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Free the Grapes: The Commerce Clause versus the Twenty-first Amendment with Regard to Interstate Shipment of Wine in America

I. INTRODUCTION

Twenty states currently forbid direct shipment of wine to consumers from out of state wineries.1 The Circuit Courts are split on the issue of whether laws forbidding direct shipment of wine to consumers are constitutional. In light of two recent cases, one in the Sixth Circuit finding this type of regulation unconstitutional and one in the Second Circuit upholding this type of regulation as constitutional, the United States Supreme Court chose to rule on this issue.2

The restriction or prohibition of wine sales in a state results in a clash between the dormant Commerce Clause, which forbids protectionist activity on the part of state governments that benefits in-state industries, and the Twenty-first Amendment, which grants the power to the states to regulate alcohol.3 This is also a clash between special interests; wineries that want to ship freely to any part of the country versus wine wholesalers that want to forbid all out of state sales.4 Proponents of regulations on the direct nationwide shipment of wine argue that the prohibition of such direct wine shipments will help states to prevent the sale of alcohol to minors and to collect taxes.5 Opponents suggest that striking down these regulations on direct nationwide wine ship-

5. Id.
ment will be good for both consumers and for wineries. The United States Supreme Court's Twenty-first Amendment jurisprudence suggests the wineries, and therefore consumers, might win this fight.

II. THE CURRENT STATE OF WINE REGULATION IN THE UNITED STATES

In order to buy a bottle of wine directly from an out of state winery, a resident of Pennsylvania must order it through one of the state operated liquor stores. The consumer must buy at least

6. Id.

Shipment of wine into Commonwealth:
(a) The shipment of wine from out-of-State to residents of this Commonwealth is prohibited, except as otherwise provided for in this section.
(b) Notwithstanding any other provision of this act or law to the contrary, a person licensed by another state as a producer, supplier, importer, wholesaler, distributor or retailer of wine and who obtains a direct wine shipper license as provided for in this section may ship up to nine liters per month of any wine not included on the list provided for in subsection (c) on the Internet order of any resident of this Commonwealth who is at least twenty-one (21) years of age for such resident's personal use and not for resale.
(c) Each month, the board shall publish on the Internet a list of all classes, varieties and brands of wine available for sale in the Pennsylvania Liquor Stores. A person holding a direct shipper license may ship only those classes, varieties and brands of wine not included on the list at the time an Internet order is placed.
(d) An out-of-State wine shipper shall:
(1) Not ship more than nine liters per month on the Internet order of any person in this Commonwealth.
(2) Report to the board each year the total of wine shipped into this Commonwealth in the preceding calendar year.
(3) Permit the board or the Secretary of Revenue, or their designated representatives, to perform an audit of the out-of-State wine shipper's records upon request.
(4) Be deemed to have submitted to the jurisdiction of the board, any other State agency and the courts of this Commonwealth for purposes of enforcement of this section and any related laws, rules or regulations.
(e) A direct shipper may ship wine on the Internet order of a resident into this Commonwealth provided that the wine is shipped to a Pennsylvania Liquor Store selected by the resident. The wine will be subject to taxes in the same manner as wine sold directly by the board. The wine will not be released by the State store until all moneys due, including all taxes and fees, have been paid by the resident.
(f) A person shall sign an affidavit provided by the Pennsylvania Liquor Store where the wine was delivered to stating that the wine will only be used for the person's personal use. Any person who resells wine obtained under this section commits a misdemeanor of the second degree.
(g) The board may promulgate such rules and regulations as are necessary to implement and enforce the provisions of this section. The board may charge the resident a fee to cover the cost associated with processing the Internet order.
six bottles of the wine, pay a deposit, pay for shipping, and wait at least two to three weeks for delivery. The consumer must then return to the store to pick up the wine, as state law forbids delivery directly to the consumer. Since the wine selection at Pennsylvania's state run liquor stores is relatively sparse compared to that of neighboring states such as West Virginia, New Jersey and Delaware, what is to stop this hypothetical consumer from crossing over the border to a neighboring state and visiting a private liquor store that has no case quantity limitations and offers both lower prices and immediate delivery? The fact that it is a crime to transport alcohol to Pennsylvania from other states might make the hypothetical consumer think twice before committing "an act most Americans consider as seditious as filling up their gas tanks." In the world of oenophiles, Pennsylvania is known as a consumer permit state, which allows shipment of alcoholic beverages via a three-tiered distribution system. Nationally, there are six different levels of regulation. Thirteen states are considered re-

(h) The board shall submit monthly reports to the Appropriations Committee and the Law and Justice Committee of the Senate and to the Appropriations Committee and the Liquor Control Committee of the House of Representatives summarizing the number of direct shipper licenses issued by the board, the quantity of wine sold pursuant to this section and the total dollar value of sales under this section.

(i) The term "wine" as used in this section shall mean liquor which is fermented from grapes and other fruits, having alcoholic content of twenty-four per centum or less. The term "wine" shall not include malt or brewed beverages nor shall wine include any products containing alcohol derived from malt, grain, cereal, molasses or cactus. 47 Pa.C.S. § 4-488.

Unlawful acts relative to liquor, alcohol and liquor licensees

It shall be unlawful...

(2) For any person, except a manufacturer or the board or the holder of a sacramental wine license or of an importer's license, to possess or transport any liquor or alcohol within this Commonwealth which was not lawfully acquired prior to January first, one thousand nine hundred and thirty-four, or has not been purchased from a Pennsylvania Liquor Store or a licensed limited winery in Pennsylvania, except in accordance with section 488 or the board's regulations. In addition, it shall be lawful for anyone to possess miniatures totaling less than one gallon purchased in another state or a foreign country. The burden shall be upon the person possessing or transporting such liquor or alcohol to prove that it was so acquired. But nothing herein contained shall prohibit the manufacture or possession of wine by any person in his home for consumption of himself, his family and guests and not for sale, not exceeding, during any one calendar year, two hundred gallons, any other law to the contrary notwithstanding. Such wine shall not be manufactured, possessed, offered for sale or sold on any licensed premises.... 47 Pa. C.S. § 4-491.

9. Id.
10. Id.
12. Id.
ciprocity states and shipment between these states is relatively unregulated. Three states and the District of Columbia are limited open shipment states, in which there is minimal regulation. Ten states require an out-of-state winery to obtain a permit before shipping to their residents. Five states, including Pennsylvania, are consumer permit states. Fourteen states prohibit any shipments. Six states not only prohibit shipment, but also make shipment a felony.

The majority of the states that regulate out of state shipments use a system similar to that used in Pennsylvania. In states that use three-tier systems, “out-of-state producers can sell only to wholesalers, who [can] sell only to retailers, who [then] sell to consumers.” Wholesalers typically charge out-of-state wineries up to twenty-five percent for their service, while in state wineries faces no such restriction.

Even in states which allow direct shipments, the system is not perfect. In July 2003, Virginia enacted a new law designed to make it easier for consumers who reside in Virginia to receive direct wine shipments and for Virginia wineries to ship their products to out of state consumers. Before the new law took effect, only Virginia wineries and retailers were permitted to ship wine to customers within Virginia. With the passage of the new law, Virginia is now considered a shipper permit state. However, even with passage of this law, things are not perfect in Virginia, especially for Virginia wineries.

