcohol. In 1917, Congress passed the Wartime Prohibition (grain and barley were needed for the war effort).[68] Thereafter, prohibition advocates pursued adoption of the Eighteenth Amendment, a feat that required two-thirds majority vote in both the House and Senate and a subsequent affirmative vote

58. *See* Note, *"Police Power" Under the Wilson Act of 1890*, 19 HARV. L. REV. 53, 53–54 (1905).

59. 27 U.S.C. § 121 (1890).

60. 170 U.S. 412, 426 (1898).

61. *See* Jason E. Prince, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment*, 79 NOTRE DAME L. REV. 1563, 1575 (2004).

62. 29 U.S.C. § 122 (1913).

63. *See* 49 CONG. REC. 4292 (1913). In vetoing the bill, President Taft described it as permitting "the states to exercise their old authority, before they became states, to interfere with commerce between them and their neighbors." *Id.*

64. *See* Granholm v. Heald, 544 U.S. 460, 502–03 (2005) (Thomas, J., dissenting).

65. *See, e.g.*, Dugan v. Bridges, 16 F. Supp. 694, 704 (D.N.H. 1936); 49 CONG. REC. 2687 (1913).

66. *See Dugan*, 16 F. Supp. 694 at 704.

67. 242 U.S. 311, 332 (1917).

68. *See* Spaeth, *supra* note 20, at 175.

by three-fourths of the states.[69] Only two states, Connecticut and Rhode Island, refused to ratify the Amendment.[70] Prohibition took effect on January 16, 1920.[71]

Prohibition proved to be "a noble but failed experiment" and was largely responsible for the rise of organized crime and a nationwide disregard for the law.[72] There were two great lessons learned from Prohibition. First, morality-driven legislation was difficult to sustain without long-term support.[73] Second, disparate community norms and standards for alcohol precluded the imposition of a single, national regulatory standard.[74]

IV. TWENTY-FIRST AMENDMENT

Enacted in 1933, the Twenty-first Amendment embodied the recognition that Americans were unwilling to accept a national policy that prohibited the manufacture and sale of alcoholic beverages.[75] Noble motives alone failed to achieve prohibition and undermined the public's belief in the rule of law.[76] The Twenty-first Amendment shifted the regulation of liquor to the level of government able to obtain broad support.[77] State, not national, regulation assumed the primary role.[78]

The ratification of the Twenty-first Amendment embedded in the Constitution the policy underlying the Webb-Kenyon Act; that is, state authority was primary regarding the regulation of alcohol.[79]

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69. *See* THOMAS PINNEY, A HISTORY OF WINE IN AMERICA: FROM THE BEGINNINGS TO PROHIBITION 434 (1989).

70. *See id.* ("[Y]et Rhode Island had once had constitutional prohibition itself.").

71. *See* Spaeth, *supra* note 20, at 175.

72. *See, e.g.*, Loretto Winery, Ltd. v. Gazzara, 601 F. Supp. 850, 856 (S.D.N.Y. 1985); Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613, 621 (1994).

73. *See* John D. Rockefeller, *Foreword* in RAYMOND FOSDICK AND ALBERT SCOTT, TOWARD LIQUOR CONTROL (1933) ("Men cannot be made good by force. In the end, intelligent lawmaking rests on the knowledge or estimate of what will be obeyed. Law does not enforce itself.").

74. *See National Prohibition Law: Hearings Before the S. Comm. on the Judiciary, Subcomm. on Bills to Amend the National Prohibition Act*, 69th Cong. 197 (1926).

75. U.S. CONST. amend. XXI.

76. *See* Rockefeller, *supra* note 73.

77. *See* David S. Versfelt, Note, *The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1578 (1975).

78. *See id.*

79. *See* Granholm v. Heald, 544 U.S. 460, 484 (2005).

Section 2 of the Twenty-first Amendment erected a constitutional hurdle to federal preemption of state alcohol regulation for importation, transportation, and distribution.[80] The Section "[g]rants the States virtually complete control over whether to permit importation or sale of liquor, and how to structure the liquor distribution system."[81]

As originally proposed, Section 3 of the Twenty-first Amendment conferred upon Congress concurrent power to regulate alcohol sales, but that language was not adopted.[82] Senators Blaine and Wagner objected to the section, explaining that the concept of concurrent power was inconsistent with the state power conferred under Section 2.[83] The intent of the Twenty-first Amendment and the Webb-Kenyon Act was not to encourage state legislation that burdened interstate commerce but rather to insulate states from federal interference with local norms and standards.[84] State authority over the regulation of alcohol was deemed paramount.[85]

After Repeal, "temperance" no longer meant prohibition, it meant sustainable moderation. Community acceptance of the laws and realistic enforcement guided state alcohol regulatory structures.[86] The challenge was to reconcile two contrasting images of alcohol: a product that if moderately consumed and responsibly sold could enhance life versus a dangerous intoxicating beverage that if abused could cause death and other social ills. The sale of alcohol was legalized but rigidly licensed.[87] Unlike other products, states rejected unrestrained competition, low prices, and wide availability as legitimate public policy.[88]

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80. U.S. CONST. amend. XXI, § 2.

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

82. *See* Spaeth, *supra* note 20, at 180.

83. *Id.* at 181–82. States desiring to remain dry after repeal feared that concurrent power would allow Congress to overrule a state's choice to remain dry.

84. *See* Granholm v. Heald, 544 U.S. 460, 525 (2005) (Thomas, J., dissenting).

85. *See* United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 300 (1945) (Frankfurter, J., concurring).

86. *See* RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 7 (1933).

87. *See, e.g*, Bolick v. Roberts, 199 F. Supp. 2d 397, 420 (E.D. Va. 2001).

88. States generally regulated with either a state monopoly of the distribution chain or a three-tier system. *See, e.g.*, Bainbridge v. Bush, 148 F. Supp. 2d 1306, 1308 (M.D. Fla. 2001).

V. THE TWENTY-FIRST AMENDMENT & THE DORMANT COMMERCE CLAUSE

The Twenty-first Amendment affords states the primary authority over the regulation of alcohol. Section 2 of the Twenty-first Amendment states, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[89] The Amendment was not just a narrow delegation of federal regulatory authority.[90] Endorsed by both Congress and state constitutional conventions, it represented perhaps the most profound legal and political expression of the American people.[91] The express language of the Amendment exclusively conferred on the states the authority to regulate the "transportation or importation" of intoxicating liquors.[92] The language of the Amendment did not limit the states' power to regulate the "transportation and importation" of alcohol or render states subservient to federal power under the Commerce Clause.[93]

The Commerce Clause affords the federal government the primary authority over interstate commerce. The Commerce Clause endows Congress with the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."[94] The clause also establishes a dormant constraint on the authority of states to enact legislation that interferes with or burdens interstate commerce.[95]

Shortly after the Twenty-first Amendment was enacted, the Supreme Court recognized the broad authority that the Twenty-first Amendment conferred upon the states in the area of alcohol regulation.[96] These early cases specifically upheld the states' power

89. U.S. CONST. amend. XXI, § 2.

90. *See* Swedenburg v. Kelly, 358 F.3d 223, 232–33 (2d Cir. 2004), *overruled by* Granholm v. Heald, 544 U.S. 460, 484–85 (2005).

91. *See id.*

92. U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

93. *See, e.g.*, Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939) (upholding a regulation on the exportation of alcoholic beverages out of the state).

94. U.S. CONST. art. I, § 8, cl. 3.

95. *See, e.g.*, Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994) (recognizing that "differential treatment of in-state and out-of-state economic interests that benefit the former and burdens the latter" violates the Commerce Clause).

96. *See Ziffrin*, 308 U.S. at 138.

to regulate intoxicating liquor even when it clearly burdened interstate commerce.[97] The unifying principle was that the control of importation is an essential component of the states' licensing and regulatory authority, and the Twenty-first Amendment insulates this authority from a Dormant Commerce Clause challenge.[98]

State regulation of intoxicating liquor, however, was not necessarily free from all constitutional limitations. In *State Board of Equalization v. Young's Market Co.*, Justice Brandeis wrote:

> The plaintiffs insist that to sustain the exaction of the importer's license-fee would involve a declaration that the Amendment has, in respect to liquor, freed the States from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization.[99]

Subsequently, the Court fleshed out such limitations.[100] The Court also clarified that the Twenty-first Amendment did not confer states with authority to regulate commercial activity extraterritorially.[101] Prior to 1984, it was not clear whether the Twenty-first Amendment insulated all state liquor laws from a Dormant Commerce Clause challenge. The cases discussed below highlight the evolution of the courts' jurisprudence in this area and

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97. *See id.*

98. In 1939, the Supreme Court decided to rely on the political process to resolve protectionist legislation, rather than adopt a constitutional analysis that examines the statutory purpose as regulatory or protectionist. *See* Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394 (1939); Finch v. McKittrick, 305 U.S. 395, 397 (1939). After the 1930s, states generally did not enact protectionist measures for alcohol regulation. *See* Joseph Kallenbach, *Interstate Commerce in Intoxicating Liquors under the Twenty-first Amendment*, 14 TEMPLE L.Q. 474, 488 (1940).

99. 299 U.S. 59, 64 (1936).

100. *See* 44 Liquor Mart, Inc. v. Rhode Island, 517 U.S. 484, 514–16 (1996) (deciding the Twenty-first Amendment does not sanction violations of the First Amendment); Larkin v. Grendel's Den, 459 U.S. 116, 120–27 (1982) (recognizing an alcohol zoning decision violated the Establishment Clause); Craig v. Boren, 429 U.S. 190, 206 (1976) (holding the Twenty-first Amendment does not limit a claim under the Equal Protection Clause); Wisconsin v. Constantineau, 400 U.S. 433, 434 (1971) (deciding the Twenty-first Amendment does not limit the Due Process Clause when the Government seeks to publicly post a one-year restriction on the consumption of alcohol for a citizen).

101. *See* Healy v. Beer Inst., Inc., 491 U.S. 324, 343 (1989) (striking down a price affirmation statute with extraterritorial effect); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–85 (1986) (striking down a N.Y. pricing statute that, in effect, controlled the process of intoxicating liquor in neighboring states).

their attempt to reconcile state authority under the Twenty-first Amendment with federal authority under the Commerce Clause.

