These Grapes Are Ripe for Pickin: A Respectful Limit on State Power to Regulate Importation of Wine under the Twenty-First Amendment

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I. INTRODUCTION

Quickly, bring me a beaker of wine, so that I may wet my mind and say something clever.

Aristophanes (448-385 B.C.)

THE legal landscape of state power under the Twenty-first Amendment of the U.S. Constitution has been undergoing intense scrutiny in both federal courts and state legislatures and will soon be

1. All historical wine quotations used in this article, with the exception of the last, were taken from Stefan K. Estreicher, A History of Wine: 5,000 B.C. – 2,000 A.D. (Dec. 2002), at http://www.jupiter.phys.ttu.edu/stefanke/HoW.pdf.
addressed by the Supreme Court. States in the spotlight allow in-state wineries to ship wine directly to in-state consumers while simultaneously restricting out-of-state wineries from shipping directly to those same consumers. These states argue they have virtually total control and immunity when exercising their Twenty-first Amendment power—a states’ rights claim. On the other hand, consumers and wineries, particularly smaller, family-owned operations excluded from the established “bricks-and-mortar,” state-mandated distribution systems, want access to products and markets and the freedom to engage in interstate trade—a dormant Commerce Clause challenge.

The crux of the current direct shipment debate is whether a state is limited in its power to control the flow of alcohol into its borders, in par-

2. On May 24, 2004, the Court consolidated petitions for review of the Second and Sixth Circuit decisions to consider the 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 Section 2 of the Twenty-first Amendment? See Mich. Beer & Wine Wholesalers Ass’n v. Heald, 124 S. Ct. 2389 (2004).

State legislatures are also actively addressing the scope of their regulatory powers under the Twenty-first Amendment. Virginia, North Carolina, and South Carolina each enacted corrective legislation allowing the direct shipment of wine by both in-state and out-of-state wineries, while the Texas Senate passed a bill which would allow for the direct shipment of wine into the state. However, the Texas bill was not passed quickly enough to get before the House by the regular session recess. VA. CODE ANN. §§ 4.1-112.1 (Michie 2003); 2003 N.C. Sess. Laws S.L. 2003-402; S.C. CODE ANN. § 61-4-745 (Law. Co-op. 2003); Tex. S.B. 770, 78th Leg., R.S. (2003).


The vast majority of the nation’s over 3,000 wineries are small, family-owned businesses. Id. at 6 (citing the Tax and Trade Bureau). There are a few, such as Gallo, which are volume producers that have no trouble getting wholesaler attention because they can exceed the threshold of 10,000 cases for profitable pick-up by licensed wholesalers. Telephone Interview with Sherry Muller, Chief of Staff for Tex. Sen. Frank Madla (San Antonio) (Jan. 29, 2004). Ms. Muller has studied the direct shipment issue for almost a decade and has assisted Senator Madla in his attempts over the last several regular legislative sessions to provide for the permitting of and direct shipment by out-of-state wineries to Texas residents for personal use. E.g., Tex. S.B. 770, 78th Leg., R.S. (2003); Tex. S.B. 489, 77th Leg., R.S. (2001); Tex. S.B. 702, 76th Leg., R.S. (1999). There are also a few exclusive wineries, such as Leonetti Cellar in Washington State, that are so coveted they sell every bottle they make in one day (with a two-year waiting list remaining) and have no need for distribution. Id. However, “[t]he challenge for [all the rest of the] wineries is finding a way to allow consumers to buy the wines that they tasted when visiting the winery. In a 2003 survey of Wine Institute members, 54 percent of the wineries indicated that they have been unable to gain access to another state due to an inability to find a wholesaler who was willing to carry their brands. This is so because the number of wineries has dramatically grown, while the number of wholesalers has decreased. . . . [T]here were 2,188 wineries in the United States as of 2000, up from 579 in 1975. The vast majority of those wineries are small, producing multiple labels that the wholesalers are not able to carry. In contrast, WSWA [Wine & Spirits Wholesalers of America], had 450 members in 1975, down to only 170 today." See Wine Institute Statement, E-Commerce: The Case of Online Wine Sales and Direct Shipment (Oct. 29, 2003), available at http://www.wineinstitute.org/communications/statistics/dirship10.30.03.htm.
ticular by the dormant Commerce Clause doctrine. Falling on the heels of a ground-breaking Seventh Circuit decision, five circuits have found these facially discriminatory regulatory schemes unconstitutional violations of the dormant Commerce Clause. Most recently, the Second Circuit joined the Seventh in finding such out-of-state direct shipment restrictions to be constitutional exercises of state power.

Even among the circuit majority, however, there has been a “sub-split” in the remedy-of-choice to correct unconstitutional regulation. One remedy has been to strike the direct shipment privilege in-state wineries have enjoyed, thus resulting in the total prohibition of all direct shipments. A very opposite approach has been to prohibit the enforcement of state laws that ban out-of-state direct shipments, thus opening the state for direct shipment. This, in effect, creates a state with unregulated importation of alcohol until the state enacts appropriate legislation to regulate the flow constitutionally.

It is tempting to judicially extend the benefit of in-state direct shipment to out-of-state wineries and allow the unabated flow of wine. Vineyards and the harvesting of grapes resonates deeply with our nation’s agricultur-

6. Heald v. Engler, 342 F.3d 517 (6th Cir. 2003), cert. granted sub nom. Granholm v. Heald 124 S. Ct. 2389 (2004); Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003); Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003); Bolick v. Danielson, 330 F.3d 274 (4th Cir. 2003) (vacated and remanded based on Beskind); Bainbridge v. Turner, 311 F.3d 1104, 1115-16 (11th Cir. 2002) (ordering a remand because “[b]efore the State can successfully raise the Twenty-first Amendment as a shield, it must show that its statutory scheme is necessary to effectuate the proffered core concern . . . .”)

Unfortunately, the Washington District Court did not address what could prove to be one of the most important issues in future direct shipment litigation—whether reciprocity agreements between states are constitutional. Washington refuses to allow direct shipment from out-of-state wineries unless the state in which the winery is located agrees to extend reciprocal direct shipment privileges to Washington wineries. WASH. REV. CODE ANN. § 66.12.190 (West 2004). This scheme may be more difficult to defend than the current wine shipment cases because Washington permits some states to ship directly into the state, but appears to prohibit others on purely protectionist grounds. Although this scenario has been dismissed by some as irrelevant to the current direct shipment debate, Mr. Craig Wolf, General Counsel of the Wine and Spirit Wholesalers of America (“WSWA”), a national trade association representing state-licensed liquor wholesalers, believes a reciprocal state case could actually be the most dangerous for his organization because these reciprocal state agreements could be found to be unconstitutional and the court remedy could be to open the state for direct shipment from every state. In other words, if a state chooses to allow direct shipment from some states, it cannot prohibit it from others. Telephone Interview with Craig Wolf, General Counsel, WSWA (Jan. 7, 2004). A quick and dirty PDI analysis, discussed infra, comes to the same conclusion.
tural heritage and tradition. The domestic wine industry is revitalizing this farming legacy, as well as growing a national pride in our developing knowledge and skill in the science of horticulture and the art of winemaking. One need look no further than the booming wine and tourism industries in the Napa and Sonoma Valleys of California to see the positive impact wine commerce has had on that state and our nation. Removing barriers to interstate direct shipment would undoubtedly help promote this growth and prosperity. However, so long as there is a Twenty-first Amendment, a court should not impose upon a state the unregulated free flow of alcohol. A state should instead be afforded the opportunity to decide for itself in what manner it wishes to control importation within the established constitutional framework.

Under the umbrella of the Twenty-first Amendment, it is undisputed that each state has the power to control importation and transportation of alcohol into its borders. This power should be respected and accorded great deference. However, its exercise must be analyzed under the framework established by the Constitution, its accompanying jurisprudence, and by statutory authority, some older than the Amendment itself, namely the Wilson and Webb-Kenyon Acts. Using this holistic approach, there emerges a three-prong analysis to determine the constitutionality of a state alcohol regulation. This analysis calls for an examination of (1) the power exercised, (2) the discriminatory effect, and (3) the interest of the state in enacting the legislation. If a state regulation is found to be unconstitutional, judicial remedy should be restoration of constitutional state control and not the creation of an unregulated state.

