COMMENTS

The Twenty-First Amendment and the Commerce Clause: What Rationale Supports *Bacchus Imports?*

Introduction

The Twenty-first Amendment to the United States Constitution was enacted primarily to repeal the Eighteenth Amendment's mandate of national prohibition.[1] Beyond merely repealing the Eighteenth Amendment, however, Section Two of the Twenty-first Amendment included a broad grant of power to the states to regulate the importation and consumption of liquor.[2] In the rush to repeal prohibition,[3] the drafters of the Amendment did not leave a clear record of their intent in including Section Two.[4] As a result, courts have never gleaned a single purpose underlying Section Two that could guide the resolution of conflicts between Section Two and other constitutional provisions.

States have often used Section Two to assert power over liquor importation in a manner that directly conflicts with the Commerce Clause.[5] In the cases arising out of these conflicts, the United States Supreme Court has never taken a consistent position on the question of the relationship between the Section Two grant of power and the Commerce Clause. Over time the Court has moved from recognizing an unqualified

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1. The Twenty-first Amendment, section 1 provides: "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. CONST. amend. XXI, § 1.

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

3. The Twenty-first Amendment was proposed by Congress on February 20, 1933, and ratification was completed by December 5, 1933. *See generally* Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness,* CONTEMP. DRUG PROBLEMS 63, 63-68 (Spring 1985). During their respective conventions in 1932, both major political parties had included in their platforms a call to repeal prohibition. *Id.* at 80-81; 76 CONG. REC. 4139 (1933) (remarks of Senator Blaine).

4. *See infra* notes 94-103 and accompanying text.

5. U.S. CONST. article I, § 8, clause 3 provides in part: "The Congress shall have Power [t]o regulate Commerce with foreign Nations, and among the several States." *See infra* notes 104-150 and accompanying text.

state power over liquor,[6] to limiting the scope of Section Two by increasingly narrow interpretations of its language,[7] to declaring in *Bacchus Imports, Ltd. v. Dias*[8] that Section Two does not permit a state to discriminate against interstate commerce.

While *Bacchus* clearly established a Commerce Clause limitation on the states' Section Two power, the reasoning of the decision is unsatisfactory. The majority opinion drew on precedents in which the Commerce Clause has limited state power at the periphery of Section Two and asserted that these precedents limit the core power of states under Section Two.[9] Although this analysis is irreconcilable with earlier Court decisions, the *Bacchus* majority failed to overrule those decisions or to distinguish them from *Bacchus*.[10] The dissenting opinion, while remaining faithful to the earlier precedents, refused to consider the possibility that the core power of Section Two may be limited to prevent discrimination against interstate commerce.[11]

Both *Bacchus* opinions assumed that the circumstances surrounding adoption of the Twenty-first Amendment were too ambiguous to help resolve the issue of whether Section Two empowers a state to protect its own liquor industry from out of state competition. This Comment, however, analyzes the history of the Amendment and constructs an interpretation of Section Two which reconciles the need to prevent economic warfare among the states—the driving force behind the majority opinion—with the core powers of Section Two.

This Comment first examines the facts and opinions in *Bacchus*. Next it discusses the strong condemnation of discrimination against interstate commerce under the Commerce Clause. It then analyzes the circumstances in which Section Two was adopted in order to provide a context within which to interpret the provision. The Comment then reviews the development of the Court's analysis of Section Two power and details the Court's efforts to advance the strong national interest in the free flow of interstate commerce by progressively narrowing its reading of the language of Section Two. Against this, the Comment contrasts the Court's willingness in *Bacchus* to go beyond the four corners of Section Two to discern its "central purpose." Finally, the Comment provides an analysis based on the history of state prohibition efforts and the circum-

6. *See infra* notes 109-110 and accompanying text.

7. *See infra* notes 111-150 and accompanying text.

8. 104 S. Ct. 3049 (1984).

9. 104 S. Ct. at 3058; for a discussion of the "peripheral" regulation decisions, *see infra* notes 127-142 and accompanying text.

10. *See* 104 S. Ct. at 3057-59. The *Bacchus* Court acknowledged the early decisions that contradicted its holding, *id.* at 3057 n.13, but dismissed them, stating, "It is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.* at 3058.

11. *See* 104 S. Ct. at 3049, 3061-64 (Stevens, J. dissenting).

stances surrounding adoption of the Twenty-first Amendment that may provide a more satisfactory rationale for the decision in *Bacchus*.

I. *Bacchus Imports, Ltd. v. Dias*

A. The Facts

In 1939, the state of Hawaii imposed an excise tax on wholesale liquor sales for the purpose of recouping the costs of industry regulation and additional police services attributable to the consumption of liquor. Originally, the tax applied equally to both imported and locally produced alcoholic beverages. Subsequently, however, in an effort to nurture the developing domestic liquor industry, the Hawaii legislature established several exemptions from the tax. Okolehao, a brandy distilled from the root of the Hawaiian ti plant,[12] was exempted from May 17, 1971, until June 20, 1981. Additionally, a local pineapple wine was exempted from May 17, 1976, until June 30, 1981.[13]

Several liquor wholesalers who imported alcohol into Hawaii and sold it to licensed retailers sued to recover approximately $45 million in taxes they had paid under protest. In part, the wholesalers claimed that the tax was an unconstitutional burden on interstate commerce.[14] Both the state Tax Appeal Court and the Hawaii Supreme Court rejected the Commerce Clause claim.[15] The Hawaii Supreme Court reasoned that there was no discrimination against interstate commerce because "incidence of the tax here is on wholesalers of liquor in Hawaii and the ultimate burden is borne by consumers in Hawaii."[16] The United States Supreme Court reversed.

B. The Decisions

Writing for the majority, Justice White addressed and disposed of Hawaii's contention that its liquor tax did not violate the Commerce Clause.[17] Citing a long history of commerce clause jurisprudence, Jus-

12. *In re* Bacchus Imports, Ltd., 65 Hawaii 566, 569 n.7, 656 P.2d 724, 727 n.7 (1982).

13. HAWAII REV. STAT. §§ 244-44(6), (7) (1976).

14. The court in *In re Bacchus* also dealt with claims by the liquor wholesalers that the tax exemption at issue violated the Equal Protection Clause and the entire tax violated the Export-Import Clause insofar as it impacted on imports of foreign liquor. The court disposed of the equal protection claim on the basis that the tax exemption was rationally related to the legitimate state objective of fostering domestic industry. *In re Bacchus,* 65 Hawaii at 573-74, 656 P.2d at 730. The court rejected the export-import clause claim on the basis that no violation had occurred due to the fact that the tax was imposed on all local sales and uses of liquor regardless of its point of origin. *Id.* at 575-78, 656 P.2d at 731-33. The Supreme Court based its decision on appeal on commerce clause grounds and did not examine the merits of either the equal protection claim or the export-import clause claim.

15. 65 Hawaii at 569, 582, 656 P.2d at 727, 735.

16. *Id.* at 581, 656 P.2d at 734.

