DORMANT COMMERCE CLAUSE — TWENTY-FIRST AMENDMENT — FOURTH CIRCUIT UPHOLDS DIFFERENTIAL WINE-SHIPPING SCHEME. — *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214 (4th Cir.), *reh'g and reh'g en banc denied*, No. 21-1906, 2022 U.S. App. LEXIS 17960 (4th Cir. June 28, 2022), *cert. denied*, 143 S. Ct. 567 (2023).

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. Thomas*[4] 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

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1 *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978).

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

3 Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 331–32 (1964) (calling the opposite view "demonstrably incorrect," *id.* at 332); Granholm v. Heald, 544 U.S. 460, 486–87 (2005).

4 139 S. Ct. 2449 (2019).

5 *Id.* at 2474.

6 36 F.4th 214 (4th Cir. 2022).

7 *Id.* at 229.

8 *See* Lebamoff Enters. Inc. v. Whitmer, 956 F.3d 863, 870 (6th Cir. 2020); Sarasota Wine Mkt., LLC v. Schmitt, 987 F.3d 1171, 1184 (8th Cir. 2021).

9 *See* N.C. GEN. STAT. § 18B-1001(4)(iii) (2021).

10 *See id.* § 18B-102.1(a), (e). The state also generally bars residents without permits from receiving out-of-state alcohol shipments. *See id.* § 18B-109(a).

11 *See B-21 Wines*, 36 F.4th at 218–19.

12 B-21 Wines, Inc. v. Stein, 548 F. Supp. 3d 555, 558–59 (W.D.N.C. 2021).

wine directly to consumers without separate wholesaler and retailer tiers.[13] 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.[14]

While North Carolina retailers enjoyed the shipping privilege amid the COVID-19 pandemic, out-of-state retailers like B-21 Wines saw differential treatment.[15] Several state consumers also lamented that they effectively could not purchase many rare wines.[16] Together, they sued North Carolina officials, arguing that the state unconstitutionally discriminated against interstate commerce.[17] The suit focused on three statutory provisions that: (1) bar out-of-state retailers from shipping alcohol to "any North Carolina resident who does not hold a valid wholesaler'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.[18]

The district court granted summary judgment to the state on all claims.[19] To address a "tension" between the dormant commerce clause and the Twenty-First Amendment, the court used a two-step test.[20] First, the court concluded that the scheme would violate the dormant commerce clause without the Twenty-First Amendment because it facially discriminated against out-of-state interests.[21] 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 system, which is a "legitimate nonprotectionist ground."[22]

The Fourth Circuit affirmed.[23] Writing for the panel, Judge King[24] 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.[25] 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 interstate commerce.[26] 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).

[15] *B-21 Wines*, 548 F. Supp. 3d at 557.

[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.[27] First, a court asks whether a state "discriminate[d] against interstate commerce."[28] Second, it asks whether the discrimination served a "legitimate nonprotectionist ground," such as "public health or safety measures."[29]

The court quickly concluded that North Carolina discriminated against interstate commerce.[30] Here, Judge King asked whether North Carolina created differential treatment that benefited in-state interests and burdened out-of-state interests.[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."[32] Moreover, Judge King argued that in-state retailers benefitted by reaching a wider market.[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."[34] That test, Judge King argued, applies to nonalcoholic products.[35] While *Tennessee Wine* considered nondiscriminatory alternatives, Judge King noted that that discussion "was not central" to the analysis.[36] "Although . . . nondiscriminatory alternatives . . . could have some relevance" to Commerce Clause challenges to alcohol regulations,[37] Judge King argued that the Twenty-First Amendment must make the test more lenient.[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.[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

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[27] *Id.* at 222.
[28] *Id.* (citing Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2474 (2019)).
[29] *Id.* (quoting *Tenn. Wine*, 139 S. Ct. at 2474).
[30] *Id.* at 223.
[31] *Id.* at 222–23.
[32] *Id.* at 223.
[33] *See id.*
[34] *Id.* at 224 (quoting Brief of All Appellants, *supra* note 16, at 17).
[35] *Id.* at 225.
[36] *Id.* at 224.
[37] *Id.* at 225.
[38] *Id.* at 225–26.
[39] *Id.* at 227.