II. BRIEF HISTORICAL PERSPECTIVE

Although man is already ninety percent water, the Prohibitionists are not yet satisfied.

John Kendrick Bangs (1862-1922)


Twenty years ago Washington had 12 wineries and approximately 2,500 acres of vineyards in production. At the end of 2003, after instituting laws to encourage the industry, there were over 200 wineries cultivating over 29,000 acres with a $2.5 billion positive economic impact for the state. Steven Schafersman, Proposition 11 Passes in Texas—Wine can be legally sold directly to consumers, Texas Wines (Sept. 13, 2003), available at http://www.texaswines.org.

9. Texas wines have received thousands of awards at national and international competitions since 1985. See Texas Wine Grape Guide, supra note 8.

10. In California alone, nearly 11 million people visit wineries in the state annually. These wineries produce more than 80 percent of U.S. wine and 90 percent of the nation's wine exports. See Wine Institute Statement, supra note 4.
A. Early Supreme Court Jurisprudence

In Craig v. Boren, the Supreme Court provided a historical perspective on Twenty-first Amendment jurisprudence:

The history of state regulation of alcoholic beverages dates from long before adoption of the Eighteenth Amendment. In the License Cases, the Court recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause. Later in the century, however, Leisy v. Hardin, undercut the theoretical underpinnings of the License Cases. This led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the State's regulatory role through the passage of the Wilson and Webb-Kenyon Acts. With passage of the Eighteenth Amendment, the uneasy tension between the Commerce Clause and state police power temporarily subsided.

In 1933, the Twenty-first Amendment repealed the Eighteenth Amendment. The wording of § closely follows the Webb-

12. U.S. CONST. amend. XVIII (repealed 1933). The Eighteenth Amendment instituted Prohibition in 1920 (after proposal in 1917 and ratification in 1919). In pertinent part, the Amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors" and gave Congress and the states concurrent power to enforce the Amendment.
13. Citation omitted from text: 5 How. 504, 579, 12 L. Ed. 256 (1847).
14. Citation omitted from text: 135 U.S. 100, 10 S. Ct. 681, 34 L. Ed. 128 (1890).
In Leisy, the Court held that a state could not regulate alcohol imported into the state in its original package because the Court found it was up to Congress under the Commerce Clause to regulate goods in interstate commerce or else grant the states power to do so. In other words, a state could regulate domestic alcohol, but the Court appeared to hold that a state could not regulate out-of-state liquor. Thus, a state effectively could not choose to be dry.
15. Leisy, 5 How. at 579.
16. Wilson Act, 27 U.S.C. § 121 (2004). In an effort to ensure states' rights, the Wilson Act gave states the power to regulate imported liquor "to the same extent and in the same" manner as domestically produced liquor. Id. (emphasis added).
17. Webb-Kenyon Act, 27 U.S.C. § 122 (2004). After the passage of the Wilson Act, the Supreme Court held in Rhodes v. Iowa, 170 U.S. 412, 417 (1898), that a state did not have the power to prevent importation of liquor, only the power to regulate its sale. Since alcohol did not "arrive" for sale in a state until it arrived at the purchaser, the state could not control or legalize the flow of out-of-state liquor, which could be direct-shipped to consumers, until in the consumers' possession. Id. at 421-23.
Congress then passed the Webb-Kenyon Act to close this direct shipment loophole by allowing states to regulate at their border. A state need not wait until alcohol beverages arrive at their final destination (which would be at the consumer's home in the case of direct shipment) to begin regulating. A state could now choose whether or not to open its borders to imported alcohol, and if it did, it could regulate imported alcohol to the same extent and in the same manner as its domestic counterpart though this ordinarily would be a violation of the Commerce Clause.
18. U.S. CONST. amend. XXI. The Twenty-first Amendment, the only amendment ever ratified by state conventions instead of by legislatures, was proposed and ratified the same year. The Los Angeles Times reported on December 5, 1933, that Utah, one of several western states wanting to claim the honor as the commonwealth that accomplished the actual repeal of Prohibition, moved up its scheduled evening meeting and at 3:32 p.m. became the thirty-sixth and last state necessary for approval. Dry Era End Proclaimed on Utah's Ratification: Roosevelt Calls on Nation to Ban Bootlegger and Saloon's Return: Huge Liquor Imports Authorized, L.A. TIMES, Dec. 6, 1933. "As quickly as the news of Utah's action had been flashed over the country . . . the people in nearly a score of States hastened
Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.

Section 2 of the Twenty-first Amendment provides that "[t]he 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."19

Following the repeal of Prohibition, most states instituted a three-tier system for the distribution of alcohol within their borders in an attempt to diffuse any concentration of power which could serve to reinstitute the illicit liquor trade.20 A common scheme requires all liquor produced or imported to be received first by licensed wholesalers, who then distribute to licensed retailers, who then sell to the consumers in "bricks-and-mortar" retail stores. While there are variations on this theme, the goal is to maintain tight regulatory control over the industry by the imposition of strict requirements such as licensing and reporting. Federal law prohibits a "tied house" which is generally an overlap of interests in one of the tiers into another tier.21 In addition, this system serves to ensure the collection of state sales tax on alcohol. The Supreme Court has approved of this distribution system as "unquestionably legitimate" to "promote temperance, ensure orderly market conditions, and collect revenues."22

It seems clear that the Supreme Court recognized at the time of Craig v. Boren that the Twenty-first Amendment returned power to the states after Prohibition to control the flow of alcohol within constitutional limits. The Court also acknowledged that a state was not limited by the nor-

to experience tasting a drink of legal liquor. It was the first time in thirteen years, ten months and nineteen days." Id. In twenty-eight states, however, the rule of prohibition continued by state decree. Id. President Roosevelt pleaded that liquor purchases be made only from dealers licensed by the state or federal governments to ensure (1) the consumption of only alcoholic beverages that had passed inspection, (2) the destruction of the "notoriously evil illicit-liquor traffic," (3) the payment of reasonable taxes for support of the government, and (4) the protection of "dry States from the inundation by wet States." Id. 19. Id. at 205 n.20 (citing U.S. CONST. amend. XXI, § 2). It is also worthy to note that an omitted section of the Amendment proposed that Congress and the states would have concurrent power under the amendment. States' rights advocates are quick to suggest that the omission evidences the intent to give states total control to act with impunity and leave the federal government powerless. Many scholars and courts, however, feel there is insufficient legislative history to draw such a definitive conclusion. Common sense also suggests that if there were even the slightest concern that such a section would prevent ratification, it was omitted in the interest of ensuring an end to "the noble experiment." This same strategy was used to ensure a greater likelihood of success in ratifying the U.S. Constitution by purposely omitting the controversial and divisive issue of slavery. JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 17-18 (First Vintage Books ed., Random House, Inc. 2002).
21. 27 U.S.C. § 205(b) (2003). Another question is how far a state can collapse its three-tier system by permitting its licensed wine producers to become wholesalers, retailers, and even direct shippers without violating this federal prohibition.
mal operation of the Commerce Clause in the same way as other products in the stream of interstate commerce. The Court found that since the Twenty-first Amendment uses nearly identical language as that used in the Webb-Kenyon and Wilson Acts (which were the most recent laws in effect prior to Prohibition when states had the primary authority to regulate alcohol), the Amendment affirms the prior Acts by "constitutionalizing the Commerce Clause framework established under those statutes." In other words, after the repeal of Prohibition, the Wilson and Webb-Kenyon Acts, as well as the accompanying case law interpretations, were once again in effect—a sort of "resurrection" of the body of law in the same way that a testator's codicil republishes and affirms his prior will—and so long as a state acts within that framework, its actions, otherwise unconstitutional, would be constitutional.