17. *Bacchus,* 104 S. Ct. at 3056-57.

tice White stressed the Court's abhorrence of disciminatory measures designed to confer a commercial advantage on domestically produced goods and services at the expense of interstate commerce.[18]

The majority found the state's argument that the exempted products were not in competition with articles of interstate commerce transparent. Justice White pointed out that the original legislative justification for the exemption—fostering the development of the okolehao and pineapple wine industries by encouraging increased consumption—assumed direct competition between local and imported liquor.[19] Justice White found Hawaii's tax exemption for locally produced liquor to be clearly discriminatory against interstate commerce in purpose and effect, in direct violation of settled commerce clause principles.[20]

The Court then turned to the state's defense, first raised on appeal, that the tax exemption fell within the protection of Section Two.[21] Justice White rejected this argument, which he saw as based on early decisions of the Court which construed Section Two as a grant of plenary power to the states to regulate liquor.[22] He reviewed more recent decisions of the Court and reasoned that they support the proposition that the Commerce Clause forbids restraints on the interstate liquor trade which go beyond Section Two's "central purpose".[23] While leaving the exact dimension of the central purpose undefined, he concluded that given the strong federal interest in preventing economic Balkanization, "one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition."[24]

In dissent, Justice Stevens argued that Justice White's decision was a complete break with the Court's prior interpretation of Section Two. Justice Stevens read Section Two as explicitly granting states the power to burden interstate commerce in liquor even in a discriminatory fash-

18. *Id.* at 3055. The Court noted that a finding that state legislation effects "economic protectionism" of domestically produced goods or services may be made on the basis of either discriminatory intent or discriminatory effect. *Id.*

19. *Id.* at 3055-56 (quoting *In re* Bacchus Imports Ltd., 65 Hawaii 566, 573-74, 656 P.2d 724, 730 (1982): " 'The legislature's reason for exempting "ti root okolehao" from the "alcohol tax" was to "encourage and promote the establishment of a new industry," S.L.H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of "fruit wine manufactured in the State from products grown in the State" was intended "to help" in stimulating "the local fruit wine industry." S.L.H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76, in 1976 Senate Journal, at 1056.' ").

20. *Bacchus,* 104 S. Ct. at 3056 ("Consequently, as long as there is some competition between the locally produced exempt products and non-exempt products from outside the State, there is a discriminatory effect.").

21. 104 S. Ct. at 3057-59; *see supra* note 2 and accompanying text.

22. 104 S. Ct. at 3057, n.13.

23. *Id.* at 3058.

24. *Id.* at 3058.

ion.[25] He rejected Justice White's assertion that more recent decisions of the Court had qualified the early interpretation of Section Two as a broad grant of power.[26] Justice Stevens distinguished the recent decisions on factual grounds and argued that those cases could only be read to have specifically recognized a discriminatory liquor taxing scheme as one of the core powers conferred on states by Section Two. Thus he concluded that Section Two shields the Hawaiian scheme from commerce clause constraints.[27]

II. The Commerce Clause and Discrimination Against Interstate Commerce

While the Commerce Clause affirmatively grants power to Congress to regulate interstate commerce, "nowhere does it explicitly limit state interference with interstate commerce."[28] The development of the so-called "dormant" Commerce Clause doctrine, limiting state power over commerce even in the absence of congressional action, springs from the Constitution's "negative implications."[29] This interpretation of the "great silences of the Constitution"[30] reflects the strong policy considerations favoring the free flow of interstate commerce. As Justice Douglas observed,

> The Commerce Clause has a negative as well as a positive aspect. The Clause not only serves to augment federal authority. By its own force it also cuts down the power of the constituent State in its exercise of what normally would be a part of its residual police power.[31]

As the Court noted in *H.P. Hood & Sons v. Du Mond,*[32] the "commercial warfare between states"[33] under the Articles of Confederation was largely responsible for the calling of the first Constitutional Convention, where the framers decided to "centralize regulation of commerce among the states."[34]

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25. *Id.* at 3062.

26. *Id.* at 3062-64.

27. *Id.* at 3064.

28. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 320 (1979).

29. *Id.*

30. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949) (Jackson, J.).

31. W. DOUGLAS, WE THE JUDGES 222 (1956).

32. 336 U.S. 525 (1949) (overturning New York's refusal to grant an operating license to a Massachusetts dairy because it might divert milk to out of state consumers).

33. 336 U.S. at 533.

34. *Id.* at 534; *see* M. FORKOSCH, CONSTITUTIONAL LAW 245 (1969) (quoting M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 7 (1913, 1962) " 'The Americans were an agricultural and a trading people. Interference with the arteries of commerce was cutting off the very life-blood of the nation and something had to be done.' "); *see also* B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 239

Since the seminal decision in *Gibbons v. Ogden,*[35] the Court has recognized the superiority of the federal interest in promoting interstate commerce over competing state interests. In *Gibbons,* Chief Justice Marshall took a broad view of Congress' power under the Commerce Clause to regulate all "commerce which concerns more States than one."[36] Under this view, no area of interstate commerce is reserved for exclusive state control.[37] Although states retain no exclusive power over interstate commerce, they may act in ways that affect interstate commerce under their police powers. For instance, under its police powers a state may encourage the development of domestic industry. The Commerce Clause, however, "stands as a limitation on the means by which a State can constitutionally seek to achieve that goal."[38]

The Commerce Clause limitations on the exercise of states' police powers clearly prohibit a state from discriminating against interstate commerce in order to aid a developing industry. In *Walling v. Michigan,*[39] the Court struck down a state law imposing a sales tax on liquor produced outside of the state. According to the Court, the discriminatory tax was a "restraint of commerce among the States" and a "usurpation of the power conferred by the Constitution upon the Congress of the United States."[40] More recently, in *Boston Stock Exchange v. State Tax Commission,*[41] the Court invalidated New York's imposition of a higher transfer tax on securities traded outside of the state than on those traded within the state. The Court stated that "no State may discriminatorily tax the products manufactured or the business operations performed in any other State" for the purpose of encouraging domestic development.[42]

It has become a truism that the Commerce Clause limits the power of states to discriminate against interstate commerce by selective taxa-

(1977) ("Thus, the generating source of the Constitution lay in the rising volume of restraints upon commerce before which the Confederation had been impotent.").

35. 22 U.S. (9 Wheat.) 1 (1824).

36. *Id.* at 194.

37. *Id.* at 198-200.

38. *Bacchus,* 104 S. Ct. at 3056; M. FORKOSCH, *supra* note 34, at 355 ("Where the state's power is exerted against interstate commerce so as to protect its industries or people from national competition then the concept of a great American free trade market is destroyed."); *see also* Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) (referring to barrier to interstate commerce erected by the state to protect local industry: "This [the state] cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.").

39. 116 U.S. 446 (1886).

40. *Id.* at 455.

41. 429 U.S. 318 (1977).

42. *Id.* at 337.

tion.[43] This doctrine reflects more than a policy of promoting economic efficiency among the states; it serves also to protect the politically powerless residents of one state from the abusive economic legislation of another state. As John Hart Ely has noted, "by constitutionally tying the fate of outsiders to the fate of those possessing political power, the framers insured that their interests would be well looked after."[44] Even those who generally may disapprove of federal judicial intervention into state legislative prerogatives "tend to support a relatively active role for the federal judiciary 'when the centrifugal, isolating or hostile forces of localism are manifested in state legislation.' "[45] This expansive doctrine brings the Commerce Clause into direct conflict with Section Two of the Twenty-first Amendment.

III. The Twenty-First Amendment and the Enigma of Section Two

The primary purpose of the Twenty-first Amendment was to repeal the Eighteenth Amendment.[46] The political realities surrounding passage of the repeal amendment required that states wishing to remain dry[47] retain the power to do so. Before the adoption of national prohibition, judicial decisions based on the Commerce Clause had emasculated the efforts of dry states to restrict the importation of liquor for consumption.[48] Congress had aided state efforts by passing the Wilson Act[49] and

43. *See e.g.,* Welton v. Missouri, 91 U.S. 275 (1876) (striking down a license levy imposed on all peddlers dealing in goods which were not produced in the state); B. SCHWARTZ, *supra* note 34, at 290.

44. J. ELY, DEMOCRACY AND DISTRUST 83 (1980); *see also* Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (upholding law prohibiting oil producers and refiners from operating retail gas stations even though it affected out of state companies exclusively, holding that burden was accidental and did not affect all out of state companies selling gas in Maryland).

