When it comes to the Constitution, alcohol makes everything a little hazy. The Commerce Clause bars states from unduly burdening interstate commerce.1 But the Twenty-First Amendment, which ended national Prohibition, empowers states to regulate alcohol within their borders.2 While the Twenty-First Amendment does not wholly trump the Commerce Clause,3 the Supreme Court noted in Tennessee Wine and Spirits Retailers Ass’n v. Thomas4 that alcohol regulation demands a “different inquiry.”5 Recently, in B-21 Wines, Inc. v. Bauer,6 the Fourth Circuit held that North Carolina did not violate the Commerce Clause by allowing licensed in-state retailers, but not out-of-state retailers, to sell and ship wine directly to the state’s consumers.7 With its strained reading of Tennessee Wine that deemphasized concrete evidence and nondiscriminatory alternatives, the court upset the balance between antiprotectionism and state power over alcohol. Although the result aligns with two circuit decisions since 2019,8 B-21 Wines’ reasoning still portends confusion on the “different inquiry” for dormant commerce clause challenges to alcohol laws.

North Carolina allows licensed in-state retailers to ship wine directly to consumers,9 but criminally bars out-of-state retailers from doing the same.10 The shipping scheme fits into the state’s generally extensive alcohol controls. Since 1939, North Carolina has funneled most alcohol sales through a three-tier system, which requires alcohol producers, wholesalers, and retailers to be separate economic entities.11 Before reaching consumers, alcohol typically must pass from a producer to an in-state wholesaler to an in-state retailer.12 The state exempts licensed in-state and out-of-state wineries (a type of producer), which can ship
wine directly to consumers without separate wholesaler and retailer
tiers. But unlike wine producers, retailers may only receive a direct-
shipping license if they are in-state and the wine travels through each of
the state’s three tiers.

While North Carolina retailers enjoyed the shipping privilege amid
the COVID-19 pandemic, out-of-state retailers like B-21 Wines saw dif-
fferential treatment. Several state consumers also lamented that they
effectively could not purchase many rare wines. Together, they sued
North Carolina officials, arguing that the state unconstitutionally dis-
criminated against interstate commerce. The suit focused on three
statutory provisions that: (1) bar out-of-state retailers from shipping al-
cohol to “any North Carolina resident who does not hold a valid whole-
saler’s permit”; (2) prohibit consumers from receiving out-of-state
alcohol shipments except from permitted wineries; and (3) require North
Carolina residency, with limited exceptions, for alcohol permits.

The district court granted summary judgment to the state on all
claims. To address a “tension” between the dormant commerce clause
and the Twenty-First Amendment, the court used a two-step test.
First, the court concluded that the scheme would violate the dormant
commerce clause without the Twenty-First Amendment because it fa-
cially discriminated against out-of-state interests. Second, it held that
in light of the Twenty-First Amendment, the shipping restrictions were
constitutional because they were essential to preserving a three-tier sys-
tem, which is a “legitimate nonprotectionist ground.”

The Fourth Circuit affirmed. Writing for the panel, Judge King cast
the dispute as a balance between the dormant commerce clause’s
constraints on state power and the Twenty-First Amendment’s grant of
state power. Because the Commerce Clause guards a national market
against protectionist state actions, courts typically use a test “akin to
strict scrutiny review” when states facially discriminate against inter-
state commerce. But while the Commerce Clause’s nondiscrimination

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13 N.C. GEN. STAT. § 18B-1001.1(a).
14 See id. §§ 18B-900(a)(2), -1001(4), -1006(h).
16 Id. Only out-of-state retailers stock some rare wines. See Brief of All Appellants at 8, B-21
Wines, 36 F.4th 214 (No. 21-1906).
17 B-21 Wines, 548 F. Supp. 3d at 557.
18 See id. at 559 (quoting N.C. GEN. STAT. § 18B-102.1(a)) (citing N.C. GEN. STAT. § 18B-
109(a), -900(a)(2)).
19 Id. at 563. The court also denied North Carolina’s motion to strike two reports as moot. Id.
20 Id. at 560.
21 Id. at 560–61.
22 Id. (quoting Tenn. Wine & Spirits Retailers Ass’n v. Thomas, 139 S. Ct. 2449, 2474 (2019)).
23 B-21 Wines, 36 F.4th at 229. Plaintiffs did not challenge on appeal the statutory provision
about residency requirements. Id. at 222.
24 Judge King was joined by Judge Quattlebaum.
25 See B-21 Wines, 36 F.4th at 221.
26 Id.
principle still applies to alcohol, Judge King agreed with the district court that Tennessee Wine enunciated a more permissive inquiry.\textsuperscript{27} First, a court asks whether a state “discriminate[d] against interstate commerce.”\textsuperscript{28} Second, it asks whether the discrimination served a “legitimate nonprotectionist ground,” such as “public health or safety measures.”\textsuperscript{29}