Together, the Webb-Kenyon and Wilson Acts and the Twenty-first Amendment give virtually total control to a state to regulate the flow of alcohol into and distribution within its borders. Within this framework, alcohol does not enjoy the same protection of free trade traditionally given to goods in interstate commerce. If a state chooses to open its borders, the Wilson Act gives a state the power to regulate out-of-state liquor to the same extent and in the same manner as its domestic counterpart. Noticeably, Congress did not expressly give to states the authority to regulate out-of-state liquor to a greater extent or to a greater degree than domestic liquor nor beyond its own borders. This limited grant of state power was acknowledged even by the Seventh Circuit challenge to Indiana's direct shipment prohibition.

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24. Of course, imported liquor will always be subject to importation laws that are inapplicable to domestically produced liquor which, by definition, need not be imported.
25. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 852 (7th Cir. 2000) (stating "This Act eliminated the privileged status of interstate sellers but did not authorize discrimination against them. See Scott v. Donald 165 U.S. 58 (1897) [other citations omitted].") The court held that Indiana's regulatory scheme is constitutional and authorized by the Twenty-first Amendment "unless the state has used its power to impose a discriminatory condition on importation, one that favors [in-state] sources of alcoholic beverages over sources in other states." Id. at 853 (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)).

Why then did the Seventh Circuit find Indiana's regulatory scheme, which the opinion briefly mentions as permitting "local wineries, but not wineries 'in the business of selling in another state or country' to ship directly to Indiana consumers," constitutional? Id. at 851. While the opinion has been criticized by some, there is speculation that since the plaintiffs were only in-state consumers and did not include any out-of-state wineries, the challenged statutes were not shown to be unconstitutional insofar as the parties standing before the court.

The court also did not take kindly to the plaintiffs' flaunting that they had been importing wine in violation of Indiana law and avoiding sales tax to boot. Because these plaintiffs were "concerned only with direct shipments from out-of-state sellers who lack and do not want Indiana permits," it is very likely that the court found itself in a similar position of needing to protect a state's right to control the flow of alcohol within its borders from in-state lawbreakers with unclean hands as the court in State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62-64 (1936) (finding the state has the power to impose and enforce an extra licensing fee on its own in-state wholesalers for the privilege of importing out-of-state alcohol, in addition to a licensing fee for selling alcohol which applied equally to all
The Webb-Kenyon Act then makes it absolutely clear that all state regulations are effective at the state’s border. The Webb-Kenyon Act accomplishes this by prohibiting shipment or transportation into a state “in violation of any law of such State.” The Act does not, contrary to the suggestion of some states, pluck state power out of the established constitutional framework, nor does it grant to the states a new power to enact “any law” nor total immunity to regulate by means of “any law.” The Webb-Kenyon Act simply builds upon the Wilson Act and ensures that constitutional laws enacted by a state cannot be circumvented. The Twenty-first Amendment was needed to repeal the Eighteenth and to ensure that this framework could not be easily defeated by the whim of a future Congress.

States and amici in the current Supreme Court appeal whole-heartedly agree that alcohol does not enjoy the traditional interstate Commerce Clause protection. Thus, they maintain that a state has the power, without consideration of the dormant Commerce Clause doctrine, to open its borders and to regulate the importation of wine by prohibiting the direct shipment of out-of-state wine. The Twenty-first Amendment framework provides a means to control the otherwise free flow of out-of-state wine into its opened borders by removing the special status and protection of articles in interstate commerce. Its character then becomes that of domestic wine.

But it seems that some states want their cake—or better phrased, want their wine—and to drink it too. These states have all unquestionably opened their borders to out-of-state wine and use their Twenty-first Amendment power to regulate this flow. To do so, these states prohibit the direct shipment of this wine into the state, but at the same time they have lessened their control on domestic wine and permit direct shipment within the state. It is as though these states want to remove the traditional interstate character and protection just to control importation, then reintroduce the classifications of “out-of-state” and “in-state” alcohol as a shield to attempt to justify regulating distribution of in-state and out-of-state wine differently. Not regulating out-of-state wine in the same manner or to the same extent as domestic wine, but rather to a greater extent, seems fundamentally contrary to the limited congressional grant of authority under the Wilson Act.

Admittedly, it sounds constitutional for a state to require that “every drop” of wine sold go through its established three-tier distribution sys-
tem. This scheme is emblazoned with equality, but it is often not so in effect. In those three-tier states that permit in-state wineries (the producer trier) to direct ship but contemporaneously prohibit out-of-state wineries, in-state wines literally bypass two of the tiers (and mark-ups) that other out-of-state products must pass through before reaching the consumer. This, in essence, reduces in-state wines to a one-tier distribution system—much less than the state regulation imposed on out-of-state wine and again quite contrary to the Wilson Act.

Further, in most of these states, importation is "by invitation only." Wholesalers make label-by-label decisions on whether or not to offer importation privileges to certain out-of-state wineries, while at the same time excluding others who have no alternative means to access the very same state market. This seems miles away from the Wilson/ Web-Kenyon congressional grant of authority. The decision to open a state's borders is supposed to be by state law. Importation should not be a day-to-day business decision of state wholesalers. While the discriminatory effect of this regulatory scheme is not evident within the state, its ramifications are felt extraterritorially by excluded wineries throughout the nation. At least reciprocity agreements between states (criticized by some because these states open their borders for importation from some states while excluding other sister states) are excluded by state law. The unfettered power to impose arbitrary restrictions and barriers to commerce and to exercise selective importation based on profitability or state citizenship—one wonders if this is the result Congress had in mind.

B. LATER SUPREME COURT JURISPRUDENCE

In the ensuing years, Twenty-first Amendment jurisprudence grew to include challenges to state alcohol regulation when the exercise of power

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28 Later Supreme Court jurisprudence contrasts with Court decisions immediately following the repeal of the Prohibition in which the Court undeniably appeared to allow state liquor regulations that violated the Wilson/Webb-Kenyon constitutional framework discussed supra. Because earlier cases are closest in time to the ratification of the Amendment, it has been argued that these interpretations are the most reliable indicator of the intent of the framers of the Amendment and thus should be regarded as the more correct application of the Amendment. This analysis, of course, results essentially in immunity for a state when regulating alcohol. The Supreme Court, however, retreated from this "unconditional" and absolute power to violate the Constitution and the previously established framework. A review of these cases, when considered in light of the surrounding circumstances, reveals what the Court may really have been trying to do which was not to grant states absolute immunity, but rather absolute power in controlling the liquor trade. See Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394 (1939) ("The substantive power of the State to prevent the sale of intoxicating liquor is undoubted."); Young's Market, 299 U.S. at 62 ("The amendment . . . abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes.").

In this period of transition from federal "control" of alcohol and its attendant powerful and persistent criminal element, it was necessary for public policy reasons to sanction state power in an effort to gain control of the illicit trade with strong regulation. Once this was accomplished and state control was assured (which unquestionably would have taken several years), the Court was able to bring state power back into alignment with the
conflicted with an affirmative act of Congress or an express provision of the Constitution.\footnote{29} Here the Court often employs a balancing test between conflicting federal and state interests to determine if a challenged state statute can stand. The challenged state law is given greater weight to trump the federal interest when "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 even though its requirements directly conflict with express federal policies."\footnote{30}

After finding a conflict between Federal Communication Commission ("FCC") regulations and state law involving a ban on alcohol advertising in \textit{Capital Cities Cable v. Crisp}, the Supreme Court used a balancing test to decide whether the state law would prevail.\footnote{31} Since there was "an important and substantial federal interest" in the "comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems" to promote the widespread development of cable communication, federal law pre-empted the state regulation.\footnote{32} Because the state was attempting to regulate outside its core Twenty-first Amendment power to regulate the actual importation or distribution of alcohol, its interest was given very little weight when balanced against the federal interests at stake.\footnote{33}

By the mid-1980s the influence of this balancing approach can be seen in cases involving the Commerce Clause and its doctrinal counterpart, the intended framework. It was at that time that the Court began to find unabated violations of the Constitution unacceptable, even in regards to the distribution of alcohol. However, the Court always ensured that so long as a state acted within the established Twenty-first Amendment constitutional framework, it would be free to exercise its power. See \textit{Hostetter v. Idlewild Bon Voyage Liquor Corp.}, 377 U.S. 324, 331-32 (1964) (stating "[t]o draw a conclusion from this line of [earlier] decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. . . . Such a conclusion would be patently bizarre and is demonstrably incorrect.").