45. L. TRIBE, *supra* note 28, at 319 (quoting Brown, *The Open Economy: Mr. Justice Frankfurter and the Position of the Judiciary,* 67 YALE L.J. 219, 220 (1957)).

46. *See supra* note 1 and accompanying text.

47. As used in this Comment, the term "dry states" refers to those states which imposed their own internal prohibitions of intoxicating liquors.

48. *See, e.g.,* Leisy v. Hardin, 135 U.S. 100 (1890) (holding that a "subject matter" such as "commerce among the states" that is placed under Congress' exclusive authority by the Constitution is not within the realm of the state police power unless Congress has acted to place it there); *see also* 76 CONG. REC. 4170 (1933) (remarks of Senator Borah, observing that early attempts at state prohibition had been defeated by constitutional litigation mounted by liquor interests). *See infra* notes 53-77 and accompanying text.

49. Wilson Act, 27 U.S.C. § 121 (1982) provides in pertinent part that

> [a]ll . . . intoxicating liquors . . . transported into any State . . . for use, consumption, sale or storage therein, 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 . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

the Webb-Kenyon Act,[50] which vested in states the power to regulate liquor traffic free from the constraints of the Commerce Clause. But because this statutory solution was vulnerable to constitutional attack and to congressional repeal, the drafters of Section Two sought to secure the power of states to remain dry by writing it into the Constitution.

1. Prohibition Before the Eighteenth Amendment

Long before the movement toward national prohibition began, individual states attempted to prohibit the importation and consumption of liquor within their boundaries. These efforts were based on the states' police powers recognized in the *License Cases* of 1847.[51] Upholding a state law requiring a license to sell liquor against a Commerce Clause challenge, the Court stated, "The law is not a revenue act, but a police measure . . . . The health laws, quarantine laws, ballast laws, etc., prove that the police power may be extended to imports and importers, if the public safety or welfare demands it."[52]

Subsequently, in *Bowman v. Chicago & Northwestern Railway Co.*[53] the Court recognized limits on the exercise of the states' police power with respect to articles in interstate commerce. *Bowman* involved a challenge to an Iowa law which furthered the state's policy of prohibition by essentially forbidding the importation of liquor.[54] The *Bowman* Court ruled that a state could not regulate liquor, even as part of a general prohibition, until after importation, when the liquor has been "mingled with and become a part of the general property of the State."[55]

In response to the devastating effect *Bowman* had on its prohibition efforts, Iowa amended its general prohibition law to permit seizure of imported liquor after entry into the state. The case of *Leisy v. Hardin*[56] arose when a liquor importer brought a Commerce Clause challenge to this law because his stock was seized after physical arrival within the state, but before the original packaging had been broken. The *Leisy* Court held that a state may not forbid the first sale of liquor while it is in

50. Webb-Kenyon Act, 27 U.S.C. § 122 (1982), provides in relevant part: "[I]ntoxicating liquors or liquids transported into any State . . . for use, consumption, sale or storage therein, shall upon arrival . . . be subject to the laws of such State . . . and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

51. *License Cases,* 46 U.S. (5 How.) 504 (1847).

52. *Id.* at 536.

53. 125 U.S. 465 (1888).

54. *Id.* at 469-70.

55. *Id.* at 507-08 (Field, J., concurring). But note that the decision recognized an exception to this for purposes of the protection of the public through inspection and quarantine as reasonably necessary. *Id.* at 498.

56. 135 U.S. 100 (1890) (the Iowa law functioned as a total prohibition and would apply to any sale of intoxicating liquor within the state, even to the first sale of liquor in its original packaging).

the original package in which it was shipped from another state.[57] The Court reasoned that liquor is a legitimate article of commerce and thus is protected just as any other article in interstate commerce.[58]

Leisy, however, contained dicta which invited congressional action to aid dry states by declaring that states may not exclude articles from commerce "in the absence of congressional permission."[59] Congress responded by passing the Wilson Act several months after *Leisy.*[60] The Act provided that state prohibition laws should apply to imported liquor in its original packaging "to the same extent as though such . . . liquors had been produced in such state."[61] The Court affirmed the constitutionality of this statute in *In re Rahrer,*[62] involving a prohibition law in Kansas. The *Rahrer* Court established that Congress may, under its commerce power, divest imported liquor of its interstate commerce character and permit state regulation at a time earlier than would ordinarily be permissible.[63]

The Court, however, restricted the scope of the Wilson Act in *Rhodes v. Iowa.*[64] The *Rhodes* Court narrowly construed the words "upon arrival" in the Act[65] to prevent a state from siezing liquor stored in a freight warehouse.[66] The Court reasoned that the state's power to regulate should not attach until the "termination of the interstate commerce shipment."[67] To hold otherwise, the Court maintained, would give state prohibition laws extraterritorial operation because "the inevitable consequence of allowing a state law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits

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57. *Id.* at 124-25.

58. *Id.* at 116. The Court responded to the argument that the state could use its quarantine power against liquor imports:

> But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. . . . But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists.

Id.

59. *Id.* at 124-25.

60. *See, e.g.,* In re Rahrer, 140 U.S. 545, 552-53 (1891) (argument of petitioner observed that the aid of Congress was invoked in order to grant the states the power to bring the interstate commerce in liquor within their jurisdiction).

61. Wilson Act, *supra* note 49.

62. 140 U.S. 545 (1891).

63. *Id.* at 562. The Court did not refer to this as a grant of power to the states, rather it was simply the removal of an "impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part." *Id.* at 564.

64. 170 U.S. 412 (1898) (where the state seized liquor being held in a railroad freight warehouse pending shipment to the ultimate consignee).

65. *See supra* note 49.

66. *Rhodes,* 170 U.S. at 421-26.

67. *Id.* at 423.

of the State for such shipments."[68] The *Rhodes* Court found this "inevitable consequence" to be beyond Congress' intent.[69]

Rhodes created a new problem for states attempting to enforce prohibition: they could not prohibit liquor sales by mail order on direct consignment to the ultimate consumer.[70] Congress responded to this dilemma by passing the Webb-Kenyon Act of 1913, which prohibited the importation of liquor into any state with the intent to receive, possess, sell, or use it in violation of that state's laws.[71] The Court upheld this Act against a commerce clause challenge in *Clark Distilling Co. v. Western Maryland Railway Co.*[72] The *Clark Distilling* Court saw the Webb-Kenyon Act as legislation

> simply [extending] that which was done by the Wilson Act; that is to say, its 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 . . . so as to cause the prohibitions of the [state] law against shipment, receipt and possession to be applicable and controlling . . . .[73]

The Court reasoned that the power of Congress to enact the Webb-Kenyon Act was sustainable on the same basis as that on which the Wilson Act had been upheld in *In re Rahrer*.[74]

Clark Distilling established the principle that Congress can prevent an individual in one state from using the instrumentalities of interstate

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68. *Id.* at 422.

69. *Id.* at 426. "We think that interpreting the statute by the light of all of its provisions, it was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to consignee." *Id.*

70. *Id.* at 415-16 (although the Court recognized that this was a more convenient way for the states to enforce prohibition laws).

71. *See supra* note 50.

72. 242 U.S. 311 (1917) (upholding the West Virginia prohibition law, which forbade common carriers from carrying intoxicating liquors intended for personal use into the state). The *Clark Distilling* Court, however, was divided in upholding the Webb-Kenyon Act. Seven justices voted to uphold the Act while two dissented. *Id.* at 332 (Holmes and Van Devanter, JJ., dissenting). This division would cause concern for dry states during debate on the Twenty-first Amendment that the Court could strike down a statutory grant of the power to restrict the importation and consumption of liquor to the states. *See infra* notes 83-85 and accompanying text.

73. 242 U.S. at 324.

74. *Id.* at 330.

