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The Wine Is in the Mail: The Twenty-first Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages

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I. INTRODUCTION

The Internet has revolutionized commerce by providing an easy way for businesses to reach vast numbers of customers, and by allowing consumers to attain products of all sorts with the mere click of a mouse. Some wine consumers, however, feel left behind by the Internet revolution. State laws against the direct shipment of alcohol leave them frustrated because they cannot purchase wine online and have it shipped to their homes.[1] These laws against direct shipment have attracted a significant amount of attention in the news media,[2] and they have recently been challenged in a number of federal courts.[3]

To understand the direct shipment issue fully, it is necessary to understand the purpose of direct shipment laws and the role they play in states' alcohol regulation schemes. All fifty states regulate the importation and distribution of alcohol in some way.[4] Some states, like Pennsylvania, have state run monopolies whereby all

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1. For an example, a consumer can go to www.wine.com and attempt to have a bottle of wine shipped into the state of Tennessee. The website will inform the consumer that www.wine.com is unable to ship wine into the state because of state laws against the direct shipment of alcohol to consumers.

2. *See, e.g.*, Alix M. Freedman & John R. Emshwiller, *A Vineyard Breaks the Mold*, WALL ST. J., Oct. 4, 1999, at A1; Benjamin Weiser, *Challenge to Wine Sale Law Can Proceed in U.S. Court*, N.Y. TIMES, Sept. 6, 2000, at B3.

3. Lawsuits have been filed or decided in over half of the federal circuits. *See* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 854 (7th Cir. 2000) (holding Indiana's direct shipment law constitutional, reversing the district court), *cert. denied*, 121 S. Ct. 1672 (2001); Bolick v. Roberts, No. 99CV755, 2001 U.S. Dist. LEXIS 11118, at *108-09 (E.D. Va. July 27, 2001) (holding Virginia's statutory scheme regarding distilled spirits constitutional, but holding the scheme for wine and beer in violation of the Commerce Clause); Bainbridge v. Bush, 148 F. Supp. 2d 1306, 1315 (M.D. Fla. 2001) (holding that Florida's direct shipment law violates the dormant commerce clause principle of nondiscrimination, but is nonetheless constitutional because the regulation falls within the "core concerns" of the Twenty-first Amendment), *aff'd*, 253 F.3d 711 (11th Cir. 2001); Dickerson v. Bailey, 87 F. Supp. 2d 691, 710 (S.D. Tex. 2000) (declaring Texas's direct shipment law unconstitutional); Sweedenburg v. Kelly, No. 00 CV 778 (RMB) (S.D.N.Y.) (pending); Beskind v. Easley, No. 3:00-CV-258-MU (W.D.N.C.) (pending); Heald v. Engler, No. 00-CV-71438-DT (E.D. Mich.) (pending). For copies of the pleadings for these pending cases, see Wine and Spirits Wholesalers of America, Inc., Overview of Challenges to State's [sic] Rights Under the 21st Amendment, *at* http://www.wswa.org/litigation (last updated Oct. 2, 2001).

4. Anne Faircloth, *Mail-order Wine Buyers, Beware!*, FORTUNE, Feb. 15, 1998, at 46.

alcohol is sold and distributed through state owned stores.[5] Most states, however, allow private wholesalers and retailers to sell and distribute alcohol pursuant to state-issued licenses.[6] States that allow private, licensed sales and distribution have a three-tier system of distribution.[7] Under these three-tier systems, alcohol suppliers (tier one) are permitted to sell their products only to licensed wholesalers (tier two). The wholesalers collect excise taxes from the suppliers and provide the state with information about the suppliers and the alcohol that they import.[8] The wholesalers then sell the alcohol to licensed retail outlets within the state (tier three), and make a profit by charging a higher price than they paid to the suppliers.[9] The retailers then sell the alcohol to consumers.[10]

State laws prohibiting the direct shipment of alcohol protect the integrity of these state distribution systems by prohibiting alcohol suppliers from shipping alcohol directly to in-state consumers without going through the three-tier system.[11] Consequently, under most state alcohol regulation schemes, there are only two ways in which in-state or out-of-state sellers of alcoholic beverages may sell alcohol to in-state consumers: (1) by obtaining a license from the state to do so,[12] or (2) by shipping the beverages through the three-

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5. Kim Marcus, *When Winemakers Become Criminals*, WINE SPECTATOR, May 15, 1997, at 68-70, 73-74. States with state run monopolies that sell alcohol to consumers are Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, Ohio, Oregon, Pennsylvania, Vermont, Virginia, Washington, West Virginia, and Wyoming. RICHARD MCGOWAN, GOVERNMENT REGULATION OF THE ALCOHOL INDUSTRY: THE SEARCH FOR REVENUE AND THE COMMON GOOD 52 (1997); John Foust, Note, *State Power to Regulate Alcohol Under the Twenty-first Amendment: The Constitutional Implications of the Twenty-first Amendment Enforcement Act*, 41 B.C. L. REV. 659, 666 n.48 (2000).

6. *See* Susan E. Brownlee, *Economic Protection for Retail Liquor Dealers: Residency Requirements and the Twenty-first Amendment*, 1990 COLUM. BUS. L. REV. 317, 317 (stating that as of 1990 "thirty-four states are 'license states' which permit state-licensed, privately owned stores to make off-premises sales"); *see also* MCGOWAN, *supra* note 5, at 102 (describing state practices); Foust, *supra* note 5, at 666 n.49 (same).

7. *See infra* notes 245-50 and accompanying text (explaining the Supreme Court's treatment of the three–tier system used by states).

8. Wine and Spirits Wholesalers of America, Inc., *What Is Wholesaling, at* http//:www.wswa.org/whole/whatwhol.htm (Nov. 4, 2000).

9. Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-first Amendment*, 85 VA. L. REV. 353, 361 (1999). Shanker argues that wholesalers can charge monopoly prices because they are the only source from which alcohol may be purchased. *Id.*

10. *Id.* at 355.

11. *See, e.g.*, IND. CODE § 7.1-5-11-1.5 (2000) ("It is unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network.").

12. These licenses could take the form of wholesaler or retailer licenses, permitting the seller himself to serve as a seller or retailer, or the form of a small winery permit or some other

tier system. Many states restrict licenses to in-state residents,[13] leaving out-of-state suppliers with the only option of sending their products through the three-tier system.

There are three basic types of direct shipment laws.[14] Twenty-nine states have "express prohibition" statutes that entirely prohibit direct shipment to consumers by any supplier without a permit.[15] Nine states and the District of Columbia allow "limited direct shipment," which generally permits direct shipment to consumers in small quantities.[16] Twelve states have "reciprocals" with other states, which authorize direct shipment from suppliers in states that reciprocate the direct shipment privilege to its state suppliers.[17]

Groups on both sides of the direct shipment debate have very strong interests in this issue. If alcohol suppliers could circumvent the three-tier system of distribution, they could sell directly to customers without having to pay excise taxes or have their products subjected to wholesaler and retailer price markups.[18] On the other

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license that would allow the seller to sell directly to an in-state customer. Some states have small farm winery permits whereby certain in-state wineries may ship wine directly to consumers. *See, e.g.*, IND. CODE § 7.1-3-12-5(a)(5) (2000) (providing exemption for direct shipping by in-state winery). These exemptions undoubtedly give in-state wineries a discriminatory advantage over out-of-state wineries because they allow in-state wineries to avoid the wholesaler and retailer price mark-ups.

13. The states that impose residency restrictions on the grant of retailer licenses are Alaska, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Nebraska, North Dakota, Oklahoma, Rhode Island, South Carolina, Texas, and Wisconsin. *See* Brownlee, *supra* note 6, at 317 n.3.

14. *See* Duncan Baird Douglass, *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, 1648-49 (2000) (providing a comprehensive review of the types of direct shipment statutes).

15. These states are Alabama, Arizona, Arkansas, Florida, Georgia, Hawaii, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and Wyoming. *See id.* at 1649 n.136 (providing all statutory cites); *see also* Wine Institute, Direct Shipment Laws by State for Wineries, *at* http://www.wineinstitute.org/shipwine/analysis/state_analysis.html (last modified Aug. 31, 2001).

16. These states are Alaska, Connecticut, Delaware, District of Columbia, Louisiana, Nebraska, Nevada, New Hampshire, North Dakota, and Rhode Island. *See* Douglass, *supra* note 14, at 1648 n.134.

17. These states are California, Colorado, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin. *See id.* at 1648 n.135. These statutes allow direct shipments only from states that reciprocate the privilege of allowing direct shipment into their state.

18. Recent estimates suggest that the direct shipment business is now close to a $1 billion dollar a year industry. W. John Moore, *Sour Grapes on Capitol Hill*, NAT'L J. Nov. 29, 1997,

hand, wholesalers and retailers have an equally strong interest in preventing the direct shipment of alcohol. Laws forbidding the direct shipment of alcohol ensure that licensed wholesalers and retailers will not face competition from other distributors.[19] Finally, states have a significant interest in forbidding the direct shipment of alcohol.[20] The three-tier system facilitates tax collection[21] by ensuring that every drop of alcohol sold to state residents is taxed.[22] If suppliers can circumvent the three-tier system, and thereby state tax schemes, then states will obviously lose revenue.[23]

Recent cases challenging state laws against direct shipment require courts to consider the relationship between the dormant commerce clause, which generally prohibits states from favoring in-state industries over out-of-state industries,[24] and the Twenty-first Amendment, which repealed national prohibition, thereby returning a substantial amount of control over alcohol regulation to the states.[25] Challengers claim that laws prohibiting the direct shipment of alcohol violate the dormant commerce clause principle of nondiscrimination because they prevent out-of-state alcohol suppliers from competing with in-state alcohol suppliers and distributors.[26] In defense of direct shipment laws, states and wholesalers argue that the Twenty-first Amendment gives states broad regulatory power over alcohol, and permits states to discriminate against out-of-state interests in certain situations. Thus far, three district courts have ruled on direct shipment laws, two of which have held them to be unconstitutional.[27] In the only federal appellate decision

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2424, 2424; *see also* Shanker, *supra* note 9, at 354 n.5 (citing estimates that the direct shipment industry is between $300 million and $1 billion in size).

19. Shanker, *supra* note 9, at 361-62.

20. MCGOWAN, *supra* note 5, at 114.

21. "In 1994, federal, state, and local governments received over $18.6 billion in revenues from alcohol beverage taxes and fees." Florida alone collects nearly $1 billion in taxes annually from the sale of alcoholic beverages. Bainbridge v. Bush, 148 F. Supp. 2d 1306, 1309 n.3 (M.D. Fla. 2001).

22. Shanker, *supra* note 9, at 356.

23. In 1997, New York State Attorney General, Dennis Vacco estimated that New York was losing up to $100 million dollars annually in sales and excise taxes because of direct shipment to consumers. *New York Declares War on Online 'Bootleggers'*, MEDIA DAILY, Dec. 15, 1997, *available at* 1997 WL 14506771. "Some states estimate excise tax losses as high as $600 million." Moore, *supra* note 18, at 2424.

24. *See infra* notes 29-49 and accompanying text (offering a more complete discussion of the dormant commerce clause).

25. *See infra* Part II.B (discussing the history that led up to the Twenty-first Amendment).

26. *See infra* Part IV (discussing the legal issues in the direct shipment context).

27. *See* Bolick v. Roberts, No. 99CV755, 2001 U.S. Dist. LEXIS 11118, at *108-09 (E.D. Va. July 27, 2001) (holding Virginia's statutory scheme regarding distilled spirits constitutional but the scheme for wine and beer in violation of the Commerce Clause); Bainbridge v. Bush, 148 F.

on the direct shipment issue to date, the Seventh Circuit reversed the district court and held that while the Twenty-first Amendment does not give states the power to discriminate against out-of-state industries, Indiana's direct shipment law did not have a discriminatory effect.[28]

Before fully analyzing the current direct shipment issue, it will be helpful to understand the legal framework in which the issue has developed. Thus, Part II of this Note briefly explains the principles of the dormant commerce clause and provides an in-depth review of the history of state alcohol regulation. Part II also reviews the Supreme Court's early interpretation of the Twenty-first Amendment. In Part III, this Note examines the Supreme Court's current interpretation of the Twenty-first Amendment, and develops a framework that attempts to clarify the Court's often confusing Twenty-first Amendment jurisprudence. Part IV analyzes how lower courts have addressed the direct shipment issue, and hypothesizes how the Supreme Court might decide direct shipment cases under its current framework. Part V provides a critique of the Court's existing framework of analysis and advocates adopting a method of analysis similar to Judge Easterbrook's Seventh Circuit opinion. Finally, in Part VI, this Note applies the suggested method of analysis to the direct shipment issue, and addresses the residency restrictions question that was not presented to Judge Easterbrook. In sum, this Note argues that direct shipment laws by themselves are constitutional, but that when states pass laws against direct shipment in conjunction with residency requirements for licenses, state regulatory schemes become unconstitutional.

Supp. 2d 1306, 1315 (M.D. Fla. 2001) (holding that Florida's direct shipment law violates the dormant commerce clause principle of nondiscrimination, but is nonetheless constitutional because the regulation falls within the "core concerns" of the Twenty-first Amendment); Bridenbaugh v. O'Bannon, 78 F. Supp. 2d 828 (N.D. Ind. 1999) (holding Indiana direct shipment law unconstitutional), *rev'd sub nom.* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1672 (2001); *see also* Dickerson v. Bailey, 87 F. Supp. 2d 691, 704 (S.D. Tex. 2000) (ruling originally that the Texas direct shipment law was unconstitutional, but denying plaintiff's motion for entry of final judgment and ordering briefs to be submitted in light of the Seventh Circuit's decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000)). *See infra* Part IV.B for a more complete discussion of these cases.

28. Bridenbaugh, 227 F.3d at 853 (7th Cir. 2000), *cert. denied*, 121 S.Ct. 1672 (2001).

II. THE DORMANT COMMERCE CLAUSE STATE ALCOHOL REGULATION

A. Dormant Commerce Clause Background

Article I, Section 8 of the Constitution reads: Congress shall have the power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."[29] The Supreme Court has interpreted this clause as possessing a dual nature.[30] First, the clause grants Congress an affirmative power to regulate commerce among the states.[31] This facet is commonly known as the affirmative commerce clause.[32] Second, and less clear from the text, the clause prohibits individual states from regulating interstate commerce.[33] This aspect of the clause acts as a restriction on states even in the absence of an affirmative exercise of the commerce power by Congress; thus, this element is called the dormant commerce clause.[34]

There are essentially two ways in which a state can run afoul of the dormant commerce clause: (1) by giving economic advantage to in-state industry at the expense of out-of-state industry;[35] or (2) by passing a statute that, while not discriminatory, places significant burdens on interstate commerce.[36] Courts review statutes that facially discriminate against an out-of-state industry

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29. U.S. CONST. art. I, § 8, cl. 3.

30. *See, e.g.*, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 279 n.5 (1984) (Stevens, J., dissenting) ("The Commerce Clause operates both as a grant of power to the Congress and a limitation on the power of the States.").

31. *Id.*

32. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 574 (1998) (using the term "affirmative Commerce powers" in contrast with the dormant commerce clause).

33. *See* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533-34 (1949) (asserting that the pre-constitutional history lends support to the idea that the Framers intended the Commerce Clause to include negative components limiting state power).

34. *See generally, e.g., Camps Newfound/Owatonna*, 520 U.S. at 564 (using the term "dormant commerce clause" throughout). Three justifications are traditionally asserted for the necessity of a dormant commerce clause. First, a common, uniform market is preferable to a system of "economic balkanization." Second, the nation's economy is better served by a system of less restricted trade. Third, the dormant commerce clause protects out-of-state interests, which are not represented in-state legislatures. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 261-62 (13th ed. 1997); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1112-13 (1986); Foust, *supra* note 5, at 672-73.

35. A clear example of this type of discriminatory statute would be one that places a tax on an out-of-state product, but does not tax the comparable in-state products. *See, e.g., Bacchus Imports*, 468 U.S. at 268.

36. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142-43 (1970).

in favor of in-state industry, also known as protectionist statutes,[37] with a very high level of scrutiny.[38] To survive this high standard of review, the state must show that the discriminatory statute serves a legitimate local purpose that is unachievable by less restrictive means.[39] Nondiscriminatory statutes that only incidentally burden commerce are held constitutional unless, "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[40]

C & A Carbone v. Town of Clarkstown provides a good example of the Court's analysis in determining whether a statute is discriminatory or protectionist.[41] In *C & A Carbone*, the town of Clarkstown, New York, passed a "flow control ordinance," which required all nonrecyclable solid waste in the town to be processed by a local, private contractor.[42] The town argued that there was no discrimination between in-state and out-of-state industries because all nonrecyclable solid waste, whether produced in-state or out-of-state, had to be processed by the local contractor before leaving the town. Thus, the town argued that it treated all in-state and out-of-state garbage equally.[43] The Court rejected this argument, however, noting that the relevant article of commerce was not the garbage itself, but rather the service of processing it.[44] Out-of-state garbage processors were discriminated against because they were not allowed to compete for the privilege of processing the town's garbage.[45] Thus, the Court held that the law constituted protectionist discrimination against out-of-state processors.[46]

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37. These statutes are "protectionist" because they protect in-state industry from out-of-state competition. *See Bacchus Imports*, 468 U.S. at 276 (describing a Hawaii law that gave Hawaii industry a tax break, not given to out-of-state industry, as "mere economic protectionism").

38. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986). The only Supreme Court case in which a discriminatory action was not declared invalid was *Maine v. Taylor*, 477 U.S. 131 (1986).

39. *Taylor*, 477 U.S. at 138.

40. *Pike*, 397 U.S. at 142.

41. *See generally* 511 U.S. 383. The *C & A Carbone* case is particularly relevant because it helps explain a key point of the direct shipment issue. *See* discussion *infra* notes 390-92 and accompanying text.

42. 511 U.S. at 389.

43. *Id.* at 390.

44. *Id.* at 390-91.

45. *Id.*

46. *Id.* at 392.

Statutes need not be discriminatory or protectionist to violate the dormant commerce clause.[47] Nondiscriminatory statutes, however, are subject to a lower level of scrutiny than discriminatory statutes.[48] The Court will find a nondiscriminatory statute unconstitutional only if "the burden on interstate commerce clearly exceeds the local benefits."[49]

B. Pre-Prohibition Alcohol Regulation

States have long struggled to gain control over alcohol sales and distribution, often finding that the dormant commerce clause restricts such control. In 1847, Massachusetts, Rhode Island, and New Hampshire were the first states whose attempts to regulate alcohol came under dormant commerce clause attack.[50] In an effort to reduce alcohol consumption within their borders, these three states passed laws requiring a license to sell alcohol.[51] In the *License Cases*, alcohol sellers attacked these laws, arguing that they violated the dormant commerce clause because they placed a burden on the movement of interstate commerce.[52] While the Court unanimously rejected this Commerce Clause argument, the Justices could not agree on one single rationale for their holding.[53] Each of the opinions, though, manifested a view in favor of broad state au-

47. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986). The statute in *Brown-Forman Distillers* essentially set a ceiling on the price of liquor sold in the state of New York. *Id.* at 575. The statute had an effect on interstate commerce because it regulated the price out-of-state alcohol sellers could charge for their product in New York; in other words, it placed a burden on out-of-state sellers. *Id.* The statute did not discriminate, however, because it placed the same burden on in-state alcohol sellers. *Id.* at 579.

48. *Id.*

49. *Id.*; *see also C & A Carbone*, 511 U.S. at 390.

50. Thurlow v. Massachusetts, 46 U.S. 504, 573 (1847). These cases are commonly referred to as the *License Cases*, and this Note will refer to them as such hereinafter.

51. *Id.*

52. *Id.*

53. *Id.* The Court produced six separate opinions in this case. Over forty years later, the Supreme Court accurately summarized the six opinions as follows: (1) all of the Justices agreed that the statutes were not per se invalid because they had some effect on interstate commerce; (2) all of the Justices agreed that Congress had not endeavored to regulate the area with which the state statutes dealt; (3) some of the Justices, including the Chief Justice, held that articles of commerce were subject to the exclusive regulation of Congress if Congress chose to act, which Congress had not done; and (4) the other Justices stated that the power of Congress to regulate commerce ceased once the article entered the state, that is, that state police power, in effect trumped the commerce power of Congress. Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465, 478-79 (1888).

thority over the sale of alcohol, authority that was relatively unrestricted by the dormant commerce clause.[54]

As temperance movements became stronger and more unified,[55] activists pushed for even stricter state alcohol regulation. In 1880, Kansas took the particularly bold step of amending its constitution to prohibit the manufacture and sale of liquor within the state.[56] A Kansas brewer challenged this amendment in the 1887 case of *Muglar v. Kansas*.[57] The Supreme Court found that it was within a state's police power to prohibit the production and sale of alcohol in the state.[58] The Court did not address the Commerce Clause challenge, however, because there was no evidence that the brewer in the case intended to ship liquor across state lines.[59] Following the *License Cases* and *Muglar*, states appeared to have full authority over alcohol: *Muglar* held that states could go so far as to outlaw the sale of in-state liquor, and the *License Cases* allowed states to restrict the import and sale of all out-of-state liquor. Following the Civil War, however, the Court moved away from the strong states' rights position that it had adopted in the *License*

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54. *See* 8 OWEN FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 269 (1993) ("When taken together, the six opinions in the *License Cases* were a resounding challenge to economic nationalism and an implicit endorsement of the view of federalism that emphasized local consensus."); *see also* Craig v. Boren, 429 U.S. 190, 205 (1976) ("In the *License Cases*, the Court recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause.") (citation omitted).

55. Sidney J. Spaeth, Comment, *The Twenty-first Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CALIF. L. REV. 161, 169 (1991) (noting that the National Prohibition Party began in 1869 and the Women's Christian Temperance Union began in 1874).

56. The amendment stated, "The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific, and mechanical purposes." KAN. CONST. art. XV, § 10 (repealed 1947), *quoted in* Muglar v. Kansas, 123 U.S. 623, 623 (1887). For a review of the interesting history that led to the enactment of the amendment in Kansas, see NORMAN H. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION 73-74 (1976).

57. *Muglar v. Kansas*, 123 U.S. 653, 657 (1887).

58. *Id.* at 661-63. After noting that the police power allowed states to pass laws protecting "public morals, public health, or the public safety," the Court stated that it is "within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks." *Id.* at 661-62.

59. *Id.* at 674 ("[T]here is no intimation in the record that the beer which the respective defendants manufactured was intended to be carried out of the State or to foreign countries."). The Court, however, alluded that it would have to decide the Commerce Clause issue eventually. *Id.* ("And, without expressing an opinion as to whether such facts would have constituted a good defense, we observe that it will be time enough to decide a case of that character when it shall come before us.").

Cases, and instead endorsed visions of greater economic union.[60] Consequently, state authority over alcohol once again came under attack.[61]

In the 1880s, Iowa, seeking to control alcohol importation without entirely banning it, passed a law that required anyone importing alcohol for resale to obtain a permit from the county auditor.[62] This law was challenged in *Bowman v. Chicago and Northwestern Railway Co.*[63] The permit law in *Bowman* was distinct from the permit law in the *License Cases*.[64] While the law in the *License Cases* required a license to sell imported liquor, the law in *Bowman* required a license merely to import it.[65] Thus, the law in *Bowman* unquestionably regulated interstate commerce because it regulated alcohol that was not yet within the state.[66] The state's primary purpose, however, was to protect its citizens from alcohol's perceived evils, which was considered a legitimate use of state police power.[67] This distinction forced the Court to address the question of whether the dormant commerce clause outweighed the state police power when the two conflicted.[68] The Court held that a state could not exercise its police power over alcohol in a way that violated the dormant commerce clause.[69]

The *Bowman* Court did not opine as to whether states retained the authority to regulate the sale of imported liquor after it was received in the state.[70] Just weeks after the *Bowman* decision, Iowa passed a law banning the sale of liquor, whether produced in-

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60. *See* FISS, *supra* note 54, at 266. That this was true is clearly seen in *Welton v. Missouri*, 91 U.S. 275 (1876). In that case, the Court firmly held that congressional silence in a particular area of commercial regulation should be interpreted as an affirmative congressional statement that Congress wanted that particular area of commerce to be free from regulation. *Id.* at 282.

61. *See* FISS, *supra* note 54, at 266.

62. IOWA CODE § 1553 (as amended in 1886), *cited in* Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465, 474 (1888). The law actually accomplished the permit requirement by forbidding any common carrier from delivering alcohol to anyone not possessing a permit. *Id.*; *see also* RICHARD F. HAMM, SHAPING THE 18TH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920, at 63 (1995) (discussing permit practices).

63. 125 U.S. 465, 474 (1888).

64. *Id.* at 476 ("The statute [in the *License Cases*] . . . applied to intoxicating liquor imported from another State, and the decision in that case upheld its validity in reference to the disposition by sale . . . of the intoxicating liquor after it had been brought into the State.").

65. *Id.*

66. *Id.* at 479.

67. *Id.* at 475-76.

68. *Id.* at 476; *see also* FISS, *supra* note 54, at 271 (discussing dormant commerce clause).

69. *Bowman*, 125 U.S. at 500 ("[T]he power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another state.").

70. The *Bowman* Court itself noted that it was not deciding this issue, but it seemed to allude to its ultimate conclusion that states could not prohibit sale after importation. *Id.* at 499.

state or imported.[71] John Leisy, an agent for an Illinois alcohol firm who was arrested for selling imported liquor in unbroken, original containers, challenged the Iowa law.[72] This challenge addressed the questions left unanswered both in *Bowman*—whether a state had the authority to regulate the sale of imported liquor—and in *Muglar*—whether a total ban on the sale of alcohol violated the dormant commerce clause. In *Leisy v. Hardin*, the Court established a broad rule of free trade among the states,[73] holding that alcohol remained an article of interstate commerce outside a state's regulatory reach, so long as the alcohol stayed in its original package.[74] States could not prohibit the sale of the alcohol in original packages,[75] thus preventing states from regulating the importation or the sale of out-of-state alcohol.[76]

The *Leisy* decision, in combination with *Muglar*, created a peculiar situation for two reasons. First, the *Muglar* Court seemed to give states the power to choose to be dry, but the *Leisy* Court rendered this impossible because it allowed alcohol to be imported and sold into the state.[77] Out-of-state liquor dealers did not hesitate to take advantage of this system and soon employed agents in prohibition states to receive shipments of alcohol in original packages and sell it on the spot to customers, effectively running saloons in dry states.[78] Second, the combination of *Muglar* and *Leisy* created a situation in which a state choosing to regulate the sale of alcohol was forced to discriminate against its in-state alcohol industry.[79] States could require in-state sellers to have a license to manufacture and sell alcohol within its borders, but they could not regulate

71. *See* Leisy v. Hardin, 135 U.S. 100, 124-25 (1889).

72. *See* HAMM, *supra* note 62, at 67; Spaeth, *supra* note 55, at 171-72.

73. *Leisy*, 135 U.S. at 124; *see* 9 ALEXANDER M. BICKEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 440 (1985); FISS, *supra* note 54, at 273.

74. *Leisy*, 135 U.S. at 124. "Original package" simply means that the alcohol is in an unopened container.

75. *Id.* at 124-25.

76. *Id.* ("Under our decision in *Bowman v. Chicago & Northwestern Railway Co.*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it.").

77. *See* FISS, *supra* note 54, at 272-73 ("As long as liquor could be shipped into a dry state from a sister state or foreign country, the consumption of liquor would continue.").

78. As one commentator noted, "Within a month of the [*Leisy*] ruling, 'original package houses' and 'supreme court saloons' had sprung up in every prohibition state." HAMM *supra* note 62, at 69.

79. *See* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 852 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1672 (2001).

out-of-state purveyors of alcohol without violating the dormant commerce clause.

The *Leisy* Court, perhaps recognizing the conundrum that it had created for states wishing to regulate alcohol, repeatedly noted that Congress could take action under its commerce power to allow states the right to regulate the importation of alcohol.[80] Within four months of the *Leisy* decision, Congress responded to this call to action by passing the Wilson Act.[81] The Wilson Act was not, however, the sweeping prohibition bill that the prohibition movement had hoped Congress would pass.[82] The Wilson Act was passed as a states' rights measure, not as a prohibition or temperance bill.[83] Indeed, few supporters of the prohibition movement played any role in the drafting or passage of the bill.[84] The central players in the passage of the Wilson Act were Republican congressmen working more for states' rights than for temperance in general.[85] Consequently, the Senate debate centered not around prohibition or temperance, but rather on national versus state authority.[86] Senator Wilson, the bill's author, characterized the original version of the bill as being designed not to further temperance objectives, but rather to give states the power "to do as they please in regard to the

80. The Court made statements throughout the opinion to this effect. "[I]n the absence of Congressional permission . . . the State had no power." *Leisy*, 135 U.S. at 124. "[T]he States cannot exercise that power without the assent of Congress." *Id.* at 119. Even liquor dealers saw an ominous future revealed in the opinion; one Baltimore brewer expressed the sentiments of many alcohol dealers, stating that the decision was "bad for brewing as it will lead Congress to take action that will make matters worse." HAMM, *supra* note 62, at 69.

81. Wilson Act, ch. 728, 26 Stat. 313 (1890) (current version at 27 U.S.C. § 121 (1994)). The Act provided in pertinent part:

> [L]iquor . . . transported into any State . . . shall upon arrival in such State . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, to the same extent and in the same manner as though such . . . liquors had been produced in such State . . . and shall not be exempt therefrom by reason of being introduced therein in original packages.

82. HAMM, *supra* note 62, at 77-78, 88.

83. *See id.* at 78-82.

84. *Id.* at 78 ("The radical, abolitionist mind-set kept [prohibitionists] from fully promoting the Wilson Bill; thus, the only prohibitionists who had any part in the shaping of the measure were the few prohibitionists in Congress.").

85. *Id.* at 79 ("The Republican party, not prohibitionists, was chiefly responsible for the Wilson Act. The author of the bill, James Wilson, was a regular Republican and no temperance fanatic. . . . Republicans dreaded the emergence of prohibition as a national question . . . .").

86. *Id.* at 81-82.

liquor question."[87] After the Wilson Act was passed, the Court unanimously upheld its constitutionality in *In re Rahrer*.[88]

Importantly, the Wilson Act ended the system of reverse discrimination by allowing states to regulate imported liquor "to the same extent" as liquor produced within the state.[89] As the text suggests, however, the Wilson Act did not give states plenary power over alcohol regulation; instead, it limited state power by the principle of nondiscrimination.[90] Essentially, states could only regulate out-of-state alcoholic beverage industries to the same extent, and not to a greater extent, than the in-state alcohol industry. The Court used this principle of nondiscrimination contained in the Wilson Act as the basis for its holding in *Scott v. Donald*.[91] In *Scott*, South Carolina enacted a statute that required all alcohol to be distributed through a state appointed commissioner.[92] The statute required that the commissioner purchase alcohol from South Carolina brewers,[93] thus discriminating against out-of-state brewers. The Court noted that the Wilson Act was not designed to allow states to give their liquor industries advantage over alcohol industries in other states.[94] According to the Court, the Wilson Act simply permitted states to "provide equal regulations for the inspection and sale of all domestic and imported liquors."[95]

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87. *Id.* at 80 (quoting CONG. REC., 50th Cong., 2d Sess., at 2882 (1888)). Senator Wilson also stated that the bill allowed states to "have prohibition, high license, local option, or free liquor." *Id.*

88. 140 U.S. 545, 562 (1891) ("No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.").

89. Wilson Act, ch. 728, 26 Stat. 313 (1890) (current version at 27 U.S.C. § 121 (1994)); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 852 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1672 (2001).

90. That Congress did not give states the power to discriminate is clear from the text of the Act, which only gave the power to regulate imports "to the same extent" as in-state alcohol. *See supra* note 81.

91. 165 U.S. 58 (1897).

92. *Id.* at 66 n.1 (citing section three of the lengthy South Carolina liquor regulation statute).

93. *Id.* (citing section fifteen of the statute which provides that the "state commissioner shall purchase his supplies from the brewers and distillers in this State when their product reaches the standard required by this act"). The statute provided that if the South Carolina alcohol was more expensive than out-of-state alcohol, then the commission could purchase from out-of-state. *Id.*

94. *Id.* at 100 ("[The Wilson Act] was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden.").

95. *Id.*

The Wilson Act undoubtedly overturned the *Leisy* decision and allowed states to prohibit the sale of imported liquor, but some questioned whether the Wilson Act also overturned *Bowman* and allowed states to prohibit even the importation of liquor. This question was crucial for states because if *Bowman* was left intact, then states could only regulate the sale of imported liquor, but the dormant commerce clause would still prevent them from regulating importation itself.

Following the passage of the Wilson Act, Iowa reenacted the law that the Court had struck down in *Bowman*, which provided that a common carrier could not deliver alcohol to an unlicensed person.[96] Thus, when the law was challenged in *Rhodes v. Iowa*, the Court was squarely confronted with the question of what impact the Wilson Act had upon the *Bowman* decision.[97] The Court noted that the Wilson Act gave states the right to regulate liquor "upon arrival" into the state,[98] and further held that liquor did not "arrive" in a state until it was received by the consignee.[99] Thus, states did not have authority under the Wilson Act to prevent alcohol from being imported into the state.[100] In other words, the Wilson Act left *Bowman* intact.[101]

Following the *Rhodes* decision, state efforts to regulate or prohibit alcohol importation were again frustrated.[102] The *Rhodes* Court's reading of the Wilson Act allowed out-of-state alcohol sellers to circumvent state regulatory schemes by selling liquor via mail order directly to consumers.[103] By shipping directly to consumer's homes, sellers avoided the only thing that the Wilson Act prevented—the in-state sale; and following *Rhodes*, states had no power to regulate importation alone.[104] This created an enormous problem for dry states.[105] An obvious solution to the problem would

96. *See* Rhodes v. Iowa, 170 U.S. 412, 418 (1898); HAMM, *supra* note 62, at 176.