The problems lie with the thirteen so-called reciprocity states. Reciprocity is an understanding that “if your state’s wineries can ship to our state’s consumers, then our state’s wineries can ship to

13. Id.
14. Id.
15. Id.
17. Id.
18. Id.
20. Id.
22. Id.
23. Id.
24. Id.
25. Id.
your state’s consumers. This is not exactly the case in Virginia. Reciprocity is conditioned on different requirements. One state might condition reciprocity on whether adults must sign for wine deliveries, while another state might condition reciprocity on minimum quantity limits for consumers, such as two cases per month. In addition to the problems in determining the definition of reciprocity, wineries in Virginia that are now free to ship to other states have to deal with the other levels of regulation in the limited shipment and permit states.

These restrictive laws occasionally backfire on the politicians that enact them. For example, in January 2003, Gray Davis, the governor of California at the time, agreed to send his counterpart in Florida, Governor Jeb Bush, a case of California cabernet if the Tampa Bay Buccaneers defeated the Oakland Raiders in Super Bowl XXXVII. After the Buccaneers won, Davis was unable to follow through on his promise because doing so would have constituted a felony in Florida. Davis settled the bet by giving Bush two bottles of cabernet at a governors’ meeting in Washington D.C.

Within the past three years, Federal courts in most of the Circuits have confronted this issue. Lawsuits have been filed in Arizona, Florida, Indiana, Michigan, New Jersey, New York, North Carolina, Ohio, Rhode Island, Texas, Virginia and Washington. These lawsuits have led to Virginia’s revision of its laws allowing the direct shipment of wine to consumers and to the Fourth and Fifth Circuits striking down as unconstitutional laws prohibiting direct shipments in North Carolina and Texas. Recent decisions in the Second Circuit (New York) and the Sixth Circuit (Michigan), which are in direct conflict with each other, have caused the

27. Id.
28. Id.
29. Id.
30. Id.
32. Id.
33. Id.
35. Id. at http://www.coalitionforfreetrade.org/litigation/index.html (last visited November 1, 2004). The cases from the Fourth and Fifth Circuits will be discussed in Section VI of this comment.
United States Supreme Court to grant certiorari to these cases to decide this complex issue.\(^{36}\)

III. THE SECOND CIRCUIT UPHOLDS NEW YORK’S REGULATORY SCHEME

In *Swedenburg v. Kelly*, the plaintiffs, proprietors of two out-of-state wineries, and several New York wine consumers, filed an action against New York State seeking a declaration that the sections of New York’s beverage law that prohibited direct sales to consumers by out-of-state wineries were facially unconstitutional under the dormant Commerce Clause.\(^{37}\) The plaintiffs argued that the New York law violated the dormant Commerce Clause because it prevented the wineries from shipping their wine directly to the New York consumers.\(^{38}\) The wineries further argued that based on their size, with estimated sales to New York of only 120 to 180 bottles of wine a year, direct sales to consumers via website or the mail were “their only possible access to the New York market.”\(^{39}\) Therefore, the plaintiffs argued that New York’s licensing scheme provided an unconstitutional advantage to in-state wineries, an advantage which was not “saved” by the Twenty-first Amendment.\(^{40}\) They also contended that the New York law impermissibly banned out-of-state wineries from soliciting orders from New York consumers, in violation of the First Amendment.\(^{41}\)

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37. 358 F.3d 223, 229 (2d Cir. 2002). The dormant Commerce Clause restricts state and local governments from impeding the free flow of goods from one state to another. *Wyoming v. Oklahoma*, 502 U.S. 437, 469-70 (1992). The Supreme Court has established a two-step approach to determine whether a state or municipal law violates the dormant Commerce Clause. *Oregon Waste Sys., Inc. v. Dep’t of Envtl. Quality Comm’n*, 511 U.S. 93, 99 (1994) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). Under the first step, the court must determine whether the challenged law “regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.” *Oregon Waste Sys., Inc.*, 511 U.S. at 99 (citing *Hughes*, 441 U.S. at 336). Discrimination in this sense means the differential treatment of in-state and out-of-state economic interests that benefits in-state industries and burdens out-of-state industries. *Id.* “If a restriction on commerce is discriminatory, it is virtually per se invalid.” *Id.* Nondiscriminatory regulations that have only incidental effects on interstate commerce are valid “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Id.* (citing *Pike v. Bruce Church*, Inc., 397 U.S. 137, 142 (1970)).
38. *Swedenburg*, 358 F.3d at 229.
39. *Id.*
40. *Id.*
41. *Id.*
New York State and the intervening defendants, wholesale distributors of alcohol, argued that the regulatory scheme operated even-handedly with respect to in-state and out-of-state interests, and did not discriminate against the out-of-state wineries. The defendants further argued that, even if the regulatory scheme did discriminate against out-of-state wineries, it was excepted from scrutiny under the dormant Commerce Clause because it was a "proper exercise of New York's authority under the Twenty-first Amendment to regulate the importation and distribution of alcohol for delivery or use within its borders."

The parties filed cross-motions for summary judgment and the district court granted the plaintiffs' motion, striking down the regulatory scheme as unconstitutional because it "directly discriminated against interstate commerce." The district court held that the ban on direct shipment of out-of-state wine did not "implicate the State's core concerns under the Twenty-first Amendment." The defendants appealed to the Second Circuit.

The Second Circuit began its opinion by noting that four other Circuits recently decided similar cases and struck down state laws prohibiting out-of-state shipments as unconstitutional violations of the dormant Commerce Clause. The court then began its analysis by setting forth the traditional dormant Commerce Clause jurisprudence: a state regulation is unconstitutional if it "affects interstate commerce in a manner that either (i) discriminates against interstate commerce, or (ii) imposes burdens on interstate commerce that are incommensurate with putative local needs."
gains." A finding that the regulatory scheme violates the dormant Commerce Clause does not doom the scheme as unconstitutional, for it can be “saved” by the Twenty-first Amendment in the second step, but only if it advances one of the Amendment’s “core concerns.” The court then noted that, “under this two-tier analysis, none of the state statutes regulating the importation of alcohol were saved by the Twenty-first Amendment core concern examination.” The court then held that “this two-step approach is flawed because it has the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language of section 2 [of the Twenty-first Amendment].”

The court adopted a second mode of analysis, a mode adopted in only one other Circuit, the Seventh Circuit, in a case in which it upheld Indiana’s statute “restricting the direct shipment of wine on the grounds that it was a permissible expression of the state’s authority under section 2 of the Twenty-first Amendment.” This mode of analysis “considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause.” In the court’s view, the inquiry “should not allow the protective doctrine of the dormant Commerce Clause to subordinate the plain language of the Twenty-first Amendment. Instead, the inquiry should be sensitive to the manner in which these two constitutional forces interact . . . .”

The court then lapsed into a detailed history of Twenty-first Amendment jurisprudence, initially focusing upon two federal laws enacted before Prohibition: the Wilson Act, passed in 1890 and the Webb-Kenyon Act of 1913, whose intent was to allow states to control and regulate alcohol within their borders. Since

48. Swedenburg, 358 F.3d at 231 (citing Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 208 (2d Cir. 2003)).
49. Swedenburg, 358 F.3d at 231.
50. Id.
51. Id.
52. Id. (citing Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 854 (7th Cir. 2000)).
53. Swedenburg, 358 F.3d at 231.
54. Id.
55. Id. at 232. The Wilson Act, Ch. 728, 26 Stat. 313 (1890), gave states the authority to regulate imported liquor “to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory,” while the Webb-Kenyon Act, Ch. 90, 37 Stat. 699 (1913), “prohibited the shipment or transportation, in any manner or by any means whatsoever, of any ... liquor of any kind, from one State ... into any other State which ... is intended, by any person interested therein, to be received, possessed, sold,
most states wished to control alcohol consumption even after the passage of the Twenty-first Amendment repealed Prohibition, the language of section 2 of the Twenty-first Amendment closely mirrored the language of the Wilson and Webb-Kenyon Acts. The Second Circuit ruled that, based on the history of the Twenty-first Amendment, section 2 of the Amendment "effectively constitutionalize[d] most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state." Because these prohibitions were "constitutionalized," the court reasoned they were exempt from dormant Commerce Clause analysis; otherwise, section 2 of the Amendment would be moot.