> As the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity, a result which, as we have previously said, would reverse *Leisy v. Hardin* and overthrow the many adjudications of this court sustaining the Wilson Act. *Id.*

commerce to violate the prohibition laws of another state.[75] Significantly, *Clark Distilling, Rhodes,* and *In re Rahrer* each involved congressional efforts to aid states in enforcing *total* prohibitions on liquor under their police powers for purposes of promoting " 'the preservation of the morals, the health, or safety of the community.' "[76] None of these cases stood for the proposition that states *without* prohibition policies could burden interstate commerce in order to aid a domestic liquor industry.[77] This distinction, which relates to Congress' statutory protections for state prohibition efforts, is crucial to placing the subsequent Section Two grant of power in the proper context.

2. *Prohibition and Repeal*

Passage of the Eighteenth Amendment[78] in 1919 created national prohibition and temporarily resolved the issue of state liquor regulation. The "noble experiment" of the Eighteenth Amendment, however, became a resounding failure.[79] The regular, almost institutionalized defiance of the Amendment, coupled with the hardships of the Depression, created fears that the populace might develop a general disrespect for law and order that could threaten property interests.[80] In addition, prohibition foreclosed the possibility of collecting much needed tax revenues from commerce in liquor.[81] Corporate interests, which originally had backed prohibition, came to support repeal.[82] The stage was set for

75. B. SCHWARTZ, *supra* note 34, at 280 ("The decisions sustaining the Wilson and Webb-Kenyon Acts gave to state regulatory power a scope previously denied to it on the basis of the Commerce Clause.").

76. M. FORKOSCH, *supra* note 34, at 254 (quoting from the *License Cases*, 46 U.S. (5 How.) 504, 592 (1847)).

77. B. SCHWARTZ, *supra* note 34, at 276; *see, e.g.,* Adams Express Co. v. Kentucky, 238 U.S. 190 (1915) (the intent of the Webb-Kenyon Act was to render state liquor prohibitions effective when liquor imported into state in violation of its laws).

78. The Eighteenth Amendment, section 1 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 from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend XVIII, § 1 (adopted in 1919, repealed in 1933).

79. *See generally* Levine, *supra* note 3, at 69-80.

80. *Id.* at 76-77 (referring to the report of the National Commission on Law Observance and Enforcement (the "Wickersham" Commission) which warned that the widespread contempt for the policy of prohibition was having a serious effect on the attitudes of the working class towards law and order in general); *id.* at 70-74 (one AFL leader was quoted in Senate hearings in January 1932 as saying: "Beer would have a decidedly soothing tendency on the present day mental attitude of the working men .... It would do a great deal to change their mental attitude on economic conditions.").

81. *Id.* at 109 n.1 (discussing the importance of the economic argument (increased tax revenues from a revitalized and legitimized liquor industry) for securing support for repeal during the height of the Depression).

82. *Id.* at 78-79 (quoting from a letter by John D. Rockefeller Jr. stating that after all of his long years of support for prohibition he had come to believe that the benefits of prohibition

repeal.

For a repeal amendment to have any chance of success, the support of the dry states was necessary.[83] Thus, as a purely political matter, supporters of repeal had to assure dry states that they would retain the power to maintain state-wide prohibition free from the constraints of the Commerce Clause. As the repeal resolution's floor leader, Senator Blaine, stated:

> I am opposed to the dry States interfering with the so-called wet States in connection with this question of intoxicating liquors; and so, by the same token, I am willing to grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors.[84]

The dry states were concerned that federal statutory protection of their power to remain dry would be inadequate. This concern stemmed from two fears: (1) that the holdings in *In re Rahrer* and *Clark Distilling,* which supported Congress' power to divest goods of their interstate character and permit state regulation, might be overruled and (2) that an act of Congress could be repealed by Congress. The method proposed to ensure adequate protection for the dry states' interests was to elevate the existing shield of the Wilson and Webb-Kenyon Acts to the constitutional level.[85] Accordingly, Section Two was included in the proposed Twenty-first Amendment and was adopted within ten months.[86]

The joint repeal resolution, as originally drafted in the Senate, also contained a third section which would have conferred concurrent power on the federal government to regulate liquor consumed on the premises where it was sold.[87] Under their police powers, states have power to regulate the manufacture and distribution of liquor within their borders.[88] The federal government, however, absent an explicit grant such as Section Three of the Eighteenth Amendment, does not possess this power.[89] The wording of proposed Section Three to the Twenty-first

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" 'are more than outweighed by the evils that have developed and flourished since its adoption.' " Rockefeller thought that prohibition had engendered a lack of respect for the law.).

83. Levine, *supra* note 3, at 82 (the Twenty-first Amendment was ratified on December 5, 1933 when the stalwart dry state Utah became the thirty-sixth state to vote for repeal).

84. 76 CONG. REC. 4141 (1933) (remarks of Senator Blaine).

85. *Id. See also id.* at 4170 (1933) (remarks of Senator Borah, referring to the Wilson and Webb-Kenyon Acts, "it never has become a settled policy . . . of the Congress and, it seems to me, could not be accepted as a sufficient protection to the dry States").

86. *See supra* note 3.

87. For the text of the proposed Section Three see *infra* note 96.

88. *See supra* notes 38 & 52 and accompanying text.

89. 76 CONG. REC. 4155 (1933) (remarks of Senator Walsh, referring to proposed Section Three, "We simply say that the Congress shall have concurrent power with the States; that is to say, the States have the power, and we give the power also to the Congress."); *see* text of Section Three *infra* note 96.

Amendment was designed to grant regulatory power over liquor to the federal government to deal with one particular, though politically-charged aspect of the liquor trade: the saloon. The possibility that saloons would return after repeal was widely criticized, both inside and outside of Congress.[90] As one senator remarked, "Everyone who advocated repeal of the eighteenth amendment always prefaced his remarks with the statement, 'We do not want the saloon back. Nobody wants the saloon back.' "[91]

While the purpose of Section Three won general approval, its vice was that it retained the shortcomings of the Eighteenth Amendment—federal control over a problem which many viewed to be essentially local in nature.[92] Thus it was defeated in Congress.[93]

3. *The Absolutist and Federalist Interpretations of the Legislative History*

Interpretations of the meaning of Section Two generally adopt one of two conflicting views which may be labeled "absolutist"[94] and "federalist."[95] The absolutist view holds that Section Two was intended to be a grant of plenary power to the states to regulate liquor within their borders. Supporters of this view point to the fact that proposed Section Three of the Amendment, providing for concurrent federal and state jurisdiction over liquor consumed in taverns and bars, was defeated during congressional debate.[96] Additionally, several Senators made statements supporting the absolutist view. Speaking against concurrent federal power, one Senator contended, "[L]et the people of each State deal with that subject, and they will do it more effectively and more successfully

90. Levine, *supra* note 3, at 101; 76 CONG. REC. 4177 (1933) (excerpt from *Liberty Magazine,* Jan. 21, 1933, "The open saloon was a destructive force of great magnitude. It catered to human depravity . . . .").

91. 76 CONG. REC. 4161 (1933) (remarks of Senator Norris).

92. *See, e.g.,* 76 CONG. REC. 4145 (1933) (remarks of Senator Wagner, referring to proposed Section Three as a means of ensuring against the return of the saloon, "It flies in the face of reason and experience. 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? The inevitable consequence of section 3 will be that the liquor question will continue to bedevil national politics.").

93. 76 CONG. REC. 4179 (1933) (vote to strike Section Three from the text of the proposed Twenty-first Amendment).

94. Note, *The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors,* 75 COLUM. L. REV. 1578, 1579-80 (1975) (the term "absolutist" is used to describe those who support a literal reading of Section Two).

