A BREWING DEBATE: ALCOHOL DIRECT SHIPMENT LAWS AND THE TWENTY-FIRST AMENDMENT

MATTHEW J. PATTERSON

Alcohol direct shipment laws exist in many forms. In some cases, these laws prohibit out-of-state producers and retailers from shipping alcohol directly to in-state consumers. In other instances, such laws allow alcohol to be shipped directly to consumers from producers and retailers in another state as long as a reciprocity agreement exists. While proponents of alcohol direct shipment laws cite underage drinking and tax evasion as reasons to keep these laws intact, opponents believe that states have no legitimate regulatory interest in the stream of intrastate alcohol.

At the center of this dispute is the Twenty-first Amendment, which assures that alcohol transportation or importation into any state will not occur in contravention of the laws of that state. As a result of this assurance, a debate has raged over whether state laws governing the intrastate flow of alcohol are exempt from the ambit of the Commerce Clause.

In this note, the author will examine the history of alcohol regulation in the United States and analyze Twenty-first Amendment jurisprudence. This note will then argue that a disassembling of state-sanctioned alcohol distribution plans is not backed by the Twenty-first Amendment or the history encompassing its passage. Finally, the note will argue that striking down alcohol direct shipment laws would produce a national alcohol market, which would be in conflict with the Twenty-first Amendment.

"Although all Americans are guaranteed certain inalienable rights such as life, liberty and the pursuit of happiness, access to wine is not one of them."[1]

I. INTRODUCTION

It may sound like hyperbole to equate the plight of wine aficionados with those who actually have been deprived of life and liberty, but such is the state of the current debate over direct interstate shipments of alco-

1. Peter Sinton, *No Wine Across the Line: Vintners Confront States' Shipping Laws*, S.F. CHRON., Jan. 29, 2001, at B1.

hol.[2] Lovers of fine Chardonnay and Cabernet—for whom alcohol direct shipment laws[3] have become a cause célèbre[4]—condemn such laws as violations of their "civil rights,"[5] rejecting the notion that state governments have an interest in regulating the intrastate flow of alcohol.[6] Equally shrill are state-sanctioned wholesalers and distributors of alcohol who warn of an explosion in underage drinking and tax evasion if efforts to eliminate prohibitions on direct interstate shipping of alcohol are successful.[7]

Beneath the extremist and alarmist rhetoric, however, lies a legal debate over the meaning of the Twenty-first Amendment that has brought virtually the entire panoply of state alcohol regulations under constitutional scrutiny. The primary impetus for the debate was a series of Supreme Court decisions, culminating in *Bacchus Imports, Ltd. v. Dias*,[8] implying that state alcohol regulations are not exempt from review under dormant commerce clause principles.[9] The alcohol direct shipment laws at issue come in a variety of forms, with the most controversial being those that completely ban the direct shipment of alcohol from out-of-state producers and retailers to consumers.[10] Such statutory provisions

2. In keeping with such hyperbole, one reporter likened the conflict between alcohol manufacturers and wholesalers to a "civil war" that turned "one-time business allies into bitter foes." Ted Appel, *Less Whining About Wine: More States Moving to Ease or Eliminate Rules That Prevent Customers from Buying Wines Directly from Vintners*, PRESS DEMOCRAT, Mar. 4, 2001, at E1.

3. The typical alcohol direct shipment law bans direct shipments of alcohol from out-of-state manufacturers and distributors to consumers within the state. *See, e.g.*, TEX. ALCO. BEV. CODE ANN. § 107.07(f) (Vernon 2002).

4. Free the Grapes!, a coalition of alcohol manufacturers and consumers that opposes direct shipping laws, claims a membership of more than 1000 wineries and more than 200,000 wine consumers. Sinton, *supra* note 1.

5. *Id.*

6. To be sure, opponents of direct shipping laws generally pay lip service to the notion that state governments have a compelling public safety interest in regulating the distribution of alcohol. *See, e.g.*, Wendell Lee, *Background on Anti-Direct Shipment Laws* (1996), *available at* http://www.wineinstitute.org/shipwine/backgrounder/backgrounder.htm ("States may have an interest in protecting its citizens from harmful products by controlling its distribution, and alcohol beverages can be abused."). Nevertheless, such deference to state authority is frequently counter-balanced by statements that implicitly question the very legitimacy of state-sanctioned indirect distribution channels. *See, e.g.*, *id.*

> But to say that a product is legitimately in the state because it went through an established state distribution system while the identical product is illegitimate simply because a consumer received it directly from the producer who just so happens to have sent it from another state raises questions. What state interest is being served?

Id.

7. *E.g.*, Travis E. Poling, *Modern Prohibition: Wine Lovers Wait for Court to Kill Texas Law Barring Interstate Deals*, SAN ANTONIO EXPRESS-NEWS, Jan. 28, 2001, at 01J ("'Out-of-state companies should not be able to blatantly break Texas law by selling alcohol without preventing minors from ordering, without paying taxes, and without honoring local county areas,' Robert Sparks said in November. Sparks is executive director of the Austin-based association Licensed Beverage Distributors.").

8. 468 U.S. 263 (1984).

9. *See id.* at 275–76.

10. *E.g.*, TEX. ALCO. BEV. CODE ANN. § 107.07(f) (Vernon 2002) ("Any person in the business of selling alcoholic beverages in another state or country who ships or causes to be shipped any alcoholic beverage directly to any Texas resident under this section is in violation of this code.").

are typically targeted at suppliers rather than consumers.[11] Somewhat less controversial, though perhaps more constitutionally suspect,[12] are the reciprocity laws that some states have adopted.[13] Alcohol direct shipment laws typically dovetail with the three-tiered indirect alcohol distribution schemes mandated by most states,[14] which usually require alcohol producers to distribute their wares through a three-tiered chain comprised of manufacturers, wholesalers/distributors, and retailers.[15] Such distribution schemes are defended by supporters as a means of preventing underage access to alcohol,[16] ensuring the orderly collection of alcohol taxes,[17] and maintaining "orderly market conditions."[18]

The wine industry was able to achieve only partial success in eliminating alcohol direct shipment laws through legislative channels.[19] Thus, it seized upon *Bacchus* in support of its cause and, backing lawsuits in seven states,[20] alleged that such laws violate the dormant commerce clause and hence should be invalidated.[21] Under a standard application of Commerce Clause principles, it is generally agreed that alcohol direct shipment laws, as well as many other state alcohol regulations, would be invalidated as unwarranted impediments upon interstate commerce.[22] Indeed, the primary supporters—and beneficiaries—of such laws tend to be local alcohol wholesalers,[23] who have historically enjoyed a uniquely

11. *Id.*

12. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 298 (5th ed. 1995).

13. *E.g.*, 235 ILL. COMP. STAT. ANN. 5/6-29(a) (West 2001). This Illinois provision states:

> Notwithstanding any other provision of law, an adult resident or holder of an alcoholic beverage license in a state which affords Illinois licensees or adult residents an equal reciprocal shipping privilege may ship, for personal use and not for resale, not more than 2 cases of wine (each case containing not more than 9 liters) per year to any adult resident of this State. Delivery of a shipment pursuant to this Section shall not be deemed to constitute a sale in this State.

Id.

14. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000).

15. *Id.*

16. Poling, *supra* note 7.

17. *Id.*

18. *Bridenbaugh*, 227 F.3d at 851 ("Like most states, Indiana has chosen a three-tiered system of alcohol distribution, with different classes of permits for manufacturers, distributors, and retailers. This facilitates what appellants call 'orderly market conditions'—a euphemism for reducing competition and facilitating tax collection.").

19. Steve Gross, state relations manager for the Wine Institute, a public policy association representing more than 500 California wineries, stated that eighteen states have liberalized their interstate alcohol distribution laws in the past fifteen years. Sinton, *supra* note 1. Thirty states continue to prohibit direct shipments, however, with some having proposed more strict alcohol direct shipment legislation in the past year. *Id.*

20. Appel, *supra* note 2.

21. *Id.*

22. *See, e.g.*, *Bridenbaugh*, 227 F.3d at 851 ("If the product were cheese rather than wine, Indiana would not be able either to close its borders to imports or to insist that the shippers collect its taxes, despite the effect on its treasury. . . . For more than a century the Supreme Court has treated the grant of commerce power to Congress as a prohibition against border-closing laws and other efforts by states to discriminate against interstate commerce.").

