

## Articles

# SMOKEY AND THE BANDIT IN CYBERSPACE: THE DORMANT COMMERCE CLAUSE, THE TWENTY-FIRST AMENDMENT, AND STATE REGULATION OF INTERNET ALCOHOL SALES

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Recently, some federal judges have given oenophiles everywhere reason to rejoice by striking down, under the dormant Commerce Clause doctrine, venerable state laws that limit the import and sale of alcoholic beverages to customers directly.<sup>1</sup> Such laws had presented a considerable obstacle to the sale of

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1. See, e.g., *Swedenburg v. Kelly*, 2000 WL 1264285 (S.D.N.Y.) (Sept. 5, 2000) (refusing to dismiss dormant Commerce Clause challenge to New York direct shipment and advertising ban); *Dickerson v. Bailey*, 87 F. Supp. 2d 691 (S.D. Tex. 2000) (striking Texas personal importation statute on dormant Commerce Clause doctrine grounds); *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828 (N.D. Ind. 1999), rev'd sub nom., *Bridenbaugh v. Freeman-Wilson*, 2000 WL 1286249 (7th Cir. 2000). The most recent opinion in the New York litigation, *Swedenburg v. Kelly*, 2002 WL 31521023 (S.D.N.Y. 2002), summarized the recent decisions, which are in some disarray.

Owing to the unusual length of time between the writing of this article and its publication, I was unable to discuss the most recent decisions discussing the dormant Commerce Clause doctrine and the Twenty-first Amendment in detail. In addition to the *Swedenburg* decision mentioned above, see *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002); *Dickerson v. Bailey*, 212 F. Supp. 2d 673 (S.D. Tex. 2002); *Beskind v. Easley*, 197 F. Supp. 2d 464 (W.D.N.C. 2002); *Bolick v. Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002); *Glazer's Wholesale Drug Co., Inc. v. Kansas*, 145 F. Supp. 2d 1234 (D. Kan. 2001). I have tried to remedy this with brief discussions of the most recent decisions in the footnotes accompanying my discussion of earlier lower court cases. See Part IV. I thank the editors for allowing me to update my article during the editing process.

alcohol, wines in particular, over the Internet.<sup>2</sup> For the most part, only parents concerned about sales to minors and in-state liquor distributors have voiced concern. Many commentators approve of federal court application of the dormant Commerce Clause doctrine—the long-standing guarantee that parochial barriers will not be allowed to inhibit the free-flow of goods throughout our national market—to invalidate these laws.<sup>3</sup>

But one might ask, glancing at a copy of the Constitution, what of the Twenty-first Amendment?<sup>4</sup> Section Two of that amendment, after all, reads: “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.”<sup>5</sup> The plain text of that section suggests that these recent court decisions are mistaken.<sup>6</sup>

2. See, e.g., *Uncorking a Wine Industry Controversy*, Nat'l J. 472 (Feb. 12, 2000) (“Thirty states prohibit the direct sale by producer to consumer.”); R.W. Apple, *Zinfandel by Mail? Well, Yes and No*, N.Y. Times F1 (May 19, 1999). Most states have some form of a “three-tier” liquor distribution system in place. As a Michigan court succinctly explained, under such a system, “consumers must purchase alcoholic beverages from licensed retailers; retailers must purchase them from licensed wholesalers; and wholesalers must purchase them from licensed manufacturers.” *Heald v. Engler*, (No. CIU.A. 00-CV-71438) 2001 U.S. Dist. LEXIS 24825 at \*3 (E.D. Mich.) (Sept. 28, 2001). Under some states’ laws, in-state producers are exempt from the common prohibition on direct shipment to consumers.

3. See, e.g., Vijay Shanker, Note, *Alcoholic Direct Shipment Laws, the Commerce Clause, and the Twenty-first Amendment*, 85 Va. L. Rev. 353, 354 (1999) (arguing that laws should be sustained only when they further the “core” purpose of the Twenty-first Amendment, which is temperance); see also Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-first Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 Duke L.J. 1619, 1653-59 (2000) (describing the debate over whether Congress should regulate Internet alcohol sales to ensure validity of state laws to prevent underage drinking, as well as allegations that such laws simply prop up state distributors and wholesalers); “Cyber-bootlegging” *Just Rhetoric for Protectionism*, Houston Chron., (May 2, 2000), available at 2000 WL 4295786.

4. See U.S. Const., Amend. XXI. Ratified in 1933, the Twenty-first Amendment contained three sections; only section two is of major importance to my article. The first section merely repealed the Eighteenth Amendment, which inaugurated national prohibition. See *id.* § 1. Section three imposed a seven year time limit on ratification. See *id.* § 3.

5. *Id.* § 2.

6. Laurence Tribe has correctly pointed out that the Twenty-first Amendment does not actually empower the states to control the liquor trade, but rather curiously makes the violation of a state’s liquor laws unconstitutional. Laurence H. Tribe, *How to Violate the Constitution Without Even Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, in William N. Eskridge and Sanford Levinson, eds., *Constitutional Stupidities, Constitutional Tragedies* 99 (New York U. Press, 1998). He acknowledges elsewhere, however, that “interpreting § 2, in accord with its apparent purposes, as authorizing states to regulate the importation of liquor in certain ways that, without the Twenty-first Amendment, would violate the Commerce Clause is surely the best way to read the provision so that it makes practical sense. . . .” Laurence H. Tribe, 1

Yet the courts tell us that the Twenty-first Amendment is not to be read literally or invoked as a shield for protectionist legislation. Only laws designed to promote “temperance,” they say, are protected by the Amendment from dormant Commerce Clause scrutiny.<sup>7</sup>

Where did the district courts get the idea for this distinction—between “good” alcohol legislation, which furthers the state’s legitimate “core” interest in temperance, and is protected under the Twenty-first Amendment, and “bad” legislation motivated by simple economic protectionism and thus constitutionally impermissible? Certainly not from the text of the Amendment, whose wording makes no such distinction. Not from the Framers of the Twenty-first Amendment, whom the recent court decisions barely discuss.<sup>8</sup> Not from Congress, which recently opened the federal courts to state attorneys general to enforce state legislation against out-of-state alcohol shippers.<sup>9</sup> Rather, it is the Supreme Court, in a series of decisions beginning over thirty years ago, that has constrained the operation of the Amendment to such a degree that it has become an “almost forgotten clause of the Constitution.”<sup>10</sup> Yet, shortly after the Amendment’s ratification, when the Court was first called upon to interpret it, no less a gray eminence than Mr. Justice Brandeis turned aside a number of challenges to allegedly protectionist state liquor legislation, arguing that to make the distinctions made by recent lower courts, would be to effect not a “construction” of the Amendment, but a “rewriting” of it.<sup>11</sup>

To put it plainly, recent lower court decisions have indulged in broad applications of the Supreme Court’s own narrow interpretations of the Twenty-first Amendment—fashioned in cases whose facts went beyond the explicit text of the Amendment—

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*American Constitutional Law* § 1-12, at 36 n.15 (Foundation Press, 3rd ed., 2000).

7. See, e.g., *Bridenbaugh*, 78 F. Supp. 2d at 831-32; Shanker, 85 Va. L. Rev. at 383 (cited in note 3) (“There is only one reason to distinguish alcohol from other commodities in terms of federal power over interstate commerce: the state’s interest in promoting temperance.”).

8. See Part IV.

9. See, e.g., S. 577, 106th Cong., 2d Sess. (March 2, 2000) (providing for federal injunctive relief to state attorneys general to stop the importation or transportation of liquor into or through their state in violation of state law); Douglass, 49 Duke L.J. at 1653-59 (cited in note 3) (describing debate over the so-called “Twenty-first Amendment Enforcement Act”).

10. *Duckworth v. Arkansas*, 314 U.S. 390, 399 (1941) (Jackson, J., concurring). Justice Jackson was expressing his displeasure at his brethren for making inroads on the power of the states granted to them under his reading of the Amendment.

11. See notes 55-56 and accompanying text.

and have erroneously concluded that those decisions dictate the invalidation of state liquor importation laws. That courts continue to construe narrowly—nearly to the vanishing point—a *specific* reservation of state power at federalism's high tide of judicial enforceability, seems particularly worthy of attention. The growing market for interstate shipment of alcohol, and the near unanimity of federal courts in their continued assertions of the Twenty-first Amendment's irrelevance, makes this an appropriate time for a reexamination of the Amendment and the Supreme Court's interpretation of it.

In this essay, I will do three things. First, I will summarize the history of the framing and ratification of the Twenty-first Amendment. Its purposes were well understood to go beyond merely allowing states to pursue temperance policies. At the time, the question was understood to be whether the states or the federal government would control the liquor trade. Second, I will chart the evolution of the Supreme Court's Twenty-first Amendment jurisprudence and describe the Court's move from rules to standards in applying the Amendment. The adoption of the more flexible approach, I will show, has resulted in a dramatic reduction of state power over alcohol. Finally, I will critique the district court decisions that limit states in the one area in which their power remained largely unquestioned by the Supreme Court—the regulation of liquor imports from out-of-state. If these recent decisions are affirmed, the result will be the functional repeal of the Twenty-first Amendment. In hopes of averting this, I offer suggestions to lower courts and to the Supreme Court for applying the Amendment in future cases.

## I. FEDERAL REGULATION OF ALCOHOL BEFORE PROHIBITION

States began to regulate the sale of alcohol in the nineteenth century, sometimes prohibiting it altogether, under their police power.<sup>12</sup> Many states exempted “personal users” from their liquor laws, which tended to restrict only wholesalers and retailers.

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12. The Court upheld such regulations, even though they involved some regulation of interstate commerce in *The License Cases*, 46 U.S. (5 How.) 504 (1847). The Court, however, did not offer a consistent rationale, rather delivering its opinion in what Carl Swisher termed “a riot of diversity.” Carl Brent Swisher, *5 The History of the Supreme Court of the United States: The Taney Period* 375 (MacMillan, 1971). For the information here, and that which follows in this section, I have freely drawn on Boris I. Bittker's, *Bittker on the Regulation of Interstate and Foreign Commerce* §§ 9.02, 13.01-13.04, 13.06 (Aspen Law & Business, 1999).

But when states attempted to expand their laws and prohibit importation of out-of-state liquor for in-state delivery, the Supreme Court struck down the import bans as direct regulations of interstate commerce.<sup>13</sup> "The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free," held the Court in *Leisy v. Hardin*.<sup>14</sup> Alarmed, states pressed Congress for permission to freely regulate alcohol. Congress responded with the Wilson Act of 1890,<sup>15</sup> which gave states the right to regulate liquor the moment it arrived in the state "to the same extent and in the same manner as though such . . . liquor had been produced" there, regardless whether such liquor was in its "original package" or not.<sup>16</sup> A year later, *In re Rahrer*<sup>17</sup> blessed this "reconveyance" of regulatory power by Congress to the states. Through the exercise of its commerce power, the Court reasoned, Congress was free to "divest" an article of commerce of its interstate characteristics.<sup>18</sup>

Despite the Wilson Act, the Court later struck down more state laws restricting the importation of liquor for personal use, again prompting congressional action. In 1898, the Court invali-

13. See, e.g., *Leisy v. Hardin*, 135 U.S. 100 (1890) (invalidating an Iowa law restricting local manufacture, importation, and sale of liquor, as applied to Illinois beer seized in Iowa); *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465 (1888) (invalidating an Iowa law prohibiting railroads from importing liquor unless accompanied by a certificate that consignee was licensed to sell liquor). See Richard F. Hamm, *Shaping the Eighteenth Amendment* 56 (U. North Carolina Press, 1995) ("The U.S. Supreme Court's interpretation of the federal interstate commerce power shaped the course of the prohibition movement. . . . [T]he brewers, after failing to establish a Fourteenth Amendment right to make liquor, turned to the federal commerce power to curtail the effects of state prohibition."). Hamm writes that "[w]ithin a month of [*Leisy*], 'original package houses' and 'supreme court saloons' had sprung up in every prohibition state." *Id.* at 69. According to Hamm, *Bowman* "became a powerful wedge for them to use to force their wares into dry states. Liquor in transit could not be legally seized nor could it be stopped at the state's borders." *Id.* at 66.

14. *Leisy*, 135 U.S. at 119. See Hamm, *Shaping the Eighteenth Amendment* at 56-57 (cited in note 13) (cases like *Bowman* and *Leisy* "define[d] the limits of state action over liquor so as to insure freedom of commerce within the nation and protect the federal government's power to regulate commerce"; at the same time, they "created a national crisis over liquor control and prompted Congress to act.").

15. 26 Stat. 313 (1890). See Hamm, *Shaping the Eighteenth Amendment* at 57 (cited in note 13) ("The Supreme Court's interstate commerce decisions created an 'original package business' that threatened all liquor controls and created a crisis in alcohol policy" resulting in the passage of the Wilson Act, which inaugurated "a system of concurrent state and federal jurisdiction over liquor.").

16. 26 Stat. 313 (1890). The reference to the "original package" was necessary because of Chief Justice Marshall's decision in *Brown v. Maryland* that goods were immune from state taxation so long as they were in their original packages. The doctrine, now discarded, was expanded by subsequent courts, and was an important part of the Court's early dormant Commerce Clause doctrine jurisprudence.

17. 140 U.S. 545 (1891).

18. *Id.* at 562.

dated a South Carolina law that prohibited the shipment of liquor into the state, as applied to consignment shipments to individuals for personal use.<sup>19</sup> Congress eventually responded with the Webb-Kenyon Act of 1913,<sup>20</sup> which prohibited the “shipment or transportation, in any manner or by any means whatsoever” of liquor “from one State, Territory, or District of the United States” into another “in violation of any law” of the State, Territory, or District.<sup>21</sup> The Court upheld the Webb-Kenyon Act in *Clark Distilling Co. v. Western Maryland Railway Co.*, relying in part on the assertion in *In Re Rahrer* that Congress could “divest” commodities of their interstate character, so as to permit state regulation otherwise forbidden by the dormant Commerce Clause doctrine.<sup>22</sup>

Two years after *Clark Distilling Co.*, the Eighteenth Amendment was ratified, and nationwide prohibition became the law of the land.<sup>23</sup> Proposed in part as a sop to “drys” around

19. *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898); see also *Rhodes v. Iowa*, 170 U.S. 412 (1898) (holding that goods “arrived” in a state only when delivered to the consignee, effectively immunizing from state regulation liquor arriving by interstate carrier). Alex Bickel commented that the *Vandercook* decision sanctioning mail-order liquor sales facilitated “the wetness that the Webb-Kenyon Act was intended to sop up.” Alexander M. Bickel and Benno C. Schmidt, Jr., 10 *History of the Supreme Court of the United States: The Judiciary and Responsible Government, 1910-21* at 440 (Macmillan, 1984); see also Hamm, *Shaping the Eighteenth Amendment* at 176-77 (cited in note 13). Hamm notes that for seventeen years after *Vandercook*, “prohibitionists did not use law to attack personal-use shipments”; in turn “[s]hippers, liberated from state hindrance . . . deluged the prohibition states with intoxicating beverages, stimulating more court cases.” *Id.* at 178. The decision “created a flourishing interstate commerce in alcohol between wet and dry states. . . . The . . . express freight offices in prohibition territory often became little more than interstate commerce liquor package stores.” *Id.* at 179.

20. 37 Stat. 699 (1913). For more on the passage of the Wilson and Webb-Kenyon Acts, and the Court cases that upheld them, see, for example, Hamm, *Shaping the Eighteenth Amendment* at 81-90, 212-20 (cited in note 13). President Taft vetoed Webb-Kenyon, which passed over his objections. See Bickel and Schmidt, *History of the Supreme Court* at 441-42 (cited in note 19).