95. Case Note, *Federal District Court Exempts Interstate Rail Carrier From State Open Saloon Prohibition,* 6 CREIGHTON L. REV. 249 (1972) (the term "federalist" is used to denote those who support a strictly limited reading of Section Two as against the Commerce Clause).

96. As originally proposed, the Twenty-first Amendment included Section Three which read: "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 CONG. REC. 4138 (1933).

than the Federal Government has done, because it is not the business of the Federal Government."[97] Finally, support for the absolutist view comes from the language of Section Two itself: the provision contains no reference to any external constitutional limitations.[98]

On the other hand, the federalist interpretation holds that Section Two was enacted solely to allow dry states to remain dry. Under this view, the federal government cannot interfere with dry states' prohibitions of liquor imports, but retains power over liquor in interstate commerce.[99] It was with this understanding that several Senators supported Section Two.[100] In the words of one Senator, Section Two was simply a "restatement of the Webb-Kenyon law, already on the law books, which would write into the Constitution the right of the dry States to have Federal protection against the importation of liquor."[101]

While the drafters' deliberations on Section Two are clearly recorded, the records of the state ratifying conventions are much less satisfactory. In many instances the records of the conventions reveal no details whatsoever of the debates.[102] Apparently, the haste and festivity of the movement toward repeal obscured the debates in the states regarding the potential legal ramifications of Section Two.[103]

4. The Supreme Court's Interpretation of Section Two

a. The Absolutist Decisions

The first Supreme Court decisions to interpret Section Two adopted the absolutist view toward the conflicts between state regulation of liquor and the Commerce Clause. In *State Board of Equalization v. Young's Market*,[104] the Court upheld a $500 fee for the privilege of importing beer into California. A group of wholesalers challenged the fee on the grounds that it violated both the Commerce Clause and the Equal Protection Clause. The federal district court ruled for the plaintiffs after a cursory analysis of the Twenty-first Amendment.[105]

97. *Id.* at 4146 (remarks of Senator Wagner). But note that the Senator was referring specifically to the issue raised by Section Three of concurrent regulation of liquor dispensed in saloons.

98. *See supra* note 2.

99. *See* Note, *supra* note 94, at 1580.

100. 76 CONG. REC. 4168 (1933) (remarks of Senator Fess: "In other words, the second section of the joint resolution that is now before us is designed to permit the Federal authority to assist the States that want to be dry to remain dry.").

101. *Id.* at 4228.

102. E. BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (Part I) (1970) (records of the state ratification conventions).

103. *Id.* at 5; *see also* 76 CONG. REC. 4164 (1933) (remarks of Senator Dickinson: "It was speed; it was 'Beer by Christmas.' ").

104. 299 U.S. 59 (1936).

105. Young's Market Co. v. Board of Equalization, 12 F. Supp. 140, 141-44 (S.D. Cal. 1935). The district court held that Section Two did not exempt state liquor regulations from

Justice Brandeis, writing for the Court, reversed the lower court. Although he agreed with the district court that the fee clearly burdened interstate commerce,[106] Justice Brandeis asserted that the Twenty-first Amendment "abrogated the right to import free, so far as concerns intoxicating liquors."[107] Addressing the equal protection claim, Justice Brandeis stated, "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[108] Urged by the wholesalers to look to past judicial limitations on the Webb-Kenyon Act in construing Section Two, Justice Brandeis took a strongly absolutist position: "As we think the language of the Amendment is clear, we do not discuss these matters."[109]

The Court maintained this sweeping view of Section Two in three later cases which held that Section Two permitted states to discriminate against imported alcohol without constraint from either the Commerce Clause or the Fourteenth Amendment.[110] Almost immediately, however, the Court began to retreat from this seemingly unlimited grant of power to the states. It did so not by going behind the language of the Amendment; instead the Court gave progressively narrower interpretations to Section Two as new cases arose. Thus, the Court preserved, for a time, the superiority of state Section Two power over federal commerce interests in increasingly narrow circumstances.

b. Limiting Section Two: The Through/Into Distinction

While the Court's early decisions appeared to define states' power under Section Two, in *Collins v. Yosemite Park & Curry Co.*[111] the Court considered the jurisdictional scope of this power. California had imposed licensing and regulatory requirements on the transportation of liquor through the state for use within Yosemite National Park. Although it struck down the regulations, the Court avoided a direct conflict with its prior Section Two decisions by holding that *Collins* involved no transportation into California within the meaning of Section Two because the

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the Commerce Clause; it only permitted states to determine whether "intoxicating liquor should be a lawful subject of commerce within their limits." *Id.* at 142.

106. *Young's Market,* 299 U.S. at 62.

107. *Id.*

108. *Id.* at 64.

109. *Id.* at 63-64.

110. Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939) (upheld a "retaliation" statute by which Missouri made it illegal to import liquor from any state that restricted the importation of Missouri liquor); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939) (upholding a "retaliation" statute which barred liquor imports from those states that proscribed shipments of liquor from other states); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938) (upholding state law which prohibited importation of liquor of more than 25 percent alcohol content not registered with United States Patent Office but which did not apply to domestically manufactured liquors).

111. 304 U.S. 518 (1938).

ultimate destination of the liquor was a national park under exclusive federal jurisdiction.[112] Thus the Court created the distinction between tranportation "into" a state and transportation "through" the state. Although Section Two permitted states to restrict the transportation of liquor to a destination within their borders, it did not allow them to prevent transportation through their territories to other states.

The through/into distinction, however, did not prohibit states from exercising *any* regulatory power over liquor transported through their borders for delivery in other jurisdictions. In *Duckworth v. Arkansas,*[113] the Court, recognizing the state's police power interest in preventing diversion of liquor shipments earmarked for other states to points within the state, upheld a permit requirement for liquor transportation through the state.[114] While the *Duckworth* majority found the requirement permissible under general commerce clause principles, Justice Jackson concluded that the decision could be supported only by relying on Section Two's grant of power.[115]

Similarly, in *Carter v. Virginia,*[116] the Court relied on the state's police powers to uphold an even more stringent set of regulations on liquor shipments through the state. As in *Duckworth,* the Court found no undue burden on interstate commerce.[117] In separate concurrences, however, three justices claimed that the regulations could be sustained only under Section Two.[118] Writing in concurrence, Justice Frankfurter argued that Section Two permitted a state to prevent diversion into its own markets of liquor intended for consumption elsewhere, even if the preventative measures imposed an undue burden on interstate commerce.[119]

After *Carter* it was twenty years before the Court in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*[120] again confronted Section Two and the through/into distinction. Idlewild sold liquor to departing international airline passengers and loaded the liquor directly onto the customer's aircraft for delivery at the end of the flight. The Federal Bureau of Customs granted a license to Idlewild and supervised its operations. When the state of New York attempted to close the enterprise for violat-

112. *Id.* at 538.

113. 314 U.S. 390 (1941).

114. *Id.* at 393. The Court upheld the permit requirement under the Commerce Clause as the least restrictive means by which the state could achieve its legitimate interest in preventing diversion of interstate liquor shipments into intrastate commerce. *Id.*

115. *Id.* at 397-99 (Jackson, J., concurring). Justice Jackson preferred upholding the permit requirement under Section Two rather than on what he saw to be an expanded notion of state police power that intruded on the federal commerce power. *Id.*

116. 321 U.S. 131 (1944). The regulations in *Carter* required the posting of a bond in order to transport liquor through the state. *Id.* at 132-33.

117. *Id.* at 137.

118. *Id.* at 139 (Frankfurter, joined by Jackson and Black, JJ., concurring).

119. *Id.* at 141-42.