\footnote{29} See, e.g., \textit{Hostetter}, 377 U.S. at 334 (asserting that the creation of the U.S. Customs Office rules and oversight was an affirmative exercise of the Commerce Clause to regulate commerce with foreign nations, and so a state, without an interest in preventing unlawful diversion into its state commerce, cannot prohibit it); \textit{California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.}, 445 U.S. 97, 111-13 (1980) (holding the federal interest in competition under the Sherman Antitrust Act outweighed the state's price-setting regulations which were not effectively accomplishing the state's goals of promoting temperance and protecting smaller retailers); \textit{North Dakota}, 495 U.S. at 444 (plurality agreeing that state taxes or regulations that discriminate against the federal government or those with whom it deals are invalid under the intergovernmental immunity doctrine).

\footnote{30} \textit{Capital Cities Cable, Inc. v. Crisp}, 467 U.S. 691, 714 (1984). \textit{See also Midcal Aluminum, Inc.}, 445 U.S. at 97. In some of these cases the Court expressly states that a state has "complete control" over how and whether to allow liquor to be shipped into its borders, and states in the current shipment debate often cite such authority. A better interpretation would be that the Court is assuring the states that the federal government must accept a state's \textit{constitutional} exercise of its \textit{core} power to regulate alcohol under the established framework.

\footnote{31} \textit{Capital Cities Cable}, 467 U.S. at 714, 716.

\footnote{32} \textit{Id.}

\footnote{33} \textit{Id.} at 716 (finding "the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred by the Supremacy Clause").
dormant Commerce Clause. In *Bacchus Imports, Ltd. v. Dias*, the Supreme Court stated that the Twenty-first Amendment does not wholly exclude a state from application of the dormant Commerce Clause even though the doctrine was not implemented by an affirmative act of Congress.\(^{34}\) Hawaii imposed an excise tax on in-state and out-of-state alcohol, but in an effort to promote a locally-produced pineapple liquor, in-state producers of this type of liquor were exempt from the tax. The Court first found the discriminatory tax scheme to violate a federal interest in free trade.\(^{35}\) This "economic protectionism," which favored in-state producers by placing a greater burden on out-of-state producers, facially discriminated against out-of-state economic interests and clearly violated the dormant Commerce Clause.\(^{36}\) However, instead of immediately finding the statute unconstitutional and ending its analysis, the Court employed a balancing test, like the balancing employed in challenges under other non-commerce provisions of the Constitution, to determine if there was some other way the statute could be saved by the Twenty-first Amendment. It is almost as if the Court is giving the state "two bites at the apple" in an effort to find the statute constitutional without applying a strict scrutiny standard.

To employ the balancing test, it was necessary to identify the federal and state interests at stake. The federal interests under the Commerce Clause were free trade and the prevention of "economic Balkanization."\(^{37}\) While the promotion of temperance was characterized as a legitimate state goal in the regulation of the distribution of alcohol,\(^{38}\) Hawaii's real interest was found to be the promotion and protection of its local liquor industry. This stated purpose was not a "core purpose" of the Twenty-first Amendment, and "[s]tate laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."\(^{39}\) Thus, the challenged statute was not related closely enough to the powers of the state under the Twenty-first Amendment to prevail—Hawaii was concerned more about domestic economic interests than the actual importation of alcohol, so it carried very little weight when balanced against the very great federal interest in not allowing the nation to separate into economically self-serving, politically hostile units. The Court took a holistic approach to its analysis of the discriminatory aspect of the excise tax regulation; it recognized the state has great power to

\(^{34}\) 468 U.S. 263, 265 (1984). "[B]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution . . . . [Like other provisions of the Constitution], each must be considered in light of the other and in the context of the issues at stake in any concrete case." *Id.* at 275.

\(^{35}\) *Id.* at 276.

\(^{36}\) *Id.*

\(^{37}\) *Id.* at 276. "Balkanization" is the "break[ing] up into small, mutually hostile political units, as the Balkans after WWI." *WEBSTER'S NEW WORLD COLLEGE DICTIONARY* 109 (4th ed. 2001).

\(^{38}\) *Id.*

\(^{39}\) *Id.*
regulate alcohol, but this power must be exercised within the entire constitutional framework and is not without bounds.

C. CURRENT CIRCUIT SPLIT: RED OR WHITE?

The majority of circuits in the direct wine shipment debate have taken a holistic approach that incorporates the traditional Commerce Clause analysis to determine the constitutionality of state alcohol regulations by examining the following: (1) whether the statute violates the Commerce Clause by discriminating either directly or indirectly against out-of-state economic interest or by imposing a burden incommensurate with putative local gains, and if so, (2) whether the statute can be saved by § 2 of the Twenty-first Amendment. 40

Discriminatory statutes are classified into one of two categories: (1) having a facially discriminatory purpose, or (2) having a discriminatory effect despite even-handed regulation to effectuate a legitimate local public interest. 41 In the latter category, the regulation will normally be upheld if the burden on interstate commerce is only incidental and there is a legitimate local purpose. 42 If the burden is clearly excessive, the Pike balancing test is employed to determine whether the local interest outweighs the burden and whether the interest could be advanced with a lesser impact on interstate commerce. 43

In the former category, statutes which are facially discriminatory have long been held "virtually per se invalid," and a strict scrutiny test is applied. 44 “This burden is stringent: ‘When a statute directly regulates or discriminates against interstate commerce or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.’” 45 Under this analysis, a state can save a facially discriminatory statute if it “can demonstrate, under rigorous scrutiny, that [1] it has no other means to advance a legitimate local interest . . . and [2] of the absence of nondiscriminatory alternatives.” 46 In the context of alcohol regulation, the statute must advance one of the Amendment's core concerns. 47

Using this two-step analysis, the Fifth Circuit found Texas's challenged regulatory scheme unconstitutional. Although previously prohibiting all direct shipment of alcoholic beverages, Texas enacted a Wine Marketing Assistance Program which had an express purpose of promoting the in-state wine industry 48 and allowed in-state wineries to direct sell and direct

41. Bacchus Imports, 468 U.S. at 270.
42. Dickerson v. Bailey, 336 F.3d 388, 396 (5th Cir. 2003).
43. Id. (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
44. Id. (citing Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996)).
45. Id. (citing Brown-Forman Distillers Corp., 476 U.S. at 579).
46. Id. (citing C&A Carbone, Inc. v. Town of Clarkstone, 511 U.S. 383, 392 (1994)).
47. Swedenburg v. Kelly, 358 F.3d 223, 231 (2d Cir. 2004).
48. TEX. ALCO. BEV. CODE ANN. § 110.02(a) (Vernon 2004).
ship “in an amount not to exceed 35,000 gallons [of wine] annually.” At the same time, state law prohibited direct shipment from out-of-state wineries and provided no way for small wineries not included in the established three-tier distribution system to access Texas markets. State law also restricted Texas residents from personally transporting into the state more than three gallons of out-of-state wine, in essence limiting out-of-state purchases to that quantity. Plaintiffs submitted into evidence alternative statutory examples of non-discriminatory means to accomplish the state’s proffered concern for temperance. The court concluded the facially discriminatory treatment of out-of-state wineries was “nothing but a pretextual rationale . . . for economic protectionism,” and therefore, not saved by the Twenty-first Amendment.