97. *Rhodes*, 170 U.S. at 419-20.

98. *Id.* at 421.

99. *Id.* at 426.

100. *Id.*; *see also* BICKEL, *supra* note 73, at 440 (discussing the Wilson Act); FISS, *supra* note 54, at 279 (same).

101. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 852 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1672 (2001).

102. BICKEL, *supra* note 73, at 440; FISS, *supra* note 54, at 280 ("Retail outlets were outlawed, only to be replaced by mail order companies.").

103. BICKEL, *supra* note 73, at 440; FISS, *supra* note 54, at 280.

104. BICKEL, *supra* note 73, at 440; FISS, *supra* note 54, at 280.

105. As one commentator noted, "The COD liquor shipments were ubiquitous; if the estimates can be believed, a startling quantity of alcohol reached residents in prohibition territory. In Kansas, a state with good records, it was estimated that 4.5 million gallons of liquor entered

have been simply to declare the personal consumption of alcohol to be illegal.[106] For various reasons, though, most prohibitionists at the time did not desire to take that step.[107] Instead, states once again appealed to Congress for help, seeking the power to regulate alcohol when it crossed the state border—before shipment to the consignee.[108]

In 1913, Congress answered the call and passed the Webb-Kenyon Act ("Webb-Kenyon"),[109] which closed the mail order loophole that *Rhodes* had created.[110] Webb-Kenyon appeared, on its face, to take a different approach than the Wilson Act.[111] For one thing, Webb-Kenyon did not contain the same nondiscrimination language that the Wilson Act did.[112] When Congress enacted Webb-Kenyon, however, it did not repeal the Wilson Act; therefore, it is

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the state in 1914." HAMM, *supra* note 62, at 180. Members of Congress recognized the problem as well:

> Every State in which the traffic in liquors has been prohibited by law is deluged with whisky sent in by people from other States under the shelter of the interstate-commerce law. There are daily trainloads of liquors in bottles, jugs, and other packages sent into the State consigned to persons, real and fictitious, and every railway station and every express company office in the State are converted into the most extensive and active whisky shops, from which whisky is openly distributed in great quantities. Liquor dealers in other States secure the names of all persons in a community, and through the mails flood them with advertisements of whiskey, with the most liberal and attractive propositions for the sale and shipment of the same. Freed from the expense of the middleman, the distiller or dealer in other States is enabled to sell to the individual in the prohibition State at a less price than the purchaser formerly paid to the domestic whiskey dealer. It is evident that under such circumstances the prohibition law of a State is practically nullified, and intoxication liquors are imposed upon its people against the will of the majority.

49 CONG. REC. 761 (1912) (statement of Sen. Kenyon, quoting Sen. Bacon from Georgia), *quoted in* Spaeth, *supra* note 55, at 173 n.78.

106. HAMM, *supra* note 62, at 182 ("[I]f there were no legitimate reason to possess alcohol, there could be no legal reason to import liquors—the consignees would always be liable to state law.").

107. One explanation offered is that what troubled prohibitionists was not so much that some people obtained liquor for personal consumption, but rather that "many lawless fellows [got] it to sell." *Id.* Another possibility is that the political realities of the time did not make a ban a personal consumption feasible. *Id.* Moreover, it is possible that such a law was unconstitutional, or at least thought to be. *See* FISS, *supra* note 54, at 284.

108. Spaeth, *supra* note 55, at 173.

109. Webb-Kenyon Act, 37 Stat. 699 (1913) (current version at 27 U.S.C. § 122 (1994)). The Act provides in pertinent part: "The shipment . . . of intoxicating liquor . . . into any State . . . in violation of the law of such State . . . is hereby prohibited." *Id.*

110. *See* BICKEL, *supra* note 73, at 441.

111. *See* Noel T. Dowling & F. Morse Hubbard, *Divesting an Article of its Interstate Character: An Examination of the Doctrine Underlying the Webb-Kenyon Act*, 5 MINN. L. REV. 253, 264 (1921).

112. The Wilson Act provided that states could regulate out of state alcohol "to the same extent an in the same manner as though such . . . liquors had been produced in such State." Wilson Act, ch. 728, 26 Stat. 313 (1890) (current version at 27 U.S.C. § 121 (2000)).

reasonable to assume that Congress still desired that the nondiscrimination principle limit state liquor regulation. Indeed, there is good evidence that Congress sought in Webb-Kenyon simply to confer upon the states the same power they had tried to give states under the Wilson Act.[113]

The Supreme Court upheld the constitutionality of Webb-Kenyon in *Clark Distilling Co. v. Western Maryland Railway Co.*[114] In this case, the Court held that the purpose of Webb-Kenyon was to prohibit brewers and alcohol distributors from using interstate commerce immunity as a way of circumventing state law.[115] The Court went on to enunciate how it perceived that Webb-Kenyon accomplished its purpose. The Court reiterated what Congress had made clear: "[Webb-Kenyon] did not simply forbid the introduction of liquor into a State for a prohibited use, but took the protection of interstate commerce away"[116] by divesting alcohol of its interstate character entirely.[117] The only remaining question for the Court was whether Congress had the power to divest an article of its interstate nature.[118] This question was potentially very difficult for the Court: If Congress could divest liquor of its interstate character, then could it divest other articles of commerce of their interstate character as well?[119] The Court avoided answering this question, merely stating that liquor was of "exceptional nature," and therefore, required "the exceptional power exerted."[120]

States rightly viewed Webb-Kenyon and *Clark Distilling Co.* as enormous victories.[121] States had finally regained the power that *Muglar* and the *License Cases* had previously extended to them—

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113. Regarding the Wilson Act's purpose, Senator Kenyon stated, "[States] could have prohibition, high license, local option, or free liquor, as they please. It was the intention that each State should be free to determine its own policy in regard to liquor traffic." 49 CONG. REC. 828 (1912).

114. 242 U.S. 311, 325 (1917).

115. *Id.* at 324 ("[I]ts purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus, in effect afford a means by subterfuge and indirection to set such laws at naught.").

116. *Id.* at 325 ("The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character . . . there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution.").

117. The title of the Webb-Kenyon Act was "An Act divesting intoxicating liquors of their interstate character in certain cases." *See* Dowling & Hubbard, *supra* note 111, at 261.

118. *Id.*

119. *Id.* at 332.

120. *Id.*

121. *See* FISS, *supra* note 54, at 291.

the power to regulate effectively all alcohol within their borders, both imported and domestic. For the active prohibitionists, however, state control over alcohol was no longer enough. Thus, they started a movement for national prohibition.[122] Less than a year after the Court's decision in *Clark Distilling Co.*, Congress passed the Eighteenth Amendment, which uniformly prohibited the manufacture and sale of liquor throughout the country.[123] Prohibition lasted fourteen years until the Twenty-first Amendment was passed, which returned the power to regulate alcohol to the states.[124]

C. Passage of the Twenty-first Amendment and Early Interpretation

The experience of national prohibition had engrained in the nation a deep-seeded disdain for federal involvement in the regulation of alcohol.[125] As a result, the Twenty-first Amendment's text and history reveal a strong proclivity toward state regulation.[126] As initially proposed, the Twenty-first Amendment contained four sections: Section 1 repealed the Eighteenth Amendment, Sections 2 and 3 dealt with how alcohol would be regulated in the future, and Section 4 called for state ratification.[127] Sections 2 and 3 of the original proposed amendment engendered much debate in Congress. Section 3 provided that Congress would have "concurrent

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122. *See id.*; HAMM, *supra* note 62, at 227.

123. The Eighteenth Amendment provided, "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII.

124. U.S. CONST. amend. XXI.

125. *See* Spaeth, *supra* note 55, at 176-78 (discussing some of the factors that led America to the conclusion that "it was [a] dismal experience with prohibition under federal control that contributed to sentiment both in Congress and in the states to insist on state control of liquor upon repeal").

126. *See id.*

127. *See id.* at 180-81. The text of the original bill provides as follows:

> Sec. One: The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Sec. Two: 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.
>
> Sec. Three: Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.
>
> Sec. Four: This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Id. at 180 n.128.

power" with the states to "regulate or prohibit" liquor. Congress, however, dropped this section from the final bill, arguably because it did not think that the federal government should retain a role in alcohol regulation.[128]

The proposed second section remained in the bill and became Section 2 of the Twenty-first Amendment. Section 2 follows the text of Webb-Kenyon very closely, and the members of Congress arguably perceived this section as a means of incorporating the Webb-Kenyon approach into the Constitution.[129] Many assert, however, that the legislative history of Section 2 does not reveal its precise purpose.[130] Indeed, debate on the Twenty-first Amendment was surprisingly sparse in Congress and in state ratifying conventions.[131] Thus, the text of the Amendment itself serves as the best available guide to interpret the meaning of Section 2. Even the text, however, is susceptible to differing interpretations.[132] Recently, in

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128. *See id.* at 180 n.130 (citing remarks of Sen. Wagner on Section 3 at 76 CONG. REC. 4145 (1933) ("If the Federal Government failed to discharge that responsibility under the all-embracing prohibition of the eighteenth amendment, what folly is it which prompts anyone to believe that it can discharge it under the milder language of the pending resolution.").

129. *See* 76 CONG REC. 4170 (1933) (statement of Sen. Borah); *see also* Craig v. Boren, 429 U.S. 190, 205-06 (1976) (stating that the framers of the Twenty-first Amendment had the "clear intention of constitutionalizing the Commerce Clause framework" established under the Wilson and Webb-Kenyon Acts).

130. A commonly cited argument for the lack of clarity in the legislative history of the Twenty-first Amendment is that its Senate sponsor, Senator Blaine, espoused two different meanings of Section 2. Indeed, at one point Senator Blaine stated that the purpose of Section 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquor." 76 CONG. REC. 4143 (1933). At another point he stated that the purpose of the Amendment was simply "to assure the so-called dry States against the importation of intoxicating liquor." *Id.* at 4141; *see also* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 274-75 (1984) ("[W]e have recognized the obscurity of the legislative history of § 2. No clear consensus concerning the meaning of the provision is apparent." (citation omitted)); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 107 n.10 (1980) (noting a "wise reluctance to wade into the complex currents beneath the congressional proposal of the Amendment and its ratification in the state conventions," then citing apparently conflicting statements made by the Senate sponsor of the Amendment resolution); Douglass, *supra* note 14, at 1631 (evaluating the legislative history and concluding that the history of the Twenty-first Amendment ratification process could yield one of three interpretations).

131. *See* Douglass, *supra* note 14, at 1631-32 (suggesting that debate may have been sparse because most members of Congress were primarily interested only in repealing the Eighteenth Amendment). *See generally* RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (Everett Somerville Brown ed. 1938).

132. *See* Douglass, *supra* note 14, at 1629-30 (suggesting that the text can be read to give states a complete exemption from strictures of the Commerce Clause when regulating liquor or the text can be read narrowly as granting states only the power to regulate alcohol in ways that do not violate the Commerce Clause). *But see* State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 63-64 (1936) (refusing to look beyond the text of the Twenty-first Amendment because "the language of the Amendment is clear" and "the Amendment has, in respect to liquor, freed the States from all restrictions upon the police power to be found in other provisions of the Constitution").

Craig v. Boren, the Supreme Court stated that the text of Section 2 reveals at least one clear intention of the framers: "The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes."[133] Thus, properly interpreting the Wilson and Webb-Kenyon Acts is absolutely essential to applying the Twenty-first Amendment to any case.[134]

The Supreme Court's interpretation regarding the extent the power of Section 2 upon the states has been quite complex and, often times, varied. Essentially, there are two broad questions that the Court has addressed. First,[135] the Court has assessed what impact, if any, Section 2 has on Congress's affirmative commerce clause power.[136] Furthermore, in the event that Congress does retain the power to regulate alcohol, the Court has determined that the Supremacy Clause still applies and requires that federal law preempt the contradictory state regulation.[137] Second,[138] the Court has assessed what impact Section 2 has upon the dormant commerce clause.[139] That is, the Court has analyzed whether the dormant commerce clause was, in effect, repealed by the state alcohol regulation, which leaves states to regulate alcohol in whatever way they please.

Soon after the passage of the Twenty-first Amendment, in cases challenging state liquor regulations as violations of the dormant commerce clause, the Court repeatedly held that Section 2 entirely removed liquor from the ambit of the dormant commerce clause.[140] Thus, out-of-state liquor industries did not receive the

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133. 429 U.S. at 205-06.

134. *See supra* notes 80-113 and accompanying text (describing the Wilson and Webb-Kenyon Acts).

135. Hereinafter, this question will be referred to as the "affirmative commerce clause" question.

136. Stated in another way, one might ask if Congress retained any power to regulate commerce in alcohol or if Section 2 completely turned alcohol regulation over to the states. Importantly, this question also involves the Supremacy Clause, U.S. CONST. art. VI, cl. 2, which in very general terms provides that federal law preempts state law when the two conflict. If Congress no longer has power over alcohol regulation because of the Twenty-first Amendment, then the principle of Supremacy Clause would not apply in the alcohol regulation context.

137. U.S. CONST. art. VI, cl. 2.

138. Hereinafter, this question will be referred to as the "dormant commerce clause" question.

139. The dormant commerce clause question asks what power states have under Section 2 if Congress has not exercised its affirmative commerce clause power.

140. *See, e.g.*, Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939) ("The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without,

protections from discrimination that the dormant commerce clause afforded to other products. In *State Board of Equalization v. Young's Market Co.*, the Court upheld a California statute that required those wishing to import beer from another state to pay a $500 license fee for the privilege of doing so.[141] Similarly, in *Joseph S. Finch & Co. v. McKittrick*, the Court again held that the dormant commerce clause did not apply to alcohol regulation.[142] In upholding the state regulation in *McKittrick*, the Court assumed that the challenged Missouri alcohol statute was passed not for social welfare purposes, but solely as an "economic weapon" against liquor from other states.[143] These decisions clearly revealed the Court's position that liquor had been entirely divested of its interstate character with respect to the dormant commerce clause—even if it meant allowing states to regulate alcohol in ways that merely protected in-state alcohol industries.

The Court's early view of the Twenty-first Amendment's effect on Congress's affirmative commerce power was that the Amendment did *not* remove Congress's power to regulate alcohol. In *William Jameson & Co. v. Morgenthau*, the Court rejected this very argument in a single sentence, stating that "[w]e see no substance in this contention."[144] Seven years after *Morgenthau*, in the dicta of a case unrelated to alcohol, the Court again noted that it did not interpret the Twenty-first Amendment as relieving Congress of its authority over interstate commerce in alcohol.[145]

It was not until *Hostetter v. Idlewild Bon Voyage Liquor Corp.* that the Court first considered whether a state regulation of alcohol that conflicted with a federal interstate commerce regulation violated the Supremacy Clause.[146] Idlewild was a business in New York City's Kennedy Airport that sold alcohol to travelers

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unfettered by the Commerce Clause."); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 397 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401, 403 (1938) ("[U]nder the Amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic. . . ."); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 62 (1936).

141. 299 U.S. at 60. In rejecting plaintiff's argument that if a state allows in-state liquor to be sold, it "must let imported liquors compete with the domestic on equal terms," the Court stated that such a view of the Twenty-first Amendment "would involve not a construction of the Amendment, but a rewriting of it." *Id.* at 62, 64.

142. 305 U.S. at 398.

143. *Id.* at 397-98.

144. 307 U.S. 171, 173 (1939).

145. Nippert v. City of Richmond, 327 U.S. 416, 425 n.15 (1946) ("Thus, even the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power.").

146. 377 U.S. 324, 324 (1964).

leaving the United States.[147] Customers who purchased alcohol from Idlewild received only a receipt, and the United States Customs Office supervised placing the actual alcohol on the departing plane.[148] Upon arrival in the foreign country, the consumer then received the alcohol.[149] A New York law required that anyone selling alcohol within the state must obtain a license.[150] Idlewild did not have a license and could not obtain one;[151] thus, it brought a Commerce Clause challenge to the New York licensing law.[152]

In the majority opinion, the Court began by recognizing that it had held in its early cases[153] that the Twenty-first Amendment gave states broad power to regulate the importation of liquor in ways that would have otherwise violated the Commerce Clause.[154] After recounting the facts and holdings of the early cases,[155] the Court noted that the principle espoused in those earlier cases "has remained unquestioned."[156] The Court noted that those cases dealt with the dormant commerce clause and in no way held that the Twenty-first Amendment also served to "repeal" Congress's affirmative commerce clause powers.[157]

In finding the licensing law in *Idlewild* was unconstitutional, the Court focused on two things. First, the Court recognized that New York had the power under the Twenty-first Amendment to regulate the importation of alcohol into the state; however, the licensing law as applied to Idlewild's business did not come within this power.[158] Idlewild's customers did not receive the purchased

147. *Id.* at 325.