120. 377 U.S. 324 (1964).

ing state liquor regulations, Idlewild obtained an injunction against the state in federal district court.[121]

On appeal, the Supreme Court upheld the injunction. Writing for the majority, Justice Stewart concluded that the liquor was destined for ultimate use in foreign countries, rather than in New York.[122] Accordingly, because the shipments were in effect "through" rather than "into" the state, Justice Stewart reasoned that the state's section two interests were not implicated and ordinary commerce clause considerations governed the decision.[123]

Justice Stewart also proposed an alternative to the analytic method that had led the Court to the through/into distinction. Rather than rely solely on the language of Section Two, Justice Stewart suggested using a balancing approach to the relationship between Section Two and the Commerce Clause: "Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."[124]

Some have argued that this statement calls for a balancing of Section Two interests against Commerce Clause interests whenever the two conflict.[125] Others have claimed that Justice Stewart advocated a balancing approach merely to determine whether Idlewild's international airline sales should be treated as shipments through the state of New York.[126] Justice Stewart probably intended the latter interpretation. The unique facts in *Idlewild*—the presence of a federal enclave in the same physical space as a state facility—required a balancing of federal and state regulatory interests. In any event, however, this balancing analysis was clearly a shift away from the traditional Section Two analysis.

The through/into cases, particularly *Idlewild,* established that Section Two does not insulate a state's prohibition or unreasonable regulation of liquor shipments that pass through the state from the Commerce Clause. The Commerce Clause, however, permits reasonable exercises of state police power to prevent diversions of interstate shipments into the domestic market. While the Court's precedents upheld this state regulatory power on the theory that the regulations did not unduly burden interstate commerce, an additional rationale stemmed from Section Two. Finally, when a liquor shipment bears characteristics of being both

121. Idlewild Bon-Voyage Liquor Corp. v. Epstein, 212 F. Supp. 376 (S.D.N.Y. 1962).

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

123. *Id.* at 330-32.

124. *Id.* at 332.

125. *See* Note, *supra* note 94, at 1594 ("This language may suggest that the federal-state relationship should be reexamined in each case in order to balance the respective interests of the commerce clause and the twenty-first amendment.").

126. Note, *The Evolving Scope of State Power Under the Twenty-First Amendment: The 1964 Liquor Cases,* 19 RUTGERS L. REV. 759, 772 (1965) (balancing was necessary here because transaction involved elements of both "through" and "into" shipment).

"through" and "into" a state, the court will balance the state and federal interests to determine whether the transaction should be deemed a "through" shipment. Significantly, the analytic touchstone in all of these cases was the language of Section Two.

c. Limiting Section Two: The Definition of Peripheral Issues

After the more or less geographical limitation on Section Two created by the through/into distinction, the Court limited Section Two further by establishing federal authority over "peripheral" aspects of state liquor regulation.[127] In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[128] the Court considered a California wine pricing law that required all wine producers, wholesalers and rectifiers to file fair trade contracts or price schedules with the state.[129] The state charged that Midcal sold wine at a price below the applicable price guideline.[130] Midcal asserted that California's pricing system restrained trade in violation of the Sherman Antitrust Act.[131] The state claimed that application of the Sherman Act was barred by Section Two.[132] The Court rejected the state's argument.[133] As in the past, the *Midcal* Court "focused primarily on the language of [Section Two] rather than the history behind it."[134] Although the Court acknowledged that the state's power could not be confined literally to the "transportation or importation"[135] of liquor, it stressed that its analysis should not "lose sight of the [section's] explicit grant of authority."[136]

In *Midcal,* the Court distinguished between state regulations involving the importation, sale, or distribution of liquor and regulations that govern "peripheral"[137] aspects of liquor control: "Although States retain substantial discretion to establish [peripheral] liquor regulations, those controls may be subject to the federal commerce power in appropriate situations."[138] Thus, the federal antitrust laws limited California's power

127. Note, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.: Federal Power Under the Twenty-First Amendment?,* 38 WASH. & LEE L. REV. 302 (1981).

128. 445 U.S. 97 (1980).

129. *Id.* at 99.

130. *Id.* at 100.

131. *Id.* The Sherman Act, 15 U.S.C. §§ 1-7 (1982), provides that the restraint of interstate commerce or trade is illegal.

132. 445 U.S. at 106.

133. *Id.* at 114.

134. *Id.* at 106-07.

135. *Id.* at 107.

136. *Id.*

137. Note, *supra* note 127, at 309 ("According to the Court in *Midcal,* the Commerce Clause permits the federal government to regulate peripheral aspects of liquor control in appropriate situations.").

138. *Midcal,* 445 U.S. at 110. *See also* Note, *supra* note 127, at 309-10 (although the point is made that the Court recognized a grant by the Twenty-first Amendment of "virtually com-

to control wine prices.

The *Midcal* analysis raises the difficult question of whether a regulation concerns the importation, sale, or distribution of liquor or some "peripheral" aspect of liquor regulation. Some guidance is available from the Court's decisions.[139] *Midcal* itself establishes that a liquor pricing system does not directly relate to liquor importation, sale, or distribution. Under *Midcal,* unless a state regulation directly relates to the importation, sale, or distribution of liquor, it does not fall within the exemption of Section Two.

The recent decision in *Capital Cities Cable v. Crisp*[140] further developed *Midcal*'s peripheral regulation analysis. In *Capital Cities,* the Court struck down an Oklahoma ban on wine advertising on out of state cable television programming. The *Capital Cities* Court found that the state interest promoted by restricting cable advertising was not sufficiently close to the core of Section Two power to allow the ban to prevail over the federal interest in uniform regulation of interstate communications.[141] The Court relied on the need to "harmonize state and federal powers within the context of the issues and interests of the state in each case."[142]

In more recent cases presenting conflicts between Section Two and constitutional provisions other than the Commerce Clause, the Court has more clearly departed from the early absolutist decisions. The Court dealt with the relationship between the Export-Import Clause[143] and Section Two in *Department of Revenue v. James B. Beam Distilling Co.,*[144] which involved a challenge to state taxes assessed on liquor imported from outside the United States. The Court rejected the state's Section Two defense of the tax, reasoning that the specific mandate of the Export-Import Clause had not been affected by Section Two.[145] The Court distinguished the more "generalized authority given to Congress by the Commerce Clause,"[146] which underlay the peripheral regulation

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plete control" over the importation, sale or distribution of alcohol rather than a blanket recognition of *complete* control over this area).

139. *See, e.g.,* Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694, 2708-09 (1984) (where the issue was 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"); *Young's Market,* 299 U.S. 61-64 (license fee for right to ship liquor into state is directly related to importation);

140. 104 S. Ct. 2694 (1984).

141. *Id.* at 2708.

142. *Id.*

143. Article I, section 10, cl. 2 of the United States Constitution provides: "No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . ." U.S. CONST. art. I, § 10, cl. 2.

144. 377 U.S. 341 (1964).

145. *Id.* at 345-46.

146. *Id.* at 344.

analysis, from the express prohibition of the Export-Import Clause.[147]

The Court also dealt with the relation between the Equal Protection Clause and Section Two in *Craig v. Boren*.[148] The Court there addressed a state law that provided a higher minimum drinking age for men than for women with respect to purchases of beer. The Court declined to follow the flat statement made in *Young's Market* that a classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.[149] Instead, the *Boren* Court distinguished between the economic discrimination in *Young's Market* and classifications based on gender.[150]

IV. The Search for a Rationale for *Bacchus*

A. Critique of the *Bacchus* Opinions

Justice White, writing for the majority in *Bacchus,* attempted to define a central purpose to Section Two which would restrict the extent to which the exercise of state power over liquor would be immune from the Commerce Clause. In so doing, he came down on all fours with the policy of the "federalist" interpretation of Section Two while expressly disclaiming any reliance on the legislative history of Section Two. Justice White seemed to base his finding of Section Two's central purpose on the Court's evolving analysis of Section Two. The connection, however, is tenuous at best. Justice Stevens, on the other hand, took a firm absolutist stance in his dissenting opinion.[151]

1. The Majority View

Even though the discriminatory tax violated the Commerce Clause, Hawaii claimed that Section Two exempted it from commerce clause constraints.[152] Hawaii's claim found considerable support in: (1) the Court's early absolutist decisions, (2) the through/into cases, because the liquor was imported for consumption within the state and, (3) the asserted corollary to *Midcal* that, because Hawaii's tax directly related to the importation of liquor, it fell within the full regulatory power of the state under Section Two.