The Eleventh Circuit also employed a two-step analysis, but it seems to have taken an approach less than strict scrutiny when analyzing the direct shipment issue. “Being facially discriminatory, Florida’s regulatory scheme violates the Commerce Clause unless the statute advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives.” “Legitimate” purpose and “reasonable” alternatives do not seem to rise to the level of the Fifth Circuit’s “core” purpose and “absence of any available alternatives” approach, but rather feels more like the balancing test the Court previously employed.

On the opposite side of the fence, the Second Circuit discarded the majority’s two-step analysis as “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].” At first blush, the court, like the Seventh Circuit, appears to take a straightforward, one-step approach to determining the constitutionality of a state’s direct shipment regulation simply by inquiring “whether the challenged statute is within the ambit of [the Twenty-first Amendment’s] grant of authority, such that it is exempted from the effect of the dormant Commerce Clause.” Finding that a state may regulate the importation and distribution of alcohol as it chooses without regard to the dormant Commerce Clause and limited only by the caveat that it “may not intrude upon federal authority to regulate beyond the state’s borders or to preserve fundamental rights,” the court held the New York regulatory scheme constitutional even though New York law restricts true out-of-state wineries from direct shipping to consumers while in-state

49. Id. § 16.01.
50. Id. § 107.07(f).
51. Id. § 107.07(a).
52. Dickerson, 336 F.3d at 406-07. The Fifth Circuit had previously decided and followed the reasoning in Cooper v. McBeath, 11 F.3d 547, 555 (5th Cir. 1994) (finding provisions of Texas’s alcohol code unconstitutional because “the statutory barrier Texas has erected . . . results in shielding the State’s operators from the rigors of outside competition. This rule subjects such laws to the Commerce Clause’s insistence on nondiscrimination.”).
53. Bainbridge v. Turner, 311 F.3d 1104, 1109-10 (11th Cir. 2002).
54. Swedenburg, 358 F.3d at 231.
55. Id.
wineries may do so.\textsuperscript{56}

While the court theoretically could have ended its analysis here because no federal authority was involved and the state's exercise of power under the Twenty-first Amendment supposedly trumped any applicability of the dormant Commerce Clause, the court still felt compelled to show that the New York regulatory scheme is non-discriminatory, necessary, and not intended to favor local interests over out-of-state interests.\textsuperscript{57} The court explained that unlike other states that have been considered at the circuit level, New York technically has not barred out-of-state wineries from direct shipment because its regulatory scheme provides a means for an out-of-state winery to direct ship just like an in-state winery if it likewise establishes a physical presence in the state.\textsuperscript{58} New York "has correlated its relaxation of regulatory scrutiny [allowing the direct shipment of wine] with a safety net ensuring accountability—presence."\textsuperscript{59} The court believed the state's claim that it would be virtually impossible for the state to ensure compliance with its laws without this physical presence requirement. In essence the court said that even if the dormant Commerce Clause applies, there is no discriminatory aspect to the regulation, so it is still constitutional. And even if the regulation is discriminatory, the state's interests are in ensuring accountability and control, not economic protectionism, so again, it is constitutional. The court applied the \textit{Bacchus} two-step.

In summarizing nearly a half century of Supreme Court jurisprudence, the \textit{Bacchus} Court stated "[i]t is by now clear that the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause."\textsuperscript{60} The Amendment did create an exception to the Commerce Clause—a state has the power to regulate, even prohibit, the otherwise free flow of alcohol in interstate commerce—but states must exercise their power to regulate the importation and distribution of alcohol within a holistic framework that includes the entire Constitution and the many laws and doctrines that flow from it.

If a state has decided to engage in interstate alcohol commerce, its grant of authority under the Twenty-first Amendment should not extend to discriminating against or arbitrarily precluding out-of-state producers from competing in the marketplace. When a winery is not invited to sell

\textsuperscript{56} Id. at 233.

\textsuperscript{57} Perhaps the court went to this trouble in case the Supreme Court finds that the dormant Commerce Clause is applicable and applies the two-step analysis on appeal. This seems to be to no avail, however, because "state statutes requiring business operations to be performed in the home State [such as New York's physical presence requirement] that could more efficiently be performed elsewhere . . . have been declared to be virtually per se illegal." \textit{Id.} at 238 (citing \textit{Pike v. Bruce Church, Inc.}, 397 U.S. 137, 145 (1970)).

\textsuperscript{58} \textit{Id.} Such physical presence requires the winery to maintain a branch office and a separate, fully-staffed warehouse facility where its wine is to be delivered before shipment to the consumer. This essentially makes an out-of-state winery an in-state winery. It also requires a tremendous capital outlay impossible for most small wineries. Petitioners' Brief at 6, 22, \textit{Swedenburg} (No. 03-1274).

\textsuperscript{59} \textit{Swedenburg}, 358 F.3d at 238.

\textsuperscript{60} \textit{Bacchus Imports}, 468 U.S. at 275.
its products in a state by the wholesaler importation tier and the winery is unable to direct ship or otherwise participate in a state-sanctioned means to access the market, surely this is economic Balkanization at its finest. Besides, if Bacchus or any other court decision that recognized a limit on state power to regulate alcohol was wrongly decided as the Michigan brief suggests, Congress could have acted to better clarify the parameters of state power as happened after Leisy.

III. THE FEDS WEIGH IN

Wine is the most civilized thing in the world.

Ernest Hemingway (1899-1961)

Congress has not remained silent on the subject of alcohol regulation. The Twenty-first Amendment Enforcement Act, effective January 2001, provides a federal forum for state attorneys general to bring a civil action for injunctive relief against a person if there is "reasonable cause to believe that a person is engaged in, or has engaged in, any act that would constitute a violation of a state law regulating the importation or transportation of any intoxicating liquor." The Act, however, expressly states that federal jurisdiction only extends to a state law that is a valid exercise of power under the Amendment as "interpreted by the Supreme Court . . . including interpretations in conjunction with other provisions of the Constitution of the United States." Also, the Act "shall not be construed to grant to States any additional power." This federal legislation, though claimed to bolster state power by some state defendants, is not substantively determinative of whether a state law passes "constitutional muster."

More recently, President George W. Bush signed legislation (herein called the "Direct Shipment Provision") that permits, "during any period in which the Federal Aviation Administration ["FAA"] has in effect restrictions on airline passengers to ensure safety," a consumer who purchases wine while physically present at a winery to direct ship the wine back to their residence if the purchaser could have hand-carried the wine lawfully into their home state. There are other requirements such as: (1) the purchaser must provide verification of legal age to purchase alcohol at the winery; (2) the shipping container must be marked to require an adult signature upon delivery and; (3) the wine must be for per-

61. Brief for Petitioners at 28, Heald (No. 03-1116) (noting the dissenting opinion in Bacchus opined "the question is not the appropriate degree of deference to state law nor of the Amendment’s core purposes, but whether or not ‘the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution.’").
63. Id. § 122a(e)(1).
64. Id. § 122a(e)(2).
sonal use only and not for resale. Any violation of these terms allows a state attorney general to bring a civil action under section 2 of "[a]n Act divesting intoxicating liquors of their interstate character in certain cases" approved March 1, 1913—our old friend the Webb-Kenyon Act.68

The Direct Shipment Provision (backed by Senator Dianne Feinstein (D-Cal.) and Representative Elton Gallegly (R-Cal.), who not surprisingly represent the state with the largest number of wineries, and Senator Patrick Leahy (D-Vt.) and Representative Jim Sensenbrenner (R-Wis.), chairmen of the Senate and House Judiciary committees, respectively) was in response to media reports and consumer comments that some airlines were prohibiting passengers from carrying wine on board because of security precautions instituted after September 11, 2001, particularly limitations relating to size, number, and type of carry-on bags.69 Wineries in California became concerned that such carry-on restrictions would reduce on-site purchases, so trade groups such as the Wine Institute and the American Vintners Association began lobbying Congress to address the issue.70 “In a situation where the state allows for people to carry something on their person back home, they should be allowed to ship the same equivalent amount back when there is a restriction on carry-on baggage,” advocated Steve Gross, state relations manager for the Wine Institute.