148. *Id.*

149. *Id.*

150. *Id.* at 326 n.2.

151. The New York law stated that no premises could be licensed to sell alcohol unless the entrance opened onto a "public thoroughfare." *Id.* Since Idlewild was located within an airport, it did not comply with theis restriction, and thus, could not obtain a license. *Id.* at 325.

152. *Id.* at 326-27.

153. *See* Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 397 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401, 403 (1938); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 62 (1936).

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

155. *Id.* at 330-31.

156. *Id.* at 330.

157. *Id.* at 331-32. The Court stated that to conclude that the Twenty-first Amendment left Congress "with no regulatory power over interstate or foreign commerce in intoxicating liquor . . . would be patently bizarre and is demonstrably incorrect." *Id.* at 332.

158. *Id.* at 332-33.

alcohol until arriving in a foreign country.[159] Thus, the regulation, as applied to Idlewild, did not prevent the importation of alcohol into the state; rather, it regulated alcohol being imported into another country—something that, according to the Court, the Twenty-first Amendment did not empower New York to regulate.[160] Second, the Court asserted that the creation of Customs Office rules and oversight was an affirmative exercise of Congress's commerce power,[161] and that New York's law violated the Supremacy Clause[162] because it conflicted with this affirmative exercise of federal power.[163]

III. BALANCING INTERESTS: CURRENT ANALYSIS OF THE TWENTY-FIRST AMENDMENT

A. Developing the Balancing Test: Midcal Aluminum *and* Capital Cities Cable

In *California Retail Liquor Dealers v. Midcal Aluminum*, the Court retracted, or at least clarified, its strong inference in *Idlewild* that a federal exercise of the commerce power necessarily preempts a state's exercise of its Twenty-first Amendment power.[164] In *Midcal Aluminum*, the Court held that California's alcohol price setting regulation conflicted with the Sherman Antitrust Act.[165] The Court considered whether the Twenty-first Amendment permitted California to enforce its alcohol regulation, despite its apparent conflict with federal law.[166] In seeking to "harmonize the state and federal powers," the Court held that the state had "complete control" over how and whether it would allow liquor to be imported into its borders.[167] The Court noted, however, that state alcohol laws that were not limited to regulating importation, like the one in *Midcal Alu-*

159. *Id.*

160. *Id.* at 333.

161. *See id.* at 334.

162. U.S. CONST. art. VI, cl. 2.

163. *See Idlewild*, 377 U.S. at 334.

164. *See* 445 U.S. 97, 103 (1980) (discussing *Idlewild*, 377 U.S. at 334 (stating that New York could not pass a law that prevented actions that were allowed by a federal law)).

165. 445 U.S. at 103. The Sherman Act was passed by Congress under its Commerce Clause power and, very generally, bans restraints on free trade. United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 300 (1945) (Frankfurter, J., concurring).

166. *Id.* at 106 ("The remaining question before us is whether § 2 [of the Twenty-first Amendment] permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.").

167. *Id.* at 109-110.

minum,[168] were subject to federal law in certain instances.[169] The Court held that the federal interest in competition, secured by the Sherman Act,[170] outweighed the state interests in this case because California's chosen method of regulation did not sufficiently accomplish the regulation's stated goals.[171] Thus, the Court created a sort of balancing test.

The Court further expounded on this balance between federal and state interests in *Capital Cities Cable v. Crisp*, a case involving a state ban on alcohol advertising that conflicted with uniform Federal Communications Commission ("FCC") regulations.[172] After finding that the federal and state laws were in conflict, the Court stated that the determination of whether a state interest outweighs an exercised federal interest hinges on "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."[173] On the federal side of the balance, the Court noted that there was substantial federal interest implicated in the FCC regulations.[174]

The Court's assessment of the state side of the balance was more complicated. In determining whether this state law should outweigh the federal law, the *Capital Cities Cable* Court used two separate assessment methods—one related to what the law did (banning liquor advertisement),[175] and the other related to what the

168. The California law regulated prices and had little to do with how liquor would be imported or distributed. *Id.* at 99.

169. *Id.* at 110 ("Although States retain substantial discretion to establish other liquor regulation [regulations not related to importation], those controls may be subject to the federal commerce power in appropriate situations.").

170. *Id.* ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.").

171. *Id.* at 111-13. The regulation in question was a price maintenance system, and the objectives of this system were to promote temperance and protect smaller retailers. *Id.* at 112. Finding that the particular regulation in question did not sufficiently serve state interests, *id.* at 112-13, the Court held that the affirmative commerce clause power outweighed the state regulation, *id.* at 114 ("The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.").

172. 467 U.S. 691, 694 (1984). While the case did not involve a federal use of the Commerce Clause, the Court likened it to Commerce Clause cases. *Id.* at 714 ("[T]he central question presented in [*Idlewild* and *Midcal Aluminum*] is essentially the same as the one before us here.").

173. *Id.*

174. *Id.* ("There can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest.").

175. *Id.* at 694.

law sought to accomplish (discouraging consumption).[176] The first method involved a determination of how closely the state law related to the core power of the Twenty-first Amendment.[177] The Court noted that the central power of the Twenty-first Amendment is the power to exercise control over how and whether alcohol will be imported into the state.[178] The Court maintained that the advertising ban did not directly relate to the central power of controlling imports;[179] thus, under this method of measurement, the state interest was low.

The second method employed for measuring the state interest closely resembled the approach taken in *Midcal Aluminum*;[180] the Court examined the state law's effectiveness at accomplishing its objective of discouraging consumption.[181] Because the ban on advertising, in the Court's view, only modestly advanced the law's stated objective of promoting temperance, the Court noted that the state interest was low by this measurement as well.[182] Without stating whether both methods of assessment had to be satisfied rather than just one, the Court held that the federal interest in having its FCC regulations enforced outweighed the state interest in the advertising ban.[183]

B. Shifting Analysis: Bacchus Imports, Ltd. v. Dias

Bacchus Imports, Ltd. v. Dias afforded the Court yet another opportunity to develop its method of balancing federal and state

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176. *Id.* at 714-15.

177. *Id.* at 715. This method seems to comport with the Court's stated balance standard of "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 . . . ." *Id.* at 714.

178. *Id.* at 715. The Court made this observation clear in two separate instances in the opinion: "the central power reserved by § 2 of the Twenty-first Amendment [as] that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system' "; and later, when the Court stated that "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." *Id.* at 715-16.

179. *Id.* at 715 ("[T]he application of Oklahoma's advertising ban to the importation of distant signals by cable television operators engages only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.' ").

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

181. *See Capital Cities Cable*, 467 U.S. at 714-15.

182. *Id.* at 715 ("[W]e may nevertheless accept Oklahoma's judgment that restrictions on liquor advertising represent at least a reasonable, albeit limited, means of furthering the goal of promoting temperance in the State. . . . [T]he selective approach Oklahoma has taken toward liquor advertising suggests limits on the substantiality of the interests it asserts here.").

183. *Id.* at 716.

interests.[184] In *Bacchus Imports*, liquor wholesalers challenged the constitutionality of a Hawaiian excise tax on alcohol.[185] The tax was placed on both in-state and out-of-state alcohol, but tax exemptions were granted to certain Hawaiian beverages.[186] The Hawaiian legislature made it clear that its purpose in enacting the exemptions was to protect its local alcohol industry.[187] The liquor wholesalers argued that the exemptions violated the dormant commerce clause because they facially discriminated against out-of-state industry.[188] In its defense, Hawaii argued that the Twenty-first Amendment gave states the power to enact this discriminatory exemption.[189] Thus, the Court once again faced the dormant commerce clause question.[190] The Court found that the discriminatory tax scheme violated the federal interest in free trade in interstate commerce—i.e., it violated the dormant commerce clause.[191] Having determined this, the Court considered whether the Twenty-first Amendment gave Hawaii the power to pass the statute despite the fact that it violated the dormant commerce clause.[192]

To determine if the statute was "saved by the Twenty-first Amendment," the Court applied the *Capital Cities Cable* balancing test.[193] On the federal side of the balance, the Court stated that the dormant commerce clause furthered important federal interests in preventing "economic Balkanization."[194] On the state side of the balance, the Court focused on the fact that the state legislature had a desire to protect and promote Hawaiian industry.[195] Because the Court found that protectionism was not a "core purpose" of the Twenty-first Amendment, it held that the state law demanded less deference.[196] Thus, the balance shifted in favor of the federal interest.[197]

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184. 468 U.S. 263 (1984).
185. *Id.* at 265.
186. *Id.*
187. *Id.* at 270-71.
188. *Id.* at 266.
189. *Id.* at 274.
190. The Court first heard this question in the *Young's Market* line of cases discussed at *supra* notes 140-63 and accompanying text.
191. *Bacchus Imports*, 468 U.S. at 273.
192. *Id.*
193. *Id.* at 274-76.
194. *Id.* at 276.
195. *Id.* at 271.
196. *Id.* at 276 ("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."). In fact, a strong argument could be made that the Court reasoned that if the

When viewed in light of previous Twenty-first Amendment jurisprudence, it is clear that the *Bacchus Imports* Court substantially shifted its analysis in two ways. First, prior to *Bacchus Imports*, the Court had always held that the dormant commerce clause did not constrain the state regulation of liquor.[198] Indeed, the Court even upheld statutes that were blatantly passed as "economic weapons" against other states.[199] The line of cases including *Morganthau, Idlewild, Midcal Aluminum*, and *Capital Cities Cable*, revealed that the Twenty-first Amendment did not wholly exclude liquor from Commerce Clause operation. Those cases, however, all dealt with situations in which the state regulation in question conflicted with an express exercise of congressional power under the affirmative commerce clause.[200] Justice Stevens argued vigorously in his dissent that these prior holdings on Congress's affirmative commerce power did not speak to the dormant commerce clause issue in *Bacchus Imports*.[201] Nonetheless, the majority implicitly

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legislature was motivated by a desire to protect local industry, then the weight accorded to that interest should be zero.

197. *Id.*

198. *See supra* notes 162-68 and accompanying text.

199. Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 397-98 (1939).

200. *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984) (stating that while there was no exercise of the commerce power, there was a federal exercise of power in passing the FCC regulations, and thus, that the state law conflicted with "express federal policies"); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102 (1980) (holding that Congress had passed the Sherman Act under its power to regulate interstate commerce); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 334 (1964) (noting that Congress had passed the Tariff Act of 1930, which the Court concluded was an "exercise of [Congress's] explicit power under the Constitution to regulate commerce with foreign nations"); William Jameson & Co. v. Morgenthau, 307 U.S. 171, 172-73 (1939) (finding that Congress had passed the Federal Alcohol Administration Act under its affirmative commerce power).

201. *Bacchus Imports*, 468 U.S. at 279 n.5 (Stevens, J., dissenting) ("Given the dual character of the [Commerce] Clause, it is not at all incongruous to assume that the power delegated to Congress by the Commerce Clause is unimpaired while holding the inherent limitation imposed by the Commerce Clause on the States is removed with respect to intoxicating liquors by the Twenty-first Amendment."). Other Justices have also argued in dissents that the Twenty-first Amendment should be read either to remove any power completely from Congress to regulate alcohol or at the very least to allow states to exercise authority without Commerce Clause restraint in the absence of an affirmative exercise of federal power. *See* Healy v. Beer Inst., Inc., 491 U.S. 324, 349 (1989) (Rehnquist, C.J., dissenting) ("Neglecting to consider [the] increased authority [over liquor given by the Twenty-first Amendment] is especially disturbing here where the perceived proscriptive force of the Commerce Clause does not flow from an affirmative legislative decision and so is at its nadir."); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 356 (1987) (O'Connor, J., dissenting) ("The history of the Amendment strongly supports [the] view that the Twenty-first Amendment was intended to return absolute control of the liquor trade to the States, and that the Federal Government could not use its Commerce Clause powers to interfere in any manner with the States' exercise of the power conferred by the Amendment."); *Idlewild*, 377 U.S. at 338 (Black, J., dissenting) ("[W]hen the Senators agreed to Section 2 they thought

overruled the earlier dormant commerce clause cases,[202] and held that the Twenty-first Amendment did not wholly exclude state alcohol regulation from the application of the dormant commerce clause.

Second, the *Bacchus Imports* decision, though decided only eleven days after *Capital Cities Cable*, shifted the focus of the *Capital Cities Cable* balancing test from one of constitutional power to one of "central purposes."[203] As noted above, the *Capital Cities Cable* Court analyzed two methods for assessing what weight should be attributed to the state interest.[204] The *Bacchus Imports* decision added yet another method for evaluating the weight of the state interest: If the legislature, in passing the bill, was motivated by a desire to promote local industry by discriminating against out-of-state competitors, then the state interest should be given little or no weight.[205]

On its face, the new method used in *Bacchus Imports* may not appear particularly extraordinary; indeed, some might argue that it is really no different from the first method used in the *Capital Cities Cable* case—it simply seeks to determine how closely the purpose of the law relates to the purpose of the Twenty-first Amendment. The fundamental difference, though, lies in the fact that in *Capital Cities Cable* the Court focused on powers while the *Bacchus Imports* method focuses on purposes or legislative motivation. In the *Capital Cities Cable* method, the Court compared whether the power that the state exercised, banning liquor advertising, matched the core power granted by the Twenty-first Amendment, that of "exercising control over whether to permit importation or sale of liquor and *how to structure the liquor distribution system*."[206] In *Bacchus Imports*, however, the Court introduced the purpose concept by analyzing whether the motivation of the state legislators matched the motivation of the framers of the

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they were returning 'absolute control' of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed.").

202. As noted, these early cases stated rather boldly that the dormant commerce clause simply did not apply to state regulations of alcohol. *See supra* notes 140-43 and accompanying text.

203. *See Bacchus Imports*, 468 U.S. at 286-87 (Stevens, J., dissenting).

204. The two methods were: (1) if the particular state law did not substantially advance the state interest, then the weight accorded to the state side of the balance would be less; and (2) if the particular method of regulation did not closely relate to the core power of regulating imported liquor, then the state side of the balance would be accorded less weight. *See supra* notes 175-83 and accompanying text.

205. *Bacchus Imports*, 468 U.S. at 276.

206. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 715 (1984).

Twenty-first Amendment.[207] In other words, the purpose concept shifted the Court's focus from what the legislature actually did to what *motivated* the legislature to do what it did.[208] Justice Stevens, dissenting in *Bacchus Imports*, expressed considerable disagreement with the majority's entire consideration of "purposes," questioning the wisdom of basing the constitutionality of a statute upon "a judicial evaluation of the motivation of legislators."[209]

C. An Overview of the Supreme Court's Framework of Analysis

The Court's decisions in *Midcal Aluminum*, *Capital Cities Cable*, and *Bacchus Imports* do not provide a great deal of clarity on how the Court will analyze state alcohol regulations that conflict with federal interests. Nonetheless, the following framework attempts to summarize and capture the various elements of the Court's analyses in Twenty-first Amendment cases. While the Court never explicitly sets out the following framework, it accurately captures the Court's analysis of Twenty-first Amendment cases. Therefore, it is a useful tool for analyzing what considerations drive the Court's analysis and perhaps whether those considerations are sound.

When a state alcohol regulation statute is challenged as an unconstitutional violation of the Commerce Clause, the Court applies a two-part test. First, the Court considers if the state statute conflicts with a federal interest.[210] A state statute is considered to be in conflict if it interferes with an affirmative exercise of the commerce power[211] or, after *Bacchus Imports*, if it runs afoul of the dormant commerce clause.[212] If there is no conflict, then the statute

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207. *Bacchus Imports*, 468 U.S. at 275-76. See *infra* Part V.A-B for a critique of the introduction of the purpose concept.

208. *Bacchus Imports*, 468 U.S. at 271 ("[W]e need not guess at the legislature's motivation.").

209. *Id.* at 287 n.15. Justice Stevens went on to liken this approach of assessing the motivation of legislators to the "repudiated era in which this Court struck down assertions of Congress's power to regulate commerce on the ground that the objective of Congress was not to regulate commerce, but rather to remedy some local problem." *Id. See generally* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (offering an example of the "repudiated era" to which Justice Stevens referred); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (same); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935) (same). For a further analysis of Justice Stevens's critique of the purposes approach, see *infra* notes 405-09 and accompanying text.

210. *See, e.g.*, *Bacchus Imports*, 468 U.S. at 275-76; *Capital Cities Cable*, 467 U.S. at 694; Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 103 (1980).

