A Circuit-Splitting Headache: The Hangover of the Supreme Court's Twenty-First Amendment Jurisprudence

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Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000).
Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002).

In recent years, many small wineries have taken advantage of the Internet as a sales tool, creating challenges to existing state laws that prohibit the direct shipment of alcohol to consumers. Were these businesses shipping nearly any other product, the constraints of the "dormant Commerce Clause" of the federal constitution would prevent states from regulating such transactions.[1] The Twenty-first Amendment, however, grants the states unique powers when the object of regulation is alcoholic beverages.[2] The extent to which this grant creates an exception to the dormant Commerce Clause, along with the manner in which that exception may be used, has been the subject of two recent cases in the Seventh and Eleventh Circuits. In *Bridenbaugh v. Freeman-Wilson*,[3] the Seventh Circuit upheld an Indiana law prohibiting the direct shipment of alcohol to Indiana consumers by anyone in the business of selling alcohol in another state or country. Yet shortly thereafter in *Bainbridge v. Turner*,[4] the Eleventh Circuit explicitly rejected the Seventh Circuit's approach and greatly limited the scope of Florida's regulatory powers under the Twenty-first Amendment. This circuit split has important implications for both oenophiles and federalists, and may occasion a Supreme Court decision that clearly shows the effect on national policy of that Court's changing composition.

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1. The Commerce Clause states that "Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. 1, § 8. The thrust of the "dormant Commerce Clause" is that this explicit grant of power to Congress implicitly limits the states' powers in the same sphere. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203 (1986).

2. "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

3. 227 F.3d 848 (7th Cir. 2000), *cert. denied*, 532 U.S. 1002 (2001).

4. 311 F.3d 1104 (11th Cir. 2002).

I. THE STATE OF THE LAW

Three Supreme Court decisions currently guide the interaction of the Twenty-first Amendment and the dormant Commerce Clause.[5] In *Bacchus Imports, Ltd. v. Dias*,[6] the Court examined a Hawaii wholesale liquor tax from which several beverages produced within the state were exempted. Justice White, writing for the Court, found that those tax exemptions violated the Commerce Clause, as they "had both the purpose and effect of discriminating in favor of local products."[7] He then addressed whether the discriminatory legislation was "saved" by Hawaii's Twenty-first Amendment powers. Justice White concluded that the Amendment did not completely repeal the Commerce Clause as it relates to alcohol; despite the fact that the Twenty-first Amendment was enacted much later than the Commerce Clause, the interests reflected by the two clauses must be considered in harmony with each other. Only if "the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption" would the constraints of the Commerce Clause be superseded.[8] Exactly what those underlying principles are is a question left mostly unanswered, other than by an offhand reference to temperance. What is clear is that the "mere economic protectionism" seen as motivating Hawaii's tax system is not a valid interest, as the Court denied the exemptions a basis in the Amendment's grant of powers.[9]

Justice Stevens, joined by Justices Rehnquist and O'Connor, dissented from the Court's decision in *Bacchus*, disputing that an inquiry into the purposes underlying the Amendment was necessary.[10] Based on the actual text of the Amendment, Justice Stevens argued, an absolute ban on imported alcohol would be constitutional; thus, a state ought also to be able to engage in a lesser form of discrimination.[11] Accordingly, it is not even necessary to determine whether a state law violates the Commerce Clause prior to justifying it under the Twenty-first Amendment.

Five years later, in *Healy v. Beer Institute*,[12] the Court struck down a Connecticut statute that required out-of-state beer shippers to certify that the prices they charged to Connecticut wholesalers were no higher than the prices they were charging in bordering states.[13] Following *Bacchus*, the majority first

5. For an overview of the historical evolution of Twenty-first Amendment jurisprudence as it relates to the dormant Commerce Clause, see Matthew J. Patterson, Note, *A Brewing Debate: Alcohol Direct Shipment Laws and the Twenty-first Amendment*, 2002 U. ILL. L. REV. 761.

6. 468 U.S. 263 (1984).

7. *Id.* at 273.

8. *Id.* at 275.

9. *Id.* at 276.

10. *Id.* at 287 (Stevens, J., dissenting).

11. *Id.* at 288.

12. 491 U.S. 324 (1989).