The court quickly concluded that North Carolina discriminated against interstate commerce.\textsuperscript{30} Here, Judge King asked whether North Carolina created differential treatment that benefited in-state interests and burdened out-of-state interests.\textsuperscript{31} For Judge King, the “readily suspect” statute facially prohibited out-of-state retailers from shipments that in-state retailers could make; the discrimination was “obvious.”\textsuperscript{32} Moreover, Judge King argued that in-state retailers benefitted by reaching a wider market.\textsuperscript{33}

Judge King then clarified the relevant test under the Twenty-First Amendment. He rejected the plaintiffs’ argument that facially differential treatment must promote “an important regulatory interest that could not be furthered by reasonable nondiscriminatory alternatives.”\textsuperscript{34} That test, Judge King argued, applies to nonalcoholic products.\textsuperscript{35} While Tennessee Wine considered nondiscriminatory alternatives, Judge King noted that that discussion “was not central” to the analysis.\textsuperscript{36} “Although . . . nondiscriminatory alternatives . . . could have some relevance” to Commerce Clause challenges to alcohol regulations,\textsuperscript{37} Judge King argued that the Twenty-First Amendment must make the test more lenient.\textsuperscript{38}

Applying the second step, Judge King held that the differential shipping scheme advanced a valid nonprotectionist goal. Notably, Judge King agreed with the district court that because maintaining a three-tier system “is itself a legitimate non-protectionist ground,” preserving a three-tier system’s essential features was per se valid.\textsuperscript{39} Thus, when a case implicates a three-tier system’s essential features, courts should neither demand evidence that the three-tier system promotes another valid
goal nor probe the challenged regulation’s actual effects. He then held that the differential shipping privilege was essential to North Carolina’s three-tier system. As more out-of-state retailers shipped wine, cheaper and less regulated alcohol would flood North Carolina through a “‘sizeable hole’ in the . . . three-tier system.” Second, Judge King noted that in-state shipping is “closely intertwined with the privilege of selling [alcohol]” in the state’s three-tier system.

Judge Wilkinson dissented. Overall, he concluded that a “textbook example of a dormant commerce clause violation” straightforwardly followed from Supreme Court precedents. First, he argued that North Carolina’s facial discrimination against out-of-state economic interests violated the Commerce Clause’s nondiscrimination principle. Next, he conceded that the Twenty-First Amendment authorizes a three-tier system but denied that North Carolina’s differential treatment was essential to a three-tier system. Regardless, Judge Wilkinson argued that North Carolina had abandoned its three-tier system with the wineries exception. Finally, Judge Wilkinson argued that the state did not satisfy the Tennessee Wine test because North Carolina had nondiscriminatory alternatives that could advance all of its legitimate health and taxation interests. Judge Wilkinson concluded that the court should level down — barring both in-state and out-of-state retailers from shipping wine directly to consumers.

_B-21 Wines_ read too much into _Tennessee Wine_’s different inquiry, which avoided the ordinary dormant commerce clause analysis to delicately balance states’ greater latitude to control alcohol with the
Commerce Clause’s antiprotectionist goals. B-21 Wines strained that balance by (1) presuming that three-tier systems’ essential features do not require concrete evidence of legitimate effects, and (2) discounting nondiscriminatory alternatives. On both axes, B-21 Wines thus risks confusing other courts on how the Twenty-First Amendment grants states greater power over alcohol.