211. *See supra* notes 165-66 and accompanying text.

212. *See Bacchus Imports*, 468 U.S. at 268.

is constitutional.[213] If there is a conflict, however, the Court will move to part two and consider whether the Twenty-first Amendment "saves" the statute despite the conflict.[214]

The Court's analysis for the second part can be confusing. Though the Court claims simply to balance the state interest against the federal interest,[215] how it truly assesses these interests is unclear. In every case in which the Court has used the balancing test, it has concluded that the federal interest should be given great weight.[216] Therefore, since the federal interest is constant, the outcome of the balancing test always hinges on the weight accorded to the state interest.

As noted, the Court has developed three separate methods for assessing the weight of the state interest. The cases do not make clear which method will be used in which case, and the Court has never applied all three methods in any single case. In general, though, it appears that if any of the three balancing methods show that the state interest is low, then the state statute will be struck down.[217] Thus, rather than thinking about these three methods as a means of weighing a state's interest, these methods can be more effectively thought of as three elements that need to be satisfied in order for the Twenty-first Amendment to save a state statute.[218]

The three methods can be restated as three elements in the following way. The first element (the powers element) relates to the

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213. *See* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 42-43 (1966) (finding no conflict and upholding the state regulation).

214. *See id.* at 42-47 (considering whether the state regulations were saved by the Twenty-first Amendment despite their conflict with federal policy).

215. *See supra* notes 172-73 and accompanying text.

216. *See Bacchus Imports*, 468 U.S. at 276 ("It is beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization."); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984) ("There can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest."). In a later case, Chief Justice Rehnquist made an oblique argument in his dissent that the federal interest should be given less weight when only the dormant commerce clause interests are implicated, stating that this is when the federal interest in its commerce power is at its "nadir." Healy v. Beer Inst, Inc., 491 U.S. 324, 349 (1989) (Rehnquist, C.J., dissenting).

217. *See Bacchus Imports*, 468 U.S. at 275-76 (using only legislative motivation-legitimate ends method); *Capital Cities Cable*, 467 U.S. at 714-15 (using only powers method and means-ends method to strike down statute); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 112-13 (1980) (using only meas-ends method to strike down statute); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 334 (1964) (using only powers method to strike down statute).

218. Note, however, that the means-ends method is not consistently used in all cases; thus, it is unclear if this element must be satisfied. *See infra* note 263.

power the Twenty-first Amendment confers on the states.[219] Under this element, the Court should examine if the Twenty-first Amendment gives the state the power to enact the particular law in question.[220] If the law is not passed pursuant to the state's power under the Twenty-first Amendment, then the Twenty-first Amendment should not save it. This element develops out of cases like *Idlewild*, in which the Court held that states do not have the power to regulate alcohol distribution outside of their own borders.[221] This element is also seen in the first method used by the Court in *Capital Cities Cable*.[222] The Court's clearest statement of what power it perceives that the Twenty-first Amendment gives to states is in *Capital Cities Cable*, where the Court held that the core power was to "control . . . whether to permit importation or sale of liquor and how to structure the liquor distribution."[223]

The second element (the *Bacchus Imports* element) involves whether, in passing the alcohol regulation, the state legislature was motivated by a legitimate concern. This element develops from the *Bacchus Imports* case, in which the Court held that the motivation behind a state alcohol regulation cannot be economic protectionism.[224] Thus, even though the power exercised by Hawaii was within its Twenty-first Amendment power (the power to regulate alcohol importation and sale within state borders), that power was used in an impermissible way (to promote in-state industry at the expense of out-of-state industry).[225]

Finally, the Court may consider a third element (the means/ends element): whether the means chosen are likely to accomplish the end sought.[226] This element arises out of cases like *Midcal Aluminum*, where the Court held that the price maintenance scheme did not sufficiently advance the state's proclaimed goals of promoting temperance and protecting small retailers,[227]

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219. *See supra* notes 177-79.

220. *See supra* notes 177-79.

221. *See Idlewild*, 377 U.S. at 333.

222. *Capital Cities Cable*, 467 U.S. at 715.

223. *Id.* Later in the same opinion the Court rephrased the core power as the power to "[regulate] the times, places, and manner under which liquor may be imported and sold." *Id.* at 716.

224. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984).

225. *Id.*

226. It is unclear whether the Court always considers this element or whether it is usually easily satisfied, and thus so rarely analyzed. Nonetheless, there are some cases where the third element is dispositive. *See, e.g.*, 324 Liquor v. Duffy, 479 U.S. 335, 350 (1987). There are some cases where the element is not a part of the Court's analysis at all. *See, e.g.*, North Dakota v. United States, 495 U.S. 423 (1990).

227. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 112-13 (1980) (accepting the California Supreme Court's determination that there was "little correlation be-

and *Capital Cities Cable*, where the Court held that the state advertising ban only moderately advanced its temperance goals.[228] It is worth mentioning that the Court did not state, in any of these cases, how closely the means had to be tied to the ends to survive the Court's review.[229]

Recent cases have displayed the Court's use of the principles developed in this framework. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, the plaintiffs challenged a New York price affirmation statute.[230] The law required all distillers and suppliers of alcohol to affirm that they did not sell liquor to New York wholesalers for a higher price than they charged out-of-state wholesalers.[231] In *Healy v. Beer Institute, Inc.*, the Court decided a similar issue, the lone difference being that the Connecticut price affirmation statute at issue in *Healy* only required out-of-state distillers to affirm their prices.[232] In both cases, the Court noted that these types of statutes effectively regulated the price of liquor in other states.[233] In determining whether or not these statutes were constitutional, the Court did not have to go further than the first element (the powers element) of the framework. In each case, the Court held that the Twenty-first Amendment grants states the power to control the sale and distribution of alcohol within its borders, but it does not grant states the authority to regulate liquor sales in other states.[234] Therefore, the Court held that the Twenty-

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tween resale price maintenance and temperance," and the statement later in the opinion that "[n]othing in the record in this case suggests that the wine pricing system helps sustain small retail establishments").

228. *Capital Cities Cable*, 467 U.S. 714-15.

229. Therefore, it is unclear if a statute will be struck down if the Court can imagine a more effective means (a strict scrutiny standard) or if the statute will be upheld if the Court can conceive of a way that the statute might accomplish its objective (a rational basis review). In one of its more recent cases, however, the Court made a statement that sounds closer to rational basis than strict scrutiny. *See North Dakota*, 495 U.S. at 433 (stating there is a strong presumption of validity for state liquor control policies). Some commentators have suggested that the Court's standard of review is strict scrutiny, requiring that there be no less burdensome way of accomplishing its goals. *See* Shanker, *supra* note 9, at 381. The support offered for this strict scrutiny of means-ends relationship, however, comes from a case involving the First Amendment, not the dormant commerce clause. *Id.* at 381 n.191.

230. 476 U.S. 573, 575 (1986).

231. *Id.* at 576.

232. 491 U.S. 324, 326 (1989).

233. *Healy*, 491 U.S. at 337; *Brown-Forman Distillers*, 476 U.S. at 579. The reasoning as to why the statutes have this effect can be summarized as follows: if a distributor of alcohol wants to sell alcohol in New York he will have to keep the prices up in other states to ensure that he is not charging more to New York wholesalers than he is to wholesalers in other states. *Brown-Forman Distillers*, 476 U.S. at 579.

234. *Brown-Forman Distillers*, 476 U.S. at 585 ("[The Twenty-first] Amendment . . . gives New York only the authority to control sales of liquor in New York, and confers no authority to

first Amendment did not save these statutes because neither state had the power the statutes asserted.[235]

In *324 Liquor Corp. v. Duffy*, the Court used the third element (the means/ends element) of the framework to find a state retail price fixing scheme unconstitutional.[236] After holding that the statute in question violated the Sherman Antitrust Act, the Court considered whether the Twenty-first Amendment saved this statute.[237] With respect to element one, the Court did little analysis, stating only that the Twenty-first Amendment granted states the "power to regulate, or prohibit entirely, the transportation or importation of intoxicating liquor within their borders."[238] Unlike in *Brown-Forman Distillers* and *Healy*, the statute in this case only regulated in-state liquor prices;[239] so presumably, the Court considered a regulation of in-state liquor prices to be within a state's power. The Court provided little analysis of legislative motivation, stating merely that the purpose of the pricing scheme was to protect small retailers.[240] Instead, the Court focused upon the means/ends element, holding that there was no evidence provided that tended to show that the pricing scheme had the effect of protecting small retailers.[241]

D. Applying the Bacchus Imports *Element*

The above cases dealt with the first (the power element) and third (the means/ends element) elements of the framework; however, the second element (the *Bacchus Imports* element) is more often the center of analysis. To review, the second element arises out of the *Bacchus Imports* case—the central question there being whether the state legislature was motivated by protectionist concerns.[242] In *Bacchus Imports*, the Court held that Hawaii's purpose

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control sales in other States."); *Healy*, 491 U.S. at 342 (relying explicitly on the *Brown-Forman Distillers* rationale).

235. *Brown-Forman Distillers*, 476 U.S. at 585.

236. 479 U.S. 335 (1987).

237. *Id.* at 346.

238. *Id.*

239. There was no regulation of out-of-state prices because the price floor was not tied to the prices charged in other states as it was in *Brown-Forman Distillers*, 476 U.S. at 579, and *Healy*, 491 U.S. at 337.

240. *324 Liquor*, 479 U.S. at 349. It is unclear whether the Court perceived that this goal was legitimate, but it did not hang its constitutional hat on this hook.

241. *Id.* at 350 ("We are unwilling to assume on the basis of this record that [the statute] has the effect of protecting small retailers.").

242. Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 276 (1984).

of protecting local industry was not a legitimate goal of Twenty-first Amendment regulation.[243] Importantly though, the *Bacchus Imports* Court did not clearly address the question of what permissible goals states could seek to achieve through the use of their Twenty-first Amendment power.[244] That question was left open for future cases.

1. Supreme Court Analysis: *North Dakota v. United States*

The Court returned to the legitimate goals question in *North Dakota v. United States*.[245] The case was actually a Supremacy Clause challenge, but the issues were identical to the Commerce Clause cases previously discussed. North Dakota, like many other states,[246] had a comprehensive system for importing and distributing liquor,[247] similar to the three-tier system already described.[248] Each tier was permitted to sell only to the tier beneath it, and the state collected taxes at all levels.[249] The distribution scheme had the effect of preventing North Dakota retailers and consumers from buying alcohol directly from out-of-state distributors by requiring the out-of-state sellers to sell only to wholesalers.[250] By way of a federal statute passed in 1986,[251] Congress permitted military bases in every state to purchase alcohol from the cheapest source.[252] This gave the federal government an option that in-state retailers and consumers did not have—the option to purchase alcohol directly from out-of-state suppliers, circumventing the in-state wholesalers.[253] North Dakota, fearing that the alcohol purchased by the federal government for use on its military bases would be diverted into the state market, passed a law requiring that out-of-state suppliers who sell alcohol to the federal government for use on military bases affix a label on all bottles stating that the liquor was for consump-

243. *Id.* ("The central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.").

244. In the only reference the Court made to this question, it stated that Hawaii's statute did not seek "to promote temperance or to carry out any other purpose of the Twenty-first Amendment." *Id.* Obviously, "any other purpose of the Twenty-first Amendment" is a uselessly broad statement of what the legitimate goals of a tate's Twenty-first Amendment regulations might be.

245. 495 U.S. 423 (1990).

246. *See supra* notes 6-10 and accompanying text (describing three-tier system).

247. *North Dakota*, 495 U.S. at 428.

248. *Id.*

249. *Id.*

250. *Id.* at 439.

251. Act of Dec. 19, 1985, tit. VIII, § 8099, Pub. L. No. 99-190, 99 Stat. 1219 (1986).

252. *North Dakota*, 495 U.S. at 427.

253. *Id.*

tion only on the military base.[254] Out-of-state distributors informed the federal government that they would not ship to military bases in North Dakota because of the labeling requirements.[255] The United States thereupon brought suit against North Dakota claiming that the labeling requirements discriminated against the federal government in violation of the Supremacy Clause.[256]

The Court viewed North Dakota's establishment of labeling requirements as an effort to protect its three-tier system of alcohol distribution.[257] The threat posed to the state's system was that the alcohol purchased by the federal government and imported onto the military bases within the state might be diverted into the state retail market, thereby disrupting the state's distribution system.[258] Thus, one of the issues before the Court was whether North Dakota had a right to protect its three-tier distribution system. In other words, the Court considered whether the creation of a three-tier system for alcohol distribution was a valid exercise of a state's Twenty-first Amendment power.

The Court used the framework developed above to answer this question. In assessing the state's regulation, the Court stated that "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders."[259] This statement essentially contains the necessary components for assessing both the first and second elements of the framework. Element one addressed whether the state law is within its Twenty-first Amendment power, and the statement makes it clear that the law here establishes a "comprehensive system for the distribution of liquor."[260] Element two involves whether the system has a legitimate goal and the statement reveals that the goals of the system are "promoting temperance, ensuring orderly market conditions, and raising revenue."[261] In one sentence, the Court answered the questions posed by both elements in favor of the state: "That system is unquestionably legitimate."[262] In other words, the

254. *Id.* at 428.

255. *Id.* at 429. Actually, only five of the six suppliers refused to deliver to bases inside North Dakota. The sixth supplier merely substantially increased its prices to cover the labeling costs. *Id.*

256. *Id.* at 438-39.

257. *Id.* at 438.

258. *Id.* at 433.

259. *Id.*

260. *Id.*

261. *Id.* at 432.

262. *Id.*

state's action was within its Twenty-first Amendment power (element one) and the goals sought by the state's exercise of its Twenty-first Amendment power were legitimate (element two).[263] This element two analysis significantly clarifies the question left unanswered by *Bacchus Imports* because it addresses which legitimate goals a state may seek to accomplish under the Twenty-first Amendment. In *North Dakota*, the Court listed three such legitimate goals as "promoting temperance, ensuring orderly market conditions, and raising revenue."[264]

2. Lower Court Analysis

Lower courts have differing interpretations of what goals states may legitimately pursue in exercising their Twenty-first Amendment power. Perhaps the narrowest statement defining a state's legitimate goals came from a New York district court case decided prior to the Supreme Court's *North Dakota* decision. In *Loretto Winery Ltd. v. Gazzara*, the plaintiffs challenged a New York statute that permitted wine coolers to be sold in New York liquor stores only if the wine was produced using New York grapes.[265] The court believed that the statute facially violated the dormant commerce clause;[266] thus, the constitutionality of the statute hinged upon whether or not it was saved by the Twenty-first Amendment.[267] The court held that the only purpose for which New York could legitimately use its Twenty-first Amendment power was to promote temperance.[268] Finding that the New York statute did not

263. Close readers may ask what happened to element three of the framework. The Court has never analyzed whether the means used (a comprehensive distribution system) furthered the state's goals of "promoting temperance, ensuring orderly market conditions, and raising revenue." Probably the most likely explanation for the absence of the element three analysis is that the Court simply presumed that the element was satisfied. This is not a surprising presumption, especially given the Court's statement that "[g]iven the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *Id.* at 433. The strong presumption of validity implies that the means would probably only need to be rationally related to the ends, a standard that is almost universally satisfied.

264. *Id.* at 432.

265. 601 F. Supp. 850, 852 (S.D.N.Y. 1985).

266. *Id.* at 857.

267. *Id.* at 859.

268. *Id.* at 861 ("[T]he powers reserved [by the Twenty-first Amendment] must be exercised with temperance as their goal.").

promote temperance in purpose or effect, the court held that the Twenty-first Amendment did not save the state regulation.[269]

In *Quality Brands, Inc. v. Barry*, another pre-*North Dakota* decision, the District Court for the District of Columbia came to a similar conclusion as the *Loretto Winery* court.[270] The case involved a D.C. regulation that required D.C. liquor wholesalers to hold their liquor at in-state storage facilities.[271] Relying on the *Loretto Winery* court's reasoning, the court concluded that the regulation could not survive unless it "directly promote[d] temperance."[272] The court specifically rejected "taxation, inspection, and the maintenance of local jobs," in and of themselves, as legitimate goals of Twenty-first Amendment regulation because they did not directly promote temperance goals.[273] Finding that the statute did not have any "real impact on temperance," the court found the regulation to be invalid.[274]

Since the *North Dakota* decision, two federal appellate courts have directly addressed the *Bacchus Imports* element;[275] neither circuit adopted the narrow interpretation of the legitimate goals issue espoused in *Loretto Winery* and *Quality Brands*.[276] In *Milton S. Kronheim & Co. v. District of Columbia*, the D.C. Circuit seriously undercut the holding of *Quality Brands* regarding the legitimate ends issue.[277] The District of Columbia, which the court held should be treated as a state for dormant commerce clause and Twenty-first Amendment purposes,[278] sought to enforce a law that was almost identical to the one the district court held unconstitutional in *Quality Brands*.[279] The law forbade liquor licensees in the District to store their beverage inventory at warehouses outside the District.[280] After determining that *Quality Brands* did not have preclusive effect,[281] the court concluded that the statute violated the

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269. *Id.* at 862-63.