goal nor probe the challenged regulation's actual effects.[40] Next, Judge King denied that the wineries exception abolished North Carolina's three-tier system.[41] He then held that the differential shipping privilege was essential to North Carolina's three-tier system. First, allowing out-of-state retailer shipments would mean allowing wine that may not have passed through a separate wholesaler tier to reach consumers.[42] 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."[43] Second, Judge King noted that in-state shipping is "closely intertwined with the privilege of selling [alcohol]" in the state's three-tier system.[44]

Judge Wilkinson dissented. Overall, he concluded that a "textbook example of a dormant commerce clause violation" straightforwardly followed from Supreme Court precedents.[45] First, he argued that North Carolina's facial discrimination against out-of-state economic interests violated the Commerce Clause's nondiscrimination principle.[46] Next, he conceded that the Twenty-First Amendment authorizes a three-tier system[47] but denied that North Carolina's differential treatment was essential to a three-tier system.[48] Regardless, Judge Wilkinson argued that North Carolina had abandoned its three-tier system with the wineries exception.[49] 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.[50] Judge Wilkinson concluded that the court should level down — barring both in-state and out-of-state retailers from shipping wine directly to consumers.[51]

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

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40 *See id.* n.8 ("When, as here, an essential feature of a state's three-tier system is challenged, a court's role is more limited and does not entail an examination of the effectiveness of the three-tier system.").

41 *See id.* at 226.

42 *Id.* at 228.

43 *Id.* (quoting Lebamoff Enters. Inc. v. Whitmer, 956 F.3d 863, 872 (6th Cir. 2020)).

44 *Id.* at 229.

45 *Id.* at 230 (Wilkinson, J., dissenting).

46 *Id.* at 231–32.

47 *Id.* at 232–33.

48 *Id.* at 235.

49 *Id.* at 236–37.

50 *See id.* at 238. North Carolina could condition permits on duties to "remit taxes, consent to jurisdiction, undergo audits, and comply with various other regulatory requirements." *Id.* (citing Joint Appendix at 95, *B-21 Wines* (No. 21-1906); FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 3, 8, 27–28 (2003)).

51 *See id.* at 239.

Commerce Clause's antiprotectionist goals.[52] *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,[53] 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.[54] 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.[55] 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."[56] The Court then broadly noted that the Twenty-First Amendment did not protect a law whose "predominant *effect*" was protectionism.[57] Finally, it emphasized that it lacked "concrete evidence" that the law "actually promote[d] public health or safety."[58]

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.[59] Because protectionism

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[52] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2474 (2019). *But see* Matthew D. Warren, Note, *Missouri's Hangover: Wine-ing About Direct-to-Consumer Prohibition*, 87 MO. L. REV. 953, 969, 973 (2022) (describing *Tennessee Wine* with the standard dormant commerce clause test). Elsewhere, B-21 Wines' lawyers argued that the "different inquiry" simply means that courts will not invalidate facially discriminatory alcohol provisions without further analysis. Reply Brief for the Petitioners at 5–6, Lebamoff Enters. Inc. v. Whitmer, 956 F.3d 863 (6th Cir. 2020) (No. 20-47). The Court, however, does not always per se invalidate facially discriminatory statutes for nonalcoholic products. *See* James M. McGoldrick Jr., *The Dormant Commerce Clause: The Endgame — From* Southern Pacific *to* Tennessee Wine & Spirits — *1945 to 2019*, 40 PACE L. REV. 44, 82–86 (2019).

[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).