First, even if B-21 Wines involved essential provisions of North Carolina’s three-tier system, Judge King problematically concluded that courts should not require concrete evidence of nonprotectionist effects. That inference sits uneasily with Tennessee Wine’s text. There, the Court held that Tennessee could not condition alcohol retail licenses on living in the state for two years. In denying that the dormant commerce clause applied only to alcohol producers, the Court admittedly noted that residency requirements are not essential to three-tier systems. But when it later analyzed the law’s effects, it never distinguished three-tier systems’ essential and nonessential features. Instead, Tennessee Wine used broad language that seemingly applies to every feature of a three-tier system: “‘[M]ere speculation’ or ‘unsupported assertions’ are insufficient to sustain a law that would otherwise violate the Commerce Clause.” The Court then broadly noted that the Twenty-First Amendment did not protect a law whose “predominant effect” was protectionism. Finally, it emphasized that it lacked “concrete evidence” that the law “actually promote[d] public health or safety.”

The Supreme Court’s understanding of the dormant commerce clause also contradicts Judge King’s approach. Whether for alcohol or other products, the dormant commerce clause roots out rampant state protectionism that once splintered the nation. Because protectionism


53 Locating a three-tier system’s essential features involves “fuzziness and impracticality.” Lebamoff Enters., Inc. v. Rauner, 909 F.3d 847, 855 (7th Cir. 2018).

54 Tenn. Wine, 139 S. Ct. at 2457.

55 Id. at 2471–72.

56 Id. at 2474 (quoting Granholm v. Heald, 544 U.S. 460, 490, 492 (2005)).

57 Id. (emphasis added).

58 Id. (quoting Granholm, 544 U.S. at 490).

sometimes masquerades as health or safety interests, courts have not been satisfied with theoretical claims that facially discriminatory statutes promote safety. Even within Twenty-First Amendment cases, evidence is “crucial” in combatting protectionism — perhaps especially so. States can easily add “boilerplate enabling language” to cast all alcohol laws as health related. And if in-state wholesalers and retailers have an outsized influence in state politics, they may increase the risk of pretextual alcohol laws. Thus, courts have emphasized evidence so much that by 1990, “Twenty-First Amendment challenges [were] essentially evidentiary contests.” Yet so much that by 1990, “Twenty-First Amendment challenges [were] essentially evidentiary contests.”


Applying Tennessee Wine’s concrete evidence and actual effects requirements would not necessarily doom North Carolina’s three-tier system. B-21 Wines appeared partly motivated by Supreme Court precedents that called three-tier systems “unquestionably legitimate.” Although some have argued that this statement is an unpersuasive “dictum-within-a-dictum,” B-21 Wines did not have to skirt the evidence inquiry to support three-tier systems. The Twenty-First Amendment implicates many valid state interests, including temperance. Therefore, North Carolina might marshal concrete evidence that out-of-state retailer shipments would increase alcohol consumption.

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60 See, e.g., Beskind v. Easley, 325 F.3d 506, 517 (4th Cir. 2003) (noting that an alcohol law was “local economic boosterism in the guise of a law aimed at alcoholic beverage control”).


62 Lebamoff Enters., Inc. v. Rauner, 909 F.3d 847, 856 (7th Cir. 2018); see Bainbridge v. Turner, 311 F.3d 1104, 1114 n.16 (11th Cir. 2002).


64 See id. at 382–83.


66 See RICHARD MENDELSON, FROM DEMON TO DARLING 116–17 (2009).


69 Quigley, supra note 67, at 1895–96; see Amy Murphy, Note, Discarding the North Dakota Dictum: An Argument for Strict Scrutiny of the Three-Tier Distribution System, 110 MICH. L. REV. 819, 829 (2012). But see Arnold’s Wines, Inc. v. Boyle, 515 F. Supp. 2d 401, 412 (S.D.N.Y. 2007) (“But if dicta this be, it is of the most persuasive kind.”).

And North Carolina tried just that. The state agreed that it must “ordinarily come forward with ‘concrete evidence’ to support [its] interests in regulating alcohol.”71 But it argued in part that a “substantial evidentiary record”72 satisfied the concrete evidence requirement by showing that its three-tier system increases prices, which “reduces demand” and “limit[s] excessive consumption.”73 To be sure, this argument is not airtight. The Supreme Court once discredited a similar argument associating alcohol consumption with price controls.74 Still, two Sixth Circuit judges recently concurred to uphold a law nearly identical to North Carolina’s because the state “presented enough evidence” about health benefits.75 But the Fourth Circuit did not make this case.