270. Quality Brands, Inc. v. Barry, 715 F. Supp. 1138, 1138 (D.D.C. 1989).

271. *Id.*

272. *Id.* at 1142-43.

273. *Id.* at 1143.

274. *Id.*

275. *See* Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193 (D.C. Cir. 1996); Cooper v. McBeath, 11 F.3d 547 (5th Cir. 1994).

276. *See supra* notes 265-74 and accompanying text.

277. *Milton S. Kronheim*, 91 F.3d at 193.

278. *Id.* at 198-99.

279. *Quality Brands*, 715 F. Supp. at 1138. The district court decision was affirmed in an unpublished opinion by the D.C. Circuit in *Quality Brands, Inc. v. Barry*, 901 F.2d 1130 (D.C. Cir. 1990) (per curiam).

280. *Milton S. Kronheim & Co.*, 91 F.3d at 195.

281. *Id.* at 197-98.

dormant commerce clause because the law was "patently discriminatory."[282] The court then considered whether the Twenty-first Amendment saved the District of Columbia alcohol ordinance. Under element one (the power element), the court noted that the law requiring warehouses to be within the District was within its Twenty-first Amendment power, which was the "plenary power to regulate and control . . . the distribution . . . of intoxicants within her territory."[283]

Primarily though, the court in *Milton S. Kronheim & Co.* focused its inquiry on the second element (the *Bacchus Imports* element). The court noted that the *Bacchus Imports* decision made clear that protection of in-state industry was not a legitimate motivation for legislation under the Twenty-first Amendment.[284] Distinguishing the case before it from *Bacchus Imports*, the court noted that in *Bacchus Imports*, the Hawaiian legislature was motivated solely by protectionist concerns, whereas here, the District of Columbia Council had passed the law with "mixed motives."[285] While its motives may have been partly protectionist, the D.C. Council also had legitimate Twenty-first Amendment goals in mind.[286] The court in this case parted from the *Loretto Wines* and *Quality Brands* decisions by not limiting legitimate purposes and motivations to the promotion of temperance. The court held that the District's motivation in passing the warehouse restriction law was to facilitate "auditing company records, monitoring compliance with the ABC laws, monitoring licenses, checking tax forms for audits"[287]—in short, the state designed the law to ensure orderly market conditions. Promoting these conditions, the court held, "falls squarely within the state's core enforcement powers over alcohol."[288]

The Fifth Circuit has also considered the second element (the *Bacchus Imports* element). In *Cooper v. McBeath*, two Florida citizens challenged a Texas law that imposed a residency requirement for obtaining a permit to sell mixed drinks in Texas.[289] First,

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282. *Id.* at 201. The court stated that the law was discriminatory because it "not only deprives out-of-state businesses access to a local market, but also requires that business operations be performed in the District even if they could be performed more efficiently elsewhere." *Id.* (citations omitted).

283. *Id.* at 203 (quoting Dep't of Revenue v. James Beam Co., 377 U.S. 341 (1963)).

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* (quoting a statement made by a District councilman that was paraphrased in *Quality Brands, Inc. v. Barry*, 715 F. Supp. 1138, 1141 (D.D.C 1989)).

288. *Id.* at 204.

289. 11 F.3d 547, 549 (5th Cir. 1994).

the court determined that the statute had the effect of discriminating against out-of-state industry in favor of in-state industry.[290] Considering whether the Twenty-first Amendment saved the statute, the court found *Bacchus Imports* dispositive. Unlike *Bacchus Imports*, where the Supreme Court had looked to legislative motivation to determine what the goal of the legislature had been, the Fifth Circuit looked to the legislative effect to determine what goal the legislature sought.[291] Nonetheless, the Fifth Circuit arrived at the same conclusion as the *Bacchus Imports* Court—the Texas law sought to protect in-state interests.[292] As the *Bacchus Imports* Court made clear, protectionism was not a legitimate goal that states could seek to accomplish through the exercise of their Twenty-first Amendment powers; thus, the Texas residency requirement was held to be unconstitutional.[293] Citing *North Dakota* for the proposition that labeling and reporting requirements were legitimate uses of Twenty-first Amendment power, the *Cooper* court cursorily indicated what might be legitimate goals under the Twenty-first Amendment.[294]

IV. THE DIRECT SHIPMENT ISSUE

A. Law Against Direct Shipment

In light of the foregoing discussion of the Twenty-first Amendment, the legal issues involved in the direct shipment debate are relatively clear. Under the Supreme Court's analysis, courts must first determine whether the state law against direct shipment of alcohol conflicts with a federal interest, namely the dormant commerce clause.[295] If the laws do violate the dormant commerce clause, then courts should consider whether the Twenty-first Amendment saves the direct shipment law. As noted above, there are three basic ways the Supreme Court has found that the Twenty-first Amendment did not save state alcohol regulation: (1) if the regulation is simply not within the state's power to control importation, distribution, or sale of alcohol within its borders; (2) if the

290. *Id.* at 553. The court noted that the legislature was not motivated by protectionism, but that "protectionism (while absent in motivation) can manifest itself in effect." *Id.*

291. *Id.*

292. *Id.* at 555.

293. *Id.* at 555-56.

294. *Id.* at 555. This statement appears to be an implicit recognition that there are legitimate goals other than the promotion of temperance.

295. *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 705 (1984).

regulation was passed with a purpose or seeks to achieve a goal that the Court views as illegitimate, such as economic protectionism; or (3) if the Court perceives that the state has chosen an ineffectual means to accomplish its ends.[296] The arguments in cases brought thus far have focused on the *Bacchus Imports* element of the framework.

B. Lower Court Analysis of Direct Shipment Laws

Though many cases have been filed,[297] only three federal district courts and one federal appellate court have decided cases challenging the constitutionality of direct shipment laws. One of the district court cases[298] is over thirty years old, thus, its applicability is somewhat questionable. In that case, the district court upheld New York's law prohibiting alcoholic beverages from being shipped into the state to non-licensed persons.[299] The *House of York, Ltd. v. Ring* court held that states have very broad power to regulate alcohol that is being imported into the state for consumption therein.[300] The court's perception of state authority in regulating imports was so broad that it quoted with approval that states have " 'the power to prohibit or to condition in the most discriminatory fashion the importation into its territory of all intoxicants.' "[301] The Twenty-first Amendment landscape, however, has changed significantly since the *House of York* decision, and district courts deciding the direct shipment issue in recent years have not followed the *House of York* lead.

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296. *See supra* notes 255-66 and accompanying text (explaining how these three elements are derived from Twenty-first Amendment cases).

297. *See* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 854 (7th Cir. 2000) (holding Indiana's direct shipment law constitutional, reversing the district court), *cert. denied*, 121 S. Ct. 1672 (2001); Bolick v. Roberts, No. 99CV755, 2001 U.S. Dist LEXIS 11118, at *108-09 (E.D. Va. July 27, 2001) (holding Florida's statutory scheme regarding distilled spirits constitutional, but the scheme for wine and beer in violation of the Commerce Clause); Bainbridge v. Bush, 148 F. Supp. 2d 1306, 1315 (M.D. Fla. 2001) (holding Florida's direct shipment law constitutional); Dickerson v. Bailey, 87 F. Supp. 2d 691, 710 (S.D. Tex. 2000) (declaring Texas's direct shipment law unconstitutional); Sweedenburg v. Kelly, No. 00 CV 778 (RMB) (S.D.N.Y.) (pending); Beskind v. Easley, No. 3:00-CV-258-MU (W.D.N.C.) (pending); Heald v. Engler, No. 00-CV-71438-DT (E.D. Mich.) (pending). For copies of the pleadings for these pending cases, see Wine and Spirits of America, Inc., *supra* note 3.

298. *See* House of York, Ltd. v. Ring, 322 F. Supp. 530 (S.D.N.Y. 1970).

299. *Id.* at 533.

300. *Id.* at 534. The court distinguished between cases where the state was attempting regulate alcohol that was merely being transported through a state, and this case where alcohol that was being transported into a state for consumption therein, holding that state authority in the latter case was afforded full protection by the Twenty-first Amendment. *Id.*

301. *Id.* (quoting Epstein v. Lordi, 261 F. Supp. 921, 932 (D.N.J. 1966)).

In *Dickerson v. Bailey*, Texas resident wine consumers challenged a Texas law that prohibited them from importing more than three gallons of wine from out of state without a license.[302] The law also contained a complimentary provision that forbade out of state suppliers from shipping wine into the state.[303] Plaintiffs claimed that the direct shipment law violated the dormant commerce clause because it discriminated against out-of-state suppliers of alcohol.[304] The court agreed with the plaintiffs that the statute was facially discriminatory. The court then considered whether the Twenty-first Amendment saved the statute from unconstitutionality.[305] Relying heavily on the *Loretto Winery* decision, the court held that the only legitimate goal a state could seek to accomplish through the exercise of its Twenty-first Amendment power was the promotion of temperance.[306] The court held that there was "no temperance goal served by the statute"; thus, it failed the legitimate purpose element and was unconstitutional.[307] The *Dickerson* court has not yet entered final judgment in the case, however, so it is unclear at this point whether the court will make its ultimate decision against the direct shipment law.[308]

The only direct shipment case to reach the federal appellate court level is a case involving a direct shipment law in Indiana.[309] In 1998, Indiana passed a law that prohibited anyone in the business of selling alcoholic beverages in another state from shipping such beverages directly to Indiana residents who did not possess a wholesaler's permit.[310] The plaintiffs, Indiana wine collectors, challenged the law as a violation of the dormant commerce clause.[311]

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302. 87 F. Supp. 2d 691, 693-94 (S.D. Tex. 2000).

303. *Id.* at 694.

304. *Id.* at 695-96.

305. *Id.* at 710.

306. *Id.* at 707-08.

307. *Id.* at 710.

308. On March 26, 2001, the court denied plaintiff's motion for the entry of final judgment and granted defendant's motion to reconsider the decision in light of the Seventh Circuit decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000). Both the plaintiff and defendant were given time to submit briefs, and the court has not yet issued decision. For a copy of the court order denying plaintiff's motion and granting defendant's motion to reconsider, see Wine and Spirits Wholesalers of America, Inc., *supra* note 3.

309. *See* Bridenbaugh v. O'Bannon, 78 F. Supp. 2d 828 (N.D. Ind. 1999), *rev'd sub nom.* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1672 (2001).

310. IND. CODE § 7.1-5-11-1.5(a) (2000). The full text of the provision states, "It is unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network." *Id.*

311. *Bridenbaugh*, 78 F. Supp. 2d at 830-31.

The State defended its statute on grounds that it did not discriminate against out-of-state commerce, and that even if the statute did discriminate, the Twenty-first Amendment granted Indiana the power to pass such a statute.[312]

The district court held that the Indiana statute violated the dormant commerce clause and did not come within a core purpose of the Twenty-first Amendment; in other words, the statute did not serve a legitimate end.[313] The court found that the statute discriminated between "in state . . . and out of state purveyors of alcoholic beverages."[314] The State argued that there was no discrimination because the law simply required all purveyors of alcohol, whether in-state or out-of-state, to have a permit to distribute alcohol; thus, both parties were treated equally.[315] Rejecting the argument, the court found the statute to be discriminatory because permits were not given to out-of-state residents.[316] Finding that the statute violated the dormant commerce clause, the court moved to the consideration of whether the Twenty-first Amendment saved the direct shipment law.

The district court focused on whether or not Indiana had exercised its Twenty-first Amendment power to accomplish a legitimate end.[317] Following *Lorretto Winery* and later *Dickerson*, the Indiana district court found that the only legitimate goal that a state could pursue via its Twenty-first Amendment power was to promote temperance.[318] The court conducted its analysis of whether the Twenty-first Amendment saved the statute in one sentence of a concluding footnote: "Temperance is not the issue in the case now before this Court."[319]

On appeal, the Seventh Circuit reversed the district court in an opinion written by Judge Easterbrook.[320] Judge Easterbrook em-

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312. *See id.* at 831-32.

313. *Id.*

314. *Id.* at 832.

315. *Id.*

316. *Id.*

317. *See id.* at 832 n.4 (holding that temperance was not served by the statute and implicitly considering whether the statute had sought to accomplish this end).

318. *Id.* at 831. The court provided little reasoning as to why temperance is the only legitimate goal stating only that "[r]ecent lower court cases have demonstrated that temperance is the core purpose of the Twenty-first Amendment." *Id.* (citing *Quality Brands*, *Loretto Winery*, and *Cooper*).

319. *Id.* at 832 n.4.

320. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 854 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1672 (2001). Ironically, Judge Easterbrook, prior to his appointment to the bench, argued the *Bacchus Imports* case before the Supreme Court for the plaintiffs, arguing that the Hawaiian statute violated the dormant commerce clause and was not saved by the Twenty-first Amend-

ployed a somewhat novel approach to the issues in the case. He began his analysis by rejecting the notion that an inquiry into the "core purposes" of the Twenty-first Amendment was required.[321] This move effectively eliminated the legitimate purposes analysis under element two that *Bacchus Imports* had developed. Having removed the legitimate purposes element from the inquiry, there was no longer a need to determine whether a state's legitimate uses of its Twenty-first Amendment power were limited to the promotion of temperance or if the Amendment permitted states to pursue broader objectives such as raising revenue and ensuring orderly market conditions.[322] Nor was there any need to inquire into the motivations of the Indiana legislature.

Judge Easterbrook's analysis focused on what power the Twenty-first Amendment conferred upon the states, and answered this issue in accordance with the "text and history" of the Amendment.[323] Judge Easterbrook noted that the Supreme Court had held in *Bowman* and *Leisy* that states could place restrictions on sales of in-state alcohol, but that states could not restrict or condition the sale of alcohol coming from out-of-state—to do so would violate the dormant commerce clause.[324] This resulted, as Judge Easterbrook interpreted it, in a sort of "reverse discrimination" against in-state industry.[325] A primary purpose, then, of the Wilson Act was to eliminate this reverse discrimination.[326] Importantly though, as Judge Easterbrook noted, the Wilson Act did not permit states to favor in-state products, but simply permitted them to treat in- and out-of-state alcohol equally.[327] Webb-Kenyon, according to Judge Easterbrook, extended the principle of allowing states to treat all alcohol equally to mail-order shipments, thus, closing the loophole

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ment. *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 264 (1984). This fact makes clear that Judge Easterbrook was particularly well-acquainted with the issues before the Seventh Circuit in *Bridenbaugh*.

321. *Bridenbaugh*, 227 F.3d at 851.

322. *Id.* Judge Easterbrook alluded that if he were forced to make a determination as to what were the legitimate uses of Twenty-first Amendment power, that he would "follow the Supreme Court rather than district courts and student notes." *Id.* In other words, he would follow the Supreme Court's holding in *North Dakota*, that core purposes of the Twenty-first Amendment include "promoting temperance, ensuring orderly market conditions, and raising revenue." North Dakota v. United States, 495 U.S. 423, 433 (1990); *Bridenbaugh*, 227 F.3d at 851.

323. *Bridenbaugh*, 227 F.3d at 851 ("[O]ur guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters.").

324. *Id.* at 852.

325. *Id.* ("[S]tates could forbid domestic production of alcoholic beverages but could not stop imports; the Constitution effectively favored out-of-state sellers.").

326. *Id.*

327. *Id.*

created by the Supreme Court's interpretation of the Wilson Act in *Rhodes*.[328] Thus, the Twenty-first Amendment simply incorporated the principles of the Wilson and Webb-Kenyon Acts into the Constitution.[329]

Judge Easterbrook began his analysis of the Indiana statute by noting that Congress enacted Webb-Kenyon to permit states to do precisely what Indiana did here—forbid the shipment of alcohol directly to consumers.[330] Thus, the central issue was whether Indiana placed an unconstitutional discriminatory condition upon the importation of alcohol. Judge Easterbrook held that there was no "functional discrimination."[331] The condition placed on out-of-state suppliers was exactly the same condition placed on in-state suppliers—both had to sell their product to residents via a licensed in-state wholesaler or they must posses a permit to ship directly to Indiana residents.[332] In Judge Easterbrook's view, forcing all alcohol to pass through the three-tier distribution system allowed "Indiana to collect its excise tax equally from in-state and out-of-state sellers."[333] In conclusion, Judge Easterbrook noted that if Indiana were not permitted to force imported alcohol to pass through its three-tier distribution system, then the "reverse discrimination" problem that gave rise to the Wilson Act, the Webb-Kenyon Act, and Section 2 of the Twenty-first Amendment would reoccur.[334] Indiana alcohol suppliers would be forced to send their alcohol through the three-tier system and have their product subjected to excise taxes while out-of-state suppliers would be allowed to avoid the system and taxes by shipping directly to Indiana residents.[335]

Importantly, there was one issue related to the discriminatory nature of Indiana's alcohol distribution scheme that the Seventh Circuit opinion did not address. As Judge Easterbrook stated, "holders of Indiana wine wholesaler or retailer permits may deliver

328. *Id.*

329. *Id.* at 853. Judge Easterbrook stated that in cases like *Bacchus Imports* and *Brown-Forman Distillers*, the Supreme Court had employed these principles by developing an "unconstitutional-conditions" approach to the Twenty-first Amendment. *Id.* In other words, the Twenty-first Amendment gives states the power to place conditions and restrictions on the importation of alcoholic beverages from out-of-state, but not discriminatory conditions. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* at 854.