A. Regulatory Differentiation between In-State & Out-of- State Producers

In *Bacchus Imports, Ltd. v. Dias*, the Court addressed the authority of the state to differentiate between in-state and out-of-state producers in a manner that benefited the former and discriminated against the latter.[102] The case involved a Hawaii tax on all intoxicating liquors except two locally produced products, ti root brandy and pineapple wine.[103] The Court held the Hawaii tax was unconstitutional on the basis that it "favor[ed] local liquor industries" and therefore was preempted by the "strong federal interest in preventing economic Balkanization."[104] The Court indicated that the Dormant Commerce Clause doctrine prohibited States from favoring "local liquor industries by erecting barriers to competition."[105] Significantly, the relevance of the Webb-Kenyon Act was never argued to the Court.[106] Hawaii did not even cite the Twenty-first Amendment until it submitted its brief to the Supreme Court.[107] The majority opinion found this belated argument unconvincing.[108]

In 2005, the Supreme Court again addressed the issue of whether and to what extent state liquor laws were subject to a Dormant Commerce Clause challenge.[109] In *Granholm v. Heald*, the Court analyzed laws in New York and Michigan that allowed in-state wineries to bypass a three-tier system and sell direct to consumers but prohibited out-of-state wineries from doing so. [110] The Court noted that the case involved a conflict between two constitutional provisions—the Commerce Clause and the Twenty-first Amendment.[111]

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102. 468 U.S. 263, 265 (1984).
103. *Id.*
104. *Id.* at 276.
105. *Id.*
106. *Id.*
107. Reply Brief for Appellants, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (No. 82-1565), 1983 U.S. S. Ct. Briefs LEXIS 597, at *5.
108. *See Bacchus*, 468 U.S. at 276.
109. Granholm v. Heald, 544 U.S. 460, 466 (2005).
110. *See id.* at 460.
111. *See* U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XXI; *id.* at 483.

The *Granholm* Court first considered whether the challenged New York and Michigan laws discriminated between in-state and out-of-state wineries in a manner that benefited the former and burdened the latter.[112] The Court concluded that the direct shipping laws granted in-state wineries access to each State's consumers on preferential terms.[113] Accordingly, the Court had "no difficulty" concluding that the New York and Michigan laws discriminated against interstate commerce.[114]

The Court then addressed the reach of the Twenty-first Amendment, specifically whether the "state alcohol [regulations were] limited by the nondiscrimination principle of the Commerce Clause."[115] It began its analysis by noting that it had previously held that the Twenty-first Amendment does not save state liquor laws that violate other provisions of the Constitution.[116]

The Court noted that it had previously held that the Twenty-first Amendment did "not abrogate Congress' Commerce Clause powers with regard to liquor."[117] In other words, state liquor laws were not immune from Commerce Clause challenges that asserted federal law preempted state liquor laws under the Supremacy Clause.[118]

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112. *Granholm*, 544 U.S. at 472–75.

113. *Id.* at 475.

114. *Id.* at 474–76.

115. *Id.* at 487 (alteration in original) (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984)).

116. *Id.* at 486–87 (citing in the context of the First Amendment, 44 Liquor Mart, Inc. v. Rhode Island, 517 U.S. 484 (1996); the Establishment Clause, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982); the Equal Protection Clause, Craig v. Boren, 429 U.S. 190 (1976); the Due Process Clause, Wisconsin v. Constantineau, 400 U.S. 433 (1971); and the Import-Export Clause, Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964)).

117. *Granholm*, 544 U.S. at 487. *See generally* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712–13 (1984) (holding that Oklahoma's regulation of retransmission of advertisements for alcoholic beverages by cable television systems is preempted, and that the Federal Government "retains authority under the Commerce Clause to regulate even interstate commerce in liquor"); Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980) ("Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.").

118. *See infra* Part VII. Although not immune from such Commerce Clause challenges, state liquor laws may yet be "saved" by the Twenty-first Amendment and avoid federal preemption if they meet the legal standard outlined by the Court in *Capital Cities*:

> [W]hether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly

The Court then considered the central issue in the case: whether state liquor laws were subject to the Dormant Commerce Clause challenge, or whether the Twenty-first Amendment provided states with the authority to pass non-uniform liquor laws and discriminate against out-of-state producers and their products.[119] To answer the inquiry, the Court examined the legislative history of the Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment.[120] The Court concluded that Section 2 of the Amendment was only intended to confer upon states the immunity as provided by Wilson and Webb-Kenyon, and Section 2 and the two acts were not intended to insulate state liquor laws from the nondiscrimination principle embodied in the Commerce Clause.[121] Therefore, facially discriminatory laws would only be upheld if they met the rigorous Dormant Commerce Clause test; namely, the challenged laws would only be upheld if they advanced legitimate state interests "that cannot be adequately served by reasonable nondiscriminatory alternatives."[122]

In *Granholm*, the laws in question could not meet this rigorous test and, accordingly, were struck down as violative of the Dormant Commerce Clause.[123] The Court, however, was careful to include language that outlined the limits of its decision:

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have

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> conflict with express federal policies. As in *Hostetter* and *Midcal Aluminum*, resolution of this question requires a "pragmatic effort to harmonize state and federal powers" within the context of the issues and interests at stake in each case.

467 U.S. at 714 (quoting *Midcal*, 445 U.S. at 109).

119. *See Granholm*, 544 U.S. at 484–85.

120. *See id.*

121. *See id.* The *Granholm* case was decided by a vote of five to four. *Id.* at 465. Justice Stevens and Justice Thomas wrote persuasive dissenting opinions, which in the opinion of this author, reflected a true interpretation of the intent of the Framers of the Twenty-first Amendment. *Id.* at 493–527.

122. *See id.* at 489.

123. *See id.* at 493.

> to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.[124]

Of particular note are the last three sentences of the above-quoted paragraph where the Court limited its decision to discrimination "*in favor of local producers*."[125] The Court further highlighted this limitation by noting that "[w]ithout demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage *out-of-state . . . producers*."[126]

This carefully chosen language illustrates the Court's attempt to balance the federal interest in interstate commerce under the Commerce Clause with the state's interest in controlling importation and structuring the liquor distribution system with its borders under the Twenty-first Amendment. Discriminating against *out-of-state* producers and their products implicated Congress' Commerce power.[127] Structuring a distribution system *within its borders* implicated the states' Twenty-first Amendment power.[128] The Court thus inferred that this distinction would determine the reach of the dormant restraints of the Commerce Clause.

The *Granholm* Court did not definitively resolve whether laws that regulate distributors and retailers must also conform to the nondiscrimination principle of the Commerce Clause.[129] Most states have a three-tier system that requires in-state residency or physical presence for a distributor or retail license.[130] Obviously, this requirement differentiates between in-state and out-of-state entities.[131] Yet the *Granholm* Court specifically rejected the contention that its decision called into question "the

124. *Id.* at 488–89 (citations omitted).
125. *Id.* at 489 (emphasis added).
126. *Id.* at 493 (emphasis added).
127. *See id.* at 489.
128. *See id.*
129. *Id.* at 488–90.
130. *See* Elias, *supra* note 48, at 211, 228.
131. *See id.*

constitutionality of the three-tier system."[132] The *Granholm* Court did not resolve the apparent conflict embodied within its holding between the application of the nondiscrimination principle to state liquor laws and the unquestionable legitimacy of the three-tier system.[133]

B. Regulatory Differentiation Between In-State & Out-of-State Retailers

Three lower courts did subsequently reconcile this apparent conflict. In *Arnold's Wines*, an Indiana retailer challenged a New York law that prohibited unlicensed, out-of-state retailers from selling and delivering alcohol directly to New York consumers.[134] The Second Circuit Court of Appeals noted that the case required it "to chart a course between two constitutional provisions that delineate the boundaries of a state's power to regulate commerce:" namely, the Twenty-first Amendment and the Commerce Clause.[135]

The *Arnold's Wines* court discussed the *Granholm* decision at length.[136] Recognizing the apparent conflict embodied within the *Granholm* decision, the Second Circuit noted the following:

> *Granholm* is best seen as an attempt to harmonize prior Court holdings regarding the power of the states to regulate alcohol within their borders—a power specifically granted to the states by the Twenty-first Amendment—with the broad policy concerns of the Commerce Clause. *Granholm* validates evenhanded state policies regulating the importation and distribution of alcoholic beverages under the Twenty-first Amendment. It is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause.[137]

Relying upon the *Granholm* conclusion that the three-tier system is "unquestionably legitimate," the Arnold Wines court upheld the challenged law on the basis that the Twenty-first Amendment

132. *Granholm*, 544 U.S. at 488.

133. *See id.* at 488–89 (citing North Dakota v. United States, 495 U.S. 423, 432 (1986)).

134. 571 F.3d 185, 186–87 (2d Cir. 2009).

135. *Id.* at 186.

136. *See id.* at 189–92.

137. *Id.* at 190 (citations omitted).

conferred upon New York the authority to structure the distribution system within the state as it saw fit.[138]

Therefore, *Granholm* stands for the proposition that states are prohibited from discriminating against out-of-state producers or their products. Under the Twenty-first Amendment, however, states are free to regulate the importation of alcohol.[139] They are also free to structure the distribution system within the state as they see fit, including the creation of a three-tier system which requires that alcohol must be funneled through in-state licensed distributors and alcohol sales to the public must be accomplished through in-state licensed retailers.[140] The Twenty-first Amendment immunizes these laws from Dormant Commerce Clause challenge.[141] Only where state law embodies discriminatory exceptions to the three-tier system will it run afoul of the Dormant Commerce Clause.[142]

The Fifth Circuit Court of Appeals reached a similar result in *Wine Country Gift Baskets.com v. Steen.*[143] In that case, out-of-state wine retailers and in-state consumers challenged Texas statutes that prohibited unlicensed, out-of-state retailers from shipping direct to in-state consumers.[144] The statutes did not contain a similar prohibition for licensed, in-state retailers.[145] Similar to the *Arnold's Wines* decision, the Fifth Circuit Court of Appeals limited the prohibition articulated in *Granholm* to producer and product discrimination.[146] The court noted that Texas laws simply require that producers sell to state-licensed wholesalers who in turn sell to state-licensed retailers, and this regulatory system "has been given constitutional approval."[147] The mere fact that retailers can deliver to consumers does not abrogate this approval.[148]

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138. *Id.* at 190–91 (rejecting an argument that the language in the *Granholm* decision is dicta).