23. Appel, *supra* note 2 ("Wholesalers and wine merchants sought tougher restrictions on direct shipping, saying the laws would thwart children from buying wine on the Internet and prevent states from losing tax revenue on unregulated sales."); Linda Ashton, *Wine Shipments Bottled Up by State Laws*, CHI. TRIB., Dec. 31, 2000, at 6 ("Many in the wine industry blame big distributors or wholesalers

profitable niche in the three-tiered indirect alcohol distribution schemes mandated by most state governments.[24] In at least two states, these legally mandated middlemen are the state governments themselves, relying on alcohol direct shipment laws to maintain alcohol distribution monopolies.[25]

Alcohol, however, enjoys an unusual position in constitutional jurisprudence, being that it is the subject of two constitutional amendments.[26] The latter of these amendments, the Twenty-first, prohibits "the transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof."[27] Proponents of alcohol direct shipment laws maintain that the plain meaning of the Twenty-first Amendment exempts state alcohol laws governing intrastate importation and distribution from Commerce Clause scrutiny.[28]

Thus far, the results of litigation involving direct shipments of alcohol have been mixed. While at least two federal district courts have authored opinions striking down direct shipment laws, reasoning that the Twenty-first Amendment does not shield such laws from scrutiny under the Commerce Clause,[29] the Seventh Circuit Court of Appeals recently became the first federal appellate court to weigh in on the issue when it upheld an Indiana ban on direct alcohol shipments.[30] Whatever the outcomes of the various cases in the lower federal courts, the wine industry aims to eventually place the issue on the Supreme Court docket.[31]

Part II of this note will briefly examine the history of alcohol regulation in the United States as a means of framing the passage of the Twenty-first Amendment in its proper historical context. An analysis of

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for tying up the interstate market with what they call protectionist legislation in their home states under the guise of concern for minors."); Sinton, *supra* note 1 ("In general, liquor wholesalers have vigorously opposed direct shipments of alcoholic beverages as a threat to their business.").

24. Indeed, the years immediately preceding the 1980s have been characterized as "golden days for [alcohol] distributors," characterized by fat profits and minimal competition between wholesalers and distributors. Joseph T. Hallinan & Douglas Holt, *How the Wirtzes Sold Liquor Law*, CHI. TRIB., Nov. 12, 1999, at 1. However, the liquor industry had encountered hard times by the 1980s, forced to cope with a decline in alcohol consumption driven by health concerns and the increase in the drinking age from eighteen to twenty-one. *Id.* The growing demand for direct shipments of alcohol in the 1990s further threatened the historical profitability of alcohol wholesalers and distributors. Appel, *supra* note 2.

25. Lee, *supra* note 6 ("Pennsylvania and Utah exert so much control over the distribution and sale of alcoholic beverages that they have deemed the State as the sole importer, wholesaler, and retailer of alcoholic beverages . . . .").

26. The Eighteenth Amendment, ratified in 1919, established a nationwide prohibition of alcohol. U.S. CONST. amend. XVIII. The Twenty-first Amendment, ratified in 1933, repealed the Eighteenth Amendment. U.S. CONST. amend. XXI.

27. U.S. CONST. amend. XXI, § 2.

28. Appel, *supra* note 2 ("States sought to justify their laws, arguing that the 21st Amendment—which repealed prohibition—gives each state the right to regulate how alcohol is sold.").

29. *See* Dickerson v. Bailey, 87 F. Supp. 2d 691, 697 (S.D. Tex. 2000); Bridenbaugh v. O'Bannon, 78 F. Supp. 2d 828, 831 (N.D. Ind. 1999), *rev'd sub nom.*, Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000).

30. *Bridenbaugh*, 227 F.3d at 853–54.

31. Appel, *supra* note 2 ("The wine industry is attempting to put at least one of the lawsuits before the U.S. Supreme Court, a process that will take another two to three years . . . .").

Twenty-first Amendment jurisprudence will follow in Part III, with a particular focus on the interaction between the countervailing principles of the Twenty-first Amendment and the Commerce Clause. Part IV will argue that expansion of the Supreme Court's decision in *Bacchus* beyond its limited holding, which would effectively dismantle state-sanctioned alcohol distribution schemes, is not supported by any reasonable construction of the language of the Twenty-first Amendment or the history surrounding its passage. Part IV will further argue that the practical effect of an expansion of *Bacchus* to strike down alcohol direct shipment laws would be to create a national alcohol market in direct contravention of the historical basis of Section 2 of the Twenty-first Amendment.

II. BACKGROUND: HISTORY SURROUNDING THE PASSAGE OF THE TWENTY-FIRST AMENDMENT

It is not entirely true to note, as one commentator has, that "[n]o Supreme Court case has addressed the validity of direct shipment laws."[32] In fact, the Supreme Court addressed the constitutionality of such laws in 1898, when it decided *Rhodes v. Iowa*.[33] Supporters of direct shipping won that battle,[34] but the history of events leading up to and following the case serves as a compelling argument that the intent of Section 2 of the Twenty-first Amendment was, at a minimum, to provide states the latitude to pass laws prohibiting the direct importation of alcohol to consumers.

A. *Pre-Eighteenth Amendment Alcohol Regulation*

Alcohol regulation during the 1800s was entirely the province of state and local governments.[35] Predictably, regulations on alcohol varied dramatically from state to state, a reflection of the diverse nature of the states.[36] Early efforts to promote temperance were local and, for the most part, successful.[37] A key victory for the states came in 1887 when the Supreme Court decided *Mugler v. Kansas*,[38] a case in which it upheld the constitutionality of state laws—passed pursuant to the states' police powers—banning the production and consumption of alcohol.[39] Nevertheless, these efforts to reform state and local alcohol laws ran headlong

32. Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 359 (1999).

33. 170 U.S. 412 (1898).

34. *Id.* at 421–23.

35. *See* Thomas H. Walters, Note, *Michigan's New Brewpub License: Regulation of Zymurgy for the Twenty-First Century*, 71 U. DET. MERCY L. REV. 621, 630 (1994).

36. *See id.*

37. *See* Sidney J. Spaeth, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 165 (1991).

38. 123 U.S. 623 (1887).

39. *Id.* at 661–62.

into a United States Supreme Court intent on asserting federal rights to regulate interstate commerce and substantially curtail state authority over intoxicating liquors.[40]

An early indication of the Supreme Court's leanings on the subject of state and local alcohol regulations came in the 1888 case, *Bowman v. Chicago & Northwestern Railway Co*.[41] Relying on the proposition that regulation of interstate commerce is an exclusive power of Congress,[42] the Court ruled that a state's right to regulate the sale of liquor under its police power "arises only after the act of transportation has terminated."[43]

Cognitive of the Supreme Court's decision in *Bowman*, Iowa set out to regulate liquor immediately following its transportation into the state.[44] Perhaps recognizing a potential loophole in the *Bowman* decision, an enterprising man named John Leisy arranged to circumvent Iowa laws banning the sale of alcohol within the state.[45] Leisy received packaged liquors from Illinois and sold them in Iowa without ever removing them from their original packages.[46] Iowa officials subsequently seized liquor belonging to Leisy, prompting Leisy to file suit for recovery of the alcohol.[47] In *Leisy v. Hardin*, the Court ruled the seizure invalid on the grounds that the state lacked the authority to regulate alcohol so long as it remained in its original package.[48] Until that point, the Court reasoned, the alcohol remained an article of interstate commerce.[49] Reflecting the burgeoning differences of opinion concerning states' rights to regulate alcohol, a dissenting opinion argued vigorously that, due to the varying attitudes toward alcohol prevalent throughout the nation, the states should be granted near-absolute power to regulate the manufacture and sale of liquor within their borders.[50]

Following the Court's decision in *Leisy v. Hardin*, the temperance movement found a useful ally in the U.S. Congress, which passed the

40. *See infra* notes 41–49 and accompanying text. *See generally* Alexander M. Bickel, *The Judiciary and Responsible Government 1910–21*, *in* IX HISTORY OF THE SUPREME COURT OF THE UNITED STATES 3 (Paul A. Freund & Stanley N. Katz eds., 1984); Owen M. Fiss, *Troubled Beginnings of the Modern State 1888–1910*, *in* VIII HISTORY OF THE SUPREME COURT OF THE UNITED STATES 3 (Stanley N. Katz ed., 1993).

41. 125 U.S. 465 (1888).

42. *See id.* at 498.

43. *Id.*

44. *See* IOWA CODE §§ 1523, 1540–1555 (1873).

45. Leisy v. Hardin, 135 U.S. 100, 100–02 (1890).

46. *Id.* at 100–01.

47. *Id.* at 100–02.

48. *Id.* at 124–25.

49. *Id.* at 125.