13. In *Healy*, the Court explicitly overruled *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S.

examined whether the statute violated the Commerce Clause: It concluded the statute had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the state."[14] After finding this violation of the Commerce Clause, the Court quickly disposed of any Twenty-first Amendment issues by holding that the extraterritorial effects of the statute precluded its justification under the Amendment.[15] Justice Scalia filed a concurring opinion, agreeing that the statute was unconstitutional on Commerce Clause grounds, but only because it facially discriminated against interstate commerce.[16] He disputed the majority's assertion that extraterritorial effects alone always violate the Commerce Clause, as such a position would invalidate numerous other state laws.[17]

Chief Justice Rehnquist, joined by Justices Stevens and O'Connor, dissented. These three again argued that Twenty-first Amendment analysis was dispositive, making the Commerce Clause discussion unnecessary.[18] Acknowledging that the states' regulatory power must co-exist with Congressional power to regulate commerce, the dissenters saw the Twenty-first Amendment as creating an exception to the Commerce Clause within which the states have virtually complete control over liquor importation, sale, and distribution.[19]

The following year, the Court decided *North Dakota v. United States*, upholding a state law implementing a labeling and reporting system for the sale of alcohol to two Air Force bases over which the state and the federal government shared concurrent jurisdiction.[20] Although the Court focused much of its attention on issues of intergovernmental immunity, it also considered the

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35 (1966), which had upheld a New York price-affirmation statute. This was a choice it had declined to make three years earlier, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986). The statute at issue in *Seagram* had been "retrospective," tying maximum prices to what had been charged in other states during the *previous* month; *Brown-Forman*, on the other hand, struck down a "prospective" statute that tied prices in New York to what would be charged elsewhere during the *upcoming* month. "In the interest of removing any lingering doubt about the constitutional validity of affirmation statutes," the *Healy* Court decided to remove that distinction, holding that the "inherent practical extraterritorial effect of regulating prices in other States" made price affirmation statutes generally invalid. 491 U.S. at 343.

As *Seagram* was still good law at the time *Brown-Forman* was decided, Justices Stevens, White, and Rehnquist dissented. 476 U.S. at 586. Justice White, however, joined the majority in *Healy* in overruling *Seagram*, thus switching positions with Justice O'Connor (who was part of the *Brown-Forman* majority).

14. *Id.* at 337.

15. *Id.* at 342.

16. *Id.* at 344 (Scalia, J., concurring).

17. *Id.* at 345. Justice Scalia argued that even a "rudimentary" law capping the maximum retail prices for cases of beer would be vulnerable under the majority's analysis, as such a law would entice out-of-state consumers to drive across state lines to purchase beverages. Such reasoning, he warned, could cause this area of jurisprudence to "degenerate into disputes over degree of economic effect."

18. *Id.* at 348 (Rehnquist, C.J., dissenting).

19. *Id.* at 349.

20. 495 U.S. 423 (1990).

Twenty-first Amendment question. Writing for a four-member plurality, Justice Stevens stated:

> The two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment. 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.[21]

Thus, though not adopting the "underlying principles" analysis he objected to in *Bacchus*, Justice Stevens shed some light on what those principles might be. Justice Scalia wrote separately to voice his disagreement with the plurality's reasoning on whether principles of intergovernmental immunity were violated by the regulations. Despite this disagreement, he argued that the regulations were saved by the Twenty-first Amendment, which does not exempt the federal government from the reach of the states' regulatory abilities (as long as the regulations do not discriminate against the federal government).[22] The remaining four members concurred in upholding the reporting requirement but found the labeling requirement to interfere with intergovernmental immunity to an extent not allowed by the Twenty-first Amendment. However, because they argued that an area of concurrent jurisdiction was not within a state for purposes of the Amendment, they did not reach the question of the extent of the states' powers to regulate the importation of alcohol.[23]

II. THE CIRCUIT SPLIT

It is against this background that two recent cases came before Circuit Courts of Appeals. The Seventh Circuit case, *Bridenbaugh v. Freeman-Wilson*, involved a challenge to an Indiana law forbidding the direct shipment of alcohol to consumers by "any person in the business of selling alcoholic beverages in another state or country."[24] As in most states, Indiana's alcohol distribution system has three tiers: Separate permits are required for manufacturers, wholesalers, and retailers.[25] In this case, several Indiana consumers challenged the law requiring a wholesaler's permit for direct purchases from out-of-state sellers, on the ground that the requirement violated the dormant Commerce Clause by discriminating in favor of local wineries.[26]

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21. *Id.* at 432.

22. *Id.* at 448 (Scalia, J., concurring).

23. *Id.* at 469 (Brennan, J., dissenting in part).

24. 227 F.3d 848, 849 (7th Cir. 2000), *cert. denied*, 532 U.S. 1002 (2001) (quoting IND. CODE. § 7.1-5-11-1.5(a) (2000)).