The court then cited California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., a case in which the United States Supreme Court held that "Section 2 of the Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." The Second Circuit construed this "constitutional grant of authority" to mean that the Twenty-first Amendment should not be "subordinated to the dormant Commerce Clause inquiry when the two provisions conflict.

The court disagreed with the plaintiffs' arguments that a series of Supreme Court decisions narrowed the grant of authority given to the states under the Twenty-first Amendment and that the Supreme Court's decisions have confined the scope of section 2 of the Amendment to state regulations that advance core concerns. The court held that the only thing the Supreme Court has done is to confine the scope of section 2 to its plain language; language that permits New York's regulatory scheme. Thus, according to

or in any manner used." These were pre-Prohibition statutes passed by Congress in an attempt to assist states wishing to prohibit alcohol sales. Swedenburg, 358 F.3d at 232. States were having trouble doing this because of the Supreme Court's rulings at the time, which would eventually come to be known as dormant Commerce Clause analysis. Id. Prohibition of course was the Eighteenth Amendment, which forbade consumption of alcohol across the United States from 1919 to 1933. Id.
56. Swedenburg, 358 F.3d at 232.
57. Id.
58. Id. at 232-33.
59. Id. at 233 (citing California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)).
60. Swedenburg, 358 F.3d at 233.
61. Id.
62. Id.
63. Id.
the Second Circuit, New York may regulate freely within its borders; it only runs afoul of the Commerce Clause if it attempts to regulate beyond its borders.\textsuperscript{64} The court said this about New York's regulatory scheme,

\begin{quote}
[it] falls squarely within the ambit of section 2's grant of authority. The statutory scheme regulates only the importation and distribution of alcohol in New York. New York's prohibition of the sale and shipment of wine by unlicensed wineries directly to New York consumers serves valid regulatory interests. The statute allows the state to monitor the distribution and sale of alcoholic beverages by permitting such distribution and sale only through state-licensed entities supervised by, and accountable to, the SLA.\textsuperscript{65}
\end{quote}

Furthermore, the court held this was not a state law that constituted mere economic protectionism because there was no evidence that the regulatory scheme was enacted to favor local wineries over out-of-state wineries.\textsuperscript{66} In fact, the court noted, out-of-state wineries are permitted to obtain a license in New York so long as a physical presence is established within the state.\textsuperscript{67} While the court recognized that "state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere . . . have been declared to be virtually per se illegal," it also recognized that alcohol was a unique area of commerce and the regulatory concerns addressed in the statute were valid concerns.\textsuperscript{68}

The court then quickly dismissed the challenge to the statute under the Privileges and Immunities Clause, holding that because "the statutory scheme operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents," it does not violate the Privileges and Immunities Clause.\textsuperscript{69}

While the Second Circuit adopted the view that the relevant inquiry should not allow the doctrine of the dormant Commerce

\begin{footnotes}
\textsuperscript{64} \textit{Id.} At this point, the opinion gets into a detailed examination of the history of Twenty-first Amendment jurisprudence. This will be discussed in Section VI of this Comment.
\textsuperscript{65} \textit{Swedenburg}, 358 F.3d at 237.
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.} at 238.
\textsuperscript{69} \textit{Id.} at 239-40.
\end{footnotes}
Clause to subordinate the plain language of the Twenty-first Amendment, the Sixth Circuit adopted the traditional dormant Commerce Clause doctrine when it struck down Michigan’s regulatory system as unconstitutional.  

IV. THE SIXTH CIRCUIT STRIKES MICHIGAN’S LAW AS VIOLATIVE OF THE COMMERCE CLAUSE

In Heald v. Engler, the plaintiffs, wine connoisseurs, wine journalists, and an out-of-state winery, filed an action under the federal civil rights statute, claiming that Michigan’s three-tier alcohol distribution system discriminated against out-of-state wine sellers in violation of the dormant Commerce Clause. Michigan’s system did not permit out-of-state wine sellers to ship directly to Michigan consumers, but in-state sellers were allowed to ship directly to the homes of Michigan customers. The defendants, who included state officials and the Michigan Wine & Beer Wholesalers Association, argued that Michigan’s regulatory scheme was constitutional under the Twenty-first Amendment. The district court granted the state’s motion for summary judgment and denied the plaintiffs’ cross-motion for summary judgment.

The district court found that Michigan’s statutory scheme was not “mere economic protectionism,” but rather was designed “to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors.” The plaintiffs appealed to the Sixth Circuit.

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70. Heald v. Engler, 342 F.3d 517 (6th Cir. 2003).
71. Heald, 342 F.3d at 519-20. Civil action for deprivation of rights, states: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.
72. Heald, 342 F.3d at 519.
73. Id. at 519-20.
74. Id. at 520.
75. Id. at 521.
76. Id. at 520.
Among the affidavits submitted by the plaintiffs were affidavits by wineries and distributors displaying their willingness to pay required taxes and obtain the necessary permits if allowed to ship directly to Michigan consumers.77 The defendants countered with documents from the Michigan Department of Treasury that estimated the potential lost tax revenue to out-of-state sales, an affidavit from the Michigan Liquor Control Commission detailing the number of controlled buy operations conducted by the Commission in Michigan to identify retailers that sell alcohol to minors and an affidavit from the Liquor Control Division of the Michigan Attorney General's Office detailing controlled buy operations conducted over the internet.78

Michigan’s regulatory scheme was the same three-tier system seen in most other states: out-of state manufacturers needed to obtain a permit in Michigan and could ship only to wholesalers, wholesalers could ship only to licensed retailers and the consumer could only purchase from licensed retailers.79 The plaintiffs argued to the Sixth Circuit that this scheme gave an unfair advantage to in-state wineries because they could avoid the price markups of the wholesaler and retailer, thereby making in-state wines cheaper to the consumer and more profitable to the in-state wineries.80 The plaintiffs also argued the price of the license was discriminatory; $300 for out-of-state wineries as opposed to $25 for in-state wineries.81 The state countered that the regulations it imposes on in-state wineries more than make up for whatever perceived advantage they possess over out-of-state wineries and that the advantage itself is “de minimis.”82

The Sixth Circuit phrased the issue as “how the ‘dormant’ Commerce Clause and the Twenty-first Amendment interact to limit the ways in which a state can control alcohol sales and distribution.”83 The majority initially noted that Article I, Section 8, of the United States Constitution granted Congress the power “to regulate Commerce with foreign Nations, and among the several States ...” and that the long held doctrine of the United States Supreme Court is that “this affirmative grant of authority to Con-

77. Heald, 342 F.3d at 520.
78. Id.
79. Id.
80. Id.
81. Id.
82. Heald, 342 F.3d at 521.
83. Id. at 522.
gress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce. The Sixth Circuit, after an examination of the Supreme Court's Twenty-first Amendment jurisprudence, decided to apply the traditional Commerce Clause analysis.