50. *Id.* at 159 (Gray, J., dissenting) ("The power of regulating or prohibiting the manufacture and sale of intoxicating liquors appropriately belongs, as a branch of the police power, to the legislatures of the several States, and can be judiciously and effectively exercised by them alone, according to their views of public policy and local needs; and cannot practically, if it can constitutionally, be wielded by Congress as part of a national and uniform system.").

Wilson Act in 1890 with the aim of closing the *Leisy* loophole.[51] The Wilson Act provided that liquor shipped into a state could be treated by that state in the same manner as locally produced liquor—without regard to whether the imported alcohol remained in its original package.[52]

While the Wilson Act was a success in terms of closing the *Leisy* loophole,[53] manufacturers and distributors quickly found another loophole that allowed them to import alcohol into dry states with impunity—direct shipments. In 1898, this loophole received the imprimatur of the Supreme Court in *Rhodes v. Iowa*, which held that state alcohol restrictions did not apply until mail-ordered liquor was actually delivered to the consignee.[54] This decision essentially prohibited state governments from enforcing dry laws against out-of-state shippers. Not surprisingly, shipping alcohol directly to consumers became the preferred means of skirting state and local alcohol regulations.[55]

Some years after the *Rhodes* decision, Senator Kenyon of Iowa, echoing the *Rhodes* dissent, complained about the Supreme Court's narrow reading of the Wilson Act, which he maintained stood in stark contrast to the intent of Congress.[56] He stated, "[The states] could have prohibition, high license, local option, or free liquor, as they please. It was the intention [of the Wilson Act] that each State should be free to determine its own policy in regard to the liquor traffic."[57]

Responding to appeals from states for more latitude in the regulation of alcohol, Congress subsequently passed the Webb-Kenyon Act, which took the radical approach of completely removing liquor from the category of interstate goods, thereby eliminating the Commerce Clause as an impediment to state alcohol laws.[58] Interestingly, President Taft vetoed the Webb-Kenyon Act, arguing that it constituted an unconstitutional delegation by Congress to the states of the exclusive power to regulate interstate commerce in liquors.[59] Nevertheless, the Act was passed over Taft's veto and subsequently affirmed by the Supreme Court.[60]

The significance of the language employed in the Webb-Kenyon Act[61] deserves mention at this point, as its similarity to the language of

51. Wilson Act, 27 U.S.C. § 121 (1994).

52. *Id.*

53. Shortly after passage of the Wilson Act, the Supreme Court, in a case involving the sale of unopened liquor in Kansas, upheld an arrest against a habeas corpus petition on the grounds that the Wilson Act expressly restricted application of the Commerce Clause from applying to state regulations governing the importation of alcohol. *See In re* Rahrer, 140 U.S. 545, 564–65 (1891).

54. 170 U.S. 412, 426 (1898).

55. Spaeth, *supra* note 37, at 173.

56. 49 CONG. REC. 825, 828 (1912) (statement of Sen. Kenyon).

57. *Id.*

58. Webb-Kenyon Act, 27 U.S.C. § 122 (1994).

59. 49 CONG. REC. 4257, 4291 (1913) (veto message of President Taft).

60. *See* Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 330–32 (1917).

61. "[T]he shipment or transportation [into a state] . . . of any . . . liquor . . . [which] is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the

Section 2[62] of the Twenty-first Amendment has been one of the more compelling arguments proffered by those who maintain that the dormant commerce clause is not a limitation on state laws regulating the distribution and importation of alcohol. As Judge Easterbrook of the United States Seventh Circuit Court of Appeals explains:

> Section 2 [of the Twenty-first Amendment] tracks the Webb-Kenyon Act and effectively incorporates its approach into the Constitution. Like the Webb-Kenyon Act, [Section] 2 incorporates state prohibitions into a federal rule; like the Webb-Kenyon Act, [Section] 2 closes the loophole left by the dormant commerce clause, abetted by *Bowman* and *Rhodes*: direct shipments from out-of-state sellers to consumers that bypass state regulatory (and tax) systems. No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; [Section] 2 speaks directly to these shipments.[63]

Despite the successful passage of the Webb-Kenyon Act, the days of growing state power over alcohol regulation were numbered. Having succeeded in securing latitude for the states to regulate alcohol, the temperance movement took prohibition nationwide by introducing an amendment to the U.S. Constitution that would ban alcohol nationally.[64] The successful passage of the Eighteenth Amendment[65] presaged the temporary end of state control over liquor regulations.[66] As one commentator has noted, "[w]hat had been a seemingly invincible states' rights movement toward local regulation of alcohol simply evaporated in the face of federal regulation."[67]

B. The Prohibition Era

While Section 2 of the Eighteenth Amendment gave the states concurrent power to enforce prohibition,[68] this authority should not be misconstrued as providing states flexibility in their approaches to dealing with liquor. While the states were free to make laws in furtherance of

original package or otherwise, in violation of any law of such state . . . is hereby prohibited." 27 U.S.C. § 122.

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

63. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000).

64. *See* NORMAN H. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION 118–19 (1976).

65. Section 1 of the Eighteenth Amendment provides, "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 from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII, § 1.

66. *See* CLARK, *supra* note 64, at 123–24.

67. Spaeth, *supra* note 37, at 175.

68. Section 2 of the Eighteenth Amendment provides, "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." U.S. CONST. amend. XVIII, § 2.

prohibition without concern for Commerce Clause limitations,[69] they lacked the power to enact alcohol regulations that ran counter to prohibition.[70]

Despite the concurrent authority of the states to enforce prohibition, the federal government served as the primary enforcer of prohibition laws, an approach to enforcement that was questioned by many.[71] Plagued by a wide divergence among states and localities in attitudes toward alcohol,[72] the federal government struggled unsuccessfully to enforce prohibition laws in the face of seemingly insatiable demand.[73] While ineffective enforcement of prohibition bred disrespect for the law, a patronage system plagued by graft and incompetence[74] led to further contempt for national prohibition.

Capitalizing on widespread public disenchantment with national prohibition,[75] some of the nation's wealthiest citizens helped underwrite the Association Against the Prohibition Amendment (AAPA), a group dedicated to securing the repeal of the Eighteenth Amendment.[76] The AAPA successfully fomented a public movement to end prohibition by highlighting the shortcomings of a national one-size-fits-all alcohol regulatory scheme.[77] The movement to repeal prohibition was also helped by the Great Depression, which heightened the need for alcohol tax revenue and spawned further resentment of well-paid federal prohibition enforcement officials.[78]

C. Passage of the Twenty-First Amendment

Seen in the context of pre-prohibition history, characterized by state and local control of alcohol regulation, and prohibition, during which the federal government dominated alcohol regulation, the repeal of the Eighteenth Amendment constituted a rejection of the notion that the country should adopt a one-size-fits-all policy on intoxicating beverages. Indeed, as one commentator noted, it was the "dismal experience with prohibition under federal control that contributed to sentiment both in

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69. *See* United States v. Lanza, 260 U.S. 377, 381 (1922) ("[T]he second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws . . . .").

70. *See* McCormick & Co. v. Brown, 286 U.S. 131, 143–44 (1932).

71. *See* Spaeth, *supra* note 37, at 175.

72. *See id.* at 162.

73. *See* Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 239–40 (2000).

74. *See* Major Chester P. Mills, *Dry Rot*, COLLIER'S, Sept. 17, 1927, at 5, 48.

75. *See* CLARK, *supra* note 64, at 207.

76. *See* Kathleen Auerhahn, *The Split Labor Market and the Origins of Antidrug Legislation in the United States*, 24 LAW & SOC. INQUIRY 411, 432 (1999).

77. *See* CLARK, *supra* note 64, at 207.

78. *Id.* at 208.

Congress and in the states to insist on state control of liquor upon repeal."[79]

These sentiments concerning federal control of alcohol regulation influenced debate over the drafting of the Twenty-first Amendment.[80] The original proposed amendment had four sections, and debate over the final version of the amendment primarily concerned sections two and three of the proposed version.[81] The entire proposed amendment provided as follows:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> Section 3. Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.
>
> Section 4. 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.[82]

Section three of the proposed amendment, with its grant to Congress of concurrent power to regulate or prohibit the sale of intoxicating liquors, generated strenuous objections among congressmen.[83] In particular, two concerns were raised about this provision: First, congressmen questioned the ability of the federal government to effectively enforce alcohol regulations,[84] particularly given its abysmal failure at this task during prohibition;[85] and second, some believed that section three ran counter to the overriding goal of returning to the states the power to regulate alcohol.[86] As a result of these objections, section three of the proposed amendment was ultimately deleted from the final version.[87]

Section two of the proposed amendment, on the other hand, was ultimately ratified and has been a source of dispute ever since the

79. Spaeth, *supra* note 37, at 180.

80. *See id.*

81. *See id.*

82. S.J. Res. 211, 72d Cong., 76 CONG. REC. 4138–39 (1933) (remarks of Sen. Wagner).

83. Spaeth, *supra* note 37, at 180.

84. "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?" 76 CONG. REC. at 4145 (remarks of Sen. Wagner).