21. 37 Stat. 699 (1913).

22. 242 U.S. 311, 330 (1917). It did, however, suggest that such power might be restricted to liquor, given “[t]he fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the *enlarged right possessed by government to regulate liquor.*” *Id.* at 332 (emphasis added). But see Bittker, *Regulation of Interstate and Foreign Commerce* at 9-12 (cited in note 12) (footnote omitted) (suggesting absence of any principled rationale for confining congressional power to liquor; noting that “later cases have ruled that Congress can consent to state regulations of interstate commerce in products with a more benign character than booze, such as insurance”). For an early assessment of Webb-Kenyon’s constitutionality, see Noel T. Dowling and F. Morsc Hubbard, *Divesting an Article of Its Interstate Character: An Examination of the Doctrine Underlying the Webb-Kenyon Act* (2 pts.), 5 *Minn. L. Rev.* 100, 253 (1921). On “reconveyance” of power by Congress to the states generally, see Bittker, *Regulation of Interstate and Foreign Commerce* at §§ 9.01-9.06 (cited in note 12).

23. For the story of Prohibition, see Norman H. Clark, *Deliver Us From Evil: An*

the country and partly as a "war measure necessary for the saving of food and man power,"<sup>24</sup> this social experiment soon ran into problems of widespread noncompliance, the rise of criminal rackets to satisfy the demand for alcohol, and the unwillingness of legislatures to appropriate resources for a real attempt to force nationwide compliance.<sup>25</sup> It took the Great Depression, however, to effect the repeal of the Eighteenth Amendment and bring an end to the "noble experiment" of Prohibition.<sup>26</sup>

## II. THE FRAMING AND RATIFICATION OF THE TWENTY-FIRST AMENDMENT

The election of 1932 was a mandate for radical reform of America's experiment with prohibition; both the GOP and Democratic Party platforms had called for its repeal. The Senate Judiciary Committee went to work; and by February, 1933, it reported out Senate Joint Resolution 211, which would have repealed prohibition, prohibited the importation of alcohol into states in violation of state law, *and* allowed for concurrent federal power "to regulate or prohibit the sale of intoxicating liquor to be drunk on the premises where sold"—a provision squarely aimed at ensuring that, no matter what, the Nation would be spared the return of the dreaded "saloon." It was this provision, then Section Three of the proposed Amendment, that proved to be the most controversial. The reasons for its eventual abandonment refute the notion that the Amendment was concerned only with promoting temperance or constitutionalizing the Webb-Kenyon Act.<sup>27</sup>

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*Interpretation of American Prohibition* (Norton, 1976); Hamm, *Shaping the Eighteenth Amendment* (cited in note 13); Richard Hofstadter, *The Age of Reform* 289-93 (Knopf, 1955).

24. John D. Hicks, *Republican Ascendancy, 1921-1933* at 177 (Harper, 1960). Other historians similarly note the linkages between war mobilization and prohibition. See, e.g., Bickel and Schmidt, *History of the Supreme Court* at 531 (cited in note 19); Clark, *Deliver Us From Evil* at 128 (cited in note 23) (discussing the embrace of "the crusade for national and international purity" and noting that "as the country steadied itself for the great sacrifice, civilians were crusaders no less than servicemen, and conditions less than bone-dry became conditions less than patriotic"); Hofstadter, *The Age of Reform* at 291-92 (cited in note 23).

25. Hicks, *Republican Ascendancy* at 177-80, 261-62 (cited in note 24).

26. *Id.* at 262 ("Just as the Eighteenth Amendment was the child of the First World War, so its repeal was the child of the Great Depression."); William Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940* at 9 (Harper & Row, 1963). See also Clark, *Deliver Us From Evil* at 205 (cited in note 23) (noting that in the early part of the Depression, FDR emerged as "the symbol of liberalism, relief, and confidence. Repeal would go with relief, recovery, and reform").

27. A consistent claim among commentators who either objected to the Supreme

Two things are clear from the Senate debates on the proposed amendment. First, supporters of Section Two intended the Amendment to return control over shipment and importation of alcohol to the states, and to insulate that state control from either congressional second-thoughts about the Webb-Kenyon Act or a hostile Supreme Court decision striking down the Act.<sup>28</sup> In other words, with regard to the importation of al-

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Court's early interpretation of the Twenty-first Amendment or who approve of its more recent cases circumscribing state power is that the intent of Section Two was "merely" meant to constitutionalize the Webb-Kenyon Act, and that states ought not be allowed to exercise more power than that which the statute conveyed; or that it was merely passed to protect dry states. See, e.g., John H. Crabb, *State Power Over Liquor Under the Twenty-first Amendment*, 12 U. Det. L.J. 11, 13 (1948) (noting similarities between the second section of the Amendment and the Webb-Kenyon Act); Douglass, 49 Duke L.J. at 1632-33 (cited in note 3) (interpreting Senate debate on the Amendment to endorse "the limited purpose of allowing states to remain dry after the repeal of Prohibition."); Eric T. Freeman, Comment, *The Twenty-first Amendment and the Commerce Clause: What Rationale Supports Bacchus Imports?*, 13 Hastings Const. L.Q. 361, 374 & n.100 (1986) (arguing that "several Senators supported Section Two" based on the understanding that it did little more than give dry states the ability to resist importation of liquor); Shanker, 85 Va. L. Rev. at 375 (cited in note 3) ("Recent lower court cases have demonstrated that temperance is the core purpose of the Twenty-first Amendment."); Ralph L. Wisner and Richard L. Arledge, *Does the Repeal Amendment Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislation on Intoxicating Liquors in Interstate Commerce?*, 7 Geo. Wash. L. Rev. 402, 402, 407 (1939) ("The second section of the Amendment generally was thought of as . . . assurance that dry states would be protected from an influx of imported liquor" as opposed to "authorization for state tariff laws"; criticizing Supreme Court decisions giving a broader construction for "refusing to consider this background"); Note, *Constitutional Law—State Control of Alcoholic Beverages in Interstate Commerce*, 27 N.Y.U. L. Rev. 127, 131 (1952) ("The principal object of the Twenty-first Amendment was to permit each state to act as sole referee in the local battle between the 'wets' and the 'drys'" not to permit erection of trade barriers and "interfere with the free movement of alcoholic beverages"); Note, *The Twenty-first Amendment Versus the Interstate Commerce Clause*, 55 Yale L.J. 815, 817 (1946) (arguing that the Amendment merely constitutionalized Webb-Kenyon Act).

There are several problems with the analysis of the commentators who take this view. First, it cannot be denied that Section Two of the Amendment reads differently than does the Webb-Kenyon Act. Second, the support they amass for the "constitutionalization of Webb-Kenyon" thesis is meager—it often consists of one or two ambiguous remarks of Senators. See, e.g., Freeman, 13 Hastings Const. L.Q. at 374 & n.100. Finally, most commentators fail to examine closely the debate surrounding the third section of the proposed amendment reported out by the Senate Judiciary Committee. The reasons senators expressed for opposing the concurrent exercise of enforcement power by the state and federal government sheds a good deal of light on the purpose behind Section Two, and on the question whether it was simply meant to insure that dry states would have their right to be dry guaranteed by the Constitution. Wet states, too, had an interest in ensuring control over their own alcohol policies free from the specter of federal interference. See notes 33-51 and accompanying text.

28. See, e.g., 75 Cong. Rec. 4141 (1933) (statement of Sen. Blaine) (speaking in favor of the Amendment "to assure the so-called dry States against the importation of intoxicating liquor into those States" and that it is necessary to insure against a hostile decision by the Supreme Court); id. at 4170 (statement of Sen. Borah) (noting that Section Two is necessary; otherwise "we are turning the dry States over for protection to a law [i.e., the Webb-Kenyon Act] which is still of doubtful constitutionality and which, as it

cohol, the dormant Commerce Clause doctrine was to be inoperative. As S.J. 211's sponsor, Senator John J. Blaine, explained it:

When our government was organized and the Constitution of the United States was adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States . . . the right to regulate commerce respecting a single commodity—namely, intoxicating liquor. . . . [B]y reason of this provision, [the State] in effect acquires powers that it has not at this time.<sup>29</sup>

Second, the section purporting to grant concurrent power to the states and the Federal Government to regulate the "saloon" was eliminated because of fears that it would invite congressional encroachment onto the states' regulatory prerogatives that Section Two was supposed to secure.<sup>30</sup> Even the Senate manager of S.J. 211, Senator Blaine, spoke at length in opposition to Section Three. In his "personal opinion," said Blaine,

section 3 is . . . contrary to section 2 of the resolution. . . . The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States. . . . Thus, the States are granted larger power . . . and are given greater protection, while under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment. My view . . . is that section 3 is inconsistent with section 2, and that section 3 ought to be taken out of the resolution.<sup>31</sup>

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was upheld by a divided court, might very well be held unconstitutional upon a representation of it"; and "we are asking dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law," possibly in the face of strong pressure to repeal); id. at 4172 (statement of Sen. Borah) ("Therefore, if we are to have what we are now promised, local self-government, State rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have . . . some other provision of the Constitution, than those which existed prior to the adoption of the eighteenth amendment.").

29. Id. at 4141 (statement of Sen. Blaine) (emphasis added).

30. See, e.g., 75 Cong. Rec. at 4143 (statement of Sen. Wagner); id. (statement of Sen. Blaine); id. at 4144-45 (statement of Sen. Wagner) (terming Section Three a "nullification of the entire program of repeal"); id. at 4147 (statement of Sen. Wagner); id. at 4177 (statement of Sen. Black) ("If this amendment should become part of the Constitution containing section 3, it would take away from the State the right the State now has to regulate or prohibit the sale of liquor. It would take it away by giving that power to Congress.").

31. Id. at 4143 (statement of Sen. Blaine) (emphasis added).

Senator Hugo Black echoed Blaine's position. Were Section Three to become part of the Constitution, he argued, "it would take away from the state the right the State now has to regulate or prohibit the sale of liquor . . . by giving that power to Congress."<sup>32</sup>

In addition, opponents of Section Three pointed out legal difficulties bound to arise from the language of the provision, which purported to give Congress concurrent power to regulate or prohibit the sale of liquor "to be drunk on the premises where sold."<sup>33</sup> What would become of state laws prohibiting consumption of liquor where sold, if Congress chose to regulate, but not to prohibit the saloon? An early colloquy among Senators Blaine, Wagner and Shortridge illustrates the problem.<sup>34</sup> Senator Blaine, explaining the position of the committee on Section Three, stated that in the absence of federal regulation of saloons, state laws "would be supreme."<sup>35</sup> If Congress, on the other hand, "legislated upon that question . . . the States would have . . . power to legislate along the same lines."<sup>36</sup> When Senator Shortridge asked, "Which would be supreme,"<sup>37</sup> Senator Blaine at first demurred, saying that was "a field in which we can get into all kinds of misunderstanding."<sup>38</sup> Pressed by Senator Wagner, who asked whether state or federal law would prevail in the event of a conflict,<sup>39</sup> Senator Blaine conceded that federal law would likely prevail.<sup>40</sup> Senator Wagner thus concluded that "the word 'concurrent' is meaningless."<sup>41</sup>

Opponents of Section Three pointed out that since the proposed amendment would give both the state and federal government equal power, it was not at all clear that ordinary pre-emption rules applied. If they did, then the result was equally unacceptable, because it provided a backdoor for federal power, which could overwhelm state regulatory efforts. Senator Blaine pronounced Sections Two and Three "inconsistent" and "incompatible."<sup>42</sup> Senator Wagner went further, alleging that Sec-

32. *Id.* at 4177 (statement of Sen. Black).

33. See S.J. 211, § 3.

34. 75 Cong. Rec. 4143 (1933).

35. *Id.* (statement of Sen. Blaine).

36. *Id.* (statement of Sen. Blaine).

37. *Id.* (statement of Sen. Shortridge).

38. *Id.* (statement of Sen. Blaine).

39. *Id.* (statement of Sen. Wagner).

40. See *id.* ("In my opinion, Federal law would prevail . . . as it does under the eighteenth amendment.") (statement of Sen. Blaine).

41. *Id.* (statement of Sen. Wagner).

42. *Id.* (statement of Sen. Blaine).

tion Three effected a “nullification of the entire program of repeal.”<sup>43</sup> If Section Three remained, “we shall have two authorities, Federal and State, simultaneously possessed of jurisdiction over the same area of regulation. The zone each is to occupy is undefined.”<sup>44</sup> This would “unavoidably lead[] to confusion, conflict, and litigation,” as well as domination of the states by federal authorities.<sup>45</sup> Senator Brookhart claimed that the grant of equal power to state and federal governments meant that conflicting laws would both be constitutional, resulting in “a state of civil war between the State and the National Government.”<sup>46</sup> Senator (later Justice) Black declared that “[b]oth the State and the Federal Government cannot have the power at the same time. The action of one of them will be the supreme law of the land, and the supreme law of the land of every State is the Constitution of the United States.”<sup>47</sup> Therefore, language about “concurrent” power notwithstanding, federal laws would prevail if there was a conflict. Then “the States of this Union will be helpless,” concluded Black, because “they can not regulate the sale of liquor within their own boundaries, nor can they prohibit it.”<sup>48</sup> By one vote, senators’ insistence on an unambiguous grant of power over liquor to the states overcame everyone’s professed horror at the prospect of the saloon’s return, and Section Three was struck from S.J. 211.<sup>49</sup> Following removal of Section Three, the Senate approved the measure 63-23.

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43. *Id.* at 4145 (statement of Sen. Wagner).

44. *Id.*

45. *Id.* Later, Wagner confessed “that my imagination is not sufficiently fertile to foresee all of the extensions which will be grafted onto section 3 should it ever be incorporated into the Constitution.” *Id.* at 4147 (statement of Sen. Wagner). He noted that the grant of power to Congress in Section Three could be easily expanded by employing the Necessary and Proper Clause. *See id.* (statement of Sen. Wagner). New York Senator Robert F. Wagner was an ardent opponent of Prohibition. That he was concerned about the role the federal government would play in the future regulation of liquor at the state level belies the notion that Section Two was solely meant to protect dry states. Wets, too, worried that dries from the West and South could combine to again impose prohibition through the proposed Section Three. *See, e.g., Ourright Repeal Urged By Wagner*, *N.Y. Times* 4 (Dec. 19, 1932) (arguing further that states could effectively prevent the return of the saloon).

46. 75 Cong. Rec. at 4155 (statement of Sen. Brookhart); *see also id.* at 4161 (statement of Sen. Brookhart) (asking Sen. Norris whether Section Three would not mean that “if the States have concurrent power to regulate or prohibit the sale of intoxicating liquors in a saloon . . . that power just as high and just as dominating as the concurrent power of the Congress?”); *id.* at 4173 (colloquy between Senators Borah and Hastings).

47. *Id.* at 4178 (statement of Sen. Black).