25. *Id.* at 851.

26. In his opinion, Judge Easterbrook acknowledged the existence of the following problem: Out-of-state vendors might not be eligible for permits required to sell to Indiana residents. Accordingly, as Indiana also has laws against purchasing alcohol from unlicensed dealers, a victory in this case would still not have made it legal for plaintiff consumers to make the purchases they desired. Judge Easterbrook declined to hold that this conundrum rendered plaintiffs' claim moot. As a practical matter, though, only the direct shipping prohibition was before the court, as plaintiffs did not have standing to

Claiming that the promotion of temperance is the only core concern of the Twenty-first Amendment, plaintiffs argued that the Amendment could not rescue the regulations from the Commerce Clause violation. Defendants countered that *North Dakota* and *Healy* left room for other considerations, such as providing orderly market conditions and raising revenue.[27] Judge Easterbrook stated that defendants' view had more precedential support but claimed that both sides missed the real issue: "[O]ur guide is the text and history of the Constitution, not the "purposes" or "concerns" that may or may not have animated its drafters. Objective indicators supply the context for § 2 [of the Amendment]; suppositions about mental processes are unilluminating."[28]

Having established its interpretative principles, the court then reviewed the pre-Prohibition history of alcohol shipment regulations, focusing on the fact that the Commerce Clause had prevented even dry states from prohibiting the importation and resale of alcohol that remained in its original package. In response to this, Congress passed the Webb-Kenyon Act in 1913, using its Commerce Clause power to forbid the violation of state prohibition laws. After Webb-Kenyon, then, states were no longer less able to regulate the importation of alcohol than its domestic production.[29]

Judge Easterbrook then asserted that the Twenty-first Amendment effectively returned to this approach after Prohibition, incorporating the states' prohibitions into federal law and closing the loophole through which the dormant Commerce Clause protected direct interstate shipments.[30] This approach puts in-state and out-of-state shipments on the same playing field: Although imports can be banned completely, the power of absolute prohibition does not imply the lesser power of allowing imports on discriminatory terms, as did the Hawaii statute struck down in *Bacchus*.[31]

Since "Indiana insists that every drop of liquor pass through its three-tiered system and be subjected to taxation," the court held that the regulation in question is in no way discriminatory.[32] No matter where the alcohol originates, a permit is required to deliver it to Indiana consumers. As the plaintiffs did not (and could not) challenge the apparent inability of those outside the state to receive permits,[33] the Indiana system was found to be constitutionally permissible.

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challenge the other statutes. *Id.* at 850.

27. *Id.* at 851.

28. *Id.*

29. *Id.* at 852.

30. *Id.* at 853.

31. *Id.* Ironically, one Frank H. Easterbrook argued the appellants' case in *Bacchus*. 468 U.S. at 264.

32. *Id.*

33. *See supra* note 26.

The Eleventh Circuit faced a similar question about direct shipment laws in *Bainbridge v. Turner*.[34] Like Indiana, Florida has a three-tiered alcohol distribution system requiring separate permits for manufacturers, distributors, and vendors (which are generally mutually exclusive categories). However, in-state wineries can take advantage of an exception that allows them to apply for vendor's permits as well; with such a permit, they can ship directly to consumers, provided they use their own vehicles (not common carriers) to do so.[35] A group of consumers and out-of-state wineries challenged this exception on the ground that it discriminated against out-of-state wineries by restricting eligibility for special vendor permits to wineries with a sales outlet contiguous to licensed manufacturing premises—thus necessarily in the state of Florida.[36]

Writing for the court, Judge Tjoflat applied the *Bacchus* test, first ruling that the Florida statute violates the dormant Commerce Clause by facially discriminating against out-of-state economic interests.[37] By directly shipping their products to consumers, in-state wineries can avoid the hassle and expense of operating through the standard three-tiered system; out-of-state wineries must contend with the price mark-ups that inevitably result from utilizing that regulatory system, putting their products at a competitive disadvantage relative to wines made in-state.[38] Because a nondiscriminatory alternative—namely, allowing out-of-state wineries to apply for licenses—could also accomplish the state's goals of raising revenue and controlling the flow of alcohol, the Commerce Clause violation would be sufficient to strike down the statute were its subject something other than alcohol.[39]