The enactment obviously will not conflict with state laws that prohibit personal importation (the law only allows direct shipment of the amount of wine already allowed to be carried into the state under current state law) or in states that already permit direct shipments of wine (unless the amount that could be hand-carried was more than the amount permitted to be direct-shipped). It will, however, impact "at least 12 states that don’t allow direct shipments, but do allow limited personal importation. It is going to result in significant change in some of the states that are tough on shipping. . . . In Florida, which is a felony state [meaning that wineries that violate the state’s shipping ban are subject to felony charges], you’re allowed to bring back up to 1 gallon of wine for personal use, so residents will be able to ship back that equivalent. In Texas, it’s 3 gallons. Vermont is 6 gallons.”71 Even in states with limited direct shipment to wet areas, there may be conflict with local dry laws.

“Ultra vires! Underhanded!” countered Mr. Craig Wolf, General Counsel for Wine and Spirit Wholesalers of America, Inc. (“WSWA”).72 WSWA is a national trade association representing the wholesale tier of the alcohol industry that works to preserve the three-tier distribution sys-

67. Id. § 124(a)(2)-(4).
68. Id. § 124(b).
70. Id. The Wine Institute is a San Francisco-based association of more than 600 wineries.
71. Id.
72. Id. (quoting David Sloane, president of the American Vintners Association).
73. Telephone Interview with Craig Wolf, General Counsel, WSWA (Jan. 7, 2004).
tem common in many states "that has served consumers and states well for seventy years." WSWA has fought in Congress and the federal courts against any interstate shipping which results in bypassing its members' tier in the traditional distribution scheme.

Wolf and the WSWA do not believe the federal government had the authority to enact such legislation, and words like "federal supremacy" and "federal interest in national security" do not seem to matter. "The Constitution provides that the rules under which alcohol may be delivered into a state are a matter of state law . . . . Those who believe the DOJ Reauthorization language [the Direct Shipment Provision] would operate to override state laws prohibiting direct shipment are mistaken. A federal statute simply cannot override the Constitution and its delegation to the states of the right to determine how alcohol may be delivered to its citizens. Therefore, in states where direct shipping is prohibited, it will remain so."

WSWA does have a valid point. As concluded earlier, Twenty-first Amendment jurisprudence still seems to indicate that so long as a state constitutionally exercises its authority to regulate the distribution of alcohol (i.e., within the established constitutional framework, the state's chosen statutory scheme cannot be run roughshod over by the federal government). In North Dakota, the state was minding its own business and regulating alcohol by requiring that all liquor sold in the state go through its three-tiered distribution system. Two military bases were located in the state where the United States sold liquor to military personnel and their families. In 1986, Congress passed a law requiring the Department of Defense ("DOD") to purchase distilled spirits (hard liquor, but not wine or beer which it continued to purchase in-state) from the most competitive source, and so DOD "developed a joint-military purchasing program to buy liquor in bulk directly from the Nation's primary distributors who offer the lowest possible prices" to then ship to the military base. At the same time, North Dakota enacted a labeling and reporting regulation requiring out-of-state distillers who sell liquor directly to a federal enclave to affix a specified label to each individual item identifying it for consumption only within the federal enclave.

To make a long plurality opinion short, the state's labeling regulation

75. Id.
76. Telephone Interview with Craig Wolf, General Counsel, WSWA (Jan. 7, 2004). Mr. Wolf's organization was given no notification about the proposed regulation and speculates the short provision was "snuck in" as part of the much larger Department of Justice appropriations bill (which even the author will admit was difficult to find without a cite).
77. Dana Nigro, supra note 69 (quoting Juanita Duggan, CEO and Executive Vice President, WSWA).
79. Id. at 427.
80. Id.
was found to be within its core Twenty-first Amendment power. In light of evidence of large quantities of liquor being diverted into other states’ local liquor markets from federal enclaves, the state had a very important interest in preventing the diversion of illegal liquor into its civilian market, and therefore it was hard to disagree that state liquor control policies “should not be set aside lightly.” Because the state labeling regulation was found not to be discriminatory against the federal government, in the sense that the government could choose to buy non-labeled liquor from in-state wholesalers like everyone else was required to do, and because Congress had not spoken otherwise, state law was not preempted. The federal government must abide by state law imposing only a slightly burdensome sticker requirement in light of such an important state interest.

One can almost hear Justice Scalia behind the bench speaking the words in his concurring opinion, “The Twenty-first Amendment . . . is binding on the Federal Government like everyone else.” While federal immunity is well-established for liquor taxation, which he finds “at least arguably consistent” with the text of the Twenty-first Amendment, federal immunity from state alcohol importation regulation is not.

So does that mean the federal government cannot impose the direct shipment of wine for personal use upon a state that has expressly decided against it? Should a constitutional challenge to the Direct Shipment Provision ever be brought by a state, the federal government will surely argue the law was an affirmative exercise of its power and therefore any conflicting state law will be overridden by the Supremacy Clause despite the Twenty-first Amendment.

The state, seeking to protect its established and legitimate liquor distribution system and laws, will counter that importation is a core power of the state. Assuming arguendo that the laws are otherwise within the constitutional framework, the federal government cannot interfere. State alcohol regulations have been forced to yield in the face of an affirmative exercise of the federal Commerce Clause power, however, these cases were not directly related to importation, which is unquestionably reserved to the state under the Amendment. In addition, the wine allowed to be direct-shipped under the provision is not being imported or used by the federal government; it is for personal use only. The Direct Shipment
Provision is a case of the federal government imposing its will on a state that is doing no wrong. Let us not forget that North Dakota won.

The federal government will then remind the state that North Dakota had a very real cause for concern in light of the evidence presented—quite unlike the interests at stake with the Direct Wine Shipment Provision. Here, the federal law is only a temporary measure in times of heightened national security, and the federal government has countervailing interests of public safety in air travel and (just in case that is not important enough) protection from another terrorist attack. The state’s interest in preventing the diversion of a whopping three or six gallons of wine into the local market, even multiplied by the number of unassociated purchasers who take advantage of the Direct Shipment Provision, cannot hold a candle to the federal interest.

Besides, is it really an imposition of federal will when the state has already agreed to allow the consumer to hand-carry the amount into the state anyway? It seems more a matter of procedural convenience than anything substantive. After all, the wine that is hand-carried into the state is probably in the trunk of a car as it goes over the border: Is that really very much different than a direct shipment of wine crossing the border in the back of a UPS truck, particularly when measures have been instituted to ensure the wine is not diverted into the local market and the state can collect taxes?

And even if the smart people at the state attorney general’s office try to convince the court that the real “federal” interest in pushing through the Direct Shipment Provision was to protect the California wine and tourism industries and that such an interest, while sincere, does not give the federal government power to infringe on another state’s importation laws, there is nonetheless an undeniable, overarching federal interest in the health of the national economy. Again, the federal interest seems superior and may prevail. Using solely a balancing approach, a state may not be able to prevent direct shipments of wine into its state. The feds would be toasting victory.

IV. PDI ANALYSIS

One not only drinks wine, one smells it, observes it, tastes it, sips it, and one talks about it.

Edward VII (1841-1910)

A. A Big Picture Approach

While no definitive conclusion can be drawn about how a court may decide a challenge to the Direct Shipment Provision, the preceding hypothetical scenario serves to demonstrate the many dimensions and tensions within Twenty-first Amendment legal analysis. Conflicts can arise between the federal government and a state government, between states, between in-state and out-of-state parties, and even between a state and its
own residents. Supreme Court cases, of course, only look at one piece of the puzzle at a time, which has resulted in decisions and enunciated tests and accompanying dicta that appear to conflict over time. In reality, what is happening is that slowly the pieces of the big puzzle are coming together. In some cases, the Court only needs to look at a part of the larger analysis to decide a case, but this does not mean that the larger analysis or other pieces of the puzzle are not still out there, waiting to be used in an appropriate case.