85. *See supra* notes 69–72 and accompanying text.

86. Specifically, there were concerns that a grant of concurrent power to the federal government would be meaningless, because any subsequent conflict between federal and state law would be resolved in favor of federal law. 76 CONG. REC. 4143 (1933) (remarks of Sen. Wagner).

87. *See* U.S. CONST. amend. XXI.

passage of the Twenty-first Amendment. By prohibiting the transportation or importation of alcohol into states in violation of state laws, the proposed section generated a contentious debate as to the extent of the power of states to regulate alcohol.[88]

One side of the debate has deemed Section 2 of the Twenty-first Amendment an unconditional grant[89] of power to the states to regulate the importation and distribution of alcohol. Relying primarily on the plain meaning of the language of Section 2,[90] and the similarity of its language to the Webb-Kenyon Act,[91] proponents of the unconditional grant theory argue that the language constitutes a delegation of Commerce Clause power to the states.[92] Accordingly, they interpret Section 2 as granting the states the authority to regulate the importation and distribution of alcohol exclusive of, at a minimum, dormant commerce clause restrictions.[93]

In contrast, proponents of the conditional grant theory view Section 2 of the Twenty-first Amendment as a conditional grant of power to the states to regulate the importation and distribution of alcohol.[94] They maintain that Section 2 grants the states the authority to regulate alcohol only to the extent that such regulations are enacted under a "core Twenty-First Amendment power."[95] To the extent that state liquor laws do not a support a core purpose of the Twenty-first Amendment, they remain subject to the restrictions of the dormant commerce clause of the Constitution.[96]

III. ANALYSIS: JUDICIAL TREATMENT OF THE TWENTY-FIRST AMENDMENT

A. The Rise and Fall of the Unconditional Grant Theory

While the merits of the conditional grant and unconditional grant theories are subject to debate, the initial interpretation of the Twenty-

88. *See* Spaeth, *supra* note 37, at 180–81.

89. Other commentators have employed the terms "absolutist" and "federalist" to describe the conflicting interpretations of Section 2 of the Twenty-first Amendment. *See, e.g.*, Michael E. Loomis, *Federal District Court Exempts Interstate Rail Carrier from Open Saloon Prohibition*, 6 CREIGHTON L. REV. 249, 252–53 (1972). The author of this note has opted to use the terms "unconditional grant theory" and "conditional grant theory" in place of, respectively, the "absolutist" and "federalist" terms.

90. *See, e.g.*, State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936) ("The amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors.").

91. *See supra* notes 61–63 and accompanying text.

92. *See Young's Mkt. Co.*, 299 U.S. at 62.

93. *See id.*

94. *See, e.g.*, Bridenbaugh v. O'Bannon, 78 F. Supp. 2d 828, 831 (N.D. Ind. 1999) ("[T]he Twenty-First Amendment does not necessarily immunize state liquor control laws from invalidation under the commerce clause.").

95. *Id.*

96. *See id.*

first Amendment by the United States Supreme Court in *State Board of Equalization v. Young's Market Co.*[97] was crystal clear. In a majority opinion written by Justice Brandeis, the Court endorsed the unconditional grant theory by upholding a California statute that imposed a license fee on imported beer while exempting domestic beer (i.e., beer brewed within the state) from any such fee.[98] While denying that the license fee at issue discriminated against interstate commerce, the opinion nevertheless made clear that passage of the Twenty-first Amendment operated to exempt states from federal constitutional and statutory restrictions on alcohol regulations.[99] In so holding, the opinion skewered the conditional grant theory of the Twenty-first Amendment as a bastardization of the plain meaning of the amendment:

> The words used [in the Twenty-first Amendment] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its boarders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.[100]

Consistent with the *Young's Market* opinion, the Supreme Court subsequently upheld several discriminatory state alcohol statutes.[101] Without exception, these opinions reaffirmed the unconditional grant theory that had been recognized by the *Young's Market* Court.

The approach taken by the Court in *Young's Market* introduced an era of relative stability in Twenty-first Amendment jurisprudence owing primarily to the bright-line approach the Court adopted. Indeed, under the *Young's Market* test, there was no need to balance the countervailing principles of the Twenty-first Amendment and the Commerce Clause; rather, a state alcohol regulation was constitutional so long as it involved

97. 299 U.S. 59 (1936).

98. *Id.*

99. "Prior to the Twenty-first Amendment, it would obviously have been unconstitutional to have imposed any fee for [the] privilege [of importing beer]." *Id.* at 62.

100. *Id.*

101. *See, e.g.*, Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939) (upholding a comprehensive Kentucky statute that rigidly regulated liquor transportation and distribution); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939) (upholding a Michigan statute that prohibited the sale of beer manufactured in a state that discriminated against Michigan beer); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939) (holding that the Commerce Clause did not limit the right of states to regulate the importation of liquor); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938) (upholding a Minnesota statute that banned the importation of liquor containing more than twenty-five percent alcohol unless the brand was registered with the U.S. patent office).

regulation of the importation or distribution of alcohol.[102] If the law did not regulate the importation or distribution of alcohol, it was treated as any other state law would be and analyzed under conventional Commerce Clause principles.[103] Accordingly, the most notable cases from this era involved the dividing line between state laws that regulated the importation and distribution of alcohol and those that extended beyond this broad grant of power. Thus, in *Collins v. Yosemite Park & Curry Co.*,[104] the Court ruled that states' rights to regulate the importation and distribution of alcohol did not extend to national parks, which were deemed to be within the exclusive jurisdiction of Congress.[105] Similarly, in *United States v. Frankfort Distilleries, Inc.*,[106] the Court refused to dismiss an antitrust indictment against several alcohol producers, wholesalers, and retailers, holding that the Twenty-first Amendment did not give the states "plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries."[107]

A year after *Frankfort Distilleries*, however, the Court first hinted that state alcohol regulations may not be completely exempt from Commerce Clause restrictions, particularly when state alcohol laws directly conflicted with federal laws governing interstate trade or traffic.[108] By 1964, the Supreme Court had set about laying the groundwork for a complete retreat from the unconditional grant theory of the Twenty-first Amendment.[109] Writing for the majority in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,[110] Justice Stewart acknowledged that the Court had "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."[111] Nevertheless, the opinion dismissed as "patently bizarre" the notion that the Twenty-first Amendment operated to "'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned."[112] According to Justice Stewart, the Twenty-first Amendment is at parity with the Commerce Clause: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light

102. *Young's Mkt. Co.*, 299 U.S. at 62 ("The words used [in Section 2 of the Twenty-first Amendment] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes.").

103. *See id.*

104. 304 U.S. 518 (1938).

105. *Id.* at 539.

106. 324 U.S. 293 (1945).

107. *Id.* at 299.

108. Nippert v. City of Richmond, 327 U.S. 416, 425 n.15 (1946).

109. *See* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).

110. *Id.*

111. *Id.* at 330.

112. *Id.* at 332.

of the other, and in the context of the issues and interests at stake in any concrete case."[113]

The significance of Justice Stewart's opinion in *Hostetter* cannot be overestimated, as it provided the theoretical foundation upon which later decisions would rely in further abrogating state powers under the Twenty-first Amendment.[114] In rejecting the notion that the Twenty-first Amendment exempts state alcohol laws from the restrictions of the dormant commerce clause, the Supreme Court introduced the modern accommodation standard for the analysis of state alcohol regulations that violate dormant commerce clause principles.[115]

Given the significance of the Supreme Court's opinion in *Hostetter*, a more thorough analysis of its rationale is warranted. Such an analysis reveals several structural flaws in the logical foundation wrought by Justice Stewart. Of particular interest is the Court's rejection of the notion that the Twenty-first Amendment operates to completely divest Congress of its regulatory power over alcohol.[116] Because such a notion would leave Congress with no regulatory power over interstate or foreign liquor and, because several precedents had held otherwise, the Court concluded that it must be false.[117] The problem with this argument, however, is that it relies on a straw man. As Justice Stevens noted in *Bacchus*,[118] proponents of the unconditional grant theory have never argued that the Twenty-first Amendment operates to completely divest Congress of the power to regulate alcohol.[119] Rather, they have argued that the Twenty-first Amendment operates to repeal the Commerce Clause as it pertains to state laws regulating the importation and distribution of alcohol.[120] Thus, Congress retains authority to regulate interstate commerce of alcohol to the extent that it does not involve importation into or distribution within a state.[121]

113. *Id.*

114. *See, e.g.*, Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 275 (1984) (quoting *Hostetter* to support the Court's conclusion that "the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause").