To overcome Hawaii's argument, Justice White had either to develop a new line of Section Two analysis or to revise one of the existing theories to forbid wet states from discriminating against liquor imports. Under the first alternative, Justice White could have reviewed the legisla-

147. *Id.*
148. 429 U.S. 190 (1976).
149. *Young's Market,* 299 U.S. at 64.
150. 429 U.S. at 206-08.
151. *Bacchus,* 104 S. Ct. at 3059-64 (Stevens, J., dissenting).
152. *Id.* at 3057-58.

tive history of Section Two. Justice White disclaimed this option, however, because of the asserted "obscurity of the legislative history"[153] of Section Two. As evidence of the obscure legislative history, the majority offered two apparently contradictory statements on the meaning of the Section from its chief sponsor in the Senate.[154] Rather than rely on the legislative history for its decision, the Court chose the second alternative and claimed that its recent decisions have limited the scope of Section Two to forbid a state from discriminating against imported liquor to aid its own industry.[155] The majority, however, did not use the analytic method underlying either the through/into distinction or the peripheral regulation analysis, both of which derive from strict construction of the wording of Section Two. Instead, Justice White framed the analysis in *Bacchus* as a balancing judgment: "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by [Hawaii's] exemption . . . to outweigh the Commerce Clause principles that would otherwise be offended."[156]

The *Bacchus* decision did not rest on the through/into distinction.[157] The liquor subject to the excise tax was imported into Hawaii solely for sale and consumption within the state. There was no passage through the state within the meaning of the distinction established in *Collins, Duckworth,* or even *Idlewild*. Justice White relied on *Idlewild* for the proposition that the Twenty-first Amendment did not "operat[e] to 'repeal' the Commerce Clause."[158] However, that language from *Idlewild* refers to federal power over liquor moving through the state, not to liquor transported into the state.[159]

Similarly, the *Bacchus* decision does not follow from the peripheral regulation analysis in *Midcal* and *Capital Cities*. That analysis applies only to regulations that are peripheral to the Section Two power over liquor importation, sale and use.[160] By contrast, a tax levied on liquor imports, no matter what the motivation, is a direct regulation lying at the heart of the express grant of power in Section Two. Thus the peripheral regulation analysis seems misplaced in *Bacchus*.

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153. *Id.* at 3058.

154. *Id.* In reporting the view of the Senate Judiciary Committee, Senator Blaine said that the purpose of Section Two was "to restore to the States . . . absolute control over interstate commerce affecting intoxicating liquors . . . . " 76 CONG. REC. 4143 (1933). On the other hand, he also expressed a narrower view: "So to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line." *Id.* at 4141.

155. *Bacchus,* 104 S. Ct. at 3058.

156. *Id.*

157. *See supra* notes 111-126 and accompanying text.

158. *Bacchus,* 104 S. Ct. at 3058 (quoting Hostetter v. Idlewild Bon-Voyage Liquor Corp., 377 U.S. 324, 331-32 (1964)).

159. *See supra* note 122 and accompanying text.

160. *See supra* notes 127-142 and accompanying text.

Despite its assertions to the contrary, the *Bacchus* Court went beyond the Section Two precedents and found a new interpretation of the meaning of Section Two itself. The majority determined the central purpose of Section Two to be to protect states from "the perceived evils of an unrestricted traffic in liquor."[161] Clearly, Justice White's discovery of a central purpose behind Section Two that controls even its express language flies in the face of the Court's early absolutist decisions under Section Two.[162] Despite this inconsistency, the majority refused to overrule the early decisions. Moreover, the majority failed to provide a principled analysis of the source of the central purpose. Although Justice White claimed that the peripheral regulation decisions supplied the central purpose in *Bacchus,* those cases cannot provide the *Bacchus* principle. Contrary to the teachings of *Midcal,* his approach was to balance state against federal interests regardless of whether the state's regulation lies at the core of its Section Two power. Even though Justice White disclaimed any reliance on the history of the Twenty-first Amendment, the legislative record certainly provides the best rationale for the holding in *Bacchus.*

2. *The Dissenting View*

The dissent tacitly accepted the majority's determination that the excise tax was a bald encroachment on the Commerce Clause.[163] The dissent, however, rejected the majority's analysis of Section Two and returned to the earliest decisions under Section Two, adopting the absolutist interpretation endorsed by the *Young's Market* Court.[164] Justice Stevens acknowledged the through/into limitation but found it inapplicable.[165] Finding Hawaii's tax to be a direct regulation of liquor, Justice Stevens also found the peripheral regulation analysis inapposite.[166] Fi-

161. *Bacchus,* 104 S. Ct. at 3058. The Court continued: "Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision is not to empower States to favor local liquor industries by erecting barriers to competition." *Id.*

162. *See supra* notes 106-109 and accompanying text. *See also* Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).

163. 104 S. Ct. at 3062 (Stevens, J., dissenting) (essentially conceding that the liquor tax exemption in question imposed a burden on interstate commerce that was not shared by local manufactures, but maintaining that the commerce clause objection was foreclosed by Section Two).

164. *Id.* Referring to the Court's decision in *Young's Market,* Justice Stevens stated that "the Court explained that the Amendment enables a State to establish a local monopoly and to prevent or discourage competition from imported liquors." *Id.* As Justice Stevens noted, this finding was based on a literal reading of Section Two.

165. *Id.* at 3060.

166. *Id.* at 3063-64 (noting that the *Capital Cities Cable* decision reaffirmed the Court's view that "a direct regulation 'on the sale or use of liquor' within a State's borders is the 'core section two power' conferred upon a State").

nally, the dissent rejected the majority's delineation of a central purpose behind Section Two that limits its grant of power.[167]

Adhering to the *Young's Market* rationale, Justice Stevens rejected any attempt to interpret Section Two that went beyond its plain language. He argued that an attempt to discern a central purpose in Section Two " 'would involve not a construction of the Amendment, but a rewriting of it.' "[168] Justice Stevens instead embraced the *Young's Market* view that the greater power to prohibit liquor within a state, which is clearly conferred by Section Two, implies the lesser power to selectively exclude or tax liquor brought into the state.[169]

Justice Stevens' reasoning has the advantages of simplicity and consistency with the early Section Two precedents. It ignores, however, the strong federal interest in preventing economic warfare among the states with respect to interstate commerce. The dissent's view would surrender control of interstate commerce in liquor to the states, which, as *Bacchus* demonstrates, are motivated by parochial economic interests. The dissent also failed to consider that Section Two's grant of power may apply differently to wet states seeking to selectively regulate liquor imports than it applies to dry states.

B. An Alternate Rationale for *Bacchus*

1. The Legislative History

Justice White's opinion in *Bacchus* took a major step toward redressing the imbalance which has existed between the Commerce Clause and Section Two since the early absolutist decisions. His reasoning, however, involved an unsupported leap to the conclusion that a central purpose underlies Section Two. To fill in the gap left by Justice White's abrupt repudiation of the *Young's Market* analysis, it may be helpful to review the record of the adoption of Section Two and observe how Justice White might have conducted a more principled analysis.