[59] *See id.* at 2460; Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984) (noting that Commerce Clause prevents "economic Balkanization"); Dep't of Revenue v. Davis, 553 U.S. 328, 337–38 (2008) (noting that modern precedents are "driven by," *id.* at 337, fears of protectionism).

sometimes masquerades as health or safety interests,[60] courts have not been satisfied with theoretical claims that facially discriminatory statutes promote safety.[61] Even within Twenty-First Amendment cases, evidence is "crucial" in combatting protectionism — perhaps especially so.[62] States can easily add "boilerplate enabling language" to cast all alcohol laws as health related.[63] And if in-state wholesalers and retailers have an outsized influence in state politics, they may increase the risk of pretextual alcohol laws.[64] Thus, courts have emphasized evidence so much that by 1990, "Twenty-first Amendment challenges [were] essentially evidentiary contests."[65] Yet *B-21 Wines* bucked the trend by shunning fact-specific inquiry and hiding essential features of the three-tier system — which postdated the Twenty-First Amendment[66] — in speculative legitimacy.[67]

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."[68] Although some have argued that this statement is an unpersuasive "dictum-within-a-dictum,"[69] *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.[70] 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").

[61] *See Tenn. Wine*, 139 S. Ct. at 2474; *Granholm*, 544 U.S. at 492; New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 280 (1988).

[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).

[63] *See* Vijay Shanker, Note, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 377 (1999) (quoting Cooper v. McBeath, 11 F.3d 547, 554 (5th Cir. 1994)).

[64] *See id.* at 382–83.

[65] Susan E. Brownlee, *Economic Protection for Retail Liquor Dealers: Residency Requirements and the Twenty-First Amendment*, 1990 COLUM. BUS. L. REV. 317, 333 (1990). *But see* Jason E. Prince, Note, *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, 1600 (2004) (arguing that requiring "extensive supporting evidence" for Twenty-First Amendment interests was "unprecedented").

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

[67] *Cf.* Kevin C. Quigley, Note, *Uncorking* Granholm*: Extending the Nondiscrimination Principle to All Interstate Commerce in Wine*, 52 B.C. L. REV. 1871, 1902 (2011) (arguing that courts should analyze three-tier systems' "constitutional *operation*" rather than constitutionalizing them).

[68] *B-21 Wines*, 36 F.4th at 227 (quoting Granholm v. Heald, 544 U.S. 460, 489 (2005)).

[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.").

[70] *See* Beskind v. Easley, 325 F.3d 506, 517 (4th Cir. 2003); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984); North Dakota v. United States, 495 U.S. 423, 432 (1990) (plurality opinion).

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.

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[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.

[74] *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 112–13 (1980). 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.

[75] Lebamoff Enters. Inc. v. Whitmer, 956 F.3d 863, 877 (6th Cir. 2020) (McKeague, J., concurring).

[76] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2474–76 (2019).

[77] *B-21 Wines*, 36 F.4th at 224.

[78] *See Tenn. Wine*, 139 S. Ct. at 2474–75.

[79] *See id.* at 2475–76.

[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.

[81] *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 492–93 (2005); *cf.* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1107 (1986) (arguing that less discriminatory alternatives can help test whether a legislative purpose is protectionist).

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.

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[82] Justin Lemaire, Note, *Unmixing a Jurisprudential Cocktail: Reconciling the Twenty-First Amendment, The Dormant Commerce Clause, and Federal Appellate Jurisprudence to Judge the Constitutionality of State Laws Restricting Direct Shipment of Alcohol*, 79 NOTRE DAME L. REV. 1613, 1659 (2004).

[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").

[85] Transcript of Oral Argument at 49–50, 53, *Tenn. Wine* (No. 18-96).

[86] *See* Eric Asimov, *The Supreme Court May Change the Way You Buy Wine*, N.Y. TIMES (Jan. 14, 2019), https://www.nytimes.com/2019/01/10/dining/supreme-court-interstate-wine-sales.html [https://perma.cc/YT43-MNKY].

[87] *See* W. Blake Gray, *SCOTUS Backs Down from Another Wine Case*, WINE-SEARCHER (Jan. 10, 2023), https://www.winesearcher.com/m/2023/01/scotus-backs-down-from-another-wine-case [https://perma.cc/W75C-8ZQT].