115. *See Hostetter*, 377 U.S. at 331–32.

116. *See id.* ("To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification.").

117. *Id.*

118. 468 U.S. 263 (1984).

119. *Id.* at 284 (Stevens, J., dissenting) ("Justice Brandeis of course in no way implied that Congress had been totally divested of authority to regulate commerce in intoxicating liquors—a proposition which Justice Stewart characterized as 'patently bizarre.'").

120. *See, e.g.*, State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936) ("The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors.").

121. This would include, for example, authority to regulate alcohol in the national parks. Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 538–39 (1938).

The facts of *Hostetter*[122] illustrate the significance of the straw man argument employed by the Court. In that case, a New York corporation sought to enjoin the New York State Liquor Authority from interfering with the corporation's business of selling tax-free bottled wines and liquors to departing international airline travelers.[123] The company had attempted to circumvent state alcohol regulations by deferring delivery until the travelers arrived at their foreign destinations.[124] *Hostetter* could have been easily dispatched through simple application of the reasoning employed in *Collins*,[125] which held that the Twenty-first Amendment did not give a state the power to regulate alcohol not intended for importation into or distribution within that state.[126] Because the alcohol in *Hostetter* was arguably neither imported into nor distributed within New York, the state had no power to regulate it even under an unconditional grant approach to the Twenty-first Amendment.

While the *Hostetter* Court clearly recognized the applicability of *Collins*,[127] it declined to dispense with the matter at hand by applying its limited holding.[128] Rather, the Court cited *Collins* to support the conclusion that the Commerce Clause had not been qualified by the Twenty-first Amendment,[129] even though *Collins* said nothing of the sort.[130] Thus, the Court blatantly misconstrued one of its own decisions to arrive at the conclusion that the Twenty-first Amendment and Commerce Clause are merely conflicting provisions of the Constitution that must be balanced against one another.[131]

The *Hostetter* Court's conclusion regarding the interaction of the Commerce Clause and the Twenty-first Amendment suffers from other shortcomings. Most notably, the *Hostetter* opinion implicitly treats the Commerce Clause and Twenty-first Amendment as if they were drafted and ratified at the same time[132] when, in fact, the latter was, by definition,

122. 377 U.S. at 324.

123. *Id.*

124. *Id.*

125. 304 U.S. at 518. Indeed, proponents of the unconditional grant approach maintain that *Hostetter* was decided solely on the reasoning employed in *Collins*. Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 284 (1984) (Stevens, J., dissenting) ("[T]he actual decision in *Hostetter* was predicated squarely on the principle reflected in the Court's earlier decision in *Collins v. Yosemite Park & Curry Co.*").

126. *Collins*, 304 U.S. at 538–39.

127. *Hostetter*, 377 U.S. at 332.

128. *See id.* at 331–34.

129. *See id.* at 332–33.

130. Indeed, by emphasizing that the activity in question (transportation of alcohol to a national park within the state) did not involve the importation or distribution of alcohol into or within the state of California, the *Collins* Court implicitly adopted the *Young's Market* rationale that the Commerce Clause had been qualified by the Twenty-first Amendment. *See Collins*, 304 U.S. at 538.

131. *See Hostetter*, 377 U.S. at 332 (concluding that the Twenty-first Amendment and the Commerce Clause "are parts of the same Constitution" and "must be considered in the light of the other" without use of direct citation).

132. *See id.*

an *alteration* of the original document that contained the former.[133] Arguing that both provisions must be granted the same credence fundamentally alters the manner in which amendments to the Constitution are interpreted. Indeed, such an approach would seem to call into question whether the Eighteenth Amendment was actually repealed by the Twenty-first Amendment, because both provisions are "part of the same Constitution"[134] and should accordingly be "considered in light of the other."[135] The Supreme Court dealt with an analogous argument in *Young's Market*, where the plaintiffs contended that the imposition of a state licensing fee on alcohol imported from outside the state constituted a violation of the Fourteenth Amendment.[136] Justice Brandeis's rejection of this argument was as definitive as it was succinct: "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[137] Likewise, a power authorized by the Twenty-first Amendment cannot be deemed prohibited by the Commerce Clause, particularly given the imminently defensible premise that the language of Section 2 of the Twenty-first Amendment was specifically intended to hamper operation of the Commerce Clause with respect to state alcohol regulations.[138]

An additional problem with Justice Stewart's treatment of the Commerce Clause and the Twenty-first Amendment as equivalent is that it ignores the express nature of the latter's grant of power to the states. The issue in *Hostetter* was whether the actions of the New York Liquor Control Board violated the dormant commerce clause,[139] a provision of the Constitution that exists only by virtue of judicial interpretation of the document. At least one federal judge has implicitly questioned the approach of treating judicially created constitutional doctrines as being on par with express provisions of the Constitution.[140]

Despite the shortcomings of Justice Stewart's opinion in *Hostetter*, its dicta continues to be cited for the proposition that the Twenty-first

133. "Amendment" is defined as "a formal revision or addition proposed or made to a statute, constitution, or other instrument." BLACK'S LAW DICTIONARY 81 (7th ed. 1999).

134. *Hostetter*, 377 U.S. at 332.

135. *Id.*

136. State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 64 (1936).

137. *Id.* Justice Black later echoed the reasoning of Justice Brandeis on this point when he wrote that "[i]t seems a trifle odd to hold that an Amendment adopted in 1933 in specific terms to meet a specific twentieth-century problem must yield to a provision written in 1787 to meet a more general, although no less important, problem." Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 348 (1964) (Black, J., dissenting). Nevertheless, the Supreme Court has limited the reasoning of Justices Brandeis and Black in this regard, holding that the Twenty-first Amendment does not insulate the liquor industry from, inter alia, the Export-Import Clause of the Constitution, *id.* at 345–46, the Fourteenth Amendment's requirements of equal protection, Craig v. Boren, 429 U.S. 190, 204–09 (1976), or claims of due process violations, Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971).

138. *See supra* notes 50–52 and accompanying text.

139. *Hostetter*, 377 U.S. at 326–27.

140. *See* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849 (7th Cir. 2000) ("This case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not").

Amendment powers of the states are limited by the Commerce Clause.[141] Time has not been so kind to *Young's Market*. While the *Young's Market* decision remains good law, it teeters on the brink of insignificance, kept alive by an occasional mention whenever the Court further abrogates its core holding.[142]

B. Fleshing Out the Modern Accommodation Standard

Having succeeded in altering the course of Twenty-first Amendment jurisprudence by introducing what has come to be known as the modern accommodation standard, the *Hostetter* opinion left the Court with the unenviable task of imbuing the vague pronouncements of Justice Stewart with a modicum of clarity. Regrettably, the Court has failed in this task, a development attributable in no small part to the foundation laid by *Hostetter*.

Following *Hostetter*, the Court was left with two distinct issues to address with respect to Twenty-first Amendment jurisprudence. The first issue concerned the scope of coverage of the Commerce Clause—determining which types of state alcohol regulations fall under its ambit. The second issue involved fashioning a framework for balancing the Twenty-first Amendment and the Commerce Clause against one another.

C. The Scope of the Commerce Clause Under the Modern Accommodation Standard

The issue concerning the scope of coverage of the Commerce Clause would appear to have been put to rest by the broad, unqualified language of *Hostetter*, in which the Court seemingly held that all state alcohol regulations may potentially violate the Commerce Clause. However, in *Department of Revenue v. James B. Beam Distilling Co.*,[143] handed down the same day as *Hostetter*, the Court indicated that the scope of the Commerce Clause did not extend to state laws that involve the distribution, use, or consumption of alcohol within state territories.[144] Indeed, proponents of the unconditional grant theory have since seized upon the *James B. Beam Distilling Co.* holding as proof that the central premise of *Young's Market*—that the power of the states to regulate the

141. *E.g.*, 324 Liquor Corp. v. Duffy, 479 U.S. 335, 346 (1987); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 275 (1984); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712–13 (1984); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 109 (1980).

142. *E.g.*, *Midcal Aluminum*, 445 U.S. at 107–08.

143. 377 U.S. 341 (1964).