Under the traditional Commerce Clause analysis, "facially discriminatory laws are subject to strict scrutiny, meaning that the state must demonstrate that no reasonable nondiscriminatory alternatives are available to advance the same legitimate goals." The court then held that the fact that a state has "virtually complete control over the importation and sale of liquor ... has little value in a case requiring Commerce Clause analysis." The court in striking down Michigan's regulatory scheme, quoted Supreme Court Justice Scalia's concurring opinion in Healy v. Beer Institute: "[The law's] invalidity is fully established by its facial discrimination against interstate commerce . . . . This is so despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." The Sixth Circuit held it was clear that the Michigan regulatory scheme was facially discriminatory, "with the effect of benefiting the in-state wineries and burdening those from out of state." Since the statute was facially discriminatory, the question then became whether Michigan's regulatory scheme was constitutional because it advanced one of the core concerns under the Twenty-first Amendment. The court held Michigan was unable to prove that its regulatory scheme was enacted to meet one of the core concerns of the Twenty-first Amendment and that "no reasonable non-

84. Id. (quoting Healy v. Beer Institute, 491 U.S. 324, 326 (1989)). See also U.S. CONST. art. I, § 8.
85. Heald, 342 F.3d at 524. A detailed examination of the history of Twenty-first Amendment jurisprudence will be discussed in Section VI of this Comment.
86. Id. The court held that a statute that "on its face discriminates against interstate commerce ... invokes the strictest scrutiny ...." Id., (quoting Hughes v. Oklahoma, 441 U.S. 322, 336-37 (1979)).
87. Heald, 342 F.3d at 524. Statutes that facially discriminate are per se invalid, and can only be upheld if they serve an important state interest and no other way exists to serve that interest. Id. (citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). Statutes that are not facially discriminatory, however, but discriminatory in their effect require a lower level of scrutiny. Id. (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). In order to get past the lower level scrutiny, the effect on interstate commerce must be minimal and the statute must serve a legitimate public purpose. Id.
88. Heald, 342 F.3d at 524 (citing Healy, 491 U.S. at 344).
89. Id. at 525.
90. Id. at 525-26.
discriminatory means [existed] to satisfy these concerns."91 The court held that discriminating against out-of-state wineries in favor of in-state wineries did not meet the core concerns of the Twenty-first Amendment and struck down the statute.92

On May 24, 2004, the United States Supreme Court granted certiorari to the appeals of the Second Circuit and Sixth Circuit decisions.93 The Supreme Court consolidated the two cases and asked the parties to confine their arguments to the following question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of sec. 2 of the 21st Amendment?"94

V. SMALL WINERIES VERSUS WHOLESALERS AND STATE ATTORNEYS GENERAL

On one side of this fight are small wineries like Peninsula Cellars, a small, 9-year old winery in Traverse City, Michigan.95 In 2003, Peninsula Cellars' Riesling wine earned the distinction of being named best in the world in both white wine and Riesling competitions.96 However, because of laws restricting sales, Peninsula is prohibited from shipping their award-winning wine to nearly half of the states in the country.97

Small wineries, such as Peninsula Cellars, are the types of wineries that make up the Coalition for Free Trade, a trade group at the forefront of the efforts to get bans on out-of-state sales overturned.98 The Coalition for Free Trade has retained former independent counsel Kenneth Starr, best known for his investigation of President Bill Clinton several years ago.99 According to Starr, "[the wineries] welcome the opportunity to challenge laws whose sole purpose is economic protectionism .... This can only benefit

91. Id. at 526.
92. Id.
96. Id.
97. Id.
98. Coalition for Free Trade, supra note 34.
Another important player on the side of the wineries is the Family Winemakers of California, a trade group that represents 570 wineries in California. The organization's president, Paul Kronenberg, recently said, "...the only way that most small wineries can survive economically is to open up new markets [by] shipping directly to consumers. New and small wineries, trying to build their brands, are of little interest to large wholesalers who like to truck pallets of wine, not a case or two."

A national grassroots organization of consumers and wineries known as "Free the Grapes" is also active in this campaign to have anti-shipping laws overturned. On its website, the group lists several reasons why consumers are angry, among them:

Each vintage, more wines are produced than are represented by wholesaler middlemen, or can be sold in retailer outlets. The number of U.S. wineries increased by over 500% to 2,700 in the past 30 years. U.S. wineries produce over 10,000 new wines each vintage, but nearly all wineries are small producers; 2,650 of America's wineries produce less than 5% of U.S. wine production. And less than 17% of U.S. wineries are represented by distributors in all 50 states. And consumer demand for these fine wines is thriving. Consumers expect to be able to purchase the wines they want, in the manner of their choosing: from retailers, at the winery, and remotely by telephone, fax, and online.

The main opponent of the wineries and consumers is the Wine & Spirits Wholesalers Association of America, Inc. On its website is the following message, "Wholesalers work every day to provide responsible access to alcohol." Allied with the wholesalers are the attorneys general of 36 states, who joined Michigan’s governor in "urging the U.S. Supreme Court to reaffirm a state's right

100. Id.
101. Id. See also Family Winemakers of California, http://familywinemakers.org/ (last visited November 1, 2004).
102. Coalition for Free Trade, supra note 99.
104. Id. at http://www.freethegrapes.org/research.html#issue (last visited November 28, 2004).
106. Id.
to regulate the sale and distribution of alcohol as guaranteed by the U.S. Constitution and federal law. In a petition sent to the Supreme Court released on March 5, 2004, the attorneys general stated “[t]he States have a significant interest in exercising their police powers to protect the health safety and welfare of their citizens in the area of alcohol shipping.” The petition added that overturning the system of regulation is a “threat to the core concerns protected by the Twenty-First Amendment - consumption by minors, maintaining an orderly market, and collection of taxes."

One party that has not yet weighed in on this dispute is President George W. Bush. President Bush is caught between “business interests that favor free commerce and religious conservatives concerned about minors buying wine.” Interestingly enough, if President Bush takes the side of religious conservatives, he would pit himself against his brother-in-law, Robert Koch. Koch is married to President Bush’s sister Doro, and is also the president of the Wine Institute, an industry group in favor of free trade. A coalition of religious and community groups complete the lineup for the pro-shipping law side.

The parties have made the issues in this dispute crystal clear: on one side wineries and consumers seek, for economic reasons, direct nationwide access to one another, mostly via the Internet. On the other side, wine wholesalers, state governments and religious and community groups want to maintain the system of regulation to avoid consumption by minors, maintain an orderly market and ensure collection of taxes.

VI. UNDERAGE ACCESS AND TAX REVENUES

The wineries and consumers cite to a report from the Federal Trade Commission (the “FTC”) released on July 3, 2003, which found that “e-commerce offers consumers lower prices and more

108. Id.
109. Id.
111. Id.
112. Id.
113. Id.
114. Id.
choices in the wine market," and that direct shipping could potentially save consumers as much as twenty-one percent on some wines.\textsuperscript{115} The report also found that there are less restrictive ways of prohibiting access to minors other than banning direct shipments to consumers altogether.\textsuperscript{116} Todd Zywicki, the Director of the FTC's Office of Policy Planning, stated in a press release announcing the FTC's findings, "[o]urs is a very comprehensive analysis of the direct shipping issue. We gathered empirical evidence on both the competition and consumer protection aspects: the effects of direct shipping laws on prices and variety, and the states' experiences with direct shipping and underage drinking."\textsuperscript{117}