334. *Id.*

335. *Id.*

directly to consumers' homes."[336] He further noted, Indiana's statutory scheme "apparently limits distribution permits to Indiana's citizens."[337] If out-of-state suppliers cannot obtain these wholesaler or retailer permits then the scheme seems to be plainly discriminatory. Indeed, this was precisely the view that the *Bridenbaugh* district court had taken.[338] Judge Easterbrook, however, did not perceive this question to be before him because the plaintiffs in that case were Indiana consumers; thus, he did not address the issue.[339]

Two district courts have decided cases involving direct shipment laws since the Seventh Circuit decided *Bridenbaugh*.[340] The first, *Bainbridge v. Bush*, involved a challenge to a Florida law that prohibited out-of-state manufacturers or suppliers of alcohol to ship their products directly to Florida persons other than those licensed to receive such shipments.[341] Under the Florida scheme, in-state wineries could obtain permits that would allow them to ship directly to customers in Florida; out-of-state vendors could not get such permits.[342] The court held that this system undoubtedly violated the dormant commerce clause by discriminating against the out-of-state purveyors of alcohol.[343] Next, the court turned to the question of whether the Twenty-first Amendment saved the Florida law from invalidation.[344] In addressing this issue, the court stated that the Florida law, though discriminatory, would be valid if it served the "core concerns" of the Twenty-first Amendment.[345] Citing *North Dakota*, the court held that the "core concerns" included not just temperance, but also "raising revenue, and ensuring orderly market conditions."[346] The court found that the Florida law did serve these core purposes and was thus saved by the Twenty-first Amendment.[347]

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336. *Id.* at 853.

337. *Id.* at 854.

338. Bridenbaugh v. O'Bannon, 78 F. Supp. 2d 828, 832 (N.D. Ind. 1999) ("[T]he General Assembly of Indiana has chosen to discriminate as between in state (Indiana) and out-of-state purveyors of alcoholic beverages."), *rev'd sub nom.* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1672 (2001).

339. *Bridenbaugh*, 227 F.3d at 854. ("Plaintiffs do not complain about the statute that apparently limits distribution permits to Indiana citizens. These plaintiffs are concerned only with direct shipments from out-of-state sellers who lack *and do not want* Indiana permits.").

340. *See* Bolick v. Roberts, No. 99CV755, 2001 U.S. Dist. LEXIS 11118 (E.D. Va. July 27, 2001); Bainbridge v. Bush, 148 F. Supp. 2d 1306 (M.D. Fla. 2001).

341. *Bainbridge*, 148 F. Supp. 2d at 1309 (citing FLA. STAT. chs. 561.54, 561.545 (2000)).

342. *Id.* at 1311.

343. *Id.*

344. *Id.* at 1312.

345. *Id.* at 1313.

346. *Id.*

347. *Id.* at 1315.

An important difference exists between this decision and the Seventh Circuit's decision in *Bridenbaugh*. In *Bridenbaugh*, Judge Easterbrook made it clear that the Twenty-first Amendment did not give states the power to discriminate against out-of-state purveyors of alcohol.[348] Judge Easterbrook held that Indiana's law was constitutional precisely because, in his view, it did not discriminate.[349] The aspect of the Indiana law that did discriminate—the provision allowing permits only to in-state residents—was not being challenged in the case, according to Judge Easterbrook.[350] The *Bainbridge* court, however, specifically noted that the discriminatory license provision in the Florida law was being challenged in its case.[351] Despite the law's discriminatory nature, the *Bainbridge* court upheld the Florida direct shipment law.[352]

The most recently decided direct shipment case involved a Virginia law, similar to both the Florida and Indiana laws, which prohibited the shipment of alcoholic beverages from out-of-state producers directly to in-state customers.[353] Just as the Indiana and Florida laws, the Virginia law also allowed in-state producers of beer and wine to get a permit to ship directly to consumers in Virginia;[354] however, unlike the Indiana and Florida laws, Virginia's scheme did not allow in-state or out-of-state producers to get a permit to ship distilled spirits directly to Virginia customers. In *Bolick v. Roberts*, the Virginia district court held that the scheme as it related to beer and wine clearly discriminated against out-of-state producers, and therefore, violated the dormant commerce clause.[355] Further, the court noted that, since the Seventh Circuit in *Bridenbaugh*, had not addressed the issue of discriminatory permits, *Bridenbaugh* was not dispositive.[356] Having found a violation

348. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 852 (7th Cir. 2000) ("Section 2 thus authorizes [direct shipment laws] 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*."), *cert. denied*, 121 S. Ct. 1672 (2001).

349. *Id.*

350. *Id.* at 854. ("Plaintiffs do not complain about the statute that apparently limits distribution permits to Indiana's citizens. These plaintiffs are concerned only with direct shipments from out-of-state sellers who lack *and do not want* Indiana permits.").

351. *Bainbridge*, 148 F. Supp. 2d at 1314 ("[U]nlike the Seventh Circuit in *Bridenbaugh*, this case requires a consideration of the impact of the discriminatory nature of the statutory scheme on out-of-state wineries.").

352. Bolick v. Roberts, No. 99CV755, 2001 U.S. Dist. LEXIS 11118, at *3, 24 (E.D. Va. July 27, 2001).

353. *Id.* at *24.

354. *Id.* at *3-4.

355. *Id.* at *42.

356. *Id.* at *41-42.

of the dormant commerce clause by way of discrimination, the court inquired into whether the Twenty-first Amendment saved the Virginia law as it related to beer and wine.[357] The court found that Virginia's direct shipment law did not further the legitimate objectives of either promoting temperance or facilitating the collection of taxes, and thus, was not saved by the Twenty-First Amendment.[358] The court then considered the distilled spirits regulation. This law, the court held, did not violate the dormant commerce clause because there was no discrimination—neither in-state nor out-of-state producers could get a permit to ship distilled spirits directly to consumers.[359]

Importantly, then, just as the courts in the *Bridenbaugh* and *Bainbridge* cases focused on discrimination, so too does the *Bolick* court. The primary difference, however, is that in *Bolick* and *Bainbridge* the courts found that the state's regulation was discriminatory, then they considered whether the Twenty-first Amendment saved the scheme despite its discrimination. In contrast, in *Bridenbaugh* Judge Easterbrook alludes that if a regulation is discriminatory that is the end of inquiry—discriminatory statutes simply are not saved by the Twenty-first Amendment because that Amendment does not convey upon the states the power to discriminate.[360]

C. The Supreme Court's Possible Approach to Direct Shipment Laws

The Supreme Court, under its method of analysis, might address the direct shipment issue as follows. It seems clear that laws prohibiting direct shipment in conjunction with residency requirements for licenses do violate the dormant commerce clause under recent Supreme Court analysis—most notably the *C & A Carbone* analysis.[361] The discrimination against out-of-state commerce is not against out-of-state alcohol itself, but rather against the service of distributing the alcohol. The three-tier system grants the right of distribution to in-state wholesalers and retailers, while direct

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357. *Id.* at *84.

358. *See id.* at *84-89.

359. *Id.* at *89-90.

360. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000) ("Like the Wilson Act and the Webb-Kenyon Act before Prohibition, § 2 enables a state to do to importation of liquor—including direct deliveries to consumers in original packages—what it chooses to do to internal sales of liquor, *but nothing more.*") (emphasis added), *cert. denied*, 121 S. Ct. 1672 (2001).

361. *See supra* notes 41-46 and accompanying text.

shipment laws prohibit out-of-state suppliers of alcohol from participating in the in-state distribution market. States may argue that there is no discrimination because in-state alcohol suppliers are forced to send their alcohol through the three-tiered distribution system just like out-of-state alcohol suppliers. The *C & A Carbone* case speaks directly to this argument. In *C & A Carbone*, the Court held that though the town's action did not discriminate between in-state and out-of-state garbage, it did discriminate between in-state and out-of-state firms in the business of processing garbage.[362] Analogously, while there may not be discrimination between the actual products—the alcohol itself—the laws are still discriminatory with respect to distribution because only in-state distributors may obtain wholesaler or retailer's permits.

Having established that direct shipment statutes that also specify residency requirements violate the dormant commerce clause, the Court then moves to the second tier to determine if the Twenty-first Amendment saves the statute.[363] Using the three methods described above, the Court's likely conclusion is not entirely clear. There is little question that direct shipment laws satisfy the power element. These laws are limited to "the State's central power under the Twenty-first Amendment of regulating the times, places and manner under which liquor may be imported."[364] How the Court would apply the *Bacchus Imports* element, however, is unclear. According to the court in *Bacchus Imports*, if the motivation of the legislature in passing a direct shipment law is protectionism, then the statute does not have a legitimate purpose or end.[365] Putting aside for the moment the inherent difficulty in determining what motivates a legislature, the *Bacchus Imports* Court held that only if a statute were designed to carry out a "clear concern" of the Twenty-first Amendment would the statute be upheld.[366] In *North Dakota*, the Court alluded to the fact that Twenty-first Amendment concerns included "promoting temperance, ensuring orderly market conditions, and raising revenue."[367] Therefore, if a state could show that the legislature's motivation was not the de-

362. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390-91 (1994) ("[W]hat makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. . . . [T]he article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.").

363. *See supra* notes 210-14 and accompanying text.

364. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 716 (1984).

365. Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 276 (1984).

366. *Id.*

367. North Dakota v. United States, 495 U.S. 423, 432 (1990).

sire to protect in-state wholesaler/retailer interests, but rather to raise revenue, then the statute would presumably be constitutional.

V. ANALYSIS

A. Problems with the Court's Twenty-first Amendment Framework

This Note aims to critique the framework of the Court's analysis and propose a new method of analysis for the future. The central problem with the Court's current framework lies in the *Bacchus Imports*-style inquiry.[368] Judge Easterbrook rightly rejected using the legitimate ends inquiry,[369] but failed to provide an explanation for his rejection. This section will explain why the legitimate ends analysis is flawed and why Judge Easterbrook was correct to reject it.

The *Bacchus Imports* element poses a problem because it forces courts to determine what legitimate ends a state may use when exercising its Twenty-first Amendment power. Neither the text of the Twenty-first Amendment nor its legislative history reveal what constitutes legitimate ends.[370] The Supreme Court, lower courts, and commentators have repeatedly noted that the legislative history does not adequately clarify what the Amendment was precisely designed to do.[371] In the absence of any objective indication as to what constitutes the legitimate purposes of the Twenty-first Amendment, a court can only offer subjective judicial speculation regarding the Amendment's purpose.

For example, some lower courts have suggested that the only legitimate end that may be sought by the use of Twenty-first

368. This inquiry requires courts to consider what constitutes the "core purposes" of the Twenty-first Amendment and to consider if, in passing the regulation at issue, the legislature was motivated by a desire to accomplish a legitimate end. *See supra* notes 224-25 and accompanying text.

369. In the opinion, Judge Easterbrook rejected the legitimate ends analysis by saying, "[O]ur guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters." Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1672 (2001).

370. As will be shown *infra* notes 372-93 and accompanying text, while it is not possible to determine what constitutes a legitimate purpose according to the text and history, it is possible to determine what constitutes a legitimate purpose from what is not indicated in the text and history—namely that the legitimate purposes are not discrimination.

371. *See supra* notes 130-33.

Amendment power is the promotion of temperance.[372] *Loretto Winery* is the central case cited for this proposition, but a close analysis of the reasoning of that opinion reveals the weakness of its claims. In *Loretto Winery*, the court began by analyzing the prohibition movement, noting that prior to the Eighteenth Amendment, many states allowed communities to decide for themselves through local option whether to permit alcohol in their localities.[373] From this fact, the court concludes that Section 2 was included in the Amendment "[t]o preserve this form of local option, and to restore the regulatory powers which the states had exercised" with respect to alcohol prior to Prohibition.[374] This is a reasonable conclusion from the Amendment's history.[375] The *Loretto Winery* court, however, leaps from this conclusion to the idea that Section 2 indicates that temperance serves the only legitimate end of state regulation.[376] In the opinion, the court states "the language of the Twenty-first Amendment and its legislative history demonstrate that Section 2 of the Amendment was intended to restore to the states the authority to promulgate local option temperance related controls . . . ."[377] Though the statement appears to rely on solid ground for its temperance only conclusion—text and legislative history—the court does not explain how the text and legislative history leads to this conclusion. In the opinion, the court merely quotes the text of Section 2 without analyzing its language.[378] Moreover, the court does not provide a single cite or reference to any legislative history of the Twenty-first Amendment. Thus, the statement that the text and history show that local option temperance was the point of Section 2 is little more than a bald assertion. The court makes its final leap to the conclusion that "[o]nly those state restrictions which directly promote temperance may now be said to be permissible under Section 2 . . . ."[379] In sum, the *Loretto Winery* court offers no objective support for its proposition; it only provides unsupported assertions.

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372. *See* Dickerson v. Bailey, 87 F. Supp. 2d 691, 707-08 (S.D. Tex. 2000); Bridenbaugh v. O'Bannon, 78 F. Supp. 2d 828, 831 (N.D. Ind. 1999); Loretto Winery Ltd. v. Gazarra, 601 F. Supp. 850, 861 (S.D.N.Y. 1985).

373. 601 F. Supp. at 856.

374. *Id.*

375. *See supra* notes 125-34 and accompanying text.

376. *Loretto Winery*, 601 F. Supp. at 861.

377. *Id.* at 859.

378. *See id.* at 856.

379. *Id.* at 861.

The Supreme Court has fared no better in its attempt to determine the legitimate uses of Twenty-first Amendment power. As previously noted, the Court manifestly dodged the issue in *Bacchus Imports*, stating only what did not constitute legitimate goals—economic protectionism.[380] The Court has made only one direct statement regarding the issue when it posited in *North Dakota* that "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders" and stated that this "system is unquestionably legitimate."[381] From this statement, it appears that "promoting temperance, ensuring orderly market conditions, and raising revenue" are all legitimate state interests under the Twenty-first Amendment.[382] The Court does not, however, explain from where it derived the conclusion that these three interests are legitimate concerns of the Twenty-first Amendment.[383] These three things do not appear in the text of the Amendment nor does the Court provide any legislative history that shows these were the aims of Section 2. Furthermore, the Court offers no historical background to the Amendment that might lead one to believe these were in fact the purposes of the Amendment. The Court cites only two cases, and neither of these cases provides any further reasoning as to why these three ends or interests are legitimate for a state to pursue under the Twenty-first Amendment.[384] One may reasonably ask if these "core purposes" are from anywhere other than the judges themselves? The entire effort to divine the core concerns or purposes is difficult at best, and entirely dubious at worst.

Furthermore, even if courts could determine what legitimate ends the Twenty-first Amendment permits state legislatures to pursue, there is still another perhaps even more vexing problem with the *Bacchus Imports*-style analysis. Under the *Bacchus Imports* analysis, courts must determine if the legislature was *motivated* by a desire to accomplish a legitimate end. This inquiry into the motivation of the state legislature was relatively easy in *Bacchus Imports* because there was no dispute between the parties that

380. Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 276 (1984) ("The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition.").

381. North Dakota v. United States, 495 U.S. 423, 432 (1990).

382. *See id.*

383. *See id.*

384. *Id.* (citing Carter v. Virginia, 321 U.S. 131 (1944) and Cal. Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936)).

the Hawaiian law was protectionist.[385] Thus, there was no need to divine the legislature's motive; both parties told the Court what motivated the legislature.[386] The problem with this analysis, however, is that rarely are courts presented with a situation in which there is no dispute as to legislative purpose and motivation.