The court then inquired whether the Twenty-first Amendment could rescue the Florida statute. Judge Tjoflat argued that the Amendment does not actually alter the Commerce Clause, but merely makes violations of state liquor laws also Constitutional violations; as those state laws might themselves be unconstitutional otherwise, the Amendment is treated as if it gives states new powers.[40] Still, the Amendment does not give states free rein to regulate alcoholic beverages. Only if a core concern of the Amendment is sufficiently implicated by the law at issue will an exception to the dormant Commerce Clause restriction be recognized—the state has the burden of showing that "it genuinely needs the law to effectuate its proffered core concern."[41] The court did hold, however, that the Amendment removes the requirement that no

34. 311 F.3d 1104 (11th Cir. 2002).
35. *Id.* at 1106.
36. *Id.* at 1107 n.6.
37. *Id.* at 1109.
38. *Id.* at 1107.
39. *Id.* at 1110.
40. *Id.* at 1111-12.
41. *Id.*

nondiscriminatory alternative be available.[42] Judge Tjoflat also recognized two other restrictions on the scope of the powers granted by the Amendment: Following *Healy*, the law cannot directly regulate extraterritorial commerce; following *Bacchus*, the law cannot have mere economic protectionism as its motivation.[43]

Florida argued that its interests in protecting minors, ensuring orderly markets for the sale of alcohol, and raising revenue fell within the scope of the Amendment's core concerns.[44] The court rejected the first two motives as inadequate. Despite having held that a lack of nondiscriminatory alternatives did not have to be shown, Judge Tjoflat stated that Florida could still protect against sales to underage consumers by requiring the same licensing requirements for out-of-state wineries as for those in the state.[45] The state's desire to "ensur[e] orderly markets" was similarly dismissed as not encompassing efforts to exclude out-of-state firms from the Florida market through discriminatory measures.[46]

As for the third state interest, the court ruled that more evidence was needed to determine whether the discriminatory statute was necessary to Florida's legitimate interest in raising revenue. Again effectively contradicting its prior holding that lack of nondiscriminatory alternatives did not have to be shown by the state, the majority held that Florida had to show not only the promotion of a core concern, but also that the facially discriminatory statute is "necessary to effectuate" that concern.[47] That is, Florida was required to demonstrate that it could not apply the same system of taxation to out-of-state firms that it used to raise revenue within the state; this narrow issue was its one remaining hope of justifying the statute. The case was remanded to the district court for resolution of this remaining question.[48]

The dissent, written by Judge Roney, did not contest the analytic framework employed by the majority, but disagreed with the conclusion that core concerns of the Twenty-first Amendment were not sufficiently implicated. He argued that the regulatory measures used to control in-state businesses would be less effective when applied to out-of-staters, as the majority suggested could be done. For example, the threat of losing a license to operate in Florida provides much more incentive for an in-state winery than it would for one located elsewhere.[49] Judge Roney did not discuss the possible existence of other nondiscriminatory alternatives, thus implying that their absence did not

42. *Id.* at 1115 n.17.
43. *Id.* at 1112.
44. *Id.* at 1114-15.
45. *Id.*
46. *Id.* at 1115.
47. *Id.*
48. *Id.* at 1115-16.
49. *Id.* at 1116 (Roney, J., dissenting).

have to be shown by the state.

III. THE SCOPE OF DISAGREEMENT

The majority in *Bainbridge* explicitly considered and rejected the analysis conducted by Judge Easterbrook in *Bridenbaugh*. In one respect, the Eleventh Circuit actually read the Twenty-first Amendment more expansively than did the Seventh Circuit, holding that § 2 ruled out only "mere economic protectionism"; in *Bridenbaugh*, the Amendment was read to include a nondiscrimination principle carried over from the Webb-Kenyon Act.[50] Thus, a facially discriminatory statute regulating the importation of alcohol would necessarily be struck down in the Seventh Circuit but would have a chance at surviving in the Eleventh Circuit if the state could show a necessary relation to effectuating a core concern of the Amendment—that is, a motivation beyond mere protectionism.

However, this disagreement masks a more fundamental way in which the two approaches diverge. In *Bridenbaugh*, Judge Easterbrook addressed the Commerce Clause issue only briefly before inquiring whether Indiana's statute was a valid exercise of its Twenty-first Amendment powers. Rather than focus on the Commerce Clause and treat the Amendment as providing a sort of affirmative defense against some Commerce Clause violations, Judge Easterbrook construed the Amendment as a positive grant of power to the states, enabling them to forbid the importation of alcohol or regulate it to the same extent as they regulate its domestic sources. Only regulations that discriminate against out-of-state sources overreach the states' power.