48. *Id.*

49. *Id.* at 4179. The vote was 33-32, with 31 not voting. Not everyone was enthusiastic about the devolution of power to the States. One member of the House complained

Even after some delay occasioned by the need for states to call and organize the ratification conventions, the requisite number of states had ratified the Amendment before 1933 was out. To the extent that the delegates to state conventions left *any* record of what they thought the Amendment would do,<sup>50</sup> they proclaimed the Amendment to have restored a measure of power to states that the states did not previously possess, and insulated the exercise of that power from federal interference.<sup>51</sup>

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that Section Two embodied "the extreme of State rights." 76 Cong. Rec. 2774, 2776 (1933) (extension of remarks by Rep. Lea). "It is theoretically unsound," Rep. Lea complained,

to propose that each State in the country shall have the right to compel the Federal Government, without any discretion of Congress, to support whatever statutory liquor laws the State legislatures see fit to write, however unwise or improvident. . . . Under this color of constitutional sanction, a State might pass a law to interfere with legitimate interstate shipments. . . . No one could anticipate the many varied, and perhaps unwise, provisions that might be written by the various States of the country. . . .

Id. No one responded that such "unwise or improvident" state laws would be forbidden by the Amendment.

50. For the documentary record of the ratifying conventions, see Everette Somerville Brown, *Ratification of the Twenty-first Amendment to the Constitution of the United States* (U. of Michigan Press, 1938). Most states' conventions ratified the Amendment unanimously and without substantive debate. New Hampshire's convention lasted all of seventeen minutes. See *id.* at 284. To date, the Twenty-first Amendment is the only amendment to be ratified by specially-convened state conventions. For more on the ratification process in the states, see Everett S. Brown, *The Ratification of the Twenty-first Amendment*, 29 Am. Pol. Sci. Rev. 1005 (1935).

51. Brown, *Ratification of the Twenty-first Amendment to the Constitution of the United States* at 50 (cited in note 50) (Amendment "return[ed] to the peoples of the several states . . . their constitutional right to govern themselves in their internal affairs . . .") (statement of President of the Connecticut Convention), *id.* at 167 (noting that the Twenty-first Amendment "expresses a widespread and deep-rooted conviction among our people of the right of the states to govern their internal and local affairs, and it designates as one office of the Federal authority . . . to uphold the states in their authority") (statement of Miss Laura Clay).

Contemporary accounts of the debate over repeal and of the congressional debates over the proposed Amendment support the conclusion that the issue was not simply about constitutionalizing Webb-Kenyon, or about protecting dry states from liquor. See, e.g., *Letter to the Editor*, N.Y. Times § 4 at 5 (Feb. 5, 1933) (discussing repeal of Prohibition in terms of "restor[ing] control of liquor traffic to the States"; Prohibition had effected "the transfer of police power over the liquor traffic to the Federal Government," repeal would "restor[c] . . . this power to the States"); *Wets Select Plan for Test in House*, N.Y. Times (Jan. 12, 1932) (describing effort by House supporters of repeal to craft language of repeal amendment, including provision "that Congress shall not interfere with the liquor traffic within States that desire to authorize manufacture or sale of liquor"); *A Liquor Plan*, N.Y. Times 16 (Sept. 19, 1932) (noting views of New York supporter of repeal that "the first subsequent duty of the States is to prepare to resume regulation of the liquor traffic" and that "[t]heir authority in that province . . . must be sole and undivided. No further Federal intrusion on it must be tolerated."); *Unrepealing Repeal*, N.Y. Times § 4, at 4 (Jan. 8, 1933) (editorial critical of proposed Section Three; concluding that "Federal prohibition is to be destroyed by retaining it in part. . . . It leaves the regulation of the liquor traffic partly in the hands of the States, partly in the hands of the Federal Government."; terming it a "two-faced and dishonest repeal"); *Modified Repeal*, N.Y.

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Prior to the ratification of the Twenty-first Amendment, the dormant Commerce Clause doctrine had restricted state authority over the importation of alcohol into their territory, which undermined state regulatory efforts and eroded congressional protections for bolder state law enforcement efforts. When structuring the repeal of Prohibition, Congress heeded the demands of states that the Amendment secure states power over alcohol that would be immune from a Congress dominated by wets or dries, which may repeal or greatly expand congressional statutes like the Webb-Kenyon Act, and insulate state alcohol regulation from dormant Commerce Clause challenges that had bedeviled enforcement efforts prior to Prohibition. Proponents of state control vigorously (and successfully) opposed an attempt to give Congress "concurrent" authority over the "saloon," in large part for fear that congressional power would eventually eclipse the power of the states over alcohol. The message from Congress, the state ratifying conventions, and the text of the Amendment itself seemed clear: Liquor was different. In the years immediately following ratification of the Twenty-first Amendment, the Supreme Court's opinions confirmed this consensus.

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Times 18 (Jan. 11, 1933) (arguing that, as reported out of the Senate Judiciary Committee, the amendment continues Prohibition in part; claiming that Section Two is superfluous because Webb-Kenyon was still in effect, and that the proposed Section Three "prolongs the power of Federal Prohibition"; noting that "There is likely to be a perpetual effort to restore the old regime." It was enough that "the Federal hand is not to be taken off the throats of the States, that they are not to be free to deal, each in its own way, with the liquor traffic, is more than enough to condemn this section."); *Shouse Hits Blaine Plan*, N.Y. Times 8 (Feb. 7, 1933) (reporting charges of the President of the Association Against the Prohibition Amendment that proposed repeal amendment "'prolong[ed] the necessity of Federal jurisdiction in an intolerable way'"); *Repeal Vote Today Set in the Senate; Filibuster Broken*, N.Y. Times 1 (Feb. 16, 1933) ("Senator Borah [a Prohibition supporter] agreed that the government would be helpless to prevent the return of the saloon. . . . 'Once you legalize liquor, as a practical proposition you cannot possibly supervise its sale'. . . . 'If we should execute such a power as herein prescribed we would be operating against the States that had legalized a saloon system.'"); TRB, *Washington Notes*, The New Republic 233 (July 13, 1932) ("The division today is not between the Dries and the Wets, not between the advocates of the Eighteenth Amendment and its opponents. The division is between the moderate Wets, who were once Dries, and the extreme Wets; between those who want state control of the liquor business under federal supervision and those who want state control without limitation."). But see *Senate Votes Dry Repeal By Conventions In States; House Will Act Monday*, N.Y. Times 1 (Feb. 17, 1933) (describing Section Two as "a provision for Federal protection of dry States").

### III. THE COURT INTERPRETS THE TWENTY-FIRST AMENDMENT

Soon after the ratification of the Twenty-first Amendment, the Supreme Court rejected several challenges to state liquor regulation. Possible protectionist motives for the regulations notwithstanding, the Court held that the Amendment was intended to return total control over liquor to the States. Beginning in the 1940s, however, the Court instead applied the dormant Commerce Clause doctrine to state regulations not directly related to importation of liquor into the state for delivery or use. While many regulations were upheld, the door was open to challenge "unreasonable" alcohol regulations. In the mid-1960s, a pair of decisions that ostensibly protected the States' "core" Twenty-first Amendment power over importation struck down state regulations of alcohol imports for the first time since the 1890s. These cases contained language employed in later cases to invalidate state liquor regulations under the dormant Commerce Clause.

#### A. THE *YOUNG'S MARKET* CASES

In *State Board of Equalization of California v. Young's Market Co.*,<sup>52</sup> California's \$500 license-fee for the privilege of importing beer from outside the state was upheld against Fourteenth Amendment and Commerce Clause challenges. "Prior to the ratification of the Twenty-first Amendment," Justice Brandeis wrote, "it would obviously have been unconstitutional to have imposed any fee" on importation, "because the fee would be a direct burden on interstate commerce."<sup>53</sup> The Amendment, he continued, "abrogated the right to import free . . . intoxicating liquors."<sup>54</sup> The plaintiffs, on the other hand, were asking the Court to read the Amendment to authorize only state prohibition *in toto*, "but if it permits . . . manufacture and sale, it must let imported liquors compete . . . on equal terms."<sup>55</sup> To adopt this argument, he concluded, "would involve not a construction of the amendment, but a rewriting of it."<sup>56</sup> For

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52. 299 U.S. 59 (1936).

53. *Id.* at 62.

54. *Id.*

55. *Id.*

56. *Id.* One student note termed the *Young's Market* approach "unpurposive verbalism," and criticized the result for "sanction[ing] the Balkanization of American trade, commerce, and industry." Note, 55 *Yale L.J.* at 819 (cited in note 27); see also Note, 27 *N.Y.U. L. Rev.* at 129-30 (cited in note 27) (stating the *Young's Market* line of cases inaugurated "a tariff war in regard to liquor commerce") (footnote omitted).

Brandeis, the greater power of total prohibition surely entailed lesser restrictions, including state monopoly of manufacture and sale, prohibition on importations, high taxation on imports, and partial prohibition.<sup>57</sup> Two years later, when a Minnesota statute discriminating against out-of-state liquor was challenged, Justice Brandeis wrote that *Young's Market* had "settled" the question whether "under the amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic."<sup>58</sup>

In 1939, the Court reaffirmed the holding of *Young's Market* in a pair of opinions also written by Justice Brandeis.<sup>59</sup> Upholding a Missouri ban on the alcohol imports from states that themselves had discriminatory import policies, Justice Brandeis held the alleged discriminatory intent of the Missouri statute to be entirely beside the point.<sup>60</sup> Following the Twenty-first Amendment, he wrote, "the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."<sup>61</sup> In a companion case decided the same day involving a similar Michigan statute, Brandeis wrote that "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause; and . . . discrimination between domestic and imported intoxicating liquors, or between imported intoxicating liquors, is not prohibited by the equal protection clause."<sup>62</sup>

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augured "a tariff war in regard to liquor commerce") (footnote omitted).

57. See *Young's Market*, 299 U.S. at 63 ("If it may permit the domestic manufacture and sale of beer and exclude all made without the state, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee?").

58. *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938).

59. See *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 397-98 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939).

60. *Joseph S. Finch & Co.* 305 U.S. at 397-98.

61. *Id.* at 398.

62. *Indianapolis Brewing Co.*, 305 U.S. at 394 (citation omitted). Nor, he added, was there any merit to the claim that such laws violated due process. "The substantive power of the State to prevent the sale of intoxicating liquor is undoubted." *Id.* See also *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939) (upholding Kentucky act that imposed rigorous conditions on the manufacture and transport of liquor). The appellant in *Ziffrin* complained that the act "prevent[s] an authorized interstate contract carrier from continuing an established business of transporting exports of liquors from Kentucky in interstate commerce exclusively." *Id.* at 137. The Court again, per Justice McReynolds, rejected such arguments: "The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. . . . Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them." *Id.* at 138. Despite the fact that the Kentucky law governed exports, Justice McReynolds contended that, again, the power to absolutely prohibit the manufacture and sale of intoxicants encompassed myriad lesser powers, including the restrictions adopted here by Kentucky.

The only “limit” the Court placed on the Amendment during the 1930s resulted from the Court’s holding that the Amendment did not apply in a federal enclave, like a national park.<sup>63</sup> Given this unambiguous early construction of the Amendment by the Court, it is surprising that later Courts have characterized the intent of Section Two as “obscur[e]” and claimed that “[n]o clear consensus” concerning its meaning “is apparent.”<sup>64</sup> Even if the legislative intent had been somewhat ambiguous (which it was not),<sup>65</sup> the early decisions of the Court are not. If states sought to regulate the importation of alcohol into their borders, neither the dormant Commerce Clause doctrine nor the Equal Protection Clause of the Fourteenth

See id. at 139. For more on *Ziffrin*, see Note, 53 Harv. L. Rev. 671 (1940).

Many early commentators found the Court’s conclusion that the Twenty-first Amendment abrogated the Fourteenth Amendment the most troubling part of the *Young’s Market* line of cases. See, e.g., Crabb, 12 U. Det. L.J. at 28 (cited in note 27) (arguing that “the words of the Amendment do[ ] not appear to sanction discrimination whose purpose it is to secure commercial advantage to the domestic product over the foreign” and that such laws would, but for *Young’s Market*, et al., violate the Equal Protection Clause); Wisner and Arledge, 7 Geo. Wash. L. Rev. at 413-14 (cited in note 27) (concluding that the Twenty-first Amendment “deals with public health and morals, not with economics and commerce” whose undoubted purpose was to allow states freedom to exercise police and taxing powers, but not to grant discriminatory powers that violate other constitutional provisions, like the Fourteenth Amendment); Note, 27 N.Y.U. L. Rev. at 130-31 (cited in note 27) (“By determining that state power over liquor traffic is not limited by the Commerce Clause or the Equal Protection Clause, the courts have sown the seeds of internal conflicts between the states.”).

63. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938) (“As territorial jurisdiction over [Yosemite] Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment.”).

64. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274 (1984). That the legislative history of the Twenty-first Amendment in general, and of Section Two in particular, is unclear or ambiguous is a familiar refrain in nearly all of the commentary on it. See, e.g., Douglass, 49 Duke L.J. at 1631 (cited in note 3) (claiming that the legislative history “supports three distinct interpretations of section two”); id. at 1636 (asserting that no “single, correct interpretation of the effect of the Amendment had on state authority to regulate commerce in alcoholic beverages following the repeal of Prohibition” is possible from either text or legislative history); id. at 1659 (“Neither the plain meaning of the text of the Twenty-first Amendment nor its legislative history resolves whether, and to what extent, the Amendment created a Dormant Commerce Clause exception for state regulations of commerce in alcoholic beverages.”); Freeman, 13 Hastings Const. L.Q. at 361 (cited in note 27) (stating that “the drafters of the Amendment did not leave a clear record of their intent in including Section Two”); id. at 374 (claiming that “the haste and festivity of the movement toward repeal obscured the debates in the states”) (footnote omitted); David S. Versfelt, Note, *The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors*, 75 Colum. L. Rev. 1578, 1579 (1975) (“Central to the ambiguity of the twenty-first amendment is its unclear legislative history.”); Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment*, 72 Harv. L. Rev. 1145, 1147 (1959) (concluding that evidence from congressional debates and state conventions “are at best inconclusive in showing the purpose of section 2”).

65. See Part II.

Amendment limited the exercise of the power granted by the Twenty-first Amendment.

#### B. THE MOVE AWAY FROM *YOUNG'S MARKET*

A generation after *Young's Market*, however, the Supreme Court embarked upon a doctrinal course much different than that charted by Justice Brandeis. The hint of a new direction is evident as early as 1941, when the Court decided the first of two cases involving regulations of alcohol shipped *through* a state, but not imported into that state for delivery or use.<sup>66</sup> While the Court upheld the regulations in both cases, it did so based not on the authority of the Twenty-first Amendment, but rather on the grounds that the dormant Commerce Clause doctrine did not

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66. See *Carter v. Virginia*, 321 U.S. 131 (1944); *Duckworth v. Arkansas*, 314 U.S. 390 (1941). The regulations required, for example, the use of the most direct routes through the state, the carrying of bills of lading, the posting of bond, and the identification of the consignees who had to be able to legally take possession of the alcohol at the place of delivery. See *Carter*, 321 U.S. at 133-34; *Duckworth*, 314 U.S. at 392. Abuses of the mail-order liquor trade that flourished before passage of the Webb-Kenyon Act and before the ratification of the Eighteenth Amendment, as well as fear of diversion for illicit use, were largely responsible for these regulations. See Bickel and Schmidt, *History of the Supreme Court* at 440 (cited in note 19); Hamm, *Shaping the Eighteenth Amendment* at 69-79, 178-88 (cited in note 13).