In attempting to synthesize this body of law, there emerged a three-prong analysis, hereinafter called the “PDI” analysis, which attempts to present a complete picture of Twenty-first Amendment jurisprudence by asking three questions:

(1) **Power**—Is the state exercising a core, fundamental power rooted in the Twenty-first Amendment?
(2) **Discrimination**—If exercising a core power, does the exercise of that power result in direct or indirect discrimination to interstate commerce or to the federal government?
(3) **Interest**—If discriminatory, do the purported interests (taking into consideration any attendant burdens) that the state is attempting to protect outweigh the interests brought by the challenging party and are therefore justified?

Cases enter the analysis at Prong 1 where the issue to be decided is whether the state exercised power rooted in the Twenty-first Amendment to enact this particular piece of legislation. Quite simply, the case is not to be decided under the Twenty-first Amendment if it is determined that the state’s power to regulate comes from some other source of authority apart from the Amendment. Directly regulating the actual importation and transportation of alcohol into the state certainly is a core power because it is expressly stated in the text of the Amendment. Another piece of the puzzle suggests that establishing and protecting an alcohol distribution system within the state is also a core power.87 This power to implement and enforce the Amendment, without which the other powers are unsecured, logically and closely flows from it.

States have suggested core powers that also include “promoting temperance, ensuring orderly market conditions, and raising revenues”88 in connection with the manufacture, shipment, and use of alcoholic beverages. It can be persuasively argued, however, that these are not core powers whose sole source of authority is derived from the Twenty-first Amendment, but rather valid interests89 of the state (to be considered in Prong 3, if necessary), and therefore, do not implicate the Amendment. When one compares the language of the Eighteenth and the Twenty-first Amendments, the prior amendment expressly prohibited the manufacture, sale, transportation, importation, and exportation of intoxicating li-

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89. Id.
quor\textsuperscript{90} while the latter amendment only refers to transportation and importation for delivery or use therein.\textsuperscript{91} Noticeably absent is the power under the Twenty-first Amendment to regulate the manufacture, sale, and exportation of liquor. This is not to say that a state does not have the power to regulate or tax in these areas; however, the authority to do so finds its roots in the state’s police and other powers and not in the Amendment. Any state action to regulate alcohol that is not plainly in the areas of importation or transportation into a state is not a core power and does not carry with it any exception to the normal operation of the Commerce or Supremacy Clauses and must instead pass constitutional muster under established jurisprudence for whatever source of power the state is exercising. The state must defend its law under tests and limits that are associated with that particular exercise of power and not the shield of the Twenty-first Amendment.\textsuperscript{92}

In Prong 2 there are several pieces of the puzzle still missing, but if the alcohol importation regulation does not discriminate against interstate commerce or the federal government (or those with whom the government deals) or impede affirmative federal action, the regulation should stand as constitutional without further inquiry and the court should exit from the PDI test. This proposal is true to the constitutional framework and assures a state that so long as it regulates within these limits, its control over importation and transportation of alcohol into its borders will be respected.

A state could, in theory, choose to be dry by prohibiting liquor coming into and within the state.\textsuperscript{93} Of course, this would never happen today, but not because a state does not have the power to do it. It is perhaps more believable to hypothesize that a state may choose to prohibit all direct shipment of alcohol. Again, so long as this legislation is not directly or indirectly discriminatory to the federal government or to other states’ alcohol to a greater extent than in-state alcohol, it would be within the constitutional framework and upheld as constitutional. If, however, the court finds the regulation discriminatory, the court should proceed to Prong 3 to decide the regulation’s fate.

In Prong 3 the court balances the state’s purported interest and purpose in enacting the law against the interests asserted by the opposing party. Again, there are still many pieces of the puzzle missing as to what

\textsuperscript{90} U.S. Const. amend. XVIII, § 1.
\textsuperscript{91} U.S. Const. amend. XXI, § 2.
\textsuperscript{92} For instance, Craig v. Boren involved the sale of alcohol and so the state had no protection under the Twenty-first Amendment from the Equal Protection Clause. See 429 U.S. 190, 208-09 (1976). North Dakota v. United States, however, directly involved importation and so the Amendment served to protect the state regulation from even the federal government. See 495 U.S. at 433.
\textsuperscript{93} Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939) ("Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them.").
weight is to be given different interests or concerns, but it is clear economic protectionism is nearly weightless.\textsuperscript{94} On the other hand, protection from unlawful diversion of alcohol into the state’s regulated market carries a great deal of weight.\textsuperscript{95} The prevention of monopolies and tied houses has also been found to be an important interest.\textsuperscript{96} The weight to be given any purported interest will rest on a case-by-case factual determination, but there are guideposts from prior cases which can assist in the balancing and the relative weights to be given to each interest.

Some circuits in the current wine shipment cases, such as the Fifth, have used a strict scrutiny test upon finding the state’s regulations directly discriminate against out-of-state wineries. This is black-letter law for Commerce Clause analysis. However, use of an approach more akin to the Eleventh Circuit’s in Bainbridge when analyzing a state’s exercise of a core power under the Twenty-first Amendment provides greater deference and respect to state law. When finding the prohibition on direct shipment by out-of-state wineries to be facially discriminatory and to favor in-state economic interests over out-of-state interests, the court states the proper test to determine constitutionality to be “[o]nly if such a regulation is shown to ‘advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternative’ will it be upheld.”\textsuperscript{97}

This test puts the burden on the State to raise a “core concern” to “show its statutory scheme is genuinely needed to effectuate the proffered core concern.”\textsuperscript{98} “This evidentiary standard is far less than the strict scrutiny required under a traditional . . . analysis of discriminatory laws. For example, the state need not show that there are no nondiscriminatory alternatives available.”\textsuperscript{99} In other words, when exercising its heightened authority under the Twenty-first Amendment, a state must only show that its need to regulate in a discriminatory fashion is legitimate and outweighs the interest raised by the challenging party. It need not pass a strict scrutiny review to be upheld, but rather only provide evidence of a worthy interest that can be found to outweigh the opposing interest asserted. This approach recognizes that while a state’s power to regulate the importation of alcohol is not completely immune from the operation of the Commerce Clause, it should be given greater deference and less scrutiny than when regulating other goods.

The important thing to see in the PDI analysis is that the power of the state is distinct and separate from the purposes or interests of the state. This distinction tends to get muddled and courts sometimes struggle to

\textsuperscript{94} See Bacchus Imports, 468 U.S. 263, 276.
\textsuperscript{95} See North Dakota, 495 U.S. at 433.
\textsuperscript{96} S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm’n, 709 F.2d 291, 293 (5th Cir. 1983).
\textsuperscript{97} Bainbridge v. Turner, 311 F.3d 1104, 1109 (11th Cir. 2002) (citing New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988)).
\textsuperscript{98} Id. at 1114 n.17.
\textsuperscript{99} Id.
determine if what the state did can be “saved by the Twenty-first Amendment.” In actuality what the court has done is: (1) Power—decided the state had exercised a core power under the Twenty-first Amendment; (2) Discrimination—decided, however, the exercise was discriminatory and not within the constitutional framework or impeded affirmative federal action; and (3) Interest—is now giving the state the opportunity to show good reason why the court should allow the state to exercise its power anyway. As alluded to earlier, this is almost a “second bite at the apple” approach that in essence allows for the state to exercise its power just outside the constitutional framework if there is good reason. I believe this is what the Court meant when it referred to state interests being “so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail.”