This approach is justified, Judge Easterbrook argued, by the history and text of the Constitution, an assertion which drew criticism from Judge Tjoflat. Though the Seventh Circuit decision did not blatantly ignore the governing Supreme Court precedents, it applied their holdings selectively. For example, whereas Judge Easterbrook saw only a nondiscrimination principle as binding precedent in his interpretation of the Amendment, Judge Tjoflat argued that the "core concerns" framework from *Bacchus* had to be followed in deciding such cases.[51] Implicit within the "core concerns" approach is the continued analytical priority of the Commerce Clause; implicating one of those concerns can "rescue" a statute from a Commerce Clause violation, meaning that a reviewing court must ascertain any such violation before addressing the Twenty-first Amendment issues.

It is this disagreement over the form of analysis necessary that ultimately leads to much of the substantive differences in the positions of the two Circuits. But the precedential status of the "core concerns" inquiry is not as clear as

50. *Id.* at 1114 n.15.
51. *Id.*

either of these two judges seems to believe. The holding in *Bacchus* did indeed rely on a determination of the purposes to be served by the Hawaii liquor tax—economic protectionism was held to be an illegitimate motive—but the Court failed to articulate a clear test for valid motives. Subsequently, in *Healy* and *North Dakota*, the Court addressed Twenty-first Amendment issues without relying upon the "core concerns" framework, although *North Dakota* did include some mention of the state's motivations.[52] A plausible case could therefore be made that the Court has abandoned the "core concerns" test, but the lack of an explicit disavowal of that test leaves the question open for debate.

In the end, it may be the latest changes in the Court's membership that determine how the Court resolves any such future case. Of the justices who decided *Bacchus* in 1984, only the three dissenters are still on the bench.[53] Presumably, those three would hold to their original view that states may enact even legislation that discriminates against imported alcohol.[54] Justice Scalia wrote separate concurrences in *Healy* and *North Dakota*; in both opinions, he mentioned only a nondiscrimination principle as a limitation on the states' Twenty-first Amendment powers.[55] Though he never explicitly addresses the "core concerns" test, his approach might very well be based on the same logic employed by Judge Easterbrook—a focus on the text and history of the Amendment itself. Justice Kennedy joined the opinion of the Court in *Healy*, and Justice Brennan's opinion in *North Dakota*.[56] However, even if those votes were to be interpreted as support for the "core concerns" framework (an uncertain inference at best), the four most recently appointed Justices have yet to voice their opinions on the issue.

Accordingly, even if Judge Tjoflat was correct in claiming that Judge Easterbrook disregarded a prescribed test by not applying the "core concerns" framework, it would only take one of those four new Justices to validate the Seventh Circuit's approach. If, for example, Justice Thomas were to concur with Justice Scalia's methodology, the majority of the Court would have clearly

52. *See supra* note 21 and accompanying text. Despite the listing of North Dakota's motivations in implementing their alcohol regulations, Justice Stevens's focus is clearly on the regulatory powers granted by the Amendment, not the subjective intentions of the legislators attempting to utilize those powers. Such a powers-based analysis is consistent with the position taken by Justice Stevens in his *Bacchus* dissent.

53. For a listing of the presiding Justices at the time of *Bacchus* and today, see Members of the Supreme Court of the United States, available at http://www.supremecourtus.gov/about/members.pdf (last viewed March 29, 2003).

54. 468 U.S. at 286 (Stevens, J., dissenting). At the same time, it is also possible that the *Bacchus* and *Healy* dissenters would change their approaches and follow precedent out of concern for *stare decisis*—the brief discussion of various state interests by the *North Dakota* plurality could be seen as a step in the direction of accepting the *Bacchus* framework. However, the lack of a clear test for defining state interests, as well as the lack of any obvious reliance interest based on the "core concerns" framework, make this possibility less likely.

55. 491 U.S. at 344 (Scalia, J., concurring); 495 U.S. at 448 (Scalia, J., concurring).

56. 491 U.S. at 325; 495 U.S. at 448 (Brennan, J., dissenting in part).

abandoned the "core concerns" approach. In such a scenario, states would only be prevented from implementing a regulatory scheme that discriminated against importation of out-of-state alcohol. Furthermore, an even more aggressively pro-state outcome is possible should two additional Justices side with the three *Bacchus* dissenters and hold that even discriminatory statutes are permitted. It is not clear that *Bainbridge* would have been decided differently under either of these analyses, but the reasoning in *Bridenbaugh* that Judge Tjoflat criticized would end up appearing rather prescient. Judge Easterbrook gambled by narrowly interpreting recent precedent. It remains to be seen whether the Supreme Court will call his bluff.