The FTC held a workshop in October 2002 "to evaluate possible anti-competitive barriers to e-commerce in wine and many other industries."\textsuperscript{118} The report is based upon a three-pronged analysis of the issue.\textsuperscript{119} First, the FTC "heard testimony from all sides of the wine issue, including wineries, wholesalers, state regulators, and a Nobel laureate in economics."\textsuperscript{120} Next, the FTC gathered evidence from a variety of published studies and court decisions and from other sources, such as package delivery companies and the Alcohol and Tobacco Tax and Trade Bureau.\textsuperscript{121} Finally, the FTC studied the wine market in McLean, Virginia, an area in a state that recently allowed direct shipments, and compared the prices and choices that consumers could find in stores in McLean to the prices and choices that could be found online.\textsuperscript{122} In all, the report made six main findings.\textsuperscript{123}

The first finding was that bans or restrictions by over half the states on interstate direct shipping of wine represented "the single largest regulatory barrier to expanded e-commerce in wine."\textsuperscript{124}

\begin{footnotes}
\item[116] \textit{Id.}
\item[117] \textit{Id.}
\item[119] \textit{Id.}
\item[120] \textit{Id.}
\item[121] \textit{Id. at 3.}
\item[122] \textit{Id. See also} Jason Ukman, \textit{supra} note 3.
\item[123] Federal Trade Commission, \textit{supra} note 118 at 3-4.
\item[124] \textit{Id. at 14-16.}
\end{footnotes}
The study also noted that many of those same states allowed for direct shipment to consumers by in-state wineries. The second finding was that consumers could usually save money by purchasing wine online, depending on the quantity purchased, and the method of delivery. The study found that “if consumers use the least expensive shipping method, they could save an average of 8-13% on wines costing more than $20 per bottle, and an average of 20-21% on wines costing more than $40 per bottle.”

The third finding was that consumers in McLean, Virginia could purchase many wines online that were not available in local liquor stores. The study found that “15 percent of a sample of wines available online were not available from retail wine stores within ten miles of McLean.”

The fourth finding was that many other regulations beside outright bans impeded e-commerce in wine. These restrictions include prohibiting online orders, limits on annual purchases, bans on advertising from out-of-state wineries, requirements that consumers purchase permits and requirements that delivery companies obtain an individual license for every vehicle used to deliver wine.

The fifth finding was that although citizens are concerned about sales to minors, states that allowed direct shipments reported few or no problems with shipments to minors. The study found that some states required delivery companies to obtain an adult signature upon delivery, while other states had “developed penalty and enforcement systems to provide incentives for both out-of-state suppliers and package delivery companies to comply with the law.” This finding seems to particularly hurt the argument that sales should be restricted or banned to keep wine out of the hands of minors.

The final finding was that many states which allowed direct shipping also collected taxes from those shipments by requiring

125. Id. at 15 n.62.
126. Id. at 16-22.
127. Id. at 19.
129. Id.
130. Id. at 4.
131. Id.
132. Id. at 26
the out-of-state wineries to obtain permits.\textsuperscript{134} Most states that allowed direct shipments reported very few, if any, problems with tax collection to the FTC.\textsuperscript{135} Many of the states that had reciprocity agreements with other states did not tax direct shipments at all.\textsuperscript{136}

The FTC concluded that consumers could reap significant benefits if given the option of purchasing wine online from out-of-state wineries and having it shipped directly to them instead of to an in-state wholesaler and retailer.\textsuperscript{137} The FTC also concluded that the problem of shipments to minors appeared to be non-existent and that states could implement a system by which they can collect taxes from direct shipments.\textsuperscript{138}

While the FTC study seems like overwhelming evidence in favor of allowing direct shipments, and will most likely be examined very closely by the Supreme Court, the wholesalers and states also have convincing evidence to offer.

In June 2004, the Massachusetts Attorney General, in an undercover “sting” caught several out-of-state alcohol retailers shipping wine and other liquor to underage college students.\textsuperscript{139} The “sting” also netted several leading overnight delivery companies for not obtaining signatures on boxes clearly labeled as containing alcoholic beverages.\textsuperscript{140} In July 2004, a television news investigation in Kentucky found similar results to the Massachusetts sting.\textsuperscript{141} The news crew was even able to videotape the delivery driver leaving liquor unattended on a doorstep, in violation of Kentucky law.\textsuperscript{142} The news station obtained the shipping records from the delivery company and found that someone scribbled in

\textsuperscript{134} Id at 38. The report used New Hampshire as an example of a state that collects taxes by requiring out-of-state wineries to obtain permits. Id. This is similar to the system used in Pennsylvania. See Pennsylvania Liquor Control statutes, supra note 7.

\textsuperscript{135} Federal Trade Commission, supra note 118 at 39

\textsuperscript{136} Id. at 39 n. 166.

\textsuperscript{137} Id. at 40-41.

\textsuperscript{138} Id. at 26-27.


\textsuperscript{140} Fitzpatrick, supra note 139.


\textsuperscript{142} Id.
the signature block on the delivery form, leaving the impression that the required adult signature had been obtained.\textsuperscript{143}

In New York, while Republican governor George Pataki is in favor of New York passing a law allowing direct shipments to consumers,\textsuperscript{144} a poll of New York residents released in mid-July 2004 found that eighty-two percent opposed direct shipment of alcoholic beverages to consumers and eighty-nine percent thought that such shipments would bring about more alcohol abuse by minors.\textsuperscript{145} An eighteen-year-old senior at Albany High School ordered four bottles of wine from a California based online retailer with his credit card.\textsuperscript{146} The wine was delivered to his address in an unmarked box.\textsuperscript{147} Although the website requires a customer to provide their age, the student lied and entered the age of twenty-five on the order form.\textsuperscript{148} The delivery driver left the box on the student’s front step and did not ask for identification.\textsuperscript{149}

It is not clear if these incidents are aberrations, noticed now only because of the attention focused on the issue, or indications of a more serious, endemic, problem. If the wholesalers and states can prove to the Supreme Court that allowing direct shipments increases the chances of minors abusing alcohol, they stand a much better chance of the Court upholding the laws banning direct shipments.

In response to the arguments made by the wholesalers, the Family Winemakers of California, Coalition for Free Trade, The Wine Institute and the American Vintners Association have proposed that states allowing direct shipments adopt a “Model Act,” which addresses the issues of sales to minors and taxes and allows for an orderly market.\textsuperscript{150}

\textsuperscript{143} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Free the Grapes, \textit{supra} note 103 at http://www.freethegrapes.org/wineries.html #model (last visited November 1, 2004). The proposed legislation states:

Add new Section ----- to the Alcohol Beverage Control Act as follows: Section ----
1. Notwithstanding any law, rule or regulation to the contrary, any person currently licensed in any other state as an alcoholic beverage producer, supplier, importer, wholesaler, distributor or retailer who obtains an out-of-state shipper's license, as provided below, may ship up to twenty-four (24) bottles per month of any alcoholic beverage directly to a resident of [State] who is at least 21 years of age for such resident's personal use and not for resale.

2. Before sending any shipment to a resident of [State] the out-of-state shipper must first:
   (a) File an application with the Department of Alcoholic Beverage Control (Department),
   (b) pay a $100.00 registration fee,
   (c) provide to the Department a true copy of its current alcoholic beverage license issued in another state, and
   (d) obtain from the Department an out-of-state shipper's license.