One commentator maintains that the "seeds of retreat" were sown in the *Ziffrin* case, in which Kentucky's liquor control statute was upheld as applied to liquor manufactured for export, since the case "appeared to apply a reasonableness test" to the regulations. Sidney J. Spaeth, Comment, *The Twenty-first Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 Cal. L. Rev. 161, 184 (1991). But there are problems with this reading of *Ziffrin*. First, the alcohol being regulated was subject to export, thus the very subject of regulation was not within the text of Section Two, which addressed importation for "delivery or use therein," not exports. Nevertheless, Justice McReynolds felt that the power exercised by the state flowed from the Twenty-first Amendment. See *Ziffrin*, 308 U.S. at 138 ("The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. . . . Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them."). Read in context, Justice McReynolds' use of the term "reasonably appropriate" hardly seems intended to restrict state power. Contemporary commentators also read *Ziffrin* as further expanding the Court's previous broad constructions of the Twenty-first Amendment. See, e.g., Crabb, 12 U. Det. L.J. at 17 (cited in note 27) (remarking that *Ziffrin* "has made state . . . regulatory statutes applicable to liquor within the state destined for exportation. This decision is in keeping with the general policy followed by the Supreme Court in giving a broad interpretation to the Amendment"); Note, 53 Harv. L. Rev. at 672 (cited in note 62) (restating the logic of the holding: "because of the unrestricted power to prohibit imports and the power to forbid manufacture even for export . . . a state may effectively prevent any exportation, and that if it may prohibit, it may permit such exports subject to any condition it wishes"; though inconsistent with doctrine of unconstitutional conditions, Court able to avoid discussion of doctrine because of the "extensive control over other aspects of the liquor traffic given the states by Acts of Congress and the Twenty-first Amendment").

prohibit “reasonable” police measures.<sup>67</sup> At first glance, the Court’s failure to invoke the Twenty-first Amendment seems understandable. After all, as Justice Stone observed, “[t]he commerce here is transportation alone, there being no question of sale or use within the state of regulation.”<sup>68</sup>

However, as Justices Jackson<sup>69</sup> and Frankfurter pointed out in their concurring opinions,<sup>70</sup> regulation of cross-shipment was a reasonable means to prevent diversion of those shipments for in-state “delivery or use therein.”<sup>71</sup> Though they did not do so explicitly, Frankfurter and Jackson might have reminded their colleagues of Chief Justice Marshall’s assertion in *McCulloch v. Maryland* that the grant of a power also implicitly granted the means to effectuate the grant.<sup>72</sup> State regulations of through

67. See *Carter*, 321 U.S. at 135 (“We have recognized that the several states in the absence of federal legislation may require regulatory licenses for through shipments of liquor in order to guard against violations of their own laws.”); *Duckworth*, 314 U.S. at 394 (“While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating primarily matters of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce.”).

68. *Duckworth*, 314 U.S. at 393.

69. See *Duckworth*, 314 U.S. at 399 (Jackson, J., concurring) (“Transportation itself presented no special dangers or hazards, but it might be a step in evading and undermining a policy as to use sale of liquor which the state has a right to prescribe for itself. Regulated transportation is a necessary incident of regulated consumption and distribution.”).

70. See *Carter*, 321 U.S. at 140-41 (Frankfurter, J., concurring).

71. The legislation is sustainable under the Twenty-first Amendment on one of two considerations. . . . Since we are dealing with a constitutional amendment that should be broadly and colloquially interpreted, liquor that enters a State in the manner in which the liquor here came into Virginia may, without undue liberty with the English language, be deemed for “delivery” there even though it is consigned for another State. . . .

In the alternative, since Virginia has power to prohibit the importation of liquor within that Commonwealth, it may effectuate that purpose by measures deemed by it necessary to prevent evasion of its policy by pretended through-shipments. . . .

*Id.* at 140-42 (Frankfurter, J., concurring). Justice Jackson warned that by characterizing the through-shipment regulations as acceptable exercises of state “police powers,” the Court was sending the Twenty-first Amendment “on [its] way to becoming another ‘almost forgotten’ clause of the Constitution. . . . It certainly applies to nothing else.” *Duckworth*, 314 U.S. at 399 (Jackson, J., concurring).

72. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (noting that “the powers given to the government imply the ordinary means of execution”). The Court could also have found support for reliance on the Twenty-first Amendment in *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), where the Court upheld Kentucky regulations limiting the transportation of liquor *out of the state* without complying with a number of requirements. “Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants,” the Court concluded, it was “imperative” that the Court allow the state “to permit these things only under definitely prescribed conditions.” *Id.* It hardly would have required judicial sorcery to uphold Virginia or Arkansas’s regulations

shipments to prevent diversion, they might have argued, are "necessary and proper" to the enforcement of states' liquor laws.<sup>73</sup>

The through-shipment cases were important for the future of the Court's Twenty-first Amendment jurisprudence because they suggested (*pace* the Court's earlier decisions) that a state's regulation of the liquor trade was still partly subject to the strictures of the dormant Commerce Clause doctrine. Thereafter, state regulations not clearly governing importation for delivery or use were subject to scrutiny for reasonableness.<sup>74</sup> Such qualifications were not lost on academic commentators who urged the Court to intervene when economic protectionism, rather than temperance, seemed the primary factor motivating state regulations.<sup>75</sup>

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by extending the reasoning in *Ziffrin*. In retrospect, *Ziffrin* was the high water mark of the Court's willingness to expand the scope of the power granted by the Twenty-first Amendment.

73. Justice Frankfurter also took the Court to task for assuming the "impossible task" of adjudicating, by way of a vague balancing test, the reasonableness of the state's regulation of its liquor traffic. *Carter*, 321 U.S. at 143 (Frankfurter, J., concurring). "Such canons of adjudication," he wrote, "open wide the door of conflict and confusion which have . . . characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-first Amendment." *Id.* at 142 (Frankfurter, J., concurring). The introduction of the balancing test probably owes to the influence of Justice Stone, who wrote the *Duckworth* opinion, and who, at the time, was persuading his colleagues on the Court to applying an all-things-considered balancing test when assessing the validity of state regulations under the dormant Commerce Clause doctrine. See, e.g., *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *California v. Thompson*, 313 U.S. 109 (1941); *South Carolina v. Barnwell Bros.*, 303 U.S. 177 (1938); see also Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* 490-93 (Viking Press, 1956) (describing the evolution of Stone's views); Noel T. Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1 (1940).

74. Moreover, the use of Justice Stone's emerging balancing test would have important consequences, because Stone suggested in other Commerce Clause cases that his balancing test should be applied only *after* determining that the regulations at issue do not *discriminate* against out-of-state interests. See, e.g., *Barnwell Bros.*, 303 U.S. at 184 n.2.

75. See, e.g., Crabb, 12 U. Det. L.J. at 26 (cited in note 27) (commenting that discriminatory liquor laws "have no perceptible relation to the protection of a dry or regulatory state policy"); Note, 27 N.Y.U. L. Rev. at 132-33 (cited in note 27) (discriminatory liquor laws ought not be shielded from application of unconstitutional conditions doctrine); Note, 55 Yale L.J. at 816 (cited in note 27) (urging "redefinition" of liquor regulation power "grounded on the conception that state liquor legislation escapes the interdict of the Commerce Clause and other state constitutional limitations only when representing a valid exercise of state police power"; "it would not require boldness beyond the capacity of the Supreme Court to interpolate the word 'proper' to modify 'laws'" in Section Two) (footnote omitted); Versfelt, 75 Colum. L. Rev. at 1585 (cited in note 64) ("Plenary state authority over imports was designed to free the states to protect their citizens from the harmful effects of unregulated imported liquor. The social dangers which prompted the amendment exist whenever liquor enters a state, regardless of origin.").

C. *HOSTETTER* AND *JAMES B. BEAM DISTILLING*

Justice Jackson's warning that the Twenty-first Amendment was in danger of becoming another "almost forgotten" clause of the Constitution was all but confirmed in 1964, when the Court decided *Hostetter v. Idlewild Bon Voyage Liquor Corporation*<sup>76</sup> and *Department of Revenue v. James B. Beam Distilling Co.*<sup>77</sup> On the same day, for the first time in over sixty years (and for the first time since the ratification of the Twenty-first Amendment), the Court struck down two state liquor control laws.<sup>78</sup> While purporting to preserve states' core Twenty-first Amendment power over importation, both opinions offered a revisionist interpretation of the Amendment that is at odds with both its history and early Supreme Court interpretations. When severely circumscribing the very state power the Court left undisturbed, lower courts now quote liberally from these cases.

*Hostetter* arose when the State of New York attempted to shut down a duty-free liquor store ("Idlewild") that operated out of John F. Kennedy International Airport.<sup>79</sup> Idlewild purchased its inventory from bonded warehouses located outside New York State, then had it delivered to Idlewild where the alcohol was stored until sale.<sup>80</sup> Idlewild's purchase and storage of alco-

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76. 377 U.S. 324 (1964).

77. 377 U.S. 341 (1964).

78. See generally Note, *The Evolving Scope of State Power Under the Twenty-first Amendment: The 1964 Liquor Cases*, 19 Rutgers L. Rev. 759 (1965). Most commentators agree that both cases marked a watershed moment in the Court's interpretation of the Twenty-first Amendment. See, e.g., Shanker, 85 Va. L. Rev. at 372 (cited in note 3) (describing *Hostetter* as an "unequivocal repudiation" of the *Young's Market* line of cases); Spaeth, 79 Cal. L. Rev. at 185 (cited in note 66) (decisions "consummated a full retreat from earlier broad readings" of the Amendment); but see Note, 19 Rutgers L. Rev. at 760, 776 (cited in note 78) (suggesting that "the historic unrestrained state power over liquor has not been substantially affected" and that decisions represent neither "a departure from the Court's traditional refusal to prevent states from erecting economic barriers to interstate commerce in liquor"). In fairness to the author of the Rutgers Note, *Hostetter's* importance became clearer only after later Court cases. As late as 1975, another student commentator was able to qualify the observation that Justice Stewart's language "may suggest that the federal-state relationship should be reexamined" on a case-by-case basis to balance state interests under the Twenty-first Amendment with federal interests protected by the dormant Commerce Clause doctrine, with the remark that Stewart's language "should be read with [*Hostetter's*] peculiar facts in mind." Versfelt, 75 Colum. L. Rev. at 1594 (cited in note 64).

79. *Hostetter*, 377 U.S. at 325.

80. Idlewild sold only to "departing international airline travelers" whose "tickets and boarding cards indicate[d] their imminent departure." *Id.* at 325. At time of purchase, "a customer [got] nothing but a receipt . . . . The liquor which he orders is transferred directly to the departing aircraft on documents approved by United States Customs" and was then "delivered to the customer [when] he arrive[d] at his foreign destination." *Id.*

hol were made pursuant to regulations of the U.S. Customs Service, which had "inspected [Idlewild's] place of business and explicitly approved its proposed method of operations."<sup>81</sup> When New York determined that Idlewild's business violated state law, it sought an injunction to close it. Idlewild responded by filing suit, claiming that the injunction violated the Commerce Clause.<sup>82</sup> The Court agreed with Idlewild, holding that New York had no power to close the duty-free shop.<sup>83</sup>

Justice Potter Stewart began by acknowledging that the Amendment and the Court's previous decisions "unquestion[ably]" free a state from the Commerce Clause's strictures when the state restricted the importation of liquor "destined for use, distribution, or consumption within its borders,"<sup>84</sup> citing *Young's Market, Indianapolis Brewing Co.*, and *Joseph Triner Corporation*, among other cases. But, Justice Stewart claimed, the facts here were different. As he characterized the issue, the Court was asked to decide

whether the Twenty-first Amendment so far obliterates the Commerce Clause as to empower New York to prohibit absolutely the passage of liquor through its territory, under the supervision of the United States Bureau of Customs acting under federal law, for delivery to customers in foreign countries.<sup>85</sup>

To draw from these cases the conclusion, he wrote, "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause" in cases involving liquor "would . . . be an absurd oversimplification."<sup>86</sup> That would mean that "Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor," a result Stewart found to be "patently bizarre" and "demonstrably incorrect."<sup>87</sup>

He went on to say that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution" and "each must be considered in the light of the other."<sup>88</sup>

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81. *Id.* at 326.

82. *Id.* at 327.

83. *Id.* at 328.

84. *Id.* at 330.

85. *Id.* at 329 (footnote omitted).

86. *Id.* at 331-32.

87. *Id.* at 332 (citing *Jameson & Co. v. Morganthau*, 307 U.S. 171, 172-73 (1939) (*per curiam*)). *Morganthau* was a citing a *per curiam* decision in which the Court upheld the Federal Alcohol Administration Act against a claim that the Twenty-first Amendment gave States exclusive control over liquor.

88. *Id.*

New York's attempt to bar Idlewild from doing business he compared with California's earlier, unsuccessful attempt to prohibit shipments of liquor through the state that were destined for Yosemite National Park, a federal enclave.<sup>89</sup> This led Stewart to "a like conclusion" because "ultimate delivery and use is not in New York but in a foreign country" and New York "has not sought to regulate or control the passage of intoxicants through her territory" to prevent diversion.<sup>90</sup> "Rather, the State has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power . . . to regulate commerce with foreign nations. This New York cannot constitutionally do."<sup>91</sup>

Note the difference that rephrasing the question made. Justice Stewart conceded that if the issue was merely state regulation of imports for delivery or use in New York, the state would have prevailed under the *Young's Market* line of cases. However, he avoided the *Young's Market* precedents (i) by claiming that through-shipment, not importation, was involved; (ii) by implying that New York's liquor laws were to some degree preempted by the federal customs regulations enacted; and (iii) by implying that the involvement of the Customs Bureau converted JFK into some sort of federal enclave.

Yet, upon close examination, it becomes apparent that if there are any "patently bizarre" conclusions and "absurd oversimplifications" in *Hostetter*, they are contained in Justice Stewart's opinion. First, Justice Stewart utterly mischaracterized the nature of Idlewild's operation. While it might be true that no liquor was bought by Idlewild for "use" in New York (since presumably any use would take place at the final destination, when the liquor was claimed by the purchaser), there was "delivery," for purposes of Section Two of the Amendment, of the liquor to Idlewild's warehouse, where it sat as inventory until purchased and loaded onto international flights.<sup>92</sup>

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89. *Id.* at 332-33 (discussing *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938)); see also note 63 and accompanying text.

90. *Id.* at 333.

91. *Id.* at 334.

92. Compare Justice Black's description of Idlewild's business:

Idlewild Bon Voyage Liquor Corporation . . . buys wines and intoxicating liquors from bonded wholesale warehouses, brings them into the State of New York, and sells them at retail in the John F. Kennedy Airport. . . . Idlewild keeps a stock of liquor in New York . . . and customers come into Idlewild's shop, choose the kind of liquor they want, and pay for it. These retail sales are just like sales made by New York's licensed and regulated liquor dealers, with a single difference . . . . Idlewild arranges with its customers to put their pur-

Then there is Stewart's discussion of the relationship between the Twenty-first Amendment and the Commerce Clause. To frame the question in terms of the Amendment's "repealing" the Commerce Clause clouds the issue. The evidence seems clear that, inasmuch as the importation of alcohol is involved, the Twenty-first Amendment created an "exception" to the dormant Commerce Clause doctrine.<sup>93</sup> It was that doctrine, after all, that earlier Courts had used to frustrate state regulation of the alcohol trade.<sup>94</sup> The source of the dormant Commerce Clause doctrine, moreover, is the delegation of power over commerce to Congress in Article I, § 8. So, in one sense, the Twenty-first Amendment *did* effect a "repeal" of at least some of the Commerce Clause's implicit limits on state power.<sup>95</sup>

chases . . . aboard planes so that the customers take physical possession of the liquor . . . at destinations abroad.