139. *See id.* at 191.

140. *See id.* at 190 ("[T]he *Granholm* Court specifically acknowledged the vital role of the three-tier system in the exercise of states' [Section 2] powers.").

141. *See id.* at 197–98.

142. *See id.* at 191.

143. 612 F.3d 809, 811 (5th Cir. 2010).

144. *See id.* at 811–12.

145. *See id.*

146. *See id.* at 820.

147. *Id.* at 818.

148. *See id.* at 819–20. "The rights of retailers at a minimum would include making over-the-counter sales. Wine Country's argument implies that is where *Granholm*-approved retailing ends and where the potential for discrimination begins. We disagree." *Id.*

Finally, the Fourth Circuit Court of Appeals also reached a similar result in *Brooks v. Vassar*.[149] The case involved the Virginia Personal Import Exception[150] to the three-tier system that limited the amount of wine and beer that Virginia consumers could personally transport into the state for their personal consumption.[151] The court rejected the argument that this discriminated against out-of-state retailers and violated the Dormant Commerce Clause.[152] The court stated that "an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself."[153]

C. Regulatory Differentiation Between In-State & Out-of-State Distributors

Arnold's Wines, *Wine Country*, and *Brooks* involved Dormant Commerce Clause challenges to state law regulating retailers. In contrast, *Southern Wine & Spirits of America, Inc. v. Division of Alcohol & Tobacco Control* involved a Dormant Commerce Clause challenge to a Missouri statute regulating distributors.[154] The Missouri law required physical presence in the State for corporate liquor distributors and their majority owners, directors, and officers.[155] Southern Wine and Spirits of America, Inc. was denied a Missouri liquor distributor license on the basis that it was a Florida-based corporation.[156]

The Eighth Circuit framed the central issue in the case as follows: "whether the residency requirement applicable to the wholesale tier of Missouri's liquor distribution system, which is otherwise impermissible under Commerce Clause jurisprudence, is authorized by [Section] 2 of the Twenty-first Amendment."[157]

Citing *Granholm*, the Eighth Circuit held that "state policies that define the structure of the liquor distribution system while giving equal treatment to in-state and out-of-state liquor products and

149. 462 F.3d 341, 344 (4th Cir. 2006).
150. VA. CODE ANN. § 4.1-310 (2007).
151. *Brooks*, 462 F.3d at 344–45.
152. *See id.* at 352.
153. *Id.*
154. 731 F.3d 799, 802 (8th Cir. 2013).
155. *See id.* at 802–03.
156. *See id.* at 803.
157. *Id.* at 807 (alteration in original).

producers are 'protected under the Twenty-first Amendment.'"[158] The court rejected *Southern Wine*'s argument that only "integral" aspects of the three-tier system were immune from Dormant Commerce Clause challenge and that a residency requirement was not such an integral component.[159] In the court's view, "[t]here is no archetypal three-tier system," and states are free under the Twenty-first Amendment to structure that system as they see fit.[160]

Upholding the statute, the court articulated the public policy underlying Missouri's residency requirement as follows:

> The legislature legitimately could believe that a wholesaler governed predominantly by Missouri residents is more apt to be socially responsible and to promote temperance, because the officers, directors, and owners are residents of the community and thus subject to negative externalities—drunk driving, domestic abuse, underage drinking—that liquor distribution may produce. Missouri residents, the legislature sensibly could suppose, are more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-to-day in ballparks, churches, and service clubs. The legislature logically could conclude that in-state residency facilitates law enforcement against wholesalers, because it is easier to pursue in-state owners, directors, and officers than to enforce against their out-of-state counterparts.[161]

D. Facially Neutral State Regulations: Discriminatory Purpose & Effect

Granholm, *Arnold's Wines*, *Wine Country*, *Brooks*, and *Southern Wine* all involved facial discrimination. The express language of the challenged state statutes differentiated between in-state and out-of-state entities.[162] In two recent cases, state liquor laws that were facially neutral were challenged under the Dormant Commerce Clause as being discriminatory in purpose or effect.[163]

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158. *Id.* at 809 (citing Granholm v. Heald, 544 U.S. 460, 489 (2005)).

159. *See id.* at 810.

160. *Id.*

161. *Id.* at 811.

162. *See Granholm*, 544 U.S. at 469–72; *see also* S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control, 731 F.3d 799, 802–03 (8th Cir. 2013); Wine Country Gift Baskets.com v. Steen, 612 F.3d 809, 812 (5th Cir. 2010); Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 187–88 (2d Cir. 2009); Brooks v. Vassar, 462 F.3d 341, 345 (4th Cir. 2006).

163. *See* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1, 4 (1st Cir. 2010); Black

In *Family Winemakers of California v. Jenkins*, a Massachusetts statute prohibited the direct sale to in-state consumers by all wineries producing 30,000 gallons of wine per year or more.[164] Wineries that produced less could ship directly to in-state consumers.[165] Out-of-state wineries brought an action challenging the statute under the Dormant Commerce Clause.[166]

The First Circuit Court of Appeals recognized that the statute unquestionably conferred a competitive advantage to in-state wineries: all Massachusetts wineries produced under 30,000 gallons per year.[167] The court also noted that the chief sponsor of the statute stated on the floor of the House that "[w]ith the limitations that we are suggesting in the legislation, we are really still giving an inherent advantage indirectly to the local wineries."[168] One of the chief Senate sponsors was even more blunt when he stated that "we should be promoting [the local wine] industry and not adopting regulations, however inadvertently, that might take away the advantage that the winery would have."[169]

The court concluded that the statute discriminated against out-of-state wineries in both purpose and effect.[170] As such, the State bore the burden to prove that the statute "advance[d] a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives."[171] The court held that the State failed to meet this burden[172] and noted "discriminatory state laws rarely satisfy this exacting standard."[173]

The court then considered the issue of whether the Twenty-first Amendment "saved" the challenged statute.[174] *Granholm* involved

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Star Farms LLC v. Oliver, 600 F.3d 1225, 1230–35 (9th Cir. 2010).

164. *See Family Winemakers*, 592 F.3d at 4.

165. *Id.*

166. *See id.*

167. *See id.* at 5.

168. *Id.* at 7.

169. *Id.* (alteration in original).

170. *See id.* at 20–21 (recognizing the Twenty-first Amendment does not shield a state alcohol law with a discriminatory effect or purpose from "the non-discrimination rule of the Commerce Clause").

171. *Id.* at 9 (alteration in original) (quoting New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988)).

172. *See id.* at 17 (recognizing Massachusetts failed to argue a legitimate local purpose with no reasonable non-discriminatory alternative).

173. *Id.* at 9.

174. *See id.* at 18.

facially discriminatory state laws.[175] On that basis, the State argued that the nondiscrimination prohibition should be limited to facially discriminatory laws, and the Twenty-first Amendment immunized facially neutral alcohol laws from challenges based on an allegation that they discriminated in purpose or effect.[176] Rejecting this argument, the First Circuit analyzed the *Granholm* holding and stated:

> Based on our analysis of historical sources, we conclude that the Wilson and Webb-Kenyon Acts did not protect facially neutral state liquor laws from invalidation under the Commerce Clause if they were discriminatory. To hold otherwise, we would have to find that these Acts not only recognized the difference between facially discriminatory and facially neutral but discriminatory state laws, but also affirmatively intended to protect the latter and not the former. All evidence points to the contrary.[177]

The court also rejected the State's argument that the Twenty-first Amendment lessened the degree of scrutiny for facially neutral but discriminatory state liquor laws to mere rational basis review.[178]

A contemporaneous Ninth Circuit decision involved very similar facts to the *Family Winemakers* case but reached a different outcome. In *Black Star Farms LLC v. Oliver*, an Arizona statute prohibited direct sales to in-state consumers by all wineries that produced 20,000 gallons of wine per year or more.[179] Wineries that produced less could ship directly to in-state consumers.[180] Unlike *Family Winemakers*, however, there was no legislative history to suggest that the statute was discriminatory in purpose or effect.[181] Indeed, Black Star Farms conceded at the district court that it did not have a "smoking gun" and limited its challenge to "discriminat[ion] in effect."[182] Furthermore, two Arizona wineries produced more than 20,000 gallons a year. Based upon this record, the court upheld the law on the basis that the appellant had failed to prove either discriminatory purpose or effect. [183]

175. *See id.* (citing Granholm v. Heald, 544 U.S. 460, 471 (2005)).
176. *See id.* at 18–19.
177. *Id.* at 19.
178. *See id.* at 21.
179. 600 F.3d 1225, 1230–35 (9th Cir. 2010).
180. *See id.* at 1227–28.
181. *See id.* at 1228.
182. *Id.* at 1230–31 (alteration in original).
183. *See id.* at 1233–35.

Granholm and its progeny illustrate that state laws which facially discriminate against out-of-state producers and their products are deemed nearly per se invalid. It is extremely difficult for states to meet the requisite test that such discriminatory laws are necessary to advance legitimate state interests "that cannot be adequately served by reasonable nondiscriminatory alternatives."[184] Similarly, a facially neutral law which can be shown to discriminate in purpose or effect against out-of-state producers and their products will suffer a similar fate. As illustrated by the *Family Winemakers* and *Black Star* cases, however, proving such discrimination will be difficult absent admissions by the law's authors of its discriminatory purpose or evidence of a clear benefit to all in-state producers.

VI. REMEDYING DISCRIMINATION: EXTENSION VS. NULLIFICATION

A statute that runs afoul of the Dormant Commerce Clause can be remedied in two ways. A court can declare the law a "nullity" and deny its benefits to in-state entities, or the court can "extend" its benefits to all entities, whether located in state or out-of-state.[185] Discussing the remedies of nullification and extension in *Heckler v. Matthews*,[186] the Supreme Court noted,

> Although the severability clause would prevent a court from redressing this inequality by increasing the benefits payable to appellee, we have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class. To the contrary, we have noted that a court sustaining such a claim faces "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion."[187]

The *Heckler* Court indicated that the selection of the remedy should be (1) consistent with the "intent of the legislature" and (2) "measure the intensity of commitment to the residual policy and

184. Granholm v. Heald, 544 U.S. 460, 463 (citing New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988)).

185. Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring).

186. 465 U.S. 728, 738 (1948) (dealing with alleged discrimination in social security benefits).