3. All out-of-state shipper licensees shall:
   (a) Not ship more than twenty-four (24) bottles per month to any person.
   (b) Not ship to any address in an area identified by the Department as a "dry" or local option area.
   (c) Ensure that all containers of alcoholic beverages shipped directly to a resident in this state are conspicuously labeled with the words "CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY."
   (d) Report to the Department annually the total of alcoholic beverages, by type, shipped into the state the preceding calendar year.
   (e) Annually pay to the [State Revenue Agency] all sales taxes and excise taxes due on sales to residents of [State] in the preceding calendar year, the amount of such taxes to be calculated as if the sale were in [State] at the location where delivery is made.
   (f) Permit the Department or the [State Revenue Agency] to perform an audit of the out-of-state shipper's records upon request.
   (g) Be deemed to have consented to the jurisdiction of the Department or any other state agency and the [State] courts concerning enforcement of this section and any related laws, rules or regulations.

4. The out-of-state shipper may annually renew its license with the Department by paying a $__.00 renewal fee and providing the Department a true copy of its current alcoholic beverage license issued in another state.

5. The Department and the [State Revenue Agency] may promulgate rules and regulations to effectuate the purposes of this law.

6. The Department may enforce the requirements of this section by administrative proceedings to suspend or revoke an out-of-state shipper's license, and the Department may accept payment of an offer in compromise in lieu of suspension, such payments to be determined by rule promulgated by the Department.

7. Shipments of alcoholic beverages from out-of-state direct to consumers in [State] from persons who do not possess a current out-of-state shipper's license or other permit or license from the Department are prohibited. Any person who knowingly makes, participates in, transports, imports or receives such a shipment from out-of-state is guilty of a misdemeanor punishable by [insert fine and/or jail]. Without limitation on any punishment or remedy, criminal or civil, any person who knowingly makes, participates in, transports, imports or receives such a shipment from out-of-state commits an unfair trade practice. Id.
light on how the Court might rule when it takes up the issue in the coming term.

VII. THE HISTORY OF TWENTY-FIRST AMENDMENT JURISPRUDENCE: DOES THE DORMANT COMMERCE CLAUSE TRUMP THE 21ST AMENDMENT?

From the sixty-five-year history of Twenty-first Amendment jurisprudence, it is clear that, in early cases, the Supreme Court made the Amendment an exception to the Commerce Clause, but, starting in the 1960s, the Court began striking down regulations enacted pursuant to the 21st amendment under the Commerce Clause.

In *Ziffrin, Inc. v. Reeves*, Ziffrin, an Indiana corporation, transported whiskey received from distillers in Kentucky to consignees in Chicago from 1933 to 1938. In 1938, Kentucky passed the Kentucky Alcohol Beverage Control Act, which forbade the carrying of intoxicating liquors by carriers other than licensed common carriers and forbade distillers to deliver to an unauthorized carrier. Kentucky refused to grant Ziffrin both a Common Carrier's Certificate and a transporter's license, denying it access to the whiskey it had been transporting to Chicago for the previous five years. Ziffrin argued, in part, that the law was unconstitutional because it violated the Commerce Clause. The Court held that “the Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors . . . unfettered by the Commerce Clause.” Since Kentucky had absolute power to prohibit manufacture, sale, transportation, or possession of intoxicants, it was permissible for Kentucky to permit these things only under certain prescribed conditions. Finally, the Court held that “permitting manufacture of whiskey only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways” were not unreasonable conditions and were “clearly appropriate for effectuating the policy of limiting traffic in order to minimize well-known evils, and secure payment of revenue.”

153. *Id.* at 137.
154. *Id.*
155. *Id.* at 138.
156. *Id.*
In *Indianapolis Brewing Co. v. Liquor Commission*, in retaliation for Indiana imposing a fee to import beer into the state, Michigan enacted a statute prohibiting the sale of beer produced in any state that discriminated against Michigan-produced beer. Indianapolis Brewing argued that such retaliation violated the Commerce Clause and that the Twenty-first Amendment should not be interpreted to allow one state to punish another for doing what the Amendment permits, imposing a fee on imports. The Supreme Court rejected this argument, holding that "...the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause."

The sweeping proposition that the Commerce Clause did not limit state regulation of alcohol stood for a quarter of a century. Beginning in the 1960s, however, the Court began to chip away at this proposition. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, involved alcohol that was sold tax-free at a New York airport to travelers departing on international flights. Although these sales were governed under a federal law and administered by a federal agency, they were illegal under New York law at the time. New York argued that the Twenty-first Amendment repealed the Commerce Clause. The Court rejected this argument, holding that "[i]f the Commerce Clause had been pro tanto repealed, then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." The Court concluded that the Twenty-first Amendment must be interpreted in light of the Commerce Clause.

In *Heublein, Inc. v. South Carolina Tax Commission*, the Court appeared to backtrack some from its decision in *Hostetter*. In that case, the South Carolina Tax Commission assessed Heublein, Inc., a Connecticut corporation that produced alcoholic beverages, over $21,000 in taxes on income derived from the sale of its bever-

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158. 305 U.S. 391, 392-93 (1939). Michigan made a list of such states, which included Indiana. *Id.* at 393.
159. *Indianapolis Brewing Co.*, 305 U.S. at 392-94.
160. *Id.* at 394.
163. *Id.* at 331-32.
164. *Id.* at 332.
165. *Id.*
166. 409 U.S. 275 (1972).
ages in South Carolina.\textsuperscript{167} Heublein paid the taxes and filed suit to recover them.\textsuperscript{168} The state trial court held that a federal statute protected Heublein from tax liability in South Carolina.\textsuperscript{169} The Supreme Court of South Carolina reversed and Heublein appealed to the United States Supreme Court.\textsuperscript{170}

At the time, only registered producers of registered brands of alcoholic beverages could ship alcoholic beverages into South Carolina.\textsuperscript{171} Heublein had one employee in South Carolina.\textsuperscript{172} The employee's office was in his home, but he kept a desk at the warehouse of the local distributor of Hueblein's products.\textsuperscript{173} This arrangement existed only to satisfy the Beverage Control Act because the distributor, rather than the employee, sold most of Heublein's products.\textsuperscript{174} Heublein argued that this regulatory scheme violated the federal statute and the Commerce Clause, but the Court disagreed.\textsuperscript{175} The Court held that "...by virtue of [the Twenty-first Amendment's] 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."\textsuperscript{176} The Court upheld South Caro-

\begin{footnotesize}
\begin{itemize}
\item[167.] \textit{Heublein, Inc.}, 409 U.S. at 276.
\item[168.] \textit{Id.}
\item[169.] \textit{Id.} (citing 15 U. S. C. § 381 (a) – State Taxation of Income from Interstate Commerce (1959)). The relevant portion of the statute provides:
\begin{quote}
(a) Minimum standards. No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act [enacted Sept. 14, 1959], a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
\begin{enumerate}
\item the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
\item the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)
\end{enumerate}
\end{quote}
\item[170.] \textit{Heublein, Inc.}, 409 U.S. at 276.
\item[171.] \textit{Id.} at 277 (citing S.C. CODE ANN § § 4-134, 4-135 (1962 and Supp. 1971)).
\item[172.] \textit{Heublein, Inc.}, 409 U.S. at 277.
\item[173.] \textit{Id.}
\item[174.] \textit{Id.}
\item[175.] \textit{Id.} at 283.
\item[176.] \textit{Id.} at 283 (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964)).
\end{itemize}
\end{footnotesize}
lina's taxation scheme under both the federal statute and the Commerce Clause.\footnote{177}