Id. at 334 (Black, J., dissenting).

93. See Part II.

94. See notes 12-22 and accompanying text.

95. This understanding was shared by state courts and lower federal courts in the years preceding *Hostetter*. See, e.g., *Chicago's Last Dep't Store v. Indiana Alcoholic Bev. Comm'n*, 161 F. Supp. 1, 4 (N.D. Ind. 1958) ("If the State has the prerogative and right to narrow and control traffic of alcoholic and spiritous beverages which are in the flow of commerce passing through the State, then the State must assuredly have the power to regulate the importation and transportation of alcoholic beverages into the State. The lesser power is included within the greater power."); *Georgia v. Wenger*, 94 F. Supp. 976, 981 (E.D. Ill. 1950) ("Both by history and by judicial interpretation in the light of history the intended scope and purpose of [the Twenty-first Amendment and the Webb-Kenyon Act] is to divest liquor in interstate commerce of its interstate character so as to deprive it of all immunity from state control."); *United States v. Renken*, 55 F. Supp. 1, 7 (W.D.S.C. 1944) ("So the Twenty-first Amendment made the laws as to delivery and use in the state of destination the test of legality of interstate movement. This obviously gives to state law a much greater control over interstate liquor traffic than over commerce in any other commodity."); *General Sales & Liquor Co. v. Becker*, 14 F. 348, 350 (E.D. Mo. 1936) ("The adoption of the Twenty-First Amendment has without doubt limited and qualified the commerce clause to the extent that state laws, regulating the importation of liquor into a state, place no prohibited burden upon commerce."); *Premier-Pabst Sales Corporation v. Grosscup*, 12 F. Supp. 970, 972 (E.D. Penn. 1935) ("Under the Twenty-first Amendment when a state passes a law upon the subject of the importation of intoxicating liquors all importation in violation of that law is forbidden by the Constitution and laws of the United States. The state of Pennsylvania has passed such a law and all imports of intoxicating liquors in violation of that law are forbidden."); *Joseph Triner Corp. v. Arundel*, 11 F. Supp. 145, 147 (D. Minn. 1935) (holding that the Amendment "left the states, territories, and possessions free to determine to what extent, if at all, intoxicating liquor should be a lawful subject of commerce within their limits"); *Boller Beverages, Inc. v. Davis*, 183 A.2d 64, 67 (N.J. 1962) (holding that "the [Twenty-first] Amendment sanctions the right of a state to legislate concerning alcoholic beverages brought from without, unfettered by the Commerce Clause, and bestowed upon the states broad regulatory powers over the liquor traffic within their borders."); *State v. Kilgore*, 103 S.E.2d 321, 322 (S.C. 1958) ("Since the adoption of the Twenty-first Amendment, each state has power, unfettered by the commerce clause, to regulate or prohibit the importation of intoxicating liquor for delivery or use within its borders."); *Pompei Winery, Inc. v. Bd. Liquor Control*, 146 N.E.2d 430, 433 (Ohio 1957) ("The liq-

uor industry of the entire nation was divested of . . . constitutional guaranties (sic) [against state regulation] when it was divested of legal existence by the Eighteenth Amendment to the Constitution of the United States, and the Twenty-first Amendment cannot be said to have returned to the liquor industry any of the protection and guaranties (sic) which may have existed prior to the passage of the Eighteenth Amendment.”); *Welborn v. Morley*, 243 S.W.2d 635, 637 (Ark. 1951) (holding that “regulation in interstate commerce by local authority in the absence of Congressional action is admissible to protect the state from injuries arising from that commerce” under the Amendment); *Capitol Distributing Co. et al. v. Redwine*, 57 S.E. 2d 578, 585 (Ga. 1950) (“If the portion of the act is discriminatory, it is outside the pale of protection of the due-process and equal-protection clauses of the Fourteenth Amendment and the commerce clause of the Federal Constitution by reason of the Twenty-first Amendment thereof.”); *Atkins v. Manning*, 56 S.E.2d 260, 262 (Ga. 1949) (holding that the “twenty-first Amendment removes spirituous liquors and alcohol from the protection of the commerce clause to the extent necessary to allow the States to adopt and enforce appropriate laws and regulations dealing with the subject, and thus to burden interstate commerce to this extent.”); *State v. Hall*, 30 S.E.2d 158, 162 (N.C. 1944) (“Both by the Constitution of the United States (Amendment XXI), and the state statutes liquor has been placed in a category in some respects different from that of other articles of commerce, and the State’s regulations aimed at the suppression of its prohibited transportation and unlawful possession should not be held obnoxious to the interstate commerce clause of the United States Constitution unless clearly in conflict with granted Federal powers and congressional action thereunder.”); *Superior Distributing Co. v. Davis*, 7 N.E. 2d. 652, 655 (Ohio 1937) (“It is the position of the state upon the issue presented that, by reason of the adoption of the Twenty-first Amendment to the Federal Constitution, the several states now have complete power and full authority to prohibit shipment of intoxicating beverages into each such state and hence may provide and enforce any regulation of such traffic without limitation or restraint.”; rejecting defendant’s claim that permit fee was invalid because it did not promote the health or safety of state citizens); *State v. Arluno*, 268 N.W. 179, 188 (Iowa 1936) (holding that “under the Twenty-first Amendment to the Federal Constitution all importation of intoxicating liquor in violation of the Iowa law is forbidden.”); *Grillo v. State*, 120 A.2d 384, 387 (Ct. App. Md. 1956) (“The Twenty-first Amendment, which repealed the Eighteenth Amendment, sanctions the right of a State to legislate concerning intoxicating liquors brought from without the State, unfettered by the Commerce Clause.”); *Dundalk Liquor Co. v. Tawes*, 92 A.2d 560, 564 (Ct. App. Md. 1952) (“If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it.”); *Schwartz v. Kelley*, 18 Conn. Supp. 59, 65 (Conn. Super. Ct. 1952) (“The attack on the law as a violation of the commerce clause of the federal constitution finds no support in the decisions of the United States Supreme Court. In a series of cases it has been firmly established that since the twenty-first amendment, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause; nor are state regulations discriminating against imported liquor prohibited by the equal protection clause of the fourteenth amendment.”); *Edelbrew Brewery, Inc. v. Weiss*, 84 A.2d 371, 373 (Pa. Super. Ct. 1951) (“Sales by outside brewers to Pennsylvania brewers are not protected by the Commerce Clause of the Federal Constitution”); *Ajax Distributors v. Springer*, 22 A.2d 838, 841 (Ct. Ch. Del. 1941) (holding that “under the Federal Constitution, since the adoption of the Twenty-first Amendment, the possible scope of local tax statutes, or of other legislation of a regulatory or even of a prohibitory nature, affecting intoxicating liquors, is quite broad”). But see *Commonwealth v. One Dodge Motortruck*, 187 A. 461, 471 (Pa. Super. Ct.) (“We are of opinion, that this Commonwealth, in adopting and promulgating its system for regulation, restraint and control of intoxicating liquors, in the exercise of its police power, had the right and authority to provide that it should be unlawful for any one

Stewart was correct when he wrote that “if the commodity involved here were not liquor, but grain or lumber, the Commerce Clause, would clearly deprive New York” of its regulatory power.<sup>96</sup> His observation, however, isn’t relevant to the constitutionality of New York’s regulation of Idlewild. New York sought to regulate the importation of alcohol; and alcohol, the Twenty-first Amendment makes clear, is different.

Is it “absurd” to conclude that Congress’s commerce power was qualified by the Twenty-first Amendment as it would be by *other* provisions of the Constitution, like the First Amendment?<sup>97</sup> Suppose that Congress exercised its commerce power in an attempt to force states to accept imports of intoxicating beverages, regardless of what state law said. Would that congressional act preempt contrary state law? If the Amendment was intended to mean anything, the answer to the question just posed must be “no.” The proper question, then, is not whether Congress is *stripped* of its commerce power, but rather whether its commerce power is trumped by the Amendment when a congressional act conflicts with state regulation of liquor, especially regulations dealing with importation.<sup>98</sup>

Justice Stewart also suggested that New York was preempted by federal law from regulating Idlewild. To him, the state’s attempt to regulate a business that was operating under federal Customs Bureau supervision presented a conflict be-

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to transport intoxicating liquors within this state without a permit from the Pennsylvania Liquor Control Board, provided the regulation adopted is *reasonable and non-discriminatory* and is reasonably calculated to effect the purpose in view . . .”) (emphasis added).

96. *Hostetter*, 377 U.S. at 329.

97. Imagine that Congress passed a law prohibiting the shipment of printed materials critical of the United States government in interstate commerce. Would it be “absurd” to say in such case that the First Amendment had “repealed” the Commerce Clause to the extent necessary to protect freedom of speech?

98. Two of Stewart’s other arguments employed to prevent Idlewild’s closure are non-sequiturs. The Court’s brief decision upholding the Federal Alcohol Administration Act, 27 U.S.C. §§ 201-219a (2000 Supp.), which Stewart cites in support of his contention that the Congress’s commerce power remained intact, did not purport to authorize alcohol shipments otherwise forbidden by state law. Moreover, Stewart’s citation to *Collins* was also of no relevance to the case: the airport was not a federal enclave over which the federal government could claim dominion. See *Hostetter*, 377 U.S. at 334-35 (Black, J., dissenting) (“The airport where the sales take place is not a federal enclave where even as to liquor federal law can constitutionally control, but is New York territory subject to New York, not federal jurisdiction.”); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938). Commentators have mistakenly claimed that the warehouse was a federal enclave. See, e.g., Freeman, 13 *Hastings Const. L.Q.* at 377 (cited in note 27) (“The unique facts in *Idlewild*—the presence of a federal enclave in the same physical space as a state facility—required a balancing of the federal and state regulating interests.”).

tween federal and state authority.<sup>99</sup> But Justice Stewart's reference to Idlewild's federal sanction is maddeningly vague. His only statutory citation is to a provision of the Tariff Act of 1930,<sup>100</sup> which deals with duty-free exports from "bonded manufacturing warehouses" in general, and says nothing about preempting state authority where alcohol is involved.<sup>101</sup> This statute was passed two years *before* the ratification of the Twenty-first Amendment, and does not explicitly *permit* importation and storage of goods in bonded warehouses regardless of state law. One might also question whether it should be construed to preempt state laws passed pursuant to a later constitutional amendment.

Stewart's obtuseness is further evidenced in *Hostetter's* companion case, *Department of Revenue v. James B. Beam Distilling Co.*,<sup>102</sup> decided on the same day. At issue was a Kentucky tax of ten cents on imported liquor, as applied to shipments of whiskey imported from Scotland.<sup>103</sup> The importer challenged the tax as a violation of the Import-Export Clause of the Constitution;<sup>104</sup> the State claimed the Twenty-first Amendment as a defense. While conceding that it *was* consistent with the Import-Export Clause for Kentucky to "regulate" or "completely prohibit the importation of some intoxicants" or "to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported,"<sup>105</sup> the Court nevertheless invalidated the tax. Though the Twenty-first Amendment makes no distinction between liquor imported from other states and that imported from abroad, the Court held that "[t]his Court has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids."<sup>106</sup>

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99. See *Hostetter*, 377 U.S. at 329 (framing the issue of one in which the state is attempting "to prohibit absolutely the passage of liquor through its territory, under the supervision of the United States Bureau of Customs acting under federal law, for delivery to consumers in foreign countries") (footnote omitted); Bittker, *Regulation of Interstate and Foreign Commerce* at 13 (cited in note 12) (commenting that Stewart's reliance on the statute and regulations "suggests that [the case] was a federal preemption case").

100. See 19 U.S.C. § 1311 (1994). The section number is the same as it was in 1964.

101. Neither could I find any regulations in effect presently or in 1964, which addressed the effect of the provision on state laws.

102. 377 U.S. 341 (1964).

103. *Id.* at 342.

104. See U.S. Const., Art. I, § 10, cl. 2.

105. *James B. Beam Distilling Co.*, 377 U.S. at 344.

106. *Id.* at 344; see also *id.* at 345-46 ("[n]othing in the language of the Amendment nor in its history leads to [the] extraordinary conclusion" that "the Twenty-first Amend-

Justice Stewart never explains just *why* the near-total control of alcohol under Section Two could not have qualified the Import-Export Clause's flat prohibition. Arguably the Amendment necessarily qualified that Clause, just as it had rendered the dormant Commerce Clause doctrine inapplicable to the interstate liquor trade.<sup>107</sup> Furthermore, Stewart never adequately accounted for statements made in the Court's previous cases, which declare in no uncertain terms the right of states to tax imported alcohol however they wished. Those cases also held the Fourteenth Amendment could operate as no restraint on the states in light of the Twenty-first, though the framers had not given the Amendment's relationship with the Fourteenth Amendment much thought either.

Finally, the opinion in *James B. Beam Distillers* was inconsistent with a 1958 case in which the Supreme Court sustained the conviction of defendants charged with bringing rum into Texas from Mexico without paying state taxes.<sup>108</sup> The Supreme Court's per curiam opinion merely affirmed the state conviction, citing only the Twenty-first Amendment and *Carter v. Virginia*.<sup>109</sup> Stewart explained away *Gordon* with a reference to the trial court's finding that the tax in that case was not levied on importation.<sup>110</sup> As Justice Black pointed out in his dissent, however, "these labels cannot obscure the fact that both in *Gordon* and in this case the same conduct was involved: the physical importation of liquor from abroad into the State, at which point the State's interest in regulating or taxing the liquor came into play. *Gordon* did not—just as the Twenty-first Amendment does not—draw nice distinctions about where the imported liquor comes from."<sup>111</sup>

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ment has completely repealed the Export-Import Clause so far as intoxicants are concerned").

107. See also Versfelt, 75 Colum. L. Rev. at 1584-85 (cited in note 64) (noting that, as neither the text of the Amendment nor the history of its ratification makes any distinction regarding the source of the liquor, "[i]t would not . . . have been so 'extraordinary' to conclude that the twenty-first amendment had 'repealed' the export-import clause with respect to intoxicants"); id. at 1585 ("The export-import clause's singular concern with shipments from abroad cannot distinguish it from the commerce clause, for the latter applies to foreign as well as domestic commerce.").

108. See *Gordon v. Texas*, 310 S.W.2d 328 (Tex. Crim. App. 1956), aff'd, 355 U.S. 369 (1958) (per curiam).

109. *Gordon v. Texas*, 355 U.S. 369, 369 (1958) (per curiam) ("The judgment is affirmed. Twenty-first Amendment to the Constitution of the United States.").

110. *James B. Beam Distilling Co.*, 377 U.S. at 345.

111. Id. at 349 (Black, J., dissenting).

If the ambiguity introduced by the Court in the through-transport cases<sup>112</sup> can be excused because the state regulations at issue did not directly address issues of “importation for delivery or use,” Justice Stewart’s two opinions are harder to explain. Stewart introduced uncertainty in cases squarely within the ambit of the Amendment’s text, whose facts were indistinguishable from the Court’s previous cases. While perhaps *Hostetter* could be understood as a preemption case, Justice Stewart’s opinion seemed unwilling to put too much weight on that argument. Nor have subsequent Supreme Court and lower court decisions read the case so narrowly. Moreover, *James B. Beam Distilling Co.’s* dubious conclusion that the Amendment did not empower states to regulate foreign importation represented an abrupt about face from *Gordon*.