187. *Id.* (quoting *Welsh*, 398 U.S. at 361); *see also* Califano v. Westcott, 443 U.S. 76, 89–91 (1979).

consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation."[188]

Prior to *Granholm*, the Minnesota Supreme Court applied the Dormant Commerce Clause to invalidate a Minnesota statute that imposed lower excise taxes on wine manufactured from grapes in the state.[189] For the remedy, the court noted that the "primary goal in determining a remedy is, insofar as possible, to effectuate the intent of the legislature had it known the statutes were invalid."[190] The court adopted the remedy of nullification and opined that the offending statute was an exception to the general taxing scheme.[191] Accordingly, the court concluded that "[i]t would obviously have been the legislature's intent that the general act still prevail if the 1980 amendment were invalid."[192]

The vast majority of successful Dormant Commerce Clause challenges to state liquor laws have adopted the remedy of nullification.[193] This is presumably due to the recognition that (1) a license to sell intoxicating liquor is a right, not a privilege; (2) most state regulatory systems impose comprehensive oversight and control over the production, distribution, and retail sale of alcohol; (3) the imposition of the extension remedy would be more disruptive to these systems than nullification; and (4) these regulatory systems are generally premised on the notion that whatever is not expressly permitted is prohibited.[194] Several courts have adopted the nullification remedy but have stayed the imposition of the remedy for a period of time in order to allow state legislatures the opportunity to fashion their own remedy.[195] Adoption of the extension remedy would likely occasion far greater

188. *Heckler*, 465 U.S. at 739 n.5 (quoting in part *Califano*, 443 U.S. at 91; *Welsh*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring)).

189. *See* Johnson Bros. Wholesale Liquor Co. v. Comm'r of Revenue, 402 NW.2d 791, 794 (Minn. 1987).

190. *Id.* at 793.

191. *See id.*

192. *Id.*

193. *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 524 (2005); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 271 (1984); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 326–28 (1964).

194. *See* Beskind v. Easley, 325 F.3d 506, 516 (4th Cir. 2003); Anheuser-Busch, Inc. v. Schnorf, 738 F. Supp. 2d 793, 812 (N.D. Ill. 2010).

195. *See, e.g.*, *Anheuser-Busch*, 738 F. Supp. 2d at 816; Action Wholesale Liquors v. Okla. Alcoholic Beverage Laws Enf't Comm'n, 463 F. Supp. 2d 1294, 1300–01 (W.D. Okla. 2006); Costco Wholesale Corp. v. Hoen, 407 F. Supp. 2d 1247, 1256 (W.D. Wash. 2005).

disruption to the state regulatory scheme and could result in the incremental deregulation of the industry.[196]

In the view of the author, if current regulatory systems overseeing this socially sensitive product are to be dismantled, that social engineering should be undertaken by state legislatures, not the courts.

VII. THE TWENTY-FIRST AMENDMENT & THE POSITIVE COMMERCE CLAUSE

In his *Granholm* dissent, Justice Stevens argued that the prior opinions of the Justices who lived through the debates surrounding the Eighteenth and Twenty-first Amendments were most dispositive regarding the original intent and reach of the Twenty-first Amendment.[197] As such, he believed that those opinions were entitled to special deference.[198] Justice Stevens pointed to opinions by Justice Brandeis[199] and Justice Black,[200] arguing that there was

196. This concern was expressed by the Fourth Circuit in *Beskind* when it noted,

> we can assume that North Carolina would wish us to take the course that least destroys the regulatory scheme that it has put into place pursuant to its powers under the Twenty-first Amendment. And as a matter of comity and harmony, we are duly bound to give effect to such a policy, disturbing only as much of the State regulatory scheme as is necessary to enforce the U.S. Constitution.

325 F.3d at 519 (citation omitted); *see also Anheuser-Busch*, 738 F. Supp. 2d at 813.

197. *See* Granholm v. Heald, 544 U.S. 460, 495–97 (2005) (Stevens, J., dissenting).

198. *See* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964) ("This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.").

199. *See Granholm*, 544 U.S. at 495 (Stevens, J., dissenting). In *Young's Market*, Brandeis stated,

> The plaintiffs ask us to limit [Section 2's] broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale . . . it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it . . . . Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations . . . by confining them to a single consignee?"

Id. (alteration in original) (quoting State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62–63 (1936)).

200. *See id.* at 495 n.2 (Stevens, J., dissenting) ("According to Justice Black, who

little doubt that Brandeis believed state liquor laws were immune from Dormant Commerce Clause challenges, and Black believed that such laws were free from all Commerce Clause restrictions.[201]

An accurate reading of history from an originalist's perspective would appear to validate the view of the *Granholm* dissenters.[202] But it is not the intent of this Article to rehash that history. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Court definitively resolved that debate and unequivocally held that state liquor laws were subject to at least some Commerce Clause limits.[203] The Court stated,

> To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect. In *Jameson & Co. v. Morgenthau*, . . . "the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States." The Court's response to this theory was a blunt one: "We see no substance in this contention."[204]

Subsequent cases (outlined below) began to flesh out those limits and the standards that governed the Court's inquiry.

A. Midcal (1980)

In *California Retail Liquor Dealers Association vs. Midcal Aluminum, Inc.*, the Court considered an antitrust challenge to "California's

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participated in the passage of the Twenty-first Amendment in the Senate, [Section] 2 was intended to return '"absolute control" of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed.'" (quoting *Hostetter*, 377 U.S. at 338 (Black, J., dissenting))).

201. *Id.*

202. *See id.* at 484–85; *supra* Part IV.

203. 377 U.S. at 324.

204. *Id.* at 331–32 (citing William Jameson & Co. v. Morgenthau, 307 U.S. 171, 172–73) (1939)); *see also* United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 299 (1945).

resale price maintenance and price posting statutes."[205] The "post-and-hold"[206] statute required all wine producers and distributors to "file fair trade contracts or price schedules with the State" and to sell at the filed price.[207] The Court held that the California statute constituted a restraint of trade in violation of the Sherman Act.[208]

The Court also considered Petitioner's assertion that the Twenty-first Amendment shielded the statute from any antitrust challenge.[209] It acknowledged the broad authority of states to regulate the importation, transportation and sale of alcohol under Section 2, but the Court emphasized that *Hostetter* had previously established that Congress' commerce power limited that authority.[210] For this limitation, the Court engaged in a "pragmatic effort to harmonize state and federal powers."[211]

In the Court's view, the federal interest was focused exclusively on promoting a "national policy in favor of competition" as enforced by the Sherman Act, which the Court described as "the Magna Carta of free enterprise . . . [and] as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[212] Although the Court acknowledged that the Sherman Act is embodied in a statute, not the Constitution, it concluded that Congress "'exercis[ed] all the power it possessed' under the

205. 445 U.S. 97, 99 (1980); *see also* Kiefer-Steward Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 212–13 (1951) (holding that an agreement to "sell liquor only to those Indiana wholesalers who would resell at prices fixed" violated the Sherman Act); *Frankfort Distilleries,* 324 U.S. at 298 (reviewing price-fixing practices of local retailers in Colorado that had interstate sales implications).

206. *See* James C. Cooper & Joshua D. Wright, *State Regulation of Alcohol Distribution: The Effects of Post & Hold Laws on Output and Social Harms* 2 (George Mason Univ. Law & Econ. Research Paper Series, Working Paper No. 10–32, 2010), https://www.law.gmu.edu/assets/files/publications/working_papers/1032StateRegulationofAlcohol.pdf [https://perma.cc/765H-PJP3] ("Although there is some variation in the substance of [post-and-hold] laws, they generally require that alcohol distributors 'post' their proposed prices in advance, thus sharing future prices with rival distributors before they go into effect, and then 'hold' these prices for a specified period of time.").

207. *Midcal*, 445 U.S. at 99.

208. *See id.* at 105–06.

209. *See Midcal*, 445 U.S at 106.

210. *See id.* at 109–10.

211. *Id.* at 109.

212. *Id.* at 110–11 (quoting United States v. Topco Assocs., 405 U.S. 595, 610 (1972)).

Commerce Clause when it approved the Sherman Act."[213] The Twenty-first Amendment was enacted forty-three years after the Sherman Act.[214] Congress refused to include language in Section 3 of the Amendment to confer concurrent jurisdiction over alcohol sales to both Congress and the States. Congress undoubtedly did so with the understanding that it either exempted state liquor laws from the exercise of Congress' Commerce Clause powers, including without limitation the Sherman Act or certainly contemplated limiting the exercise of those powers.[215]

The *Midcal* Court understood that the state's interests underlying the post-and-hold law were "promot[ing] temperance and orderly market conditions."[216] The Court found little or no correlation between the California post-and-hold law and these interests, however.[217] Accordingly, the Court concluded that the asserted state interests were "not of the same stature" as the "national policy in favor of competition."[218]

B. Capital Cities (1984)

In *Capital Cities Cable, Inc. v. Crisp*, a group of broadcasters challenged an Oklahoma law prohibiting the broadcasting of certain alcohol advertisements on the basis that Federal Communications Commission regulations preempted the law.[219] In the case, the Court expanded its *Hostetter* and *Midcal* analysis and elaborated how federal law enacted pursuant to the Commerce Clause may preempt state liquor law enacted pursuant to the Twenty-first Amendment.[220] The central inquiry was framed in a slightly different way:

> [W]hether the interests implicated by a state regulation *are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail*, notwithstanding that its requirements directly conflict with express federal

213. *Id.* at 111 (quoting Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 435 (1932)).

214. The Sherman Act was passed in 1890, 26 Stat. 209 (1890), and the Twenty-first Amendment was passed in 1933. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 188 (2d Cir. 2009).

215. *See supra* Part IV.

216. *Midcal.*, 445 U.S. at 112 (alteration in original) (quoting Rice v. Alcoholic Beverage Control Appeals Bd., 579 P.2d 476, 490 (Cal. 1978)).

217. *See id.* at 113.

218. *Id.* at 113–14.

219. 467 U.S. 691, 698 (1984).

220. *See id.* at 711–16.