Second, B-21 Wines also conflicts with Tennessee Wine by deemphasizing nondiscriminatory alternatives. In Tennessee Wine, the Court considered several nondiscriminatory alternatives that could promote a state’s valid interests.76 To Judge King, that inquiry was “limited” and “not central” to the holding.77 Yet as soon as Tennessee Wine suggested residency requirements had a predominantly protectionist effect, it invoked nondiscriminatory alternatives.78 The Court then argued that neutral alternatives could equally or better serve every possible health and safety interest.79 Thus, excising Tennessee Wine’s discussion of nondiscriminatory alternatives leaves a large gap in the holding. Perhaps recognizing this interpretive problem, Judge King acknowledged that nondiscriminatory alternatives could have “some relevance.”80 Against the broader purpose of Tennessee Wine and the dormant commerce clause, however, nondiscriminatory alternatives are a central touchpoint to confirm whether state actions are predominantly protectionist.81 When a state can easily use a nondiscriminatory alternative but does not, it is more likely that protectionist effects predominate.

71 Brief of Defendant-Appellee at 37 n.9, B-21 Wines (No. 21-1906) (quoting Brief of All Appellants, supra note 16, at 14).
72 Id.
73 Id. at 13.
75 Others argue that “direct shipment laws will do little to achieve temperance, as state residents can drink as much as they want as long as they buy their alcohol from in-state retailers.” Shanker, supra note 63, at 381–82.
77 B-21 Wines, 36 F.4th at 224.
78 See id. at 2475–76.
79 See id. at 2474–75.
80 B-21 Wines, 36 F.4th at 225. In a footnote, he also argued the state lacked viable alternatives. Id. at 229 n.10.
Following *B-21 Wines*, courts may bless alcohol regulations by mistakenly downplaying nondiscriminatory alternatives and concrete evidence about three-tier systems’ essential features. Oddly enough, *B-21 Wines* may cause confusion because it seems to solve longstanding confusion. As one commentator urged before *Tennessee Wine*, “Section 2 of the Twenty-First Amendment must do something.”82 More than the dissent, Judge King clearly ensured that it did.83 But this came at the needless cost of neglecting important factors in *Tennessee Wine*. Judge King could have probed the state’s evidence-backed temperance interests instead of avoiding the concrete evidence inquiry. And by downplaying nondiscriminatory alternatives, *B-21 Wines* could unnecessarily allow state protectionism to hide in alcohol controls. Other courts have prioritized nondiscriminatory alternatives while respecting that the Twenty-First Amendment gave states more regulatory latitude.84 Therefore, *B-21 Wines* sets a worrisome example on both concrete evidence and nondiscriminatory alternatives.

Before the Supreme Court announced its “different inquiry,” some Justices worried that the dormant commerce clause might eventually force states to treat alcohol like other online products.85 Commentators speculated whether *Tennessee Wine* would unleash a wave of retail wine shipping.86 For the time being, it seems these concerns were partly misplaced. But as more challenges to differential shipping schemes wind through other courts,87 *B-21 Wines* marks a confusing guidepost for balancing state powers with antiprotectionism. To clarify the doctrinal haze, courts must use inquiries not too different from *Tennessee Wine*’s already different inquiry.


83 The dissent set aside any state interest that could “easily be achieved by ready [nondiscriminatory] alternatives.” *B-21 Wines*, 36 F.4th at 237 (Wilkinson, J., dissenting) (quoting *Tenn. Wine*, 139 S. Ct. at 2475 (alteration in original)). It is hard to imagine any alcohol law that would fail the standard dormant commerce clause test but survive the dissent’s inquiry. Thus, Section 2 of the Twenty-First Amendment risks doing nothing.

84 See, e.g., Lebamoff Enters. Inc. v. Whitmer, 956 F.3d 863, 879 (6th Cir. 2020) (McKeague, J., concurring); Bainbridge v. Turner, 311 F.3d 1104, 1114 n.17 (11th Cir. 2002) (noting that a state need not “show that there are no nondiscriminatory alternatives available”). But see Lemaire, supra note 82, at 1639 (arguing that the analysis of Bainbridge v. Turner, 311 F.3d 1104, was “very similar to strict scrutiny”).