The inherent difficulty in assessing motivation behind a statute cannot be overstated. *Milton S. Kronheim & Co. v. District of Columbia* displays the difficulty of the task.[387] In this case, the court sought to determine the District of Columbia Council's motivation for passing an ordinance that forbade liquor licensees in the District to store their beverage inventory at warehouses outside the District.[388] The court recognized that it was entirely possible, maybe even probable, that the District of Columbia Council was motivated by protectionist concerns.[389] Implicitly recognizing that legislatures are not motivated by only one single thing,[390] and distinguishing the case from *Bacchus Imports*,[391] the court held that the legislative motivation also included legitimate concerns under the Twenty-first Amendment.[392] Thus, the court upheld the ordinance.[393]

Some commentators have suggested that public choice analysis can help determine true legislative motivation for passing direct shipment laws.[394] This argument focuses on the fact that wholesalers and retailers have virtual monopolies in some states; thus, they have a strong interest in legislation that restricts competitors, like direct shipment laws.[395] Furthermore, states have relatively few wholesalers and retailers, which enables them to organize easily.[396] Thus, the public choice model suggests that these groups will have a strong interest in, and be effective at, lobbying

385. *Bacchus Imports*, 468 U.S. at 271 ("[W]e need not guess at the legislature's motivation for it is undisputed that the purpose of the exemption was to aid Hawaiian industry.").

386. *Id.*

387. 91 F.3d 193 (D.C. Cir. 1996).

388. *Id.* at 195.

389. *Id.* at 203.

390. *Id.* ("Kronheim may colorably and even credibly argue that the District's local warehousing requirement is protectionist. Indeed, we cannot say with any assuredness that protectionism is not a purpose of the legislation. Nonetheless . . . the legislative body acted with a mixed motive.").

391. *Id.*

392. The court noted that some of these legitimate concerns implicated by "requiring geographic proximity of warehouses" included "auditing company records, monitoring compliance with the ABC laws, monitoring licenses, checking tax forms for audits." *Id.*

393. *Id.* at 204.

394. *See* Shanker, *supra* note 9, at 377-82.

395. *Id.* at 362.

396. *Id.* at 363.

their local legislatures to pass laws that protect their interests.[397] From this, one can draw the conclusion that because of the strength of the wholesaler lobby, it can be said with relative certainty that legislatures are motivated to pass direct shipment laws by desires to appease these influential lobby groups, i.e., to protect the in-state wholesaler/retailer industry.[398]

While this public choice analysis may be persuasive in identifying that *individual legislators* are influenced by these lobbying efforts, public choice analysis actually leads to an opposite conclusion about the overall purpose of the entire legislature in passing a law.[399] Public choice theorists assert that attempting to divine the intent or motivation of the legislature as a whole is impossible.[400] There is no disputing that some legislators who vote to pass direct shipment laws are motivated by the wholesaler interest groups, and that these wholesaler groups are, for the most part, concerned primarily with protecting their monopolies. It is not fair to say, however, that all legislators are motivated by these concerns. Perhaps some legislators have a moral objection to alcohol and would vote for any and all restrictions on alcohol shipment. Other legislators may vote for the laws because they facilitate tax collection. Perhaps other legislators are motivated by concerns about direct shipments making it easier for minors to obtain alcohol. Even more, a single legislator may have two separate motives for voting for a particular statute.[401] Public choice analysts say that determining a legislature's motivation is impossible to answer because a legislature is not one single voice—it is comprised of many voices, many of which are motivated to vote for a statute for entirely different reasons, or maybe even no reason at all.[402] Thus, to say the legislature, as a whole, was motivated by this concern or that purpose is absurd. Moreover, many judges and commentators would consider efforts to

397. *Id.*

398. *Id.* at 382 ("The superior ability to influence the political process possessed by in state wholesalers/distributors and retailers should provide ample evidence that direct shipment laws were passed for the purpose of economic protectionism.").

399. *See* EVA H. HANKS ET AL., ELEMENTS OF LAW 251 (1994) (asserting that a tenet of public choice theory is that "[l]egislation is an incoherent compromise, [i]ts language is simply whatever it took to get a majority on board, and 'legislative intent' does not exist").

400. *See id.*

401. *See supra* notes 386-92 and accompanying text.

402. *See supra* notes 398-99 and accompanying text; *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part) ("[The Court's task is] not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective . . . ."), *overruled on other grounds by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

determine the subjective intent or motivation behind any statute to be entirely dubious.[403]

B. Powers Not Purposes

As some Justices have suggested in dissenting opinions in Twenty-first Amendment cases, the proper inquiry for courts is neither whether a state has used its Twenty-first Amendment power to accomplish a legitimate goal, nor is it whether a state legislature was motivated by this or that concern.[404] As shown above, answering either of these questions is immeasurably difficult.[405] The proper issue for courts in determining the constitutionality of state liquor regulation should be simply whether the regulation is within a state's Twenty-first Amendment power.[406] That power can be broadly defined as the power to control importation of alcohol into the state.[407] Justice Stevens asserted this position in his *Bacchus Imports* dissent.[408] Justice O'Connor has also argued that courts should constrain their focus to state power and should not concern themselves with the wisdom or purposes of state regulation.[409] In

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403. *See, e.g.*, Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-19 (1899) ("[A statute] does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker . . . . We do not inquire what the legislature meant; we ask only what the statute means."); *see also Union Gas*, 491 U.S. at 30 (Scalia, J., concurring in part and dissenting in part) ("[The Court's task is] not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective . . . .").

404. *See infra* notes 408-10.

405. *See supra* notes 369-92 and accompanying text.

406. *See infra* notes 408-10.

407. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 715 (1984) (describing "the central power reserved by § 2 of the Twenty-first Amendment [as] that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system' ").

408. Justice Stevens stated, "It follows, according to the Court, that 'state laws that constitute mere economic protectionism are not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.' This is a totally novel approach to the Twenty-first Amendment. The question is not one of 'deference,' nor one of 'central purpose'; the question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution. It plainly is." Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 286-87 (1984) (Stevens, J., dissenting).

409. *See* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 359-60 (1987) (O'Connor, J., dissenting) ("[I]n a manner reminiscent of the long repudiated *Lochner v. New York*, the Court strikes down the ABC Law because it concludes that the law was not 'effective' in preserving small retail establishments or in decreasing alcohol consumption. The proper inquiry, however, is not whether the State of New York chose wisely in enacting a retail price maintenance law, nor whether the State New York's motivation in doing so was linked to a 'central [pupose]' of the Twenty-first Amendment. The sole 'question is whether the provision in this case is an exercise of a power

their respective dissents, both Justice Stevens and Justice O'Connor, along with Justice Rehnquist,[410] have taken the position originally taken by the *Young's Market* Court that the Twenty-first Amendment entirely removed alcohol from the ambit of the dormant commerce clause.[411] Thus, states may, pursuant to the Twenty-first Amendment, favor in-state alcohol industries over out-of-state alcohol industries. In other words, there is no restriction on state discrimination against out-of-state liquor industries.

The position of Chief Justice Rehnquist and of Justices Stevens and O'Connor in these dissents has much merit because it does not force the Court to delve into the minds of state legislators or to create unsupportable, subjective "core concerns" of the Twenty-first Amendment. Their position, however, gives states free reign to regulate alcohol without regard to any of the dormant commerce clause principles. It is apparent from the text and history of the laws behind the Twenty-first Amendment that this is not what the Amendment sought to accomplish.[412]

Judge Easterbrook, and perhaps Justice Scalia,[413] have taken a slightly different approach to the question of state power under the Twenty-first Amendment. Their approach posits, like Chief Justice Rehnquist and Justices Stevens and O'Connor do in their dissents, that the Twenty-first Amendment inquiry should focus on powers rather than legislative motivation or core purposes and concerns.[414] The crucial difference in the Judge Easterbrook/Justice

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expressly conferred upon the States by the Constitution.' ") (quoting *Bacchus Imports*, 468 U.S. at 287 (Stevens, J., dissenting)).

410. *See, e.g.*, Healy v. Beer Inst., Inc., 491 U.S. 324, 349 (1989) (Rehnquist, C.J., dissenting) ("The Court in the present cases barely pays lipservice to the additional authority of the States to regulate commerce and alcoholic beverages granted by the Twenty-first Amendment. Neglecting to consider that increased authority is especially disturbing here where the perceived proscriptive force of the Commerce Clause does not flow from an affirmative legislative decision and so is at its nadir.").

411. Justice Stevens, joined by Justice Rehnquist and Justice O'Connor, stated this position in his *Bacchus Imports* dissent: "Given the dual character of the [Commerce] Clause, it is not at all incongruous to assume that the power delegated to Congress by the Commerce Clause is unimpaired while holding the inherent limitation imposed by the Commerce Clause on the States is removed with respect to intoxicating liquors by the Twenty-first Amendment." 468 U.S. at 279 n.5 (Stevens, J., dissenting).

412. *See supra* notes 104-10 and accompanying text.

413. Justice Scalia has never given a full explanation of his view of the Twenty-first Amendment, but in his concurrence in *Healy*, he alluded to a position similar to that of Judge Easterbrook. *See Healy*, 491 U.S. at 344 (1989) (Scalia, J., concurring in part and concurring in the judgment).

414. In *Bridenbaugh v. Freeman Wilson*, Judge Easterbrook stated, "[O]ur guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters. Objective indicators supply the context for § 2; suppositions about mental

Scalia view, however, is in the perception of what the Twenty-first Amendment gives states the power to do. Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor believe that the power given to states is unlimited by the dormant commerce clause whereas Judge Easterbrook and Justice Scalia do see limits.

Justice Scalia has yet to provide a full explanation of his position on the topic, but in his concurrence in *Healy*, he alluded that, under his view, states do not have the power to regulate alcohol in a discriminatory manner.[415] He did not join the majority in *Healy* because he thought its analysis went further than necessary in deciding the case.[416] For Justice Scalia, the inquiry should have started and ended with the fact that the Connecticut law discriminated against out-of-state alcohol. Under his view, a state regulation's facially "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment."[417] As has been discussed, Judge Easterbrook asserted essentially the same position in the *Bridenbaugh* case.[418]

There is a sound and objective reason why the Twenty-first Amendment simply does not give states the power to discriminate against out-of-state alcohol industry. As the Supreme Court has stated and as the legislative history makes clear, Section 2 of the Twenty-first Amendment incorporated the approach of the pre-Prohibition statutes—the Wilson Act and the Webb-Kenyon Act.[419] The Wilson Act explicitly granted states the power to regulate out-of-state alcohol "to the same extent" as in-state alcohol, and not the power to regulate out-of-state alcohol industries in a discriminating fashion.[420] Webb-Kenyon followed, extending state power to regu-

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processes are unilluminating." 227 F.3d 848, 851 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1672 (2001).

415. *Healy*, 491 U.S. at 344.

416. *Id.* at 345 ("I would refrain, however, from applying the more expansive analysis which finds the law unconstitutional because it regulates or controls beer pricing .... [T]his rationale is not only unnecessary but also questionable.").

417. *Id.* at 344.

418. 227 F.3d at 851.

419. *See* Craig v. Boren, 429 U.S. 190, 205-06 (1976) ("The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes.").

420. Wilson Act, ch. 728, 26 Stat. 313 (1890) (current version at 27 U.S.C. § 121 (2000)) ("All ... intoxicating liquors ... transported into any State ... shall upon arrival in such State ... be subject to the operation and effect of the laws of such State ... to the same extent and in the same manner as though such liquids or liquors had been produced in such State."); *see also Bridenbaugh*, 227 F.3d at 852 (asserting that the Wilson Act did not permit states to discriminate against out-of-state alcoholic beverage industries); Scott v. Donald, 165 U.S. 58, 100 (1897)

late mail-order shipments.[421] Webb-Kenyon did not contain the same language as the Wilson Act, which could indicate that Webb-Kenyon did grant the power to discriminate. When Congress passed Webb-Kenyon, however, they did not repeal the Wilson Act; thus, it is reasonable to assume that Congress did not intend for the non-discrimination principle to be removed. Indeed, the Wilson Act's restriction on discriminatory uses of state power is still law today.[422] Given this history, Judge Easterbrook rightly concludes that the Twenty-first Amendment gives a state the power to regulate alcohol in whatever way it sees fit, so long as the state regulates in a way that does not discriminate against out-of-state alcohol industries.[423]

VI. CONCLUSION

A central part of the history of alcohol regulation has been states' struggle to gain control over the sale of alcohol within their borders. Early on, when states tried to place conditions on the sale of alcohol, the Supreme Court, applying the dormant commerce clause, frustrated states' efforts.[424] Twice through congressional act and once through constitutional amendment, America decided to alter the principles of the dormant commerce clause and give states the power to regulate the alcohol industry effectively.[425] These congressional acts involved giving states the power to control the sale of both in-state and imported alcoholic beverages.[426] As noted, many states have chosen to control and regulate the sale and distribution of alcohol by means of a three-tier system.[427] A major aspect of the three-tier system is that it requires wholesalers and retailers to obtain licenses to participate in the alcohol distribution system. By any account, the system of requiring alcohol to be distributed through licensed wholesalers and retailers is "unquestionably legitimate"[428] because it is an exercise of precisely the power given to states by the Twenty-first Amendment—the power "to control . . .

("[T]he State cannot, under the [Wilson Act] establish a system which, in effect, discriminates between interstate and domestic commerce.").

421. *See supra* notes 102-10 and accompanying text (discussing Webb-Kenyon Act).

422. *See* Wilson Act, ch. 728, 26 Stat. 313 (1890) (current version at 27 U.S.C. § 121 (1994)).

423. *See Bridenbaugh*, 227 F.3d at 853.

424. *See supra* notes 63-101.

425. *See supra* notes 80-88, 109-13, 126-29 and accompanying text.

426. *See supra* notes 80-88, 109-13, 126-29 and accompanying text.

427. *See supra* notes 6-10 and accompanying text (describing three-tier system).

428. North Dakota v. United States, 495 U.S. 423, 433 (1990).

whether to permit importation or sale of liquor and how to structure the liquor distribution system."[429]

While states are given broad authority under the Twenty-first Amendment to structure their liquor distribution systems, there are limitations on this power. It is important to understand the scope of these limitations. Since Congress first started regulating alcohol, it has emphasized that while the states have broad power to regulate both in-state alcohol industry and out-of-state industries importing alcohol, states do not have the power to favor the in-state alcohol industry.[430] Thus, a state's power is limited by the principle of nondiscrimination. A state's power is not, however, limited to certain court-specified "legitimate purposes" beyond the principle of nondiscrimination. As has been shown, court attempts to limit state power to "legitimate purposes," such as the promotion of temperance or ensuring orderly market conditions, suffer from two problems.[431] First, these attempts require judges to make a subjective determination regarding the core purposes of the Twenty-first Amendment.[432] Second, the attempts further require judges to delve into the minds of legislators to determine the purpose or motivation behind the state regulation.[433]

Accepting the principle of nondiscrimination as the sole Commerce Clause limitation on state power, the analysis of direct shipment laws proceeds as follows. Most states have structured their distribution systems such that there are only two ways an alcohol beverage supplier, whether in-state or out-of-state, can sell alcohol to state consumers: either by obtaining a state license,[434] or by shipping the beverages through the state's three-tier system. Direct shipment laws ensure that out-of-state suppliers cannot circumvent the license requirement, or the three-tier system, and sell directly to consumers. State systems that regulate the distribution of alcohol in this way are valid exercises of Twenty-first Amendment power under the analysis this Note proposes. No discrimination exists because all out-of-state suppliers are simply forced to

429. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 715 (1984) (quoting Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)).

430. *See supra* notes 89-95 and accompanying text (describing the Wilson Act).

431. *See supra* notes 369-402 and accompanying text.

432. The determination is subjective because, as shown in *supra* notes 369-89 and accompanying text, judges cannot point to objective textual evidence or legislative history to show what the purposes of the Twenty-first Amendment are.

433. *See supra* notes 390-402 and accompanying text.

434. These licenses are either wholesaler's or retailer's licenses.

comply with the same conditions for selling alcohol as in-state suppliers.

Some state distribution systems, however, go too far. Some state distribution schemes are discriminatory in that licenses are granted only to in-state residents.[435] These residency requirements clearly violate the principle of non-discrimination established in the Wilson Act and incorporated into the Twenty-first Amendment, and thus, are not within states' Twenty-first Amendment power—regardless of whether these statutes promote temperance, aid in the collection of taxes, or provide for an orderly market.[436]

In sum, this Note argues that a state, under its Twenty-first Amendment power, may prohibit out-of-state alcohol distributors from shipping alcoholic beverages directly to consumers, if that state also prohibits in-state alcohol distributors from shipping directly to consumers. Furthermore, a state, under its Twenty-first Amendment power, may require that distributors obtain a license before selling alcohol to citizens of the state; however, a state may not issue those licenses only to in-state distributors.

Russ Miller[*]

435. The Indiana alcohol distribution scheme provides an excellent example of this type of discrimination. *See supra* notes 309-19 and accompanying text. For a list of other states that impose residency restrictions on the granting of licenses, see *supra* note 13 and accompanying text.

436. *Cf.* Cooper v. McBeath, 11 F.3d 547, 555 (5th Cir. 1994) (holding a Texas law that restricted mixed beverage permits to in-state residents unconstitutional).

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