144. *Id.* at 346 ("There can surely be no doubt . . . of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported.").

importation and distribution of alcohol is not limited by the Commerce Clause—was not overturned by *Hostetter*.[145]

These divergent and conflicting interpretations of *Hostetter* were buried by a Supreme Court decision, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[146] which addressed whether the Twenty-first Amendment shielded a state wine-pricing system from enforcement of the Sherman Act.[147] Writing for the Court, Justice Powell attempted to walk a fine line between the conflicting interpretations of *Hostetter*. On the one hand, he appeared to validate the conditional grant approach in noting that Supreme Court decisions "demonstrate that there is no bright line between federal and state powers over liquor."[148] And yet, in the very next sentence, he wrote that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."[149] The *Midcal Aluminum* opinion then attempted to reconcile these seemingly contradictory statements. It stated, "Although States retain substantial discretion to establish *other liquor regulations*, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'"[150]

What was meant by the phrase "other liquor regulations" is not entirely clear, but the context of the statement would seem to indicate that it refers to state laws that do not regulate importation of alcohol or the structure of the liquor distribution system—i.e., those outside the Twenty-first Amendment powers of the states. Thus, the *Midcal Aluminum* Court appeared to validate the conclusion that the central premise of *Young's Market* had not been overruled by *Hostetter*.

What appeared to constitute a victory for proponents of the unconditional grant theory, however, was rendered hollow by the remainder of the *Midcal Aluminum* decision. Rather than explain why the state wine-pricing statute at issue came under the scrutiny of the Commerce Clause, the Court simply begged the question and went straight to a balancing of the competing interests of the Twenty-first Amendment and the Commerce Clause.[151] By omitting any discussion of how the law at issue extended beyond regulation of the state's distribution structure,[152] the

145. *Bacchus Imps., Ltd.*, 468 U.S. at 285 (Stevens, J., dissenting) ("[T]he final paragraph of the Court's opinion in the James B. Beam Distilling Co. case surely confirms my understanding that the Court did not then think that it was repudiating the central rationale of Justice Brandeis's opinion in Young's Market.").

146. 445 U.S. 97.

147. *Id.* at 106.

148. *Id.* at 110.

149. *Id.*

150. *Id.* (emphasis added) (citations omitted).

151. *See id.* at 110–11.

152. The Court did note that prior cases had indicated that "'[n]othing in the Twenty-first Amendment, of course, would prevent enforcement of the Sherman Act,' against an *interstate* conspir-

Court implicitly contradicted its own conclusion that states have virtually unfettered control over how to structure state liquor distribution systems.[153]

The effect of the *Midcal Aluminum* decision was to turn traditional Twenty-first Amendment jurisprudence on its head by implying that *all* state liquor laws fall under the ambit of the Commerce Clause, regardless of whether they involve the exercise of powers granted to the states pursuant to Section 2 of the Twenty-first Amendment. Thus, instead of beginning with an analysis of whether a state law was passed pursuant to the Twenty-first Amendment and then, if necessary, moving onto a Commerce Clause analysis, the Court implied that all judicial review of state alcohol laws should begin with a Commerce Clause analysis followed by a determination of whether the law was sufficiently in tune with Twenty-first Amendment principles to justify Commerce Clause violations. If there is any doubt as to this conclusion, it was put to rest by *324 Liquor Corp. v. Duffy*,[154] a case involving a New York pricing scheme that, like the California statute at issue in *Midcal Aluminum*, allegedly violated the Sherman Act.[155] In that case, the Court began its analysis by stating that "[t]he 'threshold question,' in this case as in *Midcal*, is whether the State's pricing system is inconsistent with the [federal] antitrust laws."[156] If the state liquor law was deemed to conflict with federal laws, the Court reasoned that the question became "'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.'"[157]

Recognizing that the result of the Court's reasoning in *324 Liquor Corp.* was to effectively overturn *Young's Market*, Justice O'Connor authored a stinging dissent, rejecting the Court's implication that all state alcohol laws fall under the purview of the Commerce Clause:

> In [*Midcal Aluminum*], and once again today, the Court ventured still further from the intent of the Twenty-first Amendment by adopting an unprecedented test that focuses on the wisdom of the State's exercise of its § 2 powers. For the Court today does not in-

acy to fix liquor prices." *Id.* at 110 (emphasis added) (quoting Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 45–46 (1966)). However, the Court neglected to explain how the California law at issue constituted such an interstate (as opposed to merely intrastate) attempt to fix prices.

153. Justice O'Connor would later highlight this contradiction when she cited *Midcal Aluminum* to support her conclusion that the Court had improperly "used a balancing test to resolve conflicts between federal statutes and state laws enacted pursuant to § 2 [of the Twenty-first Amendment]." 324 Liquor Corp. v. Duffy, 479 U.S. 335, 359 (1987) (O'Connor, J., dissenting).

154. 479 U.S. 335 (1987).

155. *Id.* at 340.

156. *Id.* at 341.

157. *Id.* at 347 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)). It should be noted that the Court neglected to mention a key distinction between *324 Liquor Corp.* and *Capital Cities Cable*: While the former case involved a conflict between a state alcohol law and a federal law (the Sherman Act) passed under the Commerce Clause, the latter case involved a conflict between a state alcohol law and the First Amendment.

> validate the [statute at issue] because it involves an exercise of power outside the scope of the Twenty-first Amendment—indeed, the Court could not do so given the long history of the use of price controls by state liquor authorities. Instead . . . the Court strikes down the [statute] 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 of New York's motivation in doing so was linked to a "central purpos[e]" of the Twenty-first Amendment. The sole "question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution."[158]

Notwithstanding Justice O'Connor's defense of the Twenty-first Amendment, the notion that some state liquor laws—those that regulate the importation and distribution of alcohol—are exempt from Commerce Clause limitations was dealt a serious blow by *Midcal Aluminum* and *324 Liquor Corp*. As a result, the focus of Twenty-first Amendment jurisprudence shifted from a determination of whether state alcohol laws were exempt from the Commerce Clause to whether state alcohol laws that violated the Commerce Clause could be saved by the Twenty-first Amendment.

D. Development of the "Central Purposes" Test

1. The Narrow View: Temperance as the Sole Central Purpose of the Twenty-First Amendment

Having essentially cast aside the fundamental principle embodied in *Young's Market*, the Court left state governments in a precarious position. After operating for years under the assumption that they possessed nearly limitless authority to regulate the distribution and importation of alcohol, state governments began facing credible Commerce Clause based challenges to the indirect alcohol distribution schemes they had implemented in the years following passage of the Twenty-first Amendment.[159] The task of defending state alcohol laws was made more difficult by the failure of the Supreme Court to provide guidance as to precisely which statutes fell under the umbrella of the Twenty-first Amendment.[160] The Court's shortcomings in this area were highlighted by *Bacchus Imports, Ltd. v. Dias*[161] and *North Dakota v. United States*,[162]

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158. *Id.* at 359–60 (O'Connor, J., dissenting) (citations omitted).

159. *See, e.g.*, North Dakota v. United States, 495 U.S. 423 (1990); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984).

160. *See Bacchus Imps., Ltd.*, 468 U.S. at 276.

161. *Id.* at 263.

162. 495 U.S. 423 (1990).

two cases that illustrate the crux of one dispute currently at issue in alcohol litigation.

Bacchus involved an effort on the part of the state of Hawaii to bolster its local wine industry by levying a twenty percent excise tax on wholesale liquor sales that exempted certain locally produced alcoholic beverages.[163] Following the lead of *Hostetter* and *Midcal Aluminum*, and over the objections of a dissenting opinion, the Court in *Bacchus* assumed that the law at issue fell under the ambit of the Commerce Clause.[164] The dispositive issue thus became whether the statute at issue could be "saved"[165] by the Twenty-first Amendment, an outcome requiring a finding that "'the interests implicated by [the] 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.'"[166]

Having arrived at the arguable conclusion that the purpose of state alcohol laws, rather than their subject matter, determines their constitutionality, the Court declined to explain precisely which types of state alcohol regulations are consistent with the "central purpose" of the Twenty-first Amendment.[167] Indeed, the Court appeared to question whether the central purpose of the Twenty-first Amendment could be divined, given that there was "[n]o clear consensus concerning the meaning of the provision."[168] Nevertheless, this humility in ascertaining the intent behind the Twenty-first Amendment did not restrain the Court from concluding without benefit of citation that "[s]tate 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."[169] Beyond this definitive, albeit unsupported, conclusion concerning protectionist measures, the only guidance provided by the *Bacchus* Court with respect to the central purpose of the Twenty-first Amendment was a hint that it may encompass laws "designed to promote temperance."[170]

As a practical matter, any subject-based test of state alcohol laws that narrowly defines the central purpose of the Twenty-first Amendment will restrict the breadth of state alcohol regulatory authority. Consistent with this self-evident conclusion, proponents of the conditional grant approach to the Twenty-first Amendment have seized upon the *Bacchus* decision to attack various elements of states' indirect distribu-

163. *Bacchus Imps., Ltd.*, 468 U.S. at 265.