In \textit{Craig v. Boren}, the Court seemingly changed course again, back toward its holding in \textit{Hostetter}.\footnote{178} Appellants, Craig, a male under twenty-one years of age and Whitener, a liquor vendor, filed an action in district court that sought declaratory and injunctive relief against the enforcement of two sections of an Oklahoma statute that prohibited the sale of non-intoxicating three and two-tenths percent beer to males under the age of twenty-one and to females under the age of eighteen.\footnote{179} Appellants argued that the statutes discriminated against males between eighteen and twenty years of age.\footnote{180} The Western District Court of Oklahoma upheld the constitutionality of the statutes and dismissed the action.\footnote{181} The Supreme Court reversed, holding that the gender-based differential invidiously discriminated and denied equal protection of the laws to males eighteen to twenty years of age.\footnote{182}

Oklahoma argued that its regulatory scheme was lawful under section two of the Twenty-first Amendment, which allows for state regulation of alcoholic beverages within its borders.\footnote{183} The Court held the Twenty-first Amendment did not save the statutes from violating the Equal Protection Clause.\footnote{184} The Majority noted that in early cases in the mid-1800s, it “recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause.”\footnote{185} Near the end of the 1800s, the Court undercut this broad authority in \textit{Leisy v. Hardin}, which led Congress to pass the Wilson and Webb-Kenyon Acts.\footnote{186} The passage of the

\begin{itemize}
\item \footnote{177}{\textit{Heublein, Inc.}, 409 U.S. at 283.}
\item \footnote{178}{429 U.S. 190 (1976).}
\item \footnote{179}{\textit{Craig}, 429 U.S. at 191-92. Oklahoma prohibited the sale of non-intoxicating three and two-tenths percent beer to minors. \textit{Id.} at 192 (citing OKLA. STAT. tit. 37, § 241) Oklahoma defined a minor as a female under eighteen years of age and a male under twenty-one years of age. \textit{Id.} at 192 (citing OKLA. STAT. tit. 37, § 245 (repealed 1983)).}
\item \footnote{180}{\textit{Id.} at 192.}
\item \footnote{181}{\textit{Id.}}
\item \footnote{182}{\textit{Id.} at 204.}
\item \footnote{183}{\textit{Id.}}
\item \footnote{184}{\textit{Craig}, 429 U.S. at 204-05. The Equal Protection Clause, states, in part, “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” \textit{U.S. CONST.} amend. XIV, § 1.}
\item \footnote{185}{\textit{Craig}, 429 U.S. at 205.}
\item \footnote{186}{\textit{Id.} (citing \textit{Leisy v. Hardin}, 135 U.S. 100 (1890)). \textit{See also} the Wilson and Webb-Kenyon Acts, supra note 55.}
\end{itemize}
Eighteenth Amendment ended this controversy, but it was rekindled after passage of the Twenty-first Amendment.\textsuperscript{187} The Court concluded that although it has traditionally treated the Amendment as an exception to normal Commerce Clause jurisprudence, "the Twenty-first Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision 'be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.'"\textsuperscript{188}

In this line of cases, \textit{Bacchus Imports Ltd. v. Dias} is a quintessential case upon which the current United States Supreme Court is likely to rely upon heavily in rendering its decision regarding the constitutionality of the regulation of direct nationwide wine delivery.\textsuperscript{189} In \textit{Bacchus}, Hawaii charged a twenty percent excise tax on all alcoholic beverages except locally produced okolehao and pineapple wine.\textsuperscript{190} Out-of-state importers challenged this law under the Commerce Clause.\textsuperscript{191} The Court noted that the Supreme Court of Hawaii, in a previous ruling, upheld a challenge to this act based in part upon violations of the Equal Protection Clause and the Commerce Clause.\textsuperscript{192}

The liquor tax at issue, enacted in 1939 to assist Hawaii in defraying the costs of governmental services, originally did not contain any exemptions.\textsuperscript{193} In 1971, seeking to encourage development of the Hawaiian liquor industry, the legislature established exemptions for okolehao and pineapple wine.\textsuperscript{194} Bacchus Imports and Eagle Distributors were liquor wholesalers that sold to licensed retailers in Hawaii.\textsuperscript{195} The wholesalers initiated protest proceedings in Hawaii’s Tax Appeal Court and sought refunds of all taxes.\textsuperscript{196} The wholesalers argued that the tax violated the Commerce Clause and requested a refund of over $45 million paid in taxes under the statute.\textsuperscript{197} The Tax Appeal Court rejected the

\textsuperscript{187} Craig, 429 U.S. at 205.
\textsuperscript{188} Id. (quoting Hostetter, 377 U.S. at 332).
\textsuperscript{189} 468 U.S. 263 (1984).
\textsuperscript{190} Bacchus Imports Ltd., 468 U.S. at 265. "Okolehao is a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii." Id. Other locally produced liquors were not exempted from the tax. Id. The Hawaii Liquor Tax was codified at HAW. REV. STAT. § 244-4 (Supp. 1983).
\textsuperscript{191} Bacchus Imports Ltd., 468 U.S. at 266.
\textsuperscript{192} Id. (citing In re Bacchus Imports, Ltd., 656 P. 2d 724, 735 (Haw. 1982).
\textsuperscript{193} Bacchus Imports Ltd., 468 U.S. at 266.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
Commerce Clause argument and held that "the exemption was rationally related to the State's legitimate interest in promoting domestic industry. . . ."\textsuperscript{198} The Tax Appeal Court also held that the tax did not illegally discriminate against interstate commerce because it applied to wholesalers located within Hawaii.\textsuperscript{199} The Hawaii Supreme Court upheld this ruling, and the wholesalers appealed to the United States Supreme Court.\textsuperscript{200}

The Supreme Court began its analysis by noting "[a] cardinal rule of Commerce Clause jurisprudence is that '[n]o State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'"\textsuperscript{201} Hawaii argued that the okolehao and pineapple wines were such a small part of liquor sales within its borders that the distillers of these liquors gained no advantage by not paying the tax.\textsuperscript{202} In response to this argument, the Court opined:

\begin{quote}
[N]either the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present 'competitive threat' to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages; instead, they go only to the extent of such competition. It is well settled that '[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.'\textsuperscript{203}
\end{quote}

The Court went on to note that Hawaii's argument that there was no competitive advantage was undermined by the underlying reason for the tax, to promote sales of the locally produced beverages.\textsuperscript{204} Hawaii argued that the tax credibly advanced legitimate state objectives, that there was no patent discrimination against interstate trade, and that the effect on interstate commerce was incidental.\textsuperscript{205} The Court applied the traditional Commerce Clause

\begin{itemize}
  \item \textsuperscript{198} \textit{Bacchus Imports Ltd.}, 468 U.S. at 266 (citing In re Bacchus Imports, Ltd., 656 P.2d at 730).
  \item \textsuperscript{199} \textit{Bacchus Imports Ltd.}, 468 U.S. at 266 (citing In re Bacchus Imports, Ltd., 656 P.2d at 734).
  \item \textsuperscript{200} \textit{Bacchus Imports Ltd.}, 468 U.S. at 267.
  \item \textsuperscript{201} \textit{Id.} at 268 (citing Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977)).
  \item \textsuperscript{202} \textit{Bacchus Imports Ltd.}, 468 U.S. at 268.
  \item \textsuperscript{203} \textit{Id.} at 269 (citing Maryland v. Louisiana, 451 U.S. 725, 760 (1981)).
  \item \textsuperscript{204} \textit{Bacchus Imports Ltd.}, 468 U.S. at 268.
  \item \textsuperscript{205} \textit{Id.} at 270.
\end{itemize}
analysis and asserted that state legislation constitutes "economic protectionism" if it is discriminatory in intent or in effect. The Court concluded that since Hawaii admitted that the statute was designed to promote local industry, there was no need to guess at the tax's purpose. The Court also determined that because there was competition between the local, exempt products and nonexempt products from outside Hawaii, the tax had a discriminatory effect. The Court added that "[o]ne of the fundamental purposes of the [commerce] Clause 'was to insure . . . against discriminating State legislation.' Furthermore, the Majority noted:

[a] discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.