#### D. POST-HOSTETTER SUPREME COURT CASES

Subsequent opinions exploited this ambiguity and constructed an alternative line of cases. Those opinions built neither on *Young’s Market* and its progeny, nor on the text and intent of the Twenty-first Amendment itself. Rather, they relied on the statements from *Hostetter* and *James B. Beam Distilling* that the power of the Twenty-first Amendment could be subordinated to other provisions of the Constitution, since both were “parts of the same Constitution” and that “each must be considered in the light of the other.” These recent cases are selective in their quotations, however, and ignore Stewart’s concession that a state was “unquestion[ably]” freed from the Commerce Clause when restricting the importation of liquor “destined for use, distribution, or consumption within its borders.”<sup>113</sup>

Cases decided after *Hostetter* continued to limit the use of the Twenty-first Amendment as a defense against challenges to state liquor laws. State drinking ages that applied different standards to men and women;<sup>114</sup> so-called “price affirmation” statutes that pegged in-state sales prices to the price at which liquor is sold in other states;<sup>115</sup> and restrictions on advertising were all

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112. See notes 66-75 and accompanying text.

113. *Hostetter*, 377 U.S. at 330.

114. See *Craig v. Boren*, 429 U.S. 190, 206 (1976) (turning aside a Twenty-first Amendment defense to a state law that authorized the sale of reduced alcohol beer to women at age 18, but not to men; “[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful”).

115. *Healy v. The Beer Institute*, 491 U.S. 324 (1988); *Brown-Forman Distillers Corp.*

struck down.<sup>116</sup> Nevertheless, each of these cases also contained language affirming the vast powers that the Twenty-first Amendment granted states to regulate alcohol, and stating that the Amendment removed Commerce Clause restrictions from that exercise.<sup>117</sup> But two decisions in particular further eroded whatever state power remained under the Twenty-first Amendment. They are often quoted, along with *Hostetter*, in recent lower court opinions striking down state liquor regulation laws.

In 1980, the Court held that a California anti-competitive liquor pricing system could not be sustained under the Twenty-first Amendment.<sup>118</sup> Writing for a majority, Justice Powell began his analysis of the state's Twenty-first Amendment defense to the Sherman Act claim on an oddly apologetic note, "In determining state powers under the Twenty-first Amendment," he wrote, "the Court has focused primarily on the language of the provision rather than the history behind it."<sup>119</sup> The language of the Amendment, Powell conceded, not only granted power over transportation and importation of liquor into states, but the Court's own early cases had also granted states "considerable regulatory power not strictly limited to importing and transporting alcohol."<sup>120</sup> "Subsequent decisions," however, "have stressed that important federal interests in liquor matters," expressed in the Import-Export Clause and the Equal Protection Clause of the Fourteenth Amendment, "survived the ratification of the Twenty-first Amendment."<sup>121</sup>

Though Congress's power to regulate liquor under the Commerce Clause "is directly qualified by § 2," Powell went on to explain that "the Federal Government retains some Commerce Clause authority over liquor," the contours of which

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v. *New York State Liquor Auth.*, 476 U.S. 573 (1986).

116. *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996). See also *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (stating that the Twenty-first Amendment does not insulate state laws from Due Process Clause scrutiny).

117. See, e.g., *Brown-Forman Distillers*, 476 U.S. at 584 (stating that the Twenty-first Amendment "gives the States wide latitude to regulate the importation and distribution of liquor within their territories"); *id.* at 585 ("New York has a valid constitutional interest in regulating sales of liquor within the territory of New York."); *Craig*, 429 U.S. at 205-06 ("This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause."); *id.* at 215 ("Every State has broad power under the Twenty-first Amendment to control the dispensation of alcoholic beverages within its borders.") (Stewart, J., concurring).

118. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Co.*, 445 U.S. 97 (1980).

119. *Id.* at 106-07.

120. *Id.* at 107.

121. *Id.* at 108.

“were sharpened in [*Hostetter*].”<sup>122</sup> Quoting its admonition that the Twenty-first Amendment and the Commerce Clause had to be interpreted in light of one another and in the “context of the issues and interests . . . in any concrete case,”<sup>123</sup> Powell concluded that *Hostetter* represented a “pragmatic effort to harmonize state and federal powers” in conflicts like that presented by the state pricing scheme and the Sherman Act.<sup>124</sup>

Justice Powell’s own pragmatic harmonization of the challenged statute and the Sherman Act resulted in a diminution of state power. “[T]here is no bright line between federal and state powers over liquor,” he wrote.<sup>125</sup> State controls imposed on liquor, at least those not directly related to importation, “may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a ‘concrete case.’”<sup>126</sup> Without explaining why a constitutional amendment must give way to a statute, the Court endorsed the state court’s view that “the asserted state interests are less substantial than the national policy in favor of competition [expressed in the Sherman Act].”<sup>127</sup>

Four years later, Justice Brennan formalized Powell’s apparent balancing test in a case involving an Oklahoma law that prohibited the broadcast of certain advertisements for alcoholic beverages.<sup>128</sup> Upholding a challenge by a cable company that transmitted out-of-state signals into Oklahoma, the Court found that the Oklahoma law was preempted by FCC regulations.<sup>129</sup> The Court specifically rejected the State’s suggestion that the Twenty-first Amendment insulated its statute from invalidation.

While conceding that “States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquors within their borders,” Justice Brennan wrote that cases like *Midcal* “have made clear that the Amend-

122. *Id.* at 109.

123. *Id.* (quoting *Hostetter*, 377 U.S. at 332).

124. *Id.*

125. *Id.* at 110.

126. *Id.*

127. *Id.* at 113. The Court added that it “need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy,” because “[t]he unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.” *Id.* at 113-14.

128. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

129. *Id.* at 708.

ment does not license the States to ignore their obligations under other provisions of the Constitution."<sup>130</sup> Cases like *Hostetter* and *Midcal* demonstrate that "the Federal Government plainly retains authority under the Commerce Clause to regulate even interstate commerce in liquor."<sup>131</sup> To resolve conflicts between the federal and state governments, the Court must evaluate "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."<sup>132</sup> On balance, the Court found Oklahoma's interests in regulating out-of-state transmissions and the selectivity of the ban (which covered wine, but not beer) wanting: "when . . . a state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law, and the State's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated," the balance tips in favor of the federal government.<sup>133</sup>

That same year, the Court held that Hawaii could not exempt a locally-produced liquor from an otherwise generally-applicable twenty percent excise tax,<sup>134</sup> subjecting a state alcohol regulation to the very dormant Commerce Clause analysis the Twenty-first Amendment was intended to disable. In *Bacchus Imports Ltd. v. Dias*, Justice White acknowledged that the *Young's Market* line of cases contained "broad language," but went on to say that the Court had come to "recognize[] the obscurity of the legislative history of § 2" and that "[n]o clear consensus concerning the meaning of the provision is apparent."<sup>135</sup> Whatever the intent or early cases indicated, Justice White continued, "[i]t is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause."<sup>136</sup> Citing *Hostetter* and *Midcal Aluminum*, White concluded that "one thing is certain" about the Amendment: "The central purpose of the provision was not to

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130. *Id.* at 712. Perhaps Justice Brennan forgot that *Midcal* concerned a conflict not between two constitutional provisions, but rather between the Sherman Act and the Amendment.

131. *Id.* at 713.

132. *Id.* at 714.

133. *Id.* at 716.

134. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

135. *Id.* at 274.

136. *Id.* at 275.

empower States to favor local liquor industries by erecting barriers to competition. . . . State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."<sup>137</sup>

Until *Bacchus*, the Court had neither limited the right of states to set the terms upon which alcohol could be imported into the state, nor suggested that the Commerce Clause limited the state's regulation of alcohol within the state. Even *Capital Cities Cable* affirmed the state's power in this regard. With no historical or textual support, Justice White simply announced that the dormant Commerce Clause in fact *did* apply to the state alcohol regulations, despite the Twenty-first Amendment.<sup>138</sup>

Some of these decisions might again be defended on the grounds that the state regulations at issue (the pricing statutes and the discriminatory drinking age, for example) had little to do with regulating importation for delivery or use. However, the Court did not make this distinction clear, instead further muddying the waters with broad statements suggesting that "temperance" was the only legitimate goal of state liquor regulation, and that any regulation smacking of economic protectionism was *per se* outside the ambit of the Twenty-first Amendment.

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137. *Id.* at 276. As I have argued, the ambiguity that Justice White finds in the Amendment's legislative history is of his own making. Moreover, the *Young's Market* line of cases squarely refutes the claim of an "economic protectionism" exception to the Twenty-first Amendment. Yet, after muddying the waters in *Hostetter*, *James B. Beam Distilling*, and *Midcal*, the Court apparently thought that its *sub silentio* abandonment of *Young's Market* required no further explanation or justification.

138. One commentator observed that "[d]espite assertions to the contrary, the *Bacchus* Court went beyond the Section Two precedents and found a new interpretation of the meaning of Section Two itself." Freeman, 13 *Hastings Const. L.Q.* at 382 (cited in note 27). Despite the author's dissatisfaction with the *reasoning* of the majority's opinion, he approved of its conclusion. *Id.* at 386-87. According to the author of this comment, the drafters of the Twenty-first Amendment thought that it went no farther than the Webb-Kenyon Act, *id.* at 384; that the Amendment was merely intended to protect dry states, *id.*; and that the defeat of the proposed Section Three had no effect on the scope of Section Two. *Id.* at 384-85. The author presents little evidence to support his conclusions.

Justice Brennan, whose opinion in *Capital Cities Cable* made clear that states still possessed tremendous power over imported liquor and its distribution within the state, did not participate in *Bacchus Imports*.

#### IV. STATE LIQUOR LAWS AND INTERNET ALCOHOL SALES: RECENT CASES

The full effect of the post-*Hostetter* decisions—especially the uncritical certitude of *Bacchus* that economic protectionism was beyond the pale of the Twenty-first Amendment—is apparent in recent lower court cases striking down state regulations of liquor imports. These initial victories will, no doubt, encourage many more similar lawsuits against state liquor regulations. District courts, the courts of appeals, and, perhaps, the Supreme Court will be called upon to decide these cases and, thus, will decide whether the Twenty-first Amendment will be truly a “forgotten clause” of the Constitution. After reviewing these recent decisions, and a Seventh Circuit Court of Appeals decision that recently affirmed state power exercised under the Twenty-first Amendment, the following section suggests approaches that both the lower courts and the Supreme Court should take in future cases.

In *Dickerson v. Bailey*,<sup>139</sup> a federal district court judge struck down a Texas statute that prohibited the importation of more than three gallons of wine without a permit unless the resident personally accompanied the wine or liquor as it entered the state.<sup>140</sup> The district court, applying the “virtually *per se* rule of invalidity”<sup>141</sup> to which discriminatory laws are subject under traditional dormant Commerce Clause analysis, found that the statute “facially discriminates against out-of-state vintners and wine shippers” in order to “protect[ ] . . . in-state liquor wholesalers and retailers at the expense of out-of-state wine sellers.”<sup>142</sup> The Court rejected the State’s claim that the Twenty-first Amendment authorized the law. Earlier decisions, like *Young’s Market*, the judge wrote, had given way to a “balancing approach” in which the courts were no longer to assume that “the twenty-first amendment in essence repealed the commerce clause where liquor regulation was concerned.” This new approach restricted the Amendment’s “core” powers over transportation and importation where regulation is undertaken for the purpose of economic protectionism.<sup>143</sup> The court put great

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139. 87 F. Supp. 2d 691 (S.D. Tex. 2000).

140. *Id.* at 693; see also *id.* at 691 (citing Tex. Alcohol Bev. Code § 107.7 (Vernon 1995)).

141. See Bittker, *Regulation of Interstate and Foreign Commerce* at § 6.06[A] (cited in note 12).

142. *Dickerson*, 87 F. Supp. 2d at 710.

143. *Id.* at 706-07. The judge seemed to find no inconsistency between his applica-

stress on language from *Hostetter* and *Midcal Aluminum*, and understood cases like *Bacchus Imports* to have grafted an “economic protectionism” exception onto the Twenty-first Amendment.<sup>144</sup>

In a similar case proceeding through a federal district court in New York, a judge recently dismissed the State’s motion to dismiss a challenge to New York’s direct shipment and advertising ban.<sup>145</sup> Citing the “evolution in Twenty-first Amendment jurisprudence” since 1970 when the state statute withstood a similar challenge, the district court felt that “it would be inappropriate” to deny plaintiffs the opportunity to present evidence in support of their claims that the statute violated the Commerce Clause.<sup>146</sup> Again, *Midcal Aluminum* and *Bacchus*

tion of a “per se rule of invalidity” and his description of recent Twenty-first Amendment cases as requiring a “balancing approach.”

144. See *id.* at 705 (citing *Hostetter’s* statement that it was “patently absurd” to argue that the Amendment repealed the Commerce Clause); *id.* at 706 (citing *Midcal* for the proposition that “the relationship and effect on each other of federal and state interests” had to be weighed; that “there is no bright line between federal and state powers over liquor”; and *Hostetter’s* language that since both the Amendment and the Commerce Clause were parts of the same Constitution, each needed to be considered in light of the other), 707 (citing *Bacchus Imports* for the proposition that courts “have increasingly emphasized federal interests and more carefully scrutinized the actual purpose behind the state’s law” as opposed to deferring “to the amendment’s express grant of virtually complete control to the states over importation and sale of liquor and structuring of a liquor distribution system within their own borders”).

Following Judge Easterbrook’s decision in *Bridenbaugh*, the district judge in *Dickerson* reconsidered the initial grant of summary judgment for the plaintiff, but affirmed the initial grant of the plaintiff’s motion. *Dickerson*, 212 F. Supp. 2d at 694-95. The court reviewed the recent cases, considered Judge Easterbrook’s decision, and concluded that the recent decisions of the Supreme Court and binding precedent in the Fifth Circuit compelled its decision. *Id.* at 692-93. The Fifth Circuit decision cited by the court was *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994), in which the court struck down a Texas law requiring a three-year durational residency requirement as a precondition for obtaining a liquor permit under the dormant Commerce Clause doctrine. The Fifth Circuit repeated the usual statements from *Hostetter* and *Bacchus* about the Twenty-first Amendment not protecting economic protectionism, and the need to reconcile the Commerce Clause with the Twenty-first Amendment. One might distinguish the situation in *Cooper* from that in *Dickerson* on the ground that the grant or denial of liquor permits is not closely related to the regulation of the importation of liquor for delivery or use in a state. See also *Glazer’s Wholesale Drug Co., Inc. v. Kansas*, 145 F. Supp. 2d 1234, 1246-47 (D. Kan. 2001) (striking down a ten-year residency requirement for a license to distribute liquor).

145. *Swedenburg v. Kelly*, 2000 WL 1264285 (S.D.N.Y.) (Sept. 5, 2000), at \*1. The ban prohibited any advertisement or solicitation for sale of alcoholic beverages without being licensed by the state, as well as in-state shipment, by common carrier or otherwise, of alcoholic beverages other than to consignees licensed by the state. *Id.* (citing N.Y. Alcohol and Bev. Control Law §§ 102(1)(a), (c), and (d)).

146. *Id.* at \*7. The court “hasten[ed] to add,” in a footnote, that its denial of the motion to dismiss “is in no way [a] ruling . . . upon the ultimate merits of the parties’ respective claims.” *Id.* at \*7 n.16.