164. *See id.* at 275 (citing *Hostetter* and *Midcal* to support the conclusion that the Twenty-first Amendment did not entirely remove state regulation of alcoholic beverages from limitations imposed by the Commerce Clause).

165. *Id.* at 274.

166. *Id.* at 275–76 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).

167. *See id.* at 276.

168. *Id.* at 274.

169. *Id.* at 276.

170. *Id.*

tion schemes, arguing that they must be motivated by temperance concerns to survive a valid Commerce Clause challenge.[171] Several federal courts have bought this argument, holding—or at least implying—that temperance is the sole core Twenty-first Amendment power.[172]

Thus far, courts applying this narrow approach to Twenty-first Amendment authority have not considered the practical, if perhaps unintended, effects of most indirect distribution schemes. Critics of the indirect distribution schemes in force in most states maintain that such regulations significantly drive up alcohol prices and limit the breadth of selection available to alcohol consumers.[173] However, courts evaluating the constitutionality of state alcohol laws generally do not consider the actual effect of the laws at issue with regard to the promotion of temperance: Rather, the focus has been solely on the subjective intentions of state governments in passing such laws.[174] Thus, the resulting jurisprudential approach strikes down laws that promote temperance on the grounds that they were not motivated by concern for temperance.

Such an approach may be appropriate for standard Commerce Clause analysis, but it nevertheless fails to address the demonstrable fear of unimpeded interstate alcohol traffic that was the motivation for Section 2 of the Twenty-first Amendment. Consistent with these concerns, those seeking to grant states more latitude to regulate alcohol under the Twenty-first Amendment have sought to define its core powers more broadly.[175]

2. *The Broad View: Temperance, Tax Collections, and Maintenance of an "Orderly Market" as Multiple Purposes of Twenty-First Amendment*

The broadest and most influential approach toward defining the core powers of the Twenty-first Amendment was adopted by the Supreme Court in *North Dakota v. United States*,[176] a case involving the constitutionality of two state statutes governing the importation of alcohol

171. Shanker, *supra* note 32, at 377 (arguing that direct shipment laws are unconstitutional because "federal courts have increasingly required state laws regulating alcohol to be passed with the intent of furthering the core Amendment purpose: temperance").

172. *E.g.*, Dickerson v. Bailey, 87 F. Supp. 2d 691, 710 (S.D. Tex. 2000) ("The Court finds that there is no temperance goal served by the statute . . . ."); Quality Brands Inc. v. Barry, 715 F. Supp. 1138, 1143 (D.D.C. 1989) ("[T]he powers reserved to the States by the Amendment must be exercised with temperance as their goal."), *aff'd*, 901 F.2d 1140 (D.C. Cir. 1990); Loretto Winery Ltd. v. Gazzara, 601 F. Supp. 850, 861 (S.D.N.Y. 1985), *aff'd and modified as to remedy sub nom.* Loretto Winery Ltd. v. Duffy, 761 F.2d 140 (2d Cir. 1985) ("Only those state restrictions which directly promote temperance may now be said to be permissible under Section 2 of the Twenty-first Amendment").

173. *See Review and Outlook: Those Musty Wine Laws*, WALL ST. J., June 1, 2000, at A22 [hereinafter *Musty Wine Laws*].

174. *See Bacchus Imps., Ltd.*, 468 U.S. at 270 ("Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce").

175. *See Musty Wine Laws*, *supra* note 173.

176. 495 U.S. 423 (1990).

onto federal military bases within the state of North Dakota.[177] Writing for a plurality,[178] Justice Stevens injected vitality into the Twenty-first Amendment[179] by opining that the core powers of state governments under the Twenty-first Amendment include establishing "comprehensive system[s] for the distribution of liquor" aimed at "promoting temperance, ensuring orderly market conditions, and raising revenue."[180] Consistent with these broad powers, state governments have authority under the Twenty-first Amendment "to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets."[181]

Naturally, defendants of state-mandated indirect alcohol distribution schemes, no longer having success with the argument that state alcohol laws are exempt from the Commerce Clause, seized upon *North Dakota v. United States* as a fallback position in defending state alcohol restrictions.[182] Accordingly, the extent of core powers under Section 2 of the Twenty-first Amendment has, for better or worse, become a primary issue of contention in litigation involving Commerce Clause challenges of state alcohol laws.

3. *Application of the Central Purposes Test Under the Modern Accommodation Standard*

Left unanswered by the string of Court decisions addressing the Twenty-first Amendment is precisely how a statute found to be passed in accordance with a central purpose of the Twenty-first Amendment is to be balanced against the conflicting principles of the Commerce Clause.

177. *Id.*

178. *Id.* At least one federal district court assessing the core Twenty-first Amendment powers has dismissed the opinion of Justice Stevens in *North Dakota v. United States* as "a split decision with no majority opinion." Dickerson v. Bailey, 87 F. Supp. 2d 691, 699 n.9 (S.D. Tex. 2000). Justice Scalia's concurring opinion, however, indicates he had an even more expansive view of state powers under the Twenty-first Amendment than that which was adopted by the other four justices in the majority. *See North Dakota*, 495 U.S. at 447 (Scalia, J., concurring) ("The Twenty-first Amendment, which prohibits 'the transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof,' is binding on the Federal Government like everyone else, and empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.").

179. Indeed, the Court's opinion in *North Dakota v. United States*, while not completely rejecting the modern accommodation standard, expressly indicated that state laws passed pursuant to the Twenty-first Amendment have a strong presumption of validity. *See North Dakota*, 495 U.S. at 433 ("Given 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."). Nevertheless, this strong presumption did not restrain the Court from undergoing a full-blown preemption analysis after finding that the statute at issue had, in fact, been passed pursuant to a core Twenty-first Amendment power. *See id.*

180. *Id.* at 432.

181. *Id.* at 431.

182. *See, e.g.*, Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000); *Dickerson*, 87 F. Supp. 2d at 699.

The only indication given by the Supreme Court with regard to how to balance the Twenty-first Amendment and the Commerce Clause has been a vague pronouncement that "the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders."[183] Precisely to what extent the Twenty-first Amendment limits the effect of the dormant commerce clause remains a mystery and, like the debate over the central purpose of the Twenty-first Amendment, will no doubt provide fodder for future litigation until addressed by the Supreme Court.

IV. RESOLUTION: THE CASE FOR THE CLASSICAL APPROACH TO TWENTY-FIRST AMENDMENT JURISPRUDENCE

Three practical options are available for courts addressing constitutional attacks on state alcohol laws, specifically alcohol direct shipment laws. Either of the first two options involves accepting the *Hostetter* dicta that all state alcohol laws fall under the ambit of the Commerce Clause.[184] The next step would be to clarify the extent of core state powers under the Twenty-first Amendment, opting for either the narrow or broad view.[185] These approaches will also require courts to provide more definitive guidance as to how laws passed pursuant to the central purposes of the Twenty-first Amendment should be balanced against the countervailing principles of the Commerce Clause.[186]

While resolution of the dispute over the core powers authorized by the Twenty-first Amendment would provide much-needed judicial clarity in Twenty-first Amendment jurisprudence, a more appropriate course of action would be to jettison the whole notion of a purpose-based review of state alcohol regulations and instead return to the proposition first embraced—and never expressly overturned—in *Young's Market* that state alcohol laws should be exempt from Commerce Clause scrutiny if they pertain to the importation and distribution of alcohol within state territories.[187]

A. The Plain Meaning of the Words Employed

Without reciting the eloquent words of Justice Brandeis in *Young's Market* regarding the plain meaning of the Twenty-first Amendment,[188] suffice it to say that no reasonable argument has yet been proffered that would interpret that meaning in a manner inconsistent with the classical,

183. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996).
184. *See supra* notes 110–41 and accompanying text.
185. *See supra* notes 161–82 and accompanying text.
186. *See supra* note 183 and accompanying text.
187. *See supra* notes 97–101 and accompanying text.
188. *See supra* note 100 and accompanying text.

or unconditional grant, approach to Twenty-first Amendment jurisprudence. Even cases that have abrogated state powers under the Twenty-first Amendment have implicitly affirmed Justice Brandeis's conclusion regarding the plain meaning of Section 2.[189] Indeed, such an interpretative approach is particularly appropriate in situations where the legislative history surrounding a provision is ambiguous,[190] as is the case with the legislative history of Section 2 of the Twenty-first Amendment.[191] Nevertheless, despite recognizing this ambiguity, the Supreme Court has, in the years since *Young's Market*, contradicted the plain meaning of the provision by reference to the history surrounding its passage.[192]

B. History Surrounding the Passage of the Twenty-First Amendment

Judicial reference to the history surrounding the passage of the Twenty-first Amendment has been instrumental in altering Twenty-first Amendment jurisprudence in two significant ways. The first alteration took the form of a retreat from the *Young's Market* approach that the amendment qualifies all preexisting provisions of the Constitution.[193] Instead, the Court has ruled that the Twenty-first Amendment serves only to qualify, to some extent at a minimum, the Commerce Clause.[194] Such a modification to the *Young's Market* approach is certainly defensible, given that the Webb-Kenyon Act,[195] which has language mirroring Section 2 of the Twenty-first Amendment,[196] was passed in response to Court decisions that had restrained state power to regulate alcohol through application of the dormant commerce clause.[197]

189. *See, e.g.*, Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106–07 (1980) ("In determining state powers under Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it. . . . In terms, the Amendment gives the States control over the 'transportation or importation' of liquor into their territories.").