> policies. As in *Hostetter* and *Midcal Aluminum*, resolution of this question requires a "pragmatic effort to harmonize state and federal powers" within the context of the issues and interests at stake in each case.[221]

With this language, the Court seemingly interjected a new component in its analysis; namely, whether the interests implicated by a state regulation are "closely related to the powers reserved by the Twenty-first Amendment."[222] The "balancing" test adopted in *Midcal* was not abandoned, but the Court did focus more on whether the challenged statute was promulgated pursuant to the State's "central" or "core" power under the Twenty-first Amendment.[223] If so, the Court suggested that the law would be shielded from preemption by conflicting federal law.[224] The Court also defined a state's "central" or "core" Twenty-first Amendment power as "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."[225] The power was characterized as "regulating the times, places, and manner under which liquor may be imported and sold."[226] The Court concluded that the advertising ban did not "directly implicate" this power.[227] Accordingly, the Court held that the Federal Communication Commission's regulations preempted the Oklahoma liquor law.[228]

C. Brown-Forman (1986)

In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, the Court faced a challenge to New York's Alcoholic Beverage Control Law.[229] The post-and-hold law required a distiller licensed in New York to affirm its monthly prices were at least equivalent to its lowest prices in other States.[230] The law was struck down on the basis that it infringed upon the Commerce Clause by directly

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221. *Id.* at 714 (emphasis added) (quoting Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 109 (1980)).

222. *Id.*

223. *See id.* at 712–13; *see also* Spaeth, *supra* note 20, at 191 ("By drawing a bright-line rule between core power regulations and other liquor regulations, the [*Capital Cities*] Court fashioned a workable balance between state and federal concerns.").

224. *See Capital Cities*, 467 U.S. at 712–13.

225. *Id.* at 715 (quoting *Midcal*, 445 U.S. at 110).

226. *Id.* at 716.

227. *See id.*

228. *See id.*

229. 476 U.S. 573, 575–76 (1986).

230. *See id.*

regulating out-of-state transactions and interstate commerce.[231] The Court noted that the Twenty-first Amendment does not afford states the authority to control sales of liquor in other states.[232] The power was vested in each respective state and, to the extent that it implicated interstate commerce, in Congress.[233]

In dissent, Justices Stevens, White, and Rehnquist quoted Judge Friendly "who was 'present at the creation' of the Twenty-First Amendment."[234] Judge Friendly stated,

> [T]here is an aura of unreality in [the] assumption that we must examine the validity of New York's Alcoholic Beverage Control Law . . . just as we would examine the constitutionality of a state statute governing the sale of gasoline"—or, as the dissent would add, of milk.[235]

The dissent surmised that the majority was concerned that state liquor laws had evolved to the point where they created "'so grave an interference with' interstate commerce as to exceed the 'wide latitude for [state] regulation under the Twenty-first Amendment.'"[236] The dissenting justices disagreed with that perception and suggested that the litigant challenging the statute should be required to prove that supposition.[237]

D. 324 Liquor Corp. (1987)

In *324 Liquor Corp. v. Duffy*, the Supreme Court again took up the issue of whether the Sherman Act preempted a post-and-hold law or whether the Twenty-First Amendment saved the law from invalidation.[238] The challenged New York law required liquor wholesalers to post monthly price schedules regarding their case prices and their bottle prices to liquor retailers.[239] The law also required liquor retailers to charge at least 112% of the distributor's

231. *See id.* at 578.

232. *See id.* at 582–84.

233. *See* U.S. CONST. art. I, § 8, cl. 3.

234. *Brown-Forman Distillers Corp.*, 476 U.S. at 590 (Stevens, J., dissenting) (quoting Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 168 (2d Cir. 1984), *cert denied*, 470 U.S. 1027 (1985)).

235. *Id.*

236. *See id.* at 592 (quoting Seagram & Sons, Inc. v. Hostetter, 384 U.S. 37, 42–43 (1966)) (Stevens, J., dissenting).

237. *Id.* This suggestion that the litigant challenging a state liquor law on the basis of preemption bears the burden of proof foreshadowed the holding in *North Dakota v. United States*, 495 U.S. 423, 430–33 (1990).

238. 479 U.S. 335, 337 (1987).

239. *See id.* at 338–40.

posted bottle price in effect at the time that the retailer sold or offered to sell the item.[240] As in *Midcal*,[241] the Court held that this New York law constituted a restraint of trade in violation of the Sherman Act.[242]

Pursuant to *Capital Cities*, the Court examined the relationship between the law and the objectives of the Twenty-first Amendment.[243] The Court discerned that the purpose of the twelve percent markup was to protect small retailers, preserve competition in the retail liquor industry, and stabilize the retail market.[244] But the Court questioned whether imposing the twelve percent markup on the "posted bottle price," as opposed to the "posted case price," was designed to protect small retailers.[245] Indeed, the Court noted that there was "no legislative or other findings that either the markup requirement or the 'bottle price' definition of cost has been effective in preserving small retail establishments."[246] Thus, the Court declined to consider or "reach the question whether New York's liquor-pricing system could be upheld as an exercise of the State's power to promote temperance."[247]

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240. *See id.*

241. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105–06 (1980).

242. *See 324 Liquor Corp.*, 479 U.S. at 343 (citing Parker v. Brown, 317 U.S. 341, 351 (1943)).

243. *See id.* at 347 (noting that the question is "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" (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984))). The New York statue was enacted after a study concluded that there was a lack of competition in the New York liquor retail market, and "the mass of small retailers [we]re unable to compete with the large volume outlets that . . . emerged." *Id.* at 348.

244. *See id.* at 349.

245. *Id.*

246. *Id.* at 350.

247. *See id.* at 351–52. Appellees argued that New York's pricing system increased the price of liquor, which had the effect of decreasing sales and consumption. *See id.* Accordingly, the statute fell squarely within the state's Twenty-first Amendment power to promote temperance. *See id.* In contradiction to the laws of supply and demand, the New York Court of Appeals relied upon a study which concluded that higher prices do not decrease consumption of liquor. *See id.* In *324 Liquor Corp*, the Court accorded "great weight" to the New York Court of Appeals' conclusion and declined to consider the issue of whether the New York pricing system could be upheld under the Twenty-first Amendment on that basis. *Id.* at 351.

E. North Dakota (1990)

In *North Dakota v. United States*, the Court further elaborated and expanded upon the *Capital Cities* analytic standard.[248] The case involved a preemption challenge to a North Dakota law that imposed labeling and reporting requirements on out-of-state liquor suppliers to military bases.[249] The law also required out-of-state distillers who sold product directly to a federal enclave to affix labels indicating that the product was for domestic consumption only within the federal enclave.[250] The federal government argued preemption on the basis that the North Dakota law ran afoul of a federal regulation that required distilled spirits to be acquired from "the most competitive source, price and other factors considered."[251]

The Court noted that "the State has 'virtually complete control' over the importation and sale of liquor and the structure of the distribution system."[252] The Court also indicated,

> In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate.[253]

The State's authority included the power to prevent the disruption of the local distribution system by the "unlawful diversion of liquor into their regulated intrastate markets."[254] Because it viewed the risk of diversion with respect to federal enclaves as "both substantial and real," the Court held that the challenged laws clearly fell "within the core of the State's power under the Twenty-first Amendment."[255] As such, it was not preempted by conflicting federal law.

The *North Dakota* decision highlights a subtle shift in the Court's Twenty-first Amendment analysis in federal preemption cases.[256] At

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248. 495 U.S. 423, 439–41 (1990).

249. *See id.* at 426–28.

250. *See id.* at 428.

251. *Id.* at 427 (citing Pub. L. 99-661, § 313, 100 Stat. 3853 (codified at 10 U.S.C § 2488(a) (1986))).

252. *Id.* at 431 (quoting Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)).

253. *Id.* at 432; *see also* Carter v. Virginia, 321 U.S. 131, 132 (1944); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 60 (1936).

254. *North Dakota*, 495 U.S. at 431.

255. *Id.* at 432–33.

256. The persuasive value of the *North Dakota* holding should be limited—it is a

the outset, by virtue of the Twenty-first Amendment, state liquor control policies must be accorded a strong presumption of validity.[257] Accordingly, a person challenging its validity on preemption grounds necessarily bears the burden of proof.[258] Without allocating the burden of proof in this fashion, the "strong presumption" would have no meaning.[259] This conclusion flows from the *North Dakota* holding and from the unique history, context, and structure of regulatory authority under the Twenty-first Amendment.[260] Furthermore, if a state liquor law *directly* relates to the exercise of the state's Twenty-first Amendment "core powers," then the state law is deemed to be primary and is insulated from a preemption challenge.[261]

F. Reconciling Competing Interests

In *North Dakota*, the United States failed to overcome the strong presumption of validity in favor of the North Dakota's liquor law, and the statute was upheld.[262] In antitrust challenges to state liquor laws preceding *North Dakota*, the Court appeared to impose the burden of proof on the State to demonstrate that the challenged regulations, in isolation, effectively achieved their Twenty-first Amendment goals. For instance, in *Midcal*, the Court did not appear to accord the California post-and-hold law a presumption of validity or expressly reference which party bore the burden of proof.[263] The

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plurality decision.

257. *See North Dakota*, 495 U.S. at 433 (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714–15 (1984)). In *Capital Cities*, however, the Court concluded that "the application of Oklahoma's advertising ban to the importation of distant signals by cable television operators engages only *indirectly* the central power reserved by [Section 2] of the Twenty-first Amendment—that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" 467 U.S. at 715 (alteration in original) (emphasis added) (quoting *Midcal*, 445 U.S. at 110).

258. *North Dakota*, 495 U.S. at 433.

259. *Id.*

260. *See supra* Part IV.

261. *See generally* Lebamoff Enters. v. Huskey, 666 F.3d 455, 464 (7th Cir. 2012) (Hamilton, J., concurring) (arguing that "*Capital Cities Cable* does not offer helpful guidance for dealing with a preemption challenge to a state law that *is* an exercise of core Twenty-first Amendment power").

262. *See North Dakota*, 495 U.S. at 444.

263. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 107–13 (1980). In "harmonizing" the federal and state interests, the Court summarily noted that the "'federal interest in enforcing the national policy in favor of competition is both familiar and substantial." *Id.* at 110. In concluding that the

Court simply noted that the Sherman Act was the "Magna Carta of free enterprise" and specifically acknowledged "the importance of the Act's procompetition policy."[264] Significantly, the decision did not even mention the national interests arising under the Federal Alcohol Administration Act[265] or the Robinson-Patman Act[266] that were both implicated and similarly aligned with California's interests.