*Imports* figured prominently in the court's conclusion that a jurisprudential "evolution" had taken place.<sup>147</sup>

Finally, there is *Bridenbraugh v. O'Bannon*,<sup>148</sup> which was the first case to strike down, on dormant Commerce Clause doctrine grounds. In *Bridenbraugh*, state law outlawed the shipment of alcoholic beverages into the state to anyone except wholesalers, specifically including sales over the Internet.<sup>149</sup> In a brief opinion, the district judge dismissed the argument that the Twenty-first Amendment authorized Indiana's law. The court took "judicial notice of the historic setting of [the] Amendment" and asserted that "the second section of [the] Amendment had as its legislative purpose to permit states to regulate by local option, or indeed enforce statewide prohibition in regard to alcoholic beverages."<sup>150</sup> But neither of those goals, the judge continued, had "any bearing whatsoever to this case." The judge instead applied a balancing test: "whether the interests implicated by a state's regulation are so closely related to the powers reserved by the Amendment that the regulation may prevail, notwithstanding the fact that its requirements directly conflict with express federal policy."<sup>151</sup> The only core principle protected by the Twenty-first Amendment is temperance, the judge concluded; because the Indiana statute facially discriminated against interstate commerce and was not obviously related to temperance, it had to yield to the Commerce Clause.<sup>152</sup>

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147. See *id.* at \*5, \*6 & n.11. The district court recently granted summary judgment to the plaintiffs who challenged the New York laws, concluding that the "Defendants have not shown that New York's ban on the direct shipment of out-of-state wine, and particularly the in-state exceptions to the ban, implicate the State's core concerns [i.e., the promotion of temperance] under the Twenty-first Amendment." *Swedenburg v. Kelly*, 2002 WL 31521023, at \*10 (S.D.N.Y. 2002).

148. 78 F. Supp. 2d 828 (N.D. Ind. 1999), *rev'd sub. nom.*, *Bridenbraugh v. Freeman-Wilson*, 2000 WL 1286249 (7th Cir. 2000).

149. *Bridenbraugh*, 78 F. Supp. 2d at 829 & n.2 (citing Ind. Stat. § 7.1-5-11-1.5).

150. *Id.* at 831. The judge adduced no historical evidence to support what he asserted to be the clear purpose of § 2. Compare Part II.

151. *Id.*

152. *Id.* at 831-32. Other district court decisions follow the trend of the other district courts in striking down aspects of state liquor shipment laws. See *Beskind v. Easley*, 197 F. Supp. 2d 464 (W.D.N.C. 2002); *Bolick v. Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002); *Glazer's Wholesale Drug Co., Inc. v. Kansas*, 145 F. Supp. 2d 1234 (D. Kan. 2001). These cases held that the Twenty-first Amendment provides no shield to "protectionist" state laws imposing different requirements on in-state and out-of-state alcohol manufacturers. See *Beskind*, 197 F. Supp. 2d at 474 ("Economic protectionism is not the purpose of this safe harbor [i.e., the Twenty-first Amendment] from the Commerce Clause."); *Bolick*, 199 F. Supp. 2d at 416-17 (accepting magistrate judge's finding that aspects of Virginia's alcohol control statutes were unconstitutional under the dormant Commerce Clause doctrine, and that the Twenty-first Amendment provided no defense for the state).

All of the district court opinions share a common flaw: They give unduly broad readings to Supreme Court opinions that do not directly address issues of state regulation of importation of alcohol, then proceed to apply them to situations covered by the express language of the Amendment. For example, as unconvincing as his distinction might have been, Justice Stewart took pains to characterize the arrangement in *Hostetter* as one *not* involving “importation . . . for delivery or use therein” to avoid falling squarely within the Amendment’s language and the Court’s own prior cases.<sup>153</sup> Similarly, *Midcal Aluminum* turned on whether California’s discriminatory pricing scheme—as opposed to regulations of alcohol imports—was protected by the Twenty-first Amendment.<sup>154</sup> Even *Bacchus Imports* involved a question—whether Hawaii could offer a tax exemption to an otherwise generally-applicable tax for locally-produced liquor—much different than those posed by the recent cases, which strike at the very heart of what *Midcal* and *Capital Cities Cable* did not presume to question: the power of states to structure their liquor importation systems.

The confusion in the lower courts received a welcome corrective when the Seventh Circuit unanimously overturned the district court’s decision in *Bridenbraugh*.<sup>155</sup> Writing for the court, Judge Easterbrook recognized that “§ 2 of the twenty-first amendment empowers Indiana to control alcohol in ways that it cannot control cheese” under the dormant Commerce Clause doctrine.<sup>156</sup> Rejecting the “core purpose” argument adopted by the district courts, and relying on the text and history of the provision, Judge Easterbrook concluded that, after the ratification of the Twenty-first Amendment, “[n]o longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; § 2 speaks directly to these shipments.”<sup>157</sup> Every such regulation, he noted, is “‘discrimination’ . . . because every statute limiting importation leaves intrastate commerce unaffected.” Were such regulation held to be outside the ambit

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153. *Hostetter*, 377 U.S. at 330.

154. *Midcal Aluminum*, 445 U.S. at 110 (“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.”).

155. See *Bridenbraugh v. Freeman-Wilson*, 2000 WL 1286249 (7th Cir.) (Sept. 13, 2000).

156. *Id.* at \*2.

157. *Id.* at \*5.

of the Amendment, he concluded, “§ 2 would be a dead letter.”<sup>158</sup>

As for the Supreme Court’s case law allegedly forbidding the sort of statute passed by Indiana, Judge Easterbrook correctly noted that “[n]o decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause.” He read subsequent cases as “apply[ing] an unconstitutional conditions approach to the use of § 2 power,” further explaining that “[w]hat the Court has held . . . is that the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms.”<sup>159</sup> Thus, “unless the state has used its power to impose a discriminatory condition on importation, one that favors Indiana sources of alcoholic beverages over sources in other states, as Hawaii did in *Bacchus*,” the Indiana law was constitutional.<sup>160</sup> Because he could find no such discrimination and because, in his opinion, the Indiana statute was exactly the sort of law intended to be passed under Section Two’s grant of power, the court upheld the statute.<sup>161</sup>

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158. *Id.*

159. *Id.* But see note 184.

160. *Id.*

161. *Id.* at \*6. Subsequent district court opinions, however, have not followed Judge Easterbrook’s analysis. Many courts accused Judge Easterbrook of ignoring “the last forty years of Supreme Court jurisprudence relating to balancing and harmonizing the dormant commerce clause and § 2 of the twenty-first amendment.” *Dickerson*, 212 F. Supp. 2d at 682; see also *Bolick*, 199 F. Supp. 2d at 434 (“To accept the *Bridenbaugh* court’s decision as dispositive would require explicit rejection of the applicability of the dormant Commerce Clause. . . . That conclusion is unacceptable in light of the Supreme Court’s decisions resolving the conflict between the Twenty-first Amendment and the rest of the Constitution.”) (footnote omitted). Other courts noted the difference between the law at issue in their cases, and the Indiana direct shipment law, which Judge Easterbrook held to apply equally to in-state and out-of-state shippers. See *Swedenburg*, 2002 WL 3152103, at \*7 (“That the New York direct shipping ban on out-of-state wine . . . is discriminatory (on its face) is clear from the very wording . . . of the exemptions favoring in-state wineries.”) (footnote omitted); *Beskind*, 197 F. Supp. 2d at 475 (“[U]nlike the Seventh Circuit, this Court is faced with a statutory scheme that clearly favors North Carolina sources of alcoholic beverages over sources in other states.”) (emphasis added). But see *Heald v. Engler*, (No. CIU.A 00-CV-71438) 2001 U.S. Dist. LEXIS 24825 at \*10 (E.D. Mich.) (Sept. 28, 2001) (upholding a Michigan direct shipment law that exempted in-state producers).

In the only other case to reach the Court of Appeals, the Eleventh Circuit recently vacated a Florida district court decision upholding that state’s direct shipment laws (which contain an in-state exemption), remanding the case for evidence regarding the purpose served by the statutory scheme. *Bainbridge v. Turner*, 311 F.3d 1104, 1106 (11th Cir. 2002). “If the subject of Florida’s regulatory scheme were an ordinary widget (rather than liquor),” Judge Tjoflat wrote, “the statutes would violate the Commerce Clause. But if the State demonstrates that its statutory scheme is closely related to a core concern of the Twenty-first Amendment and not a pretext for mere protectionism, Florida’s statutes can be upheld.” *Id.* While noting that the Supreme Court had not been particularly

## V. A SUGGESTED APPROACH FOR FUTURE CASES

As Judge Easterbrook's opinion for the Seventh Circuit demonstrates, all is not lost. There is still hope for reviving the moribund Twenty-first Amendment; perhaps the spate of recent litigation over Internet alcohol sales will provide the tonic needed to arrest its complete demise. In this last section, I will put forth some principles that courts should employ when hearing cases involving dormant Commerce Clause challenges to state alcohol regulations—principles that follow directly from the history of the Twenty-first Amendment and the subsequent cases discussed above. Most of what follows seeks, as its intended audience, a hearing from the lower courts, although there may also be hope at the Supreme Court level.<sup>162</sup> Accordingly, I also have some suggestions for the Court.

### A. LOWER COURTS

1. *Remember the Text and Purpose of the Twenty-first Amendment*—Despite recent suggestions that only temperance, or some similar police power aim, can justify treating alcohol differently from other consumer articles under the dormant Commerce Clause doctrine,<sup>163</sup> the history of the Twenty-first Amendment, particularly the controversy over the original “saloon” section and its eventual rejection, and the text of Section Two make clear that the Amendment was about states receiving

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helpful on this question, it seemed to accept that the universe of the Twenty-first Amendment's “core concern[s]” was not exhausted by temperance. *Id.* at 1114-15. The court also noted that a state's scheme could be discriminatory without constituting “mere protectionism.” *Id.* at 1113. One judge on the panel dissented, and would have upheld the district court's decision upholding the laws. *Id.* at 1116 (Roney, C.J., dissenting). *Bainbridge*, too, declined to follow Judge Easterbrook's analysis in *Bridenbaugh*. *Id.* at 1114 n.15 (“We disagree with the analytical framework used in that case and are skeptical of its assessment of the facts.”).

162. It is worth noting that, at present, three present members of the Court—Chief Justice Rehnquist, and Justices O'Connor and Stevens—have been among the most vocal critics of the Court's Twenty-first Amendment decisions. See *Healy*, 491 U.S. at 345, 349 (Rehnquist, C.J., Stevens and O'Connor, JJ., dissenting) (“by reason of the Twenty-first Amendment the States possess greater authority to regulate commerce in beer than they do commerce in milk”; acknowledging power that Twenty-first Amendment gives states over alcohol imports and alcohol distribution structure); *Brown-Forman Distillers Corp.*, 476 U.S. at 586, 590-91 (Stevens, White and Rehnquist, JJ., dissenting) (arguing that greater power of exclusion from state includes lesser power to impose conditions on sale, including power to require in-state sale prices be keyed to sale prices in other states); *Bacchus Imports, Ltd.*, 468 U.S. at 278, 279 (Stevens, Rehnquist and O'Connor, JJ., dissenting) (“I would affirm the judgment of the Supreme Court of Hawaii because the wholesalers' Commerce Clause claim is squarely foreclosed by the Twenty-first Amendment to the Constitution of the United States.”).

163. See, e.g., Shanker, 85 Va. L. Rev. at 383 (cited in note 3).

constitutional assurance of their power over the alcohol trade. Without Section Two, the states had no assurance against repeal of legislation like the Webb-Kenyon Act; and a change in personnel on the Supreme Court could have returned them to the days when the dormant Commerce Clause doctrine was employed to frustrate efforts to control alcohol importation. From this, a second point naturally follows.

2. *State Alcohol Regulations Should Come to Court with a Presumption of Validity*—There is a certain irony that in the midst of the most vigorous judicial enforcement of federalism in over sixty years, a specific textual reservation of power to states has been eroded almost to the point of irrelevance. Even if the “new” New Federalism is not her cup of tea, respect for the text of the Twenty-first Amendment and its history ought to compel a judge to presume the validity of state alcohol regulations—especially those that regulate the importation or transportation of alcohol into or through the state—regardless whether those regulations make doing business more expensive for retailers or consumers, or whether the regulations seem quaint or paternalistic. This presumption, of course, is not irrebuttable. As Judge Easterbrook suggests in his opinion, and as the Court itself has made clear, there are some limits to the state’s power. While there is ample evidence that the framers and ratifiers of the Twenty-first Amendment sought freedom from the restraints of the dormant Commerce Clause doctrine, there is nothing to suggest that state alcohol regulators are to be free of the Due Process Clause<sup>164</sup> or the First Amendment.<sup>165</sup> Nor should the Amendment permit one state to control the liquor trade within its borders by reaching into other jurisdictions to regulate the liquor trade in that state.<sup>166</sup> The core power is the power to control the importation of alcoholic beverages for delivery or use within the state, and those ancillary powers that are necessary to effectuate that core power.<sup>167</sup>

3. *Do Not Construe Supreme Court Cases in This Area Broadly*—The lower courts in recent alcohol cases insist on extracting broad principles from the Supreme Court cases, without

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164. See note 116.

165. See note 116.

166. See note 115.

167. Thus, states ought to be given leeway in regulating through-shipments. See notes 66-75 and accompanying text (discussing the Court’s treatment of early through-shipment cases). Like Justices Frankfurter and Jackson, I would find this power to regulate through-shipments in the penumbra of the Twenty-first Amendment, instead of allowing it as a matter of judicial grace, and only if “reasonable.”

sufficient attention to relevant facts that should counsel a narrower reading. Worse are the decisions that quote portions of Court opinions (especially those portions stressing the need to harmonize the Commerce Clause and the Twenty-first Amendment, or that claim that it is folly to presume the Amendment “repealed” the Commerce Clause) and treat *those* as the proposition for which the cases stand.<sup>168</sup> The Supreme Court cases from which the choicest quotations are taken—*Hostetter*, *Midcal Aluminum*, *Bacchus Imports*, and the like—are factually distinguishable from the recent alcohol cases concerning Internet sales and direct shipment bans.<sup>169</sup> Lower courts should recognize that whatever state regulations the Court has stuck down, it has always been careful to preserve the state’s power to regulate alcohol imported into the state for delivery or use. The Court’s language on this point has been quite unambiguous.<sup>170</sup> This insensitivity to the factual context in which other cases arose, I think stems from two related misunderstandings.

4. *Do Not Mistake “Regulation” of Imports for Impermissible “Discrimination”*—The text of the Twenty-first Amendment clearly entitles states to regulate importations into the state; no Supreme Court case suggests otherwise. To claim, as recent court decisions have, that requiring importers of alcohol to obtain a license from the state constitutes facial discrimination forbidden by the dormant Commerce Clause doctrine is absurd. The differential treatment (imported alcohol versus domestically produced alcohol, or out-of-state importers versus in-state retailers) is *authorized* by the Amendment itself. Benefits flowing to intrastate distributors, retailers, brewers, or distillers are a natural byproduct of the state’s exercise of its constitutionally-granted power.

5. *Do Not Allow Internet Commerce Elements to Confuse the Issue*—While the advent of the Internet and electronic commerce has convinced some that old rules do not apply, others have cautioned that we should not get too carried away; that the old rules *do* still have some application.<sup>171</sup> When older cases involved illegal importation of liquor into states in the back of a truck or a car,<sup>172</sup> or, say, the transportation of several hundred

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168. See notes 139-154 and accompanying text.