In debating proposed Section Two, the Senators couched their discussion of the level of protection it contained for the dry states strictly in terms of the Wilson and Webb-Kenyon Acts. There was no dispute over whether these two statutes adequately safeguarded the power of dry states to remain dry. Because the Senators were satisfied with the extent of the protection already available to dry states, the sole issue concerning Section Two was whether to constitutionally guarantee the well-defined

167. *Id.* at 3064. Justice Stevens noted that *Young's Market* had rejected the proposition that the " 'State may not regulate importations except for the purpose of protecting the public health, safety or morals.' " *Id.* at n.15 (quoting State Bd. of Equalization v. Young's Market, 299 U.S. 59, 63 (1936)).

168. 104 S. Ct. at 3062 (quoting State Bd. of Equalization v. Young's Market, 299 U.S. 59, 62-63 (1936)).

169. 104 S. Ct. at 3064.

protection provided by those statutes.[170] Thus the drafters apparently *assumed* that the protection of Section Two would be no greater than the scope of the Wilson and Webb-Kenyon Acts.

During the congressional debate, the drafters of Section Two distinguished carefully between the interests of wet and dry states. This distinction was, of course, implicit in the various references to the cases involving prior congressional enactments to aid the prohibition efforts of dry states.[171] The distinction was explicit in the remarks of the Senators.[172] Thus it appears that the framers intended Section Two exclusively to protect the interests of dry states and not to benefit wet states. The framers of the Amendment did not concern themselves with the ability of wet states to restrict liquor traffic beyond the powers already available to them to achieve legitimate state regulatory goals under their ordinary police powers. Rather, the framers viewed the dry states as requiring special protection to guarantee their power to remain dry. It was, after all, to secure the political support of dry states for repeal that Section Two was included at all.

Some commentators have suggested that the rejection of proposed Section Three demonstrated that Congress intended to deny the federal government any authority over liquor whatsoever.[173] If true, the defeat of Section Three would support Justice Stevens' absolutist stance in *Bacchus* and undermine the majority's conclusion.

The fate of Section Three, however, does not undermine the narrow reading of Section Two. Section Three, as proposed, was an explicit grant of power to the federal government to interfere in the internal affairs of the states.[174] Section Two, on the other hand, was merely a guarantee to the states that an existing power of the federal govern-

170. *See supra* notes 83-85, 100-101 and accompanying text. Senator Borah, referring to attacks on state prohibition efforts, said, "All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States." 76 CONG. REC. 4172 (1933).

171. *See, e.g.,* 76 CONG. REC. 4140 (1933) (remarks of Senator Blaine referring to the history of congressional enactments on this issue Senator Blaine mentioned cases which involved total state prohibitions on intoxicating liquors and state efforts at enforcement).

172. *See, e.g., id.* at 4169-70 (remarks of Senator Borah, referring to the Wilson and Webb-Kenyon Acts, "[I]t never has become a settled policy of the Government or a settled policy of the Congress and, it seems to me, could not be accepted as a sufficient protection to the dry states.... Therefore, Mr. President, we are turning the dry States over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it. Secondly, we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law.").

173. *See, e.g.,* Note, *supra* note 94, at 1579 (offering as support for an "absolutist" interpretation of Section Two "the Congressional deletion of a section of the amendment that would have expressly endorsed concurrent state and federal regulation of liquor").

174. *See supra* note 89 and accompanying text.

ment—protecting interstate commerce—would not be used to thwart the efforts of states choosing to remain dry. The rejection of Section Three, therefore, is not inconsistent with a narrow reading of Section Two.

2. The Case Law

The majority opinion in *Bacchus* suggests that there is an evolving policy in recent Section Two decisions that supports a narrow reading of the Section.[175] The majority's precedents, however, do not support the proposition that there is a limited central purpose for Section Two as it relates to the states' core powers.[176] On the other hand, some recent decisions do demonstrate that the Court is willing to limit its original absolutist interpretation of Section Two by some means other than narrow construction of its language. These decisions reveal an analytic shift away from construction of the language of Section Two to determining its relation with other constitutional provisions. These precedents lend some indirect support to the majority's conclusion in *Bacchus*.

One example of this change in analytic approach appears in the Court's modern conception of the relationship of Section Two and the Fourteenth Amendment. When the equal protection claim was raised in *Young's Market,* the Court stated flatly, "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[177] In *Craig v. Boren,*[178] however, the Court retreated from this strong position. The *Craig* Court, in striking down a higher minimum drinking age for men than for women, distinguished between the economic discrimination in *Young's Market* and gender-based discrimination.[179] The Court stated that nothing in the history or text of Section Two supports the proposition that it qualifies the protections of the Fourteenth Amendment.[180] Clearly, *Craig* diverged from the early absolutist position.

Another shift away from the absolutist position came in *Department of Revenue v. James B. Beam Distilling Co.*.[181] The constitutional challenge in *Beam Distilling Co.* was based not on the Commerce Clause, but on the Export-Import Clause.[182] The Court held that Section Two did

175. *Bacchus,* 104 S. Ct. at 3057-59.

176. *See supra* notes 157-162 and accompanying text.

177. *Young's Market,* 299 U.S. at 64.

178. 429 U.S. 190 (1976).

179. *Id.* at 206-08 (referring to *Young's Market* and *Mahoney,* in which equal protection objections were overruled in the face of Section Two, the Court noted that they "touched upon purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment"). *Craig* is discussed *supra* text accompanying note 148-150.

180. *Craig,* 429 U.S. at 206.

181. 377 U.S. 341 (1964).

182. *Id.* at 342. Article I, section 10, clause 2 provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and

not exempt the state from the constraints of the Export-Import Clause because Section Two did not repeal the specific prohibition against the imposition of duties on imports by states.[183] The dissent, however, made the logical argument that, on an absolutist reading, the Export-Import Clause should be no more exempt from Section Two than the Commerce Clause: "The Amendment, after all, does not talk about 'foreign' liquors or 'domestic' liquors; it simply speaks of 'liquors'—all liquors, whatever their origin."[184] Indeed, from the standpoint of the dry states, it is just as important to restrict the flow of liquor from foreign nations as that from other states.

Finally, the facts in *Capital Cities Cable* may offer some support for the *Bacchus* majority's conclusion. A major factor in *Capital Cities Cable* weighing against the state was the *selectivity* of its advertising ban. The ban applied only to cable signals carrying liquor advertising from out of state. The ban did not prohibit such advertising by other, locally-produced media.[185] Although the *Capital Cities Cable* Court went on to distinguish regulation of liquor advertising as an indirect liquor regulation lying at the periphery of Section Two, that decision reveals that the Court may closely scrutinize states' attempts to cloak selective regulations under Section Two.

Conclusion

The implication throughout the adjudication of Section Two has been, perhaps, that in the rush to restore the legitimate liquor trade, the legal implications of the provision were not adequately considered. As a result, Section Two litigation has never been guided by a single conception of the purpose of the provision. The Supreme Court helped to create this uncertainty with its early decisions construing Section Two as a grant of plenary power. Since those decisions, however, the Court has tried to define limits for Section Two in relation to the Commerce Clause. By carefully limiting Section Two, the Court until *Bacchus* remained outwardly faithful to the early decisions while protecting the federal commerce interests.

Bacchus clearly repudiated the early absolutist interpretation. Further, by defining a central purpose for Section Two, *Bacchus* may have defined the single rationalizing principle that can guide future adjudication. Although the *Bacchus* majority's reasoning is unsatisfactory, its conclusion—that Section Two does not allow a wet state to unreasonably

Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress." U.S. CONST. art. I, § 10, cl. 10.

183. *Beam*, 377 U.S. at 344.

184. *Id.* at 347-48 (Black, J., dissenting).

185. *Capital Cities*, 104 S. Ct. at 2708-09.

interfere with interstate commerce in alcoholic beverages—is firmly grounded in the history surrounding the adoption of the Twenty-first Amendment.

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