Rather, the State was required to empirically prove that the California wine-pricing scheme, to the exclusion of all other factors, was effective in promoting temperance and orderly market conditions.[267] The Court acknowledged that the state's primary interest in orderly markets was to protect small retailers from predatory pricing.[268] In the case, prior administrative and lower court findings indicated that the pricing scheme was not "necessary to the economic survival of small retailers."[269] The Court found that "[n]othing in the record in this case suggests that the wine pricing system helps sustain small retail establishments," and therefore, the state interests were "not of the same stature" as the those underlying

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asserted state interest in promoting temperance and orderly markets are "less substantial than the national policy in favor of competition," the *Midcal* Court relied upon the conclusions of the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 579 P.2d 476, 479 (Cal. 1978), which had stricken California's liquor resale price maintenance scheme on similar grounds. *Midcal*, 445 U.S. at 112–14.

264. *Midcal*, 445 U.S. at 110–11.

265. *See* 27 U.S.C. §§ 201–212 (2012). The Federal Alcohol Administration Act ("FAAA") strives to promote temperance and create orderly markets through restraints on alcohol industry members. *See id.* For instance, industry members (suppliers and distributors) are prohibited from furnishing, giving, renting, lending, or selling to any retailer any equipment or any other thing of value. *See id.*

266. *See* 15 U.S.C. § 13 (2012); *see also* Fed. Trade Comm'n v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968) ("[T]he Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over small ones by virtue of their greater purchasing power."); Fed. Trade Comm'n v. Sun Oil Co., 371 U.S. 505, 520 (1963); Fed. Trade Comm'n v. Henry Broch & Co., 363 U.S. 166, 168 (1960).

267. *See Midcal*, 445 U.S. at 112.

268. *See id.* at 113.

269. *Id.* at 113. Proving that the post and hold law was "necessary" to achieve temperance was truly an impossible task and certainly a more onerous standard than proving that it was "effective" in achieving state goals. *Id.* "Effective" must necessarily mean *only* that the law has an "effect" or bears some relationship to the State's interests under the Twenty-first Amendment, not that it is essential or necessary to the achievement of those goals. *Id.*

the Sherman Act.[270] Significantly, the Court did not begin with the premise that the California law enjoyed a strong presumption of validity as subsequently required by *North Dakota*[271] and certainly did not impose upon the Respondent the burden of demonstrating that it was entirely ineffective. In the context of this case, those distinctions were likely outcome determinative.

Similarly, in *324 Liquor Corp.*,[272] there was virtually no analysis of the magnitude of the national interests. The Court simply noted that "[a]ntitrust laws in general, and the Sherman Act in particular . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[273] As in *Midcal*, no mention was made of the national interests arising under the Federal Alcohol Administration Act or the Robinson-Patman Act.[274] Again, in contrast, the State was required to empirically prove that the twelve percent markup on the "posted bottle price," to the exclusion of all other factors, promoted temperance and protected small retailers.[275]

As illustrated by the discussion below, in the absence of a strong presumption of validity and a clear allocation of the burden of proof to the party challenging a state liquor law, lower courts are left with little guidance regarding the balancing of the ostensible federal interest in competition with the countervailing state interest in protecting the public's health, safety, and welfare by regulating and restraining competition in alcohol markets.[276]

The issue should not be whether a court agrees with the judgment of the legislature in balancing those interests. Rather, the issue should be whether the liquor law was promulgated pursuant to the state's primary authority under the Twenty-first Amendment or at least directly relates to the core interests thereunder.[277] Thus, any

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270. *Id.* at 113–14.

271. *See* 495 U.S. 423, 433 (1990).

272. 479 U.S. 335, 337 (1987).

273. *Id.* at 350 (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972)).

274. *Compare id.*, *and Midcal*, 445 U.S. 97, *with* Fed. Trade Comm'n v. Henry Broch & Co., 363 U.S. 166, 168 (1960) (considering the Robinson-Patman Act), *and* Levers v. Berkshire, 151 F.2d 935, 938 (10th Cir. 1945) (considering the Federal Alcohol Administration Act).

275. *324 Liquor Corp.*, 479 U.S. at 349.

276. *See infra* Part VIII.

277. *See generally* Nancy Williams, *Constitutional Law—The Dormant Commerce Clause and the Twenty-first Amendment—Reconciling the Two Provisions to Allow the Direct Shipment of Wine*, 75 MISS. L.J. 619, 619 (2006) (discussing the tension between the

party challenging the state alcohol law must overcome a strong presumption of validity and demonstrate that the law bears no relationship to or fails to advance the state's legitimate interests under the Twenty-first Amendment. [278]

VIII. *TFWS, INC. V. FRANCHOT*

Perhaps no case better illustrates the need for greater clarity and guidance in this area than *TFWS, Inc. v. Franchot*.[279] The case was litigated over a ten-year period and went up on appeal to the Fourth Circuit on four separate occasions.[280] The case involved an antitrust challenge to Maryland's post-and-hold law and its volume discount ban.[281] Initially, the district court concluded that the challenged laws constituted per se violations of the Sherman Act and were not immune from antitrust challenges.[282] The district court dismissed the suit, however, on the basis that the challenged laws represented a valid exercise of the State's Twenty-first Amendment powers, and that the State's interest in promoting temperance trumped the federal interest in promoting competition under the Sherman Act.[283]

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legislature's authority to promulgate laws related to the Twenty-first Amendment and courts' recognition of this authority).

278. The presumption is not only mandated by the Twenty-first Amendment but is also consistent with the general presumption against preemption of state laws. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (internal quotation marks omitted)); *see also* Wyeth v. Levine, 129 S. Ct. 1187, 1194–95 (2009).

279. 572 F.3d 186, 188 (4th Cir. 2009) (explaining the extensive litigation that had already occurred).

280. TFWS, Inc. v. Schaefer, No. WDQ-99-2008, 2007 WL 2917025 (D. Md. Sept. 27, 2007) (memorandum decision), *aff'd sub nom.* TFWS, Inc. v. Franchot, 572 F.3d 186 (4th Cir. 2009); TFWS, Inc. v. Schaefer, 315 F. Supp. 2d 775 (D. Md. 2004), *vacated and remanded*, TFWS, Inc. v. Schaefer, 147 F. App'x 330 (4th Cir. 2005) (per curiam); TFWS, Inc. v. Schaefer, 183 F. Supp. 2d 789 (D. Md. 2002) (memorandum decision), *vacated and remanded*, TFWS, Inc. v. Schaefer, 325 F.3d 234 (4th Cir. 2003); TFWS, Inc. v. Schaefer, 242 F.3d 198 (4th Cir. 2001).

281. *See TFWS*, 572 F.3d at 188.

282. *See TFWS*, 242 F.3d at 203–04.

283. *See id.* at 211.

A. First Appeal Reversing and Remanding to District Court

The Court of Appeals for the Fourth Circuit reversed and noted that the district court apparently raised the issue of the Twenty-first Amendment *sua sponte* without the benefit of a record.[284] Accordingly, the court remanded the case to provide the parties with the opportunity to present evidence on the issue of whether the challenged laws promoted temperance or served other legitimate Twenty-first Amendment goals.[285] Its instructions on remand were as follows:

> On remand Maryland should be given the opportunity to assert and substantiate its Twenty-first Amendment defense, and TFWS should be permitted to respond. The analysis the district court should undertake in analyzing Maryland's interest and then balancing it against the federal interest is straightforward. First, the court should examine the expressed state interest and the closeness of that interest to those protected by the Twenty-first Amendment. We acknowledge that little analysis is needed on this point. Temperance is the avowed goal of the Maryland regulatory scheme, and the Twenty-first Amendment definitely allows a state to promote temperance. Second, the court should examine whether, and to what extent, the regulatory scheme serves its stated purpose in promoting temperance. Simply put, is the scheme effective? Again, the answer to this question "may ultimately rest upon findings and conclusions having a large factual component." Finally, the court should balance the state's interest in temperance (to the extent that interest is actually furthered by the regulatory scheme) against the federal interest in promoting competition under the Sherman Act.[286]

Noticeably absent in these instructions was any direction to consider any federal interests other than those underlying the Sherman Act.[287] The Fourth Circuit instructions failed to cite the *North Dakota*[288] decision or reference any presumption of validity.[289] By requiring the State to "substantiate its Twenty-first Amendment

284. *See id.*
285. *See id.* at 213.
286. *Id.* at 213 (quoting Miller v. Hedlund, 813 F.2d 1344, 1352 (9th Cir. 1987)).
287. *See id.*
288. 495 U.S. 423, 423 (1990).
289. *See TFWS*, 242 F.3d at 213.

defense," it appears the Court believed that the State bore the burden of proof in the evidentiary hearing.[290]

On remand, the parties conducted various discovery and brought cross-motions for summary judgment.[291] The district court, citing the *North Dakota*[292] decision, concluded that the "State's avowed goal of promoting temperance clearly relates to the interests generally protected by the Twenty-first Amendment."[293] In support of its motion, the State offered the affidavit testimony of two experts, who the court found to be credible and well qualified, on the issue of whether the challenged laws were effective in achieving the goal of temperance.[294] The State's experts concluded that the post-and-hold law and volume discount ban resulted in higher prices, that higher prices constrain alcohol consumption, and, therefore, that the challenged laws served the State's Twenty-first Amendment goal of promoting temperance.[295] On the other hand, the plaintiff's expert asserted that the challenged laws could not be "proven to promote temperance and, paradoxically, can lead to an overall increase in consumption."[296] The district court concluded that the State had "adequately substantiated its avowed purpose of preventing undue stimulation of alcohol sales and consumption through regulation of price competition."[297]

Interestingly, the district court was guided by the deferential principles embodied in the *North Dakota* decision:

> Drawing on its Twenty-first Amendment powers, "the State may protect her people against evil incident to intoxicants," "may adopt measures to effectuate these inhibitions and exercise full police authority in respect of

290. *Id.* In the context of a Dormant Commerce Clause challenge, a pre-*Granholm* Eleventh Circuit ruling suggested that a discriminatory state liquor law could be upheld if (1) it related to a "core concern" under the Twenty-first Amendment and (2) "is genuinely needed to effectuate the proffered core concern." Bainbridge v. Turner, 311 F.3d 1104, 1114 (11th Cir. 2002). The burden of proving those evidentiary predicates fell on the state apparently on the theory that the state was raising the affirmative defense of the Twenty-first Amendment. *See id.* at 1115.