169. See notes 153-154 and accompanying text.

170. See notes 113, 122 & 130 and accompanying text.

171. See, e.g., Jack L. Goldsmith and Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785 (2001).

172. See, e.g., *Atkins v. Manning*, 56 S.E.2d 260, 262 (Ga. 1949) (upholding condem-

cases of Coors beer from Texarkana, Texas to Atlanta, Georgia,<sup>173</sup> there was no question that the state had the power to prosecute violations of its laws. That more recent cases involve epicures importing fine wines ordered over the Internet, rather than Big and Little Enos Burdette hiring the Bandit and the Snowman to fetch their beer,<sup>174</sup> should not make one iota of difference in a court's analysis.

## B. SUPREME COURT

1. *Acknowledge Accessibility and Reliability of Intent of Twenty-first Amendment*—The Twenty-first Amendment was debated and ratified in the early 1930s. Relevant materials describing positions of supporters and opponents, as well as the perceptions of those who were to ratify the Amendment, abound.<sup>175</sup> Yet, in several key Supreme Court opinions (not coincidentally those in which the Court was curbing the power of the states) Justices have gone out of their way to claim that the intent is “confused” or that it does not exist.<sup>176</sup> Freed from inconvenient facts, the Court is then able to substitute its own preferences for those of the Amendment's framers and ratifiers. If the Court cannot even discern what an amendment passed just sixty-odd years ago was supposed to accomplish, then one would expect to see a complete abandonment of all attempts to inform constitutional interpretation through the use of history. Since this obviously has not happened in recent years, the question then becomes why has the Twenty-first Amendment been treated any differently than other amendments? As I showed in an earlier section, the lack of clarity in the materials surrounding the ratification of the Amendment cannot suffice as a reason.

2. *Clarify Status of Young's Market Cases*—Even if doubts remained about the precise intent of the framers and ratifiers of

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nation of truck used in illegal transportation of liquor from South Carolina; rejecting Commerce Clause challenge to condemnation: “the Twenty-first Amendment removes spiritous liquors and alcohol from the protections of the commerce clause to the extent necessary to allow the States to adopt and enforce appropriate laws and regulations dealing with the subject, and thus to burden interstate commerce to this extent”); see also *Welborn v. Morely*, 243 S.W.2d 635, 636-37 (Ark. 1951) (upholding confiscation of liquor transported illegally into state during journey from Louisiana to Kansas); *State v. Goldberg*, 166 P.2d 664, 180-81 (Kan. 1946) (upholding forfeiture for transportation of intoxicating beverages in violation of state law).

173. See *Smokey and the Bandit* (Universal Pictures 1977).

174. See *id.*

175. See Part II.

176. See notes 135-136 and accompanying text.

the Twenty-first Amendment, the early case law could not have been more clear. When it came to importation for delivery or use, neither the Commerce Clause nor the Equal Protection Clause applied. When it came to through-shipment or regulation of exports, great deference was accorded state regulations. The *Young's Market* line of cases was so clear, in fact, that subsequent Courts (beginning with *Hostetter*) either had to twist facts to escape the gravitational pull of those cases (Justice Stewart's approach); simply to ignore them, relying on unsupported claims that the original intent commanded a different result (Justice White's approach); or conclude that there were interests that outweighed enforcement of the Amendment (Justice Powell's approach). This transformation of the Twenty-first Amendment jurisprudence from one of rules to one of standards has, in effect, overruled the *Young's Market* line of cases, but without the Court acknowledging responsibility for having done so. Should the Court accept one of these alcohol cases for review, it should take the opportunity to do some doctrinal pruning. If it is too late to return to the days of *Young's Market*, so be it; but the removal of doubt will greatly benefit both lawmakers and lower court judges.

3. *Clearly Endorse Constitutional Power of States to Enforce Control over Importation for Delivery or Use*—Assuming that the Court might be unlikely to regard the *Young's Market* line of cases as its touchstone for interpreting the Twenty-first Amendment, the Court could still affirm the considerable power of the states over liquor merely by enforcing the text of the Amendment. Not until *Bacchus Imports* did the Court strike down an exercise of state power over liquor imports;<sup>177</sup> on the contrary, earlier decisions affirmed that control over importation and liquor distribution—not merely an interest in promoting temperance, as Justice White suggested—were the core powers granted by the Amendment. This would mean, at a minimum, that the sorts of liquor licencing laws now being challenged would withstand scrutiny. Far from violating the Constitution, the state would merely be exercising the very power given to it by the

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177. While *Hostetter* struck down New York's regulation of Idlewild's operation, it did so by asserting that the alcohol was not actually imported into the state for delivery or use in New York. In *James B. Beam Distilling Co.*, the invalidation of Kentucky's tax was on the ground that it offended the prohibitions of the Import-Export Clause, whose limitations Justice Stewart claimed were left in tact by the Amendment. See notes 76-112 and accompanying text.

Twenty-first Amendment, as the framers of that Amendment intended.

4. *Overrule James B. Beam Distilling and Bacchus Imports*—Some might object to strict application of the text on the ground that it could open the door to state suppression of, say, First Amendment freedoms under the guise of alcohol regulations.<sup>178</sup> But applying the text of the Amendment does not mean completely ignoring the primary purpose of the Amendment: to enable the states to control the liquor trade in their states, whether it involves domestic producers or importations from out-of-state, the dormant Commerce Clause doctrine notwithstanding. That purpose is not implicated when a state alcohol regulation, even one concerning imports, offends one of the provisions of the Bill of Rights, or the Due Process Clause of the Fourteenth Amendment.<sup>179</sup> However, a textual application of the Amendment, with its purpose in mind, does suggest that some of the Supreme Court's jurisprudence is simply wrong, and should be overruled. I suggest that the Court, should the opportunity arise, overrule *James B. Beam Distillers and Bacchus Imports*.

Even proponents of what one commentator called the Court's "strangulation"<sup>180</sup> of the Twenty-first Amendment recognize the weakness of Justice Stewart's rationale for holding that states may not regulate the importation of foreign liquor.<sup>181</sup> No evidence from the framing or ratification of the Amendment suggests that foreign liquor was to be given some sort of privileged position. And the text of the Amendment certainly suggests that no such distinction was contemplated.

The text of the Amendment also offers no support for Justice White's bald assertion, made in *Bacchus Imports*, that whatever the framers and ratifiers had in mind, they did not intend to authorize states to engage in economic protectionism. In fact, in the months immediately after the ratification, state legislatures hurried to draft statutes exempting imported liquors from certain taxes and regulations, if their liquor was offered reciprocal exemptions by other states.<sup>182</sup> Along with at least one statement

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178. See note 116.

179. See note 116.

180. See Spaeth, 79 Cal. L. Rev. at 163 (cited in note 66) (characterizing recent decisions as having "strangled much of the vitality from the twenty-first amendment").

181. See note 107 and accompanying text.

182. See Wisner and Arledge, 7 Geo. Wash. L. Rev. at 403 (cited in note 27) ("As though in anticipation of the Supreme Court's broad interpretation of the grant of power

made by a member of Congress opposing Section Two of the Amendment because of the possibility states would abuse their power<sup>183</sup>—these reciprocity laws confirm what the text suggests, *viz.*, that there was no distinction made between “good” regulations of imports and “bad” ones.<sup>184</sup>

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in the Twenty-first Amendment, some states had feared economic discrimination by other states against their liquor products and several . . . deemed it necessary to establish by statute what . . . amount to reciprocal trade agreements.”). The authors ignore what seems to be an equally plausible interpretation of the states’ actions: that the possibility of resultant discrimination against out-of-state liquor was seen as a possible byproduct of Section Two’s grant of power. This evidence of the states’ understanding of the scope of the Amendment, moreover, contradicts a earlier statement in the same article that “[t]he second section of the Amendment generally was thought of as . . . assurance that dry states would be protected from an influx of imported liquor” as opposed to authorizing “state tariff laws.” *Id.* at 402.

183. See note 49 and accompanying text.

184. In his *Bridenbaugh* opinion, Judge Easterbrook suggested that the Supreme Court, in some recent Twenty-first Amendment cases like *Bacchus Imports*, had been applying the “unconstitutional conditions” doctrine: states may prohibit the importation of liquor altogether, but if it chooses to allow importation, it may not condition the ability to import on the payment of discriminatory taxes or the submission to discriminatory or protectionist regulations. See *Bridenbaugh*, 2000 WL at \*5. Since Judge Easterbrook found no such discrimination in the statute, other than that authorized by § 2’s grant of power, he upheld the Indiana regulatory scheme. See *id.*

While the unconstitutional conditions doctrine may furnish an explanation for cases like *Constantineau* and *44 Liquormart*, where the First Amendment and the right to due process are implicated, I think that it is *inapplicable* to cases like *Bacchus Imports*, in which locally-produced liquor was exempted from an otherwise generally-applicable excise tax.

In her seminal article on the subject, Kathleen Sullivan defined the unconstitutional conditions doctrine as holding “that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly” under a greater-includes-the-lesser view of governmental power. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989). In the context of the Twenty-first Amendment, then, *Constantineau* and *44 Liquormart* are correct: just because the state may prohibit alcohol altogether, it does not follow that it has *carte blanche* to extort waivers of constitutional rights as a condition of allowing its sale or purchase.

However, the application of the unconstitutional conditions doctrine to situations in which the state is allegedly engaging in discriminatory or protectionist regulation of out-of-state liquor is more problematic. The right of an out-of-state commercial actor to be free from discriminatory treatment at the hands of state governments derives from the dormant Commerce Clause doctrine. Section 2 of the Twenty-first Amendment was understood to disable the dormant Commerce Clause as it applied to liquor—thus removing the “right” to import liquor free of state discrimination. Therefore, it seems that by allowing liquor to be imported, but subjecting it to discriminatory regulations not imposed on domestically-produced liquor, the state is not attempting to “do indirectly what it may not do directly”; rather, it is exercising the very power granted to it under the Twenty-first Amendment.

## CONCLUSION

Recent lower court cases invalidating longstanding state alcohol regulations seem to have fallen under the spell of the Internet, and assume that “e-commerce must be free!” But as more courts have succumbed to the siren song of cyberspace, they have in the process ignored constitutional text, evinced indifference to the history of the Twenty-first Amendment, and misapplied Supreme Court precedent. They have, in fact, come close to effecting a virtual repeal of the Amendment. But there is opportunity in this new wave of litigation, the opportunity to repair the erosion of state power under the Amendment caused by years of parsimonious interpretation by the U.S. Supreme Court. By keeping the text and the history of the Amendment squarely in view, courts can not only restore a measure of state power, but also protect the integrity of the amending process, as well.

In response to judicial restrictions on state regulation of the interstate alcohol trade, Congress passed a series of statutes granting such regulatory power to the states, the restrictions of the dormant Commerce Clause doctrine notwithstanding. These congressional efforts culminated in the ratification of the Eighteenth Amendment, which inaugurated a fourteen year experiment with national prohibition. When the decision was made to end the experiment, state concerns about their ability to control the alcohol trade reemerged. The history of the Twenty-first Amendment’s drafting demonstrates that its provisions were designed to allay those concerns by constitutionalizing state control over alcohol imported into states. Proponents and opponents of repeal both agreed that the power rightly belonged to the states, and were careful to eliminate the possibility of federal encroachment upon that power by eliminating the “concurrent power” provision, which would have empowered both the federal and state governments to regulate the saloon.

With that important change, what became the Twenty-first Amendment was sent to the states for ratification. The “drys” were assured that the dormant Commerce Clause doctrine would not be revived to strike down state regulatory efforts; the “wets,” too, were provided with constitutional assurances that dry forces could not use a concurrent power provision to reestablish some form of federal prohibition in the future. As the participants understood it, the main question regarding alcohol

regulation was one of power. The Twenty-first Amendment settled it in favor of the states.

Early Supreme Court cases clearly reflected that understanding, refusing to rewrite the Amendment under the guise of interpreting it, even when the Court was presented with discriminatory state regulatory regimes. Since the mid-1960s, however, the Supreme Court has consistently made inroads on the power reserved to the states by the Amendment. Finally, in 1984, the Court signaled an intent to apply to state alcohol regulations the very dormant Commerce Clause analysis that the Amendment was intended to foreclose. At no time, moreover, has the Court made a convincing case for the correctness of its more recent decisions, as compared with its earlier decisions declining to supervise state control of alcohol. Recent lower court decisions have continued the virtual repeal of the Twenty-first Amendment by broadly construing the Supreme Court's restrictive cases, while ignoring important factual differences between those cases and the recent cases involving direct shipment bans that would prohibit, for example, Internet alcohol sales. If the trend continues, the Amendment will become a dead letter.

Were the matter of the Twenty-first Amendment simply one of cheap versus expensive liquor, or whether states ought to protect local interests as a matter of policy, I might applaud the actions of the Court. After all, the dormant Commerce Clause doctrine *is* a powerful judicial weapon designed to enforce the "common market" vision of the Framers—and so much the better for the Nation. But, as is so often the case when means are subordinated to ends in fashioning constitutional law, there are real costs to the approach the Court ultimately chose to take.

Perhaps the most serious cost of judicial abnegation of the Twenty-first Amendment is to the integrity of the amending process itself. As Laurence Tribe has noted, "[t]he resort to amendment—to constitutional *politics* as opposed to constitutional *law*—should be taken as a sign that the legal system has come to a point of discontinuity, a point at which something . . . distinctly more radical than ordinary legal evolution is called for."<sup>185</sup> If members of Congress who propose amendments, and those in the states who are called upon to ratify them cannot be assured that the judiciary will respect the "constitutional politics" of the amendment when interpreting it, then one might for-

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185. Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 436 (1983).

give them for asking whether it is worth going to the trouble of proposing Article V amendments at all. Such treatment might also signal to the judiciary that amendments need not be taken seriously.<sup>186</sup> Thus does the alleged lack of importance of the Article V amending process become a self-fulfilling prophecy.

Not only would the denigration of our amending process (so important to the Framers<sup>187</sup>) be a loss for our constitutional regime, but it might have more ominous consequences for constitutionalism in general. For if the judiciary is not bound to respect the words and intent animating a relatively young amendment, then why should the Constitution's other, older textual boundaries command observance? The written nature of the Constitution was cited by Chief Justice John Marshall as one of the primary justifications for placing in the courts the power to review congressional acts for constitutionality.<sup>188</sup> Unfortunately, even in this age when, to paraphrase Thomas Jefferson, "we are all textualists, we are all originalists," the history of the Twenty-first Amendment shows that some members of the judiciary regard parts of the Constitution as less important than others. Thus, when contemplating the fate of the Twenty-first Amendment, it hardly seems alarmist to wonder whether other parts of the Constitution are similarly vulnerable.

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186. This is what seems to have happened to the Twenty-seventh Amendment, U.S. Const. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."). See Brannon P. Denning and John R. Vile, *Necromancing the Equal Rights Amendment*, 17 Const. Comm. 593, 598-99 (2000) (describing subsequent judicial treatments of the Twenty-seventh Amendment). For an argument that constitutional amendment are not, in fact, important, see David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457 (2001). But see Brannon P. Denning and John R. Vile, *The Relevance of Constitutional Amendments: A Reply to David Strauss*, 77 Tul. L. Rev. 247 (2002).

187. See, e.g., Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 Tenn. L. Rev. 155, 162 (1997) (noting that the delegates to the Philadelphia Convention unanimously approved a resolution calling for the inclusion of a provision allowing for amendment).

188. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (writing that under our Constitution, "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and . . . that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?") A constitution, he continued, "is either a superior paramount law . . . or it is on a level with ordinary acts." *Id.*