190. *Id.* at 107 n.10 ("The [plain meaning] approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional proposal of the Amendment and its ratification in the state conventions.").

191. *Id.* ("The sketchy records of the state conventions reflect no consensus on the thrust of § 2 [of the Twenty-first Amendment], although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately.").

192. *See supra* notes 168–70 and accompanying text.

193. *See supra* notes 136–37 and accompanying text.

194. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) ("[A]lthough the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, 'the Amendment does not license the States to ignore their obligations under other provisions of the Constitution.'" (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984))); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 n.5 (1982) (noting that the Twenty-first Amendment does not qualify Establishment Clause of Constitution); Craig v. Boren, 429 U.S. 190, 204–09 (1976) (finding that the Twenty-first Amendment does not qualify Equal Protection Clause of Constitution); Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (noting that state powers under Twenty-first Amendment are circumscribed by procedural due process); Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 345–46 (1964) (stating that the Twenty-first Amendment does not qualify Export-Import Clause of Constitution).

195. *See supra* note 58 and accompanying text.

196. *See supra* notes 61–63 and accompanying text.

197. *See supra* notes 40–55 and accompanying text.

Less convincing is the argument that the Twenty-first Amendment was intended to extend the right to regulate the importation and distribution of alcohol to *dry states only*.[198] The primary support for this interpretation is a statement by Senator Blaine, who sponsored the Twenty-first Amendment resolution,[199] that the purpose of the Amendment was to "assure the so-called dry States against the importation of intoxicating liquor into those States."[200] However, the same senator is also on record as saying that Section 2 of the Twenty-first Amendment was intended "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors."[201] Understandably, these conflicting statements have led many scholars to conclude that the intent of Congress with regard to Section 2 of the Twenty-first Amendment is unclear.[202] Accordingly, the legislative history does not provide sufficient justification to override the plain meaning of Section 2 that *all states* have the power to regulate the importation and distribution of alcohol.[203]

C. Harmonization with Applicable Precedents

The most compelling argument against reaffirming the classical, or unconditional grant, approach to the Twenty-first Amendment is that such a shift would undermine the modern accommodation standard adopted by *Hostetter*.[204] This argument, however, is less convincing when *Hostetter*'s adoption of the modern accommodation standard is recognized as dictum. As previously noted, the holding in *Hostetter* was predicated upon the Supreme Court's earlier decision in *Collins v. Yosemite Park & Curry Co.*,[205] which held that state power to regulate the importation and distribution of alcohol does not extend beyond the internal commerce of the state.[206] Accordingly, the *Hostetter* holding "merely rejected the broad proposition that the Twenty-first Amendment had entirely divested Congress of all regulatory power over interstate or foreign commerce in intoxicating liquors."[207]

Of course, relegating *Hostetter*'s dictum to the dustbin of legal history will not do away with *Bacchus*,[208] a case that struck down a discriminatory state tax on alcohol imported into the state of Hawaii.[209] While the reasoning in *Bacchus* relied on the aforementioned dictum from

198. *E.g.*, Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 107 n.10 (1980).
199. *Id.*
200. 76 CONG. REC. 4, 141 (1933).
201. *Id.* at 4, 143.
202. *See supra* note 191.
203. *See supra* note 190 and accompanying text.
204. *See supra* notes 110–42 and accompanying text.
205. *See supra* notes 104–31 and accompanying text.
206. *See supra* note 130.
207. Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 284 (1984) (Stevens, J., dissenting).
208. *See supra* notes 161–72 and accompanying text.
209. *Id.*

Hostetter in reaching its conclusion,[210] the holding of *Bacchus* is nevertheless compatible with the view that alcohol direct shipment laws are constitutional. As Judge Easterbrook of the Seventh Circuit noted:

> No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause. What the Court *has* held, however, is that the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms.[211]

D. Ease of Judicial Administration

While such practical concerns as ease of judicial administration have rarely influenced the debate surrounding state powers under the Twenty-first Amendment, such concerns take on added emphasis when the classical approach to Twenty-first Amendment is abandoned. Such a conclusion should be self-evident, given that the classical approach essentially adopts a bright-line test whereas the modern accommodation standard requires courts to balance two competing principles. This hypothesis is confirmed by the history of Twenty-first Amendment jurisprudence: The first twenty years following passage of the amendment, during which the classical approach was employed, produced a relatively consistent and stable body of case law.[212] The years since *Hostetter* have been characterized by a series of ambiguous and contradictory holdings.[213] Indeed, *Hostetter* itself appears to have been contradicted by another opinion issued on the very same day.[214]

Concerns about ease of judicial administration, of course, should not dictate the Court's approach to the Twenty-first Amendment. Nevertheless, where concerns about ease of judicial administration dovetail with the plain meaning of the provision, as well as applicable historical precedents, consideration of such issues is warranted.

E. Social Policy Concerns

Opponents of direct shipment laws lament the impact of such laws on wineries, many of which tend to be small businesses that lack nationwide distribution agreements for their products.[215] To be sure, the effect of direct shipment laws on these businesses can be quite dramatic.[216] Moreover, wine makers do not suffer alone: Consumers of wine generally pay higher prices and enjoy a poorer selection of wine owing to alco-

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210. *Id.*
211. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000).
212. *See supra* notes 101–07 and accompanying text.
213. *See supra* notes 108–83 and accompanying text.
214. *See supra* notes 143–45 and accompanying text.
215. Ellen Rettig, *Wineries, Companies Square Off*, INDIANAPOLIS BUS. J., Apr. 10, 2000, at 3A.
216. Sinton, *supra* note 1 ("[D]irect shipments are one of the few cost-effective sales channels for the growing number of small wineries.").

hol direct shipment laws.[217] Relying on an oft-cited passage from *H.P. Hood & Sons, Inc. v. Du Mond*,[218] opponents of direct shipment laws maintain that this unfortunate situation undercuts the guiding constitutional principle that the "economic unit is the Nation . . . [and] the states are not separate economic units."[219]

The lack of a national market in alcohol, however, is not an accidental effect of an erroneous Supreme Court decision, and certainly does not contradict longstanding Commerce Clause jurisprudence. Rather, an implicit intention behind the passage of Section 2 of the Twenty-first Amendment was to ensure against the creation of a national market for alcohol. Simply put, a national market for alcohol is incompatible with the notion that some states may completely ban alcohol, and nearly everyone involved in the debate over the Twenty-first Amendment agrees that a state has the authority to completely ban alcohol within its jurisdiction.[220]

V. CONCLUSION

The current state of Twenty-first Amendment jurisprudence has left a host of state alcohol laws—including direct shipment laws—vulnerable to constitutional challenges. This vulnerability reflects the ambiguous state of Twenty-first Amendment jurisprudence. While the classical, or unconditional grant, approach to interpreting the Twenty-first Amendment has never been overturned, it has been diluted considerably by the modern accommodation standard, a doctrine that essentially reverses the classical approach. Given the uncertainty prevalent in Twenty-first Amendment jurisprudence and the incompatibility of the classical approach and modern accommodation standard, a reaffirmation of the classical approach is warranted. The classical approach to Twenty-first Amendment jurisprudence, beyond reflecting the plain meaning and historical thrust of the Twenty-first Amendment, will ensure that the debate over direct shipping remains where it belongs—in the state legislative processes.

217. *See supra* note 173 and accompanying text.
218. 336 U.S. 525 (1949).
219. *Id.* at 537–38.
220. *E.g.*, *supra* note 201 and accompanying text.