291. *See* TFWS, Inc. v. Schaefer, 183 F. Supp. 2d 789, 790–94 (D. Md. Feb. 4, 2002) (memorandum decision), *vacated and remanded*, TFWS, Inc. v. Schaefer, 325 F.3d 234, 235 (4th Cir. 2003).

292. *See* North Dakota v. United States, 495 U.S. 423, 423 (1990).

293. *TFWS*, 183 F. Supp. 2d at 791.

294. *See id.* at 791–92.

295. *Id.* at 792–93.

296. *Id.* at 793.

297. *Id.* at 794.

> them," and "may exercise large discretion as to means employed." Thus, courts give deference to legislative acts passed pursuant to the States' Twenty-first Amendment powers.[298]

Based on these principles, the Court granted the State's motion and dismissed the case, concluding that the "State's interest in protecting against the myriad and substantial harms associated with alcohol, as noted here and in this Court's first opinion in this case . . . outweigh the federal interest in unrestricted economic competition in the liquor industry."[299]

B. Second Appeal Reversing and Remanding to District Court

Thereafter, TFWS appealed to the Fourth Circuit a second time asserting that genuine issues of material fact precluded disposition of the case on summary judgment.[300] The court agreed and critiqued the opinion of the TFWS expert on the basis that the challenged laws might not reduce consumption despite higher prices for several reasons: consumers might buy less expensive brands and drink the same amount; higher prices would likely increase distributor's margins, marketing, and consumption; and reduced competition might lead to more small retailers and increased consumption.[301] The Fourth Circuit again reversed and directed the lower court to hold "a trial on the question of whether, and to what extent, Maryland's regulatory scheme is effective in promoting temperance."[302]

After two reversals, the district court unsurprisingly reached a different conclusion on remand.[303] In this opinion, the court did not discuss the presumption of validity or burden of proof. It simply compared liquor prices in Maryland and Delaware, noting that the Maryland prices for many liquor and wine brands were not significantly higher than Delaware.[304] The court concluded that the challenged Maryland statutes did not increase the price of liquor

298. *Id.* at 795 (citations omitted)*; see also* North Dakota v. United States, 495 U.S. 423, 433 (1990); Carter v. Virginia, 321 U.S. 131, 137 (1944).

299. *Id.*

300. *See* TFWS, Inc. v. Schaefer, 325 F.3d 234, 234 (4th Cir. 2003).

301. *See id.* at 238.

302. *Id.* at 242.

303. *See* TFWS, Inc. v. Schaefer, 315 F. Supp. 2d 775, 782 (D. Md. 2004), *vacated and remanded*, TFWS, Inc. v. Schaefer, 147 F. App'x 330 (4th Cir. 2005) (per curiam).

304. *See id.* at 778–82 (recognizing that the Maryland prices may have been lower than Delaware).

because Delaware had previously repealed its post-and-hold law and volume discount ban.[305] Accordingly, the court held that there was "no reason to determine whether those prices affect consumption" and struck down the law as being ineffective in promoting temperance.[306]

C. Third Appeal Reversing and Remanding to District Court

Thereafter, the State appealed a third time, arguing the district court failed to consider "whether the difference in the two states' excise tax rates affects the price comparison analysis."[307] The Fourth Circuit noted that Maryland imposed one of the lowest excise tax rates in the country.[308] The Fourth Circuit reversed and vacated on the basis that the omission was "clearly erroneous."[309]

On remand, the district court took up these issues for a fourth time.[310] In direct contrast to its prior rulings, the district court held that "[t]he State has the burdens of production and persuasion for its Twenty-first Amendment defense."[311] Although it previously cited the *North Dakota* case with approval regarding the "strong presumption of validity," the court distinguished *North Dakota* on the basis that it dealt with a Dormant Commerce Clause challenge, rather than a preemption challenge under the Sherman Act.[312] The court refused to apply the presumption on that basis.[313] However, *North Dakota*[314] did not, in fact, arise under the Dormant Commerce Clause, and the district court was incorrect in limiting its holding on that basis.[315] Rather, the issue in *North Dakota* was whether a federal

305. *See id.* at 781–82.

306. *Id.* at 782 n.9.

307. *TFWS*, 147 Fed. App'x at 331.

308. *See id.* at 333–34.

309. *Id.* at 335–36.

310. *See* TFWS, Inc. v. Schaefer, No. WDQ-99-2008, 2007 WL 2917025 (D. Md. Sept. 27, 2007) (memorandum decision), *aff'd sub nom.* TFWS, Inc. v. Franchot, 572 F.3d 186 (4th Cir. 2009).

311. *Id.* at *1.

312. *Id.* at *8.

313. *See id.*

314. *See* North Dakota v. United States, 495 U.S. 423, 423 (1990).

315. *See TFWS*, 2007 WL 2917025, at *8. Referring to the presumption of validity concept expressed in *North Dakota*, the district court stated that "the cases the State cites in support of this presumption regard the validity of state alcoholic beverage regulations under the Dormant Commerce Clause, and do not weigh state Twenty-first Amendment interests against the federal interest in promoting competition under the Sherman Act." *Id.* The *North Dakota* case, however, implicitly involved

regulation preempted a state labeling regulation.[316] Like the Sherman Act, the federal regulation was designed to promote competition and lower prices.[317] Accordingly, it had direct application to *TFWS*.[318]

The State conceded that it did not have "direct evidence" of the effect of the challenged statutes on consumption in isolation of all other factors but argued that the real issue was whether "Maryland's prices would be lower" without those statutes.[319] If so, the State argued that the statutes should be upheld as a valid exercise of the State's Twenty-first Amendment power.[320] The State also argued that TFWS must prove that the challenged statutes violated the Sherman Act and demonstrate the negative impact on the underlying federal interest.[321] In essence, the State argued that without quantifying the impact on the federal interest it was impossible to fairly balance and reconcile the federal interests with the state interests.[322]

The district court rejected these arguments because Maryland's liquor prices were only slightly higher than Delaware's after accounting for the excise tax differential.[323] The court held that "[t]he State's evidence of the impact of the increased wholesale prices on consumption is tenuous," and "the State has proven that the challenged regulations have at best only a minimal impact in furthering the State's interest in temperance."[324] In essence, the court found that the State had failed to meet its burdens and struck down the statutes on that basis.[325]

D. Fourth Appeal

Again, the State appealed to the Fourth Circuit Court of Appeals on the basis that the statutes did not violate the Sherman Act, and the district court erred in finding that the statutes were "ineffective"

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weighing federal versus state interests: it was a preemption challenge to a state statute that imposed labeling and reporting requirements on out-of-state liquor suppliers to military bases. *See supra* Part VII.E; *see also North Dakota*, 495 U.S. at 443.

316. *See North Dakota*, 495 U.S. at 426.
317. *See id.* at 423.
318. *See TFWS*, 2007 WL 2917025, at *8.
319. *Id.* at *2.
320. *See id.* at *8.
321. *See id.*
322. *See id.* at *8–9.
323. *See id.*
324. *Id.* at *9–10.
325. *See id.*

in achieving temperance.[326] The court rejected the State's argument that the findings of the lower court regarding the effectiveness of the challenged statutes, or lack thereof, were clearly erroneous.[327] Interestingly, Judge Howard in his concurring opinion noted,

> Were we writing on a clean slate, however, I would vote to uphold both the volume-discount ban and the post-and-hold pricing system on the grounds that they are unilaterally imposed government restrictions, which do not run afoul of [Section 1] of the Sherman Act, and, alternatively, that they constitute a proper exercise of Maryland's Twenty-first Amendment interests.[328]

Perhaps, the tortured journey of this litigation into the murky border between the Twenty-first Amendment and Commerce Clause caused Judge Howard to reevaluate the entire framework of antitrust challenges to state liquor laws.

E. A Presumption of Validity Provides Needed Guidance to a Lower Court's Evidentiary Inquiry Regarding the Weight of Competing State and Federal Interests

Any post-and-hold law has to be considered, analyzed, and examined in the context of the state's entire regulatory scheme. In *Midcal*, beyond the challenged post-and-hold law, California law embodied provisions that prohibited brewers and wholesalers from discriminating in the price of their product to their customers.[329] Without a post-and-hold law, these nondiscrimination provisions are virtually impossible to enforce. The nondiscrimination provision would be rendered meaningless if an industry member can change their price daily or hourly. These nondiscrimination laws are designed to create an economically level playing field among retailers by guaranteeing that the terms and conditions of sale by each supplier and wholesaler must be offered equally to its retailers. This prevents large retail chains from achieving monopolistic domination of the sale of intoxicating liquor, thereby promoting

326. TFWS, Inc. v. Franchot, 572 F.3d 186, 188–91 (4th Cir. 2009). In making this argument, the State relied on the recently decided Supreme Court case of *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 877 (2007). The Fourth Circuit, however, declined to reverse its prior decision based on the "law of the case" doctrine. *TFWS*, 572 F.3d at 192–94.

327. *See TFWS*, 572 F.3d at 197.

328. *Id.* (Howard, J. concurring).

329. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 99–100 (1980).

stability at the retail tier and reducing pressure to stimulate sales and marketing incentives to consumers. Without these laws, there would be significant disruptions in the retail market.

Not only does stabilizing the market preserve competition in the long run, but it also serves the goal of temperance.[330] The stability achieved by these regulations make it less likely that smaller retailers will face the level of economic pressure that results in selling practices or aggressive marketing outside the letter and spirit of the law. Furthermore, a locally based liquor retailer will be more accountable to liquor regulatory authorities as well as more responsive to positive and responsible local social influences.[331]

This is not to suggest that the national interests associated with the Sherman Act are insubstantial or insignificant. That is obviously not the case. By definition, however, all alcohol regulation constrains competition to some degree. As stated earlier, alcohol regulation fundamentally represents a balance between unfettered competition and availability, on the one hand, and strict control, on the other.[332] The authority to determine where to fix that balance point has been expressly reserved to the states by the passage of the Twenty-first Amendment.[333]

Some have argued that the Twenty-first Amendment removes state liquor laws from all Commerce Clause limits.[334] Others have argued that state liquor laws should be immune from Commerce Clause challenge if they are rationally related to legitimate state purposes under the Twenty-first Amendment.[335] *North Dakota* suggests that a challenged statute that directly relates to an exercise

330. *See TFWS*, 572 F.3d at 195–96. For instance, as noted by the National Institute on Alcohol Abuse and Alcoholism ("NIAAA"), Maryland had one of the lowest per capita consumption rates for alcohol in the country. *See* Nekisha E. Lakins et al., *Apparent Per Capita Alcohol Consumption: National, State, and Regional Trends, 1977–2005*, NAT'L INST. ALCOHOL ABUSE & ALCOHOLISM (Aug. 2007), https://pubs.niaaa.nih.gov/publications/surveillanceArchive/CONS04.pdf [https://perma.cc/KTJ6-KGHP]. Not surprisingly, however, the State was unable to prove that this was the result of the challenged post-and-hold statute to the exclusion of all other factors. *See TFWS*, 572 F.3d at 196.