Thus, the Court held "the Commerce Clause limits the manner in which States may legitimately compete for interstate trade, for 'in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." Finally, the Court found it was "therefore apparent that the Hawaii Supreme Court erred in concluding that there was no improper discrimination against interstate commerce merely because the burden of the tax was borne by consumers in Hawaii."

Alternatively, Hawaii argued that it had the power to implement this taxation scheme under the Twenty-first Amendment. The Majority asserted that despite broad language in some of the opinions of the Supreme Court written shortly after ratification of the Twenty-first Amendment, the grant of authority given to

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207. Bacchus Imports Ltd., 468 U.S. at 271.
208. Id.
209. Id. (citing Welton v. Missouri, 91 U.S. 275, 280 (1876)).
210. Bacchus Imports Ltd., 468 U.S. at 271 (citing Walling v. Michigan, 116 U.S. 446, 455 (1886)).
212. Bacchus Imports Ltd., 468 U.S. at 272.
213. Id. at 274.
states in those early cases was not as clearly given in section two of the Amendment as it was thought to have been at one time.\textsuperscript{214} It was clear to the Court that "the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause."\textsuperscript{215} According to the Majority, the ultimate question to be decided in this case was "whether the principles underlying the Twenty-first Amendment [were] sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended."\textsuperscript{216} The Court was convinced that Hawaii's discriminatory tax could not stand because the central purpose of the Twenty-first Amendment was not to empower states to favor local liquor industries by erecting barriers to competition.\textsuperscript{217} Since Hawaii "[did] not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was 'to promote a local industry,'" the Court struck down the tax.\textsuperscript{218}

The dissent argued that the tax should stand because "the wholesalers' Commerce Clause claim [was] squarely foreclosed by the Twenty-first Amendment . . . ."\textsuperscript{219} Since the tax applied to the sale of liquor in the local market in Hawaii, Justice Stevens reasoned, it fell within the protection of the Twenty-first Amendment.\textsuperscript{220} The dissent relied primarily on cases such as \textit{Ziffrin, Indianapolis Brewing Co., Hueblein, Inc., Hostetter} and \textit{Craig} to find that the Amendment removed cases involving alcohol from Commerce Clause analysis.\textsuperscript{221}

In decisions just prior to \textit{Swedenburg} and \textit{Heald}, the Fourth and Fifth Circuits struck down laws that prohibited direct shipments in North Carolina and Texas as violative of the Commerce Clause.\textsuperscript{222} In doing so, both of these cases relied heavily upon the Supreme Court's analysis in \textit{Bacchus Imports v. Dias}.

\begin{flushright}
\textsuperscript{214} \textit{Id.} \\
\textsuperscript{215} \textit{Id.} at 275. \\
\textsuperscript{216} \textit{Id.} \\
\textsuperscript{217} \textit{Bacchus Imports Ltd.}, 468 U.S. at 276. \\
\textsuperscript{218} \textit{Id.} \\
\textsuperscript{219} \textit{Id.} at 279 (Stevens, J., dissenting). Justice Rehnquist and Justice O'Connor join. \\
\textsuperscript{220} \textit{Id.} at 280. \\
\textsuperscript{221} \textit{Bacchus Imports Ltd.}, 468 U.S. at 282. \\
\textsuperscript{222} Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003); Dickerson v. Bailey, 336 F.3d 388 (5th Cir, 2003). \\
\textsuperscript{223} Beskind, 325 F.3d at 514; Dickerson, 336 F.3d at 395-97.
\end{flushright}
In *Beskind v. Easley*, the Fourth Circuit found that North Carolina's prohibition against direct shipments favored in-state wineries, thereby violating the Commerce Clause. The Fourth Circuit did not accept North Carolina's argument that the prohibition fell under the "core concerns" exception carved out of the Twenty-first Amendment.

In *Dickerson v Bailey*, the Fifth Circuit struck down a Texas law prohibiting direct shipments to consumers by out-of-state wineries because the same prohibition did not apply to Texas wineries. The court held that under controlling Supreme Court precedent, it first had to determine whether the law violated the Commerce Clause, and, if so, whether it was "saved" by the "core concerns" argument under the Twenty-first Amendment. The court determined that the law violated the Commerce Clause and was not saved by the Twenty-first Amendment, despite Texas' arguments that the law was enacted for the protection and safety of the people of the state.

If *Bacchus Imports, Ltd.* is in fact the controlling Supreme Court precedent, as suggested by *Beskind*, then *Beskind, Dickerson* and *Heald* will serve as the roadmap to guide the Supreme Court as it strikes down laws prohibiting direct shipments of wine to consumers. Opponents would argue that the Court should follow the analysis in *Swedenburg* and *Bridenbaugh*, cases in which the Second and Seventh Circuits exempted laws regulating alcohol from traditional Commerce Clause doctrine.

VIII. CONCLUSION

The current prohibition on direct shipment of out-of-state wines leaves wine consumers with limited choices. Additionally, the system hurts small wineries by limiting their ability to ship to consumers who reside in numerous jurisdictions. Although the number of wineries and available wines has grown dramatically in
the United States over the past 30 years, wine wholesalers, who
benefit most from the current system, continue to dictate the
availability of out-of-state wines to many American wine consum-
ers. Consumers and trade groups argue that reasonable mea-
sures can be added to state statutes to address the Twenty-first
Amendment’s core concerns and to ensure that alcoholic beverages
are not delivered to minors. Requiring a purchaser of wine to
provide a driver’s license number and credit card at the time of
purchase in conjunction with requiring shipping agents to obtain
proof upon delivery that the recipient is at least twenty-one years
of age constitute reasonable measures that allow states to police
wine purchases from out-of-state wineries.

In addition, if a state can collect taxes on clothing and furniture
shipped from out of state, it directly follows that it can collect
taxes on alcohol shipped from out-of-state. Moreover, with the
current state of the economy, states must be constantly on the
lookout for new ways to raise revenue. Taxes from out-of-state
wine sales provide the perfect opportunity. States that currently
allow in-state shipments of wine, but ban out-of-state shipments,
should in particular consider rewriting their alcoholic beverage
control laws and allow some form of shipment from out-of-state
wineries. If the United States Supreme Court invalidates laws
banning direct shipments, its remedy may be in the form of allow-
ing direct shipments nationwide; however, it may also be in the
form of enjoining in-state direct shipment of wine, thereby hurting
the nation’s wineries even more than the current system. Allowing
for direct shipments of wine nationwide will allow wine to join
other agricultural products which are shipped nationwide, such as
potatoes from Idaho, steaks from Nebraska and hams from Vir-
ginia. “Adults should be able to buy a legal agricultural product
directly from the grower, and it should matter not whether it’s an

232. Id.
233. Id. at 8.
234. Id.
236. Lloyd C. Anderson, Direct Shipment of Wine, the Commerce Clause and the Twenty-
first Amendment: A Call for Legislative Reform, 37 AKRON L. REV. 1, 16 (2004).
237. Id.
238. Id.
239. Id.
240. Froma Harrop, Stop the Prohibitionist Bickering, THE PROVIDENCE JOURNAL,
June 6, 2004 at I-9.
orange from Florida or Pinot Noir from Oregon. To say that they cannot defies both the [C]ommerce [C]lause and common sense.\textsuperscript{241}

\textit{Gerald B. McNamara}