331. *See* S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control, 731 F.3d 799, 811 (8th Cir. 2013). For the court's statement on the residency requirement applicable to distributors, see *supra note* 169 and accompanying text.

332. *See supra* Part I.

333. U.S. CONST. amend. XXI.

334. *See* 76 CONG. REC. 4143 (statements of Senator Blaine).

335. *See* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1, 18–19 (1st Cir. 2010).

of the state's core powers under the Amendment is either shielded from a preemptive Commerce Clause challenge or at least is entitled to a "strong presumption of validity."[336] The application of the presumption by necessity allocates the burden of proof to those challenging such laws and perhaps requires at least substantial evidence to sustain that burden. It is a clear evidentiary framework that courts can readily apply. Without abrogating judicial oversight, the imposition of the presumption of validity and the allocation of the burden of proof to the party challenging the state statute tempers judicial policymaking. It also defers to the state's regulatory authority under the Twenty-first Amendment, particularly when this authority is being measured against a federal interest arising by virtue of a statute enacted pursuant to Congress' Commerce Clause powers.

IX. CONCLUSION

The Dormant Commerce Clause has been characterized as "a 'quagmire,' 'not predictable,' 'hopelessly confused,' and 'not always . . . easy to follow.'"[337] Applying the Dormant Commerce Clause doctrine to a state liquor statute complicates the analysis even further because of the Court's evolving jurisprudence under the Twenty-first Amendment.[338] The *Bacchus* and *Granholm* decisions determined that state liquor laws are not entirely immune from a Dormant Commerce Clause challenge.[339] Such laws are subject to the nondiscrimination prohibition at least to the extent that they regulate producers and their products.[340] The states' primary authority under the Twenty-first Amendment, however, shields state laws that regulate the importation of alcohol into a state from a

336. *See* North Dakota v. United States, 495 U.S. 423, 433 (1990); *supra* Part VII.E.

337. *See, e.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987); Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 706 (1981) (Rehnquist J., dissenting); Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)); Julian Cyril Zebot, Note, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1063 (2002) (citing Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897–98 (1988) (Scalia, J. concurring)).

338. *See* Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 192–201 (2d Cir. 2009) (Calabresi, J., concurring).

339. *See supra* Part V.

340. *See* Granholm v. Heald, 544 U.S. 460, 463 (2005).

Dormant Commerce Clause challenge.[341] It also shields state laws that structure a state's three-tier distribution system, specifically the requirement that all liquor must be sold through in-state, licensed distributors and retailers.[342] In this way, courts have appropriately balanced the federal interest in facilitating interstate commerce with the state interest in regulating alcohol within its borders.[343]

Notwithstanding the likely original intent of the Twenty-first Amendment framers,[344] *Hostetter* and its progeny established that state liquor laws are also not immune from preemptive (positive) Commerce Clause challenges.[345] Courts have subsequently struggled to define the reach of federal authority under the Commerce Clause vis-à-vis states' authority under the Twenty-first Amendment.[346] Most preemption challenges to state liquor laws have arisen under the Sherman Act.[347] Such challenges require courts to balance the competing and often incompatible interests of safeguarding unfettered competition and open alcohol markets, on the one hand, with strict control, licensure, and "orderly" alcohol markets, on the other.[348] These are precisely the type of policy judgments that should be made after legislative deliberation within the democratic process.

As noted by Judge Calabresi in his concurring opinion in *Arnold's Wines*, "[t]he evolving interpretation of the Twenty-First Amendment raises important questions about the role of courts."[349] Judge Calabresi warned against the dangers of judicial interpretation

341. U.S. CONST. amend. XXI, § 2.

342. *See* S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control, 731 F.3d 799, 806 (8th Cir. 2013); *Arnold's Wines*, 571 F.3d at 190.

343. *See* Elias, *supra* note 48, at 210.

344. *See supra* Part IV.

345. *See supra* Part VII.

346. *See* Tania K. M. Lex, Note, *Of Wine and War: The Fall of State Twenty-first Amendment Power at the Hands of the Dormant Commerce Clause-Granholm v. Heald*, 32 WM. MITCHELL L. REV. 1145, 1155–57 (2006) (describing how six separate circuit courts had come to "widely varying conclusions").

347. *See, e.g.*, Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982); Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 887 (9th Cir. 2008).

348. By definition, liquor regulations are designed to constrain or at least manage competition through licensure and the regulation of the manner, means, and hours of sale. The Sherman Act predated the Twenty-first Amendment raising the legitimate issue of whether the framers intended to insulate state liquor laws from antitrust challenges. *See* Hostetter v. Idlewild Bon Liquor Voyage Corp., 377 U.S. 324, 330 (1964); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1168 (2000) (noting that states enjoyed such expansive authority under the Twenty-first Amendment as to allow "liquor-related political trade wars among the states").

349. Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 197 (2d Cir. 2009).

designed to "update" what some view as anachronistic laws, particularly when those laws are embedded in the Constitution.[350]

> It may permit courts, especially well-meaning ones, to substitute their own notions of modern needs for those of the majority. Moreover, when a rereading results in the erection of a constitutional barrier, it may remove serious issues from the democratic process and from legislative deliberation. . . . Additionally, this sort of updating presents another problem, and one that is especially apparent in the context of the Twenty-First Amendment: It can leave state legislatures and lower federal courts with no firm understanding of what the law actually is.[351]

When faced with preemption challenges to state liquor laws, courts should begin with the premise that the law is valid unless proven otherwise. A presumption of validity and the imposition of the burden of persuasion and proof on the party challenging the law provides the proper deference to the state's constitutional authority and to the policymaking function of state legislatures. It also preserves the Court's ultimate role as the adjudicator of constitutional issues and conflicting state and federal interests. Perhaps most importantly, it provides guidance and structure to a court's evidentiary inquiry into the troublesome and often indecipherable question of whether a particular state liquor law "effectively" serves Twenty-first Amendment interests.

Prior to Prohibition, for well over a hundred years, the "liquor question" dominated our political discourse.[352] To this day, it is an industry that invites some of our most contentious judicial, legislative, and administrative battles.[353] It is a product that brings both great joy and great misery. It is a product that excites great passion on all sides of the issue.[354] It is also the only product that is the subject of a constitutional amendment, and in fact, two constitutional amendments.[355] Finally, it is an industry that generates over $642 billion in total U.S. economic activity, $196 billion in

350. *See id.* at 197–201.

351. *Id.* at 200 (citations omitted).

352. *See* RORABAUGH, *supra* note 50, at 191.

353. *See, e.g.*, J. Patrick Coolican, *Sunday Sales Debate is Finished, But Fight over Liquor Laws Likely Continues*, STAR TRIB. (Mar. 5, 2017), http://www.startribune.com/sunday-sales-debate-is-finished-but-fight-over-liquor-laws-likely-continues/415403344/ [https://perma.cc/RD3V-JN4V].

354. *See id.*

355. *See* U.S. CONST. amends. XVIII, XXI.

wages, and over 4.3 million jobs.[356] Alcohol taxes remain a significant source of revenue for federal, state, and local governments generating over $98 billion in federal and state business taxes, and over $82 billion in consumption taxes.[357]

The tumultuous history of liquor regulation should serve as a warning to courts against traveling too far down the road of policymaking under the guise of judicial review. Incrementally invalidating key provisions of a state's liquor regulatory scheme can lead to unintended consequences by pulling a thread that threatens to unravel the entire regulatory fabric. It can also undermine or perhaps even cripple the ability of the state to effectively regulate the industry. Vertical integration and monopolization of the industry will likely permit global suppliers to exert undue influence and control over retailers.[358] It would likely result in excessive retail capacity, overstimulated sales, and ultimately to an increase in intemperate consumption and alcohol abuse. A vertically integrated enterprise, which combined manufacturing, distribution, and retailing, would be less responsive to community norms and standards and less susceptible to effective enforcement by state and local regulators.

Deregulation would return us to the days of the tied-house where suppliers owned the retail outlets.[359] History teaches us that this would ultimately lead to a multiplicity of retail outlets because each supplier would require a sales outlet in each community.[360] There is an undisputed correlation between the density of retail outlets and excessive alcohol consumption.[361] It would also have the effect of dramatically reducing consumer choice and variety because

356. *A Study of the U.S. Beer Industry's Economic Contribution in 2016*, BEER SERVES AM. (May 2017), http://beerservesamerica.org/wp-content/uploads/2017/05/2017-Beer-Serves-America-Report.pdf [https://perma.cc/S9HA-MWTX].

357. *See id.*

358. *See supra notes* 31–48 and accompanying text.

359. *See* FOSDICK & SCOTT, *supra* note 86.

360. *Id.*

361. *See Preventing Excessive Alcohol Consumption: Regulation of Alcohol Outlet Density*, COMMUNITY GUIDE, https://www.thecommunityguide.org/findings/alcohol-excessive-consumption-regulation-alcohol-outlet-density [https://perma.cc/4PPE-SU64] (last updated Sept. 24, 2013) ("On the basis of the reviewed evidence, the Community Preventive Services Task Force found sufficient evidence of a positive association between outlet density and excessive alcohol consumption and related harms to recommend limiting alcohol outlet density through the use of regulatory authority [to reduce or control] excessive alcohol consumption and related harms.").

small suppliers would lack the resources to overcome the barriers of entry and compete with global suppliers.

While state liquor laws certainly need to adapt to evolving economic, social, and technological conditions, it is prudent to remember that the intoxicating character of liquor has neither changed nor has the human proclivity for some to abuse the product and harm themselves or others. The fundamental need to protect the public health, safety and welfare through regulation remains. The great challenge is how to accommodate those changing conditions without upsetting the delicate balance between control and competition.