B. HYPOTHETICAL APPLICATION

Consider now the Direct Shipment Provision by looking at a state law that allows some hand-carrying but prohibits all direct shipment and now conflicts with federal law. Must the state law fall in the face of the Provision? Under the PDI analysis, Prong 1 is met because regulating the importation of wine is unquestionably an exercise of state core power under the Twenty-first Amendment. Continuing to Prong 2, a strong case can be made for the state that its prohibition on direct shipment is not discriminatory and does not impede the federal government. First, the state is not interfering with the federal government’s ability to import or transport alcohol. The state law also does not impede the federal government in ensuring air traffic safety. Carry-on limitations, which may impede airline passengers from traveling with as much baggage, address these security issues regardless of state law. Unlike North Dakota, the Direct Shipment Provision deals only with personal importation, and the federal government, including the FAA, is not burdened any more or less as a result of a state law which merely denies the convenience of direct shipment to its own residents. Lastly, because Congress did not expressly state any economic purpose for its enactment of the provision, it cannot be said Congress affirmatively acted to protect the national economy.

The PDI analysis would conclude that the state law, if otherwise constitutional, should be respected. The federal government cannot force direct shipment of wine for personal use upon a state contrary to its importation laws enacted under the authority of the Twenty-first Amendment. The court would exit the PDI test and not proceed to Prong 3 because there is no need for the state to defend its proper exercise of power under the Twenty-first Amendment.101

100. Capital Cities Cable, 467 U.S. at 714.

101. If Congress had stated that its purpose was to promote interstate commerce in wine, the PDI analysis would proceed to Prong 3 to weigh the federal and state interests at stake. The true federal purpose in economically protecting wine-producing states, a nearly weightless interest, probably would not be able to outweigh the remaining states’ interest in maintaining control of wine importation.
C. **Direct Shipment Application**

The current direct shipment question can be analyzed under the same PDI analysis. Beginning with Prong 1, regulating the importation of alcohol is unquestionably a core power of the state under the Twenty-first Amendment, so we quickly move to the next question. Prong 2 should find the prohibition on direct shipment by out-of-state wineries, while contemporaneously permitting direct shipment by in-state wineries, to be undeniably discriminatory because it does not extend a benefit to interstate commerce which has been extended to intrastate commerce.\(^{102}\)

Moving to Prong 3, even giving the state a second bite at the apple, it is difficult to see how a state interest can outweigh the strong federal interest in the protection of the nation's economy and the freedom to engage in interstate commerce, absent some extenuating circumstance. A state's economic protectionism is by now a well-known, nearly weightless interest. The promotion of temperance is not an easily defendable purpose in this instance because that state has previously enacted legislation that allows direct shipment by in-state wineries, thus the state has already "de-regulated" wine by easing access and promoting purchase and consumption. As the Texas District Court pointed out, "there is no temperance goal served by the statute since Texas residents can become as drunk on local wine . . . as those that . . . are in practical effect kept out of state by the statute."\(^{103}\) States have thus been forced to try to find other, more convincing purposes to sustain their discriminatory regulation.

One such argument has been the state's need to collect tax revenue and the inability to do so from out-of-state wineries, particularly on internet sales. However, many states have already imposed requirements for the collection of taxes on out-of-state wineries as a condition of being licensed direct shipper, just as is imposed on in-state wineries, with no constitutional challenge.\(^{104}\) In addition, reciprocal states generally exempt each other from tax collection in a sort-of "it's a wash" philosophy, particularly since the amount of tax revenue generated by direct shipment is relatively small.\(^{105}\) A state's unwillingness, or delay, to enact such legisla-

\(^{102}\). The State of Texas might choose to differ. Texas conceded that its regulatory scheme did indeed treat out-of-state wineries differently than in-state wineries. Texas argued this is acceptable, however, because "[d]ifferent, but equal, is not discrimination." Defendant's Cross Motion with Brief for Summary Judgment at 25, Dickerson v. Bailey, 212 F. Supp. 2d 673 (S.D. Tex. 2002) (No. H-99-1247).

\(^{103}\). *Dickerson*, 87 F. Supp. 2d at 710.


\(^{105}\). Should Texas enact such licensing legislation, it was estimated by the Comptroller of the State that revenues would only be approximately $60,000 per year. Telephone Interview with Sherry Muller, Chief of Staff for Tex. Sen. Frank Madla (San Antonio) (Jan. 29, 2004).
tion to effectively collect tax revenue from out-of-state wineries is probably not a legitimate reason that can outweigh the interest asserted by plaintiffs to engage in otherwise lawful interstate commerce.

A second argument is based on the state's interest in the safety and welfare of its citizens. The state claims a need to prohibit the direct shipment of out-of-state wine to ensure alcohol, particularly wine ordered over the internet, does not fall into the hands of minors. Although these very real concerns are appropriately raised in state and amici briefs, the argument loses much of its strength because the state has already allowed the direct shipment of wine to consumers by in-state wineries anyway. These briefs passionately address the dangers of direct shipment, but at times seem to forget that the state has already instituted direct shipment and that potential risks exist regardless of whether it is in-state or out-of-state wine being delivered by a carrier, such as Federal Express. The state has already decided there are effective means to minimize these risks or else it would not have allowed direct shipment in the first place. Perhaps the state realized what common sense and prior experience tells each of us about teenage experimentation with alcohol—to raid mom's liquor cabinet or to “convince an older guy in the 7-Eleven parking lot to go in and buy them a six-pack of cheap beer they can drink immediately” is a lot easier than “to order up a case of booze on the Internet (using the credit cards their parents gave them at age 10), wait seven to 10 business days for it to arrive (praying all the while that the UPS guy will show up when their parents aren’t home to intercept it) and then stash the goods under their bed until party time rolls around.”

Recognizing the potential seriousness of the risk, however, many states, including those that allow only in-state direct shipment, have instituted safety precautions and procedures to ensure minors do not receive direct shipments of wine, such as shippers labeling the package as wine and only using licensed carriers who must see adult identification upon delivery. States could impose these very same safety requirements on out-of-state wineries in its licensing requirements to protect the health, safety, and welfare of its residents. The state not having done so, how-

106. "These diverse organizations [from the Michigan Association of Secondary School Principals to the National Association of Evangelists] have come together as Amici to oppose the efforts of Respondents to invalidate state statutes regulating the direct shipping of alcohol, which would cause a major increase in the number of alcohol-related traffic fatalities, injuries, assaults, and other crimes, especially among our youths.” Brief of Mich. Ass'n of Secondary Sch. Principals . . . as Amici Curiae in Support of Petitioners at 3, Heald (Nos. 03-1116 and 03-1120).

Even if statistical evidence or projections could be provided to give some idea of what a “major increase” might be, “proving broad sociological propositions by statistics is a dubious business.” Craig v. Boren, 429 U.S. at 204.

107. At last count, 26 states allow some form of direct shipment. This is an increase from only 19 states in 1999. Petitioners' Brief on the Merits at 7-12, Swedenburg, 124 S. Ct. 2927 (2004) (No. 03-1274).

ever, is no excuse to use potential lawbreaking as the grounds to forbid an otherwise lawful activity.

In addition, the Federal Trade Commission (FTC) addressed the sensitive issue of underage accessibility to alcohol in its recently-conducted study on potential anticompetitive barriers to e-commerce.\(^{109}\) The study examined several different industries across the country, one of which was the wine industry (referred to as the "Wine Report"), to determine the possible detrimental effect of state policies and legislation on online sales, out-of-state suppliers, and consumers.\(^{110}\) The FTC takes no position on the constitutional issues raised in the ongoing direct shipment controversy and is clearly a "pro-commerce" government agency. The Commission, however, conducted a thorough investigation, soliciting input from many different perspectives (including online companies, bricks-and-mortar businesses, consumer groups, academics, state officials, and others) in its efforts to impartially address states' public policy concerns.\(^{111}\)

In regards to underage drinking, the Wine Report found that among states that allow direct shipment, few, if any, experienced problems with shipment to minors.\(^{112}\) Some reasons suggested were the delay and additional shipping expense of ordering wine online and the lack of necessity for shipping because 68-95% of high school students in a 2002 survey indicated alcohol was already "easy" or "very easy" to get.\(^{113}\) Overall, the FTC found state regulations "may have legitimate consumer protection rationales, [but] many of them also have the effect of insulating local businesses from out-of-state competitors."\(^{114}\)

A state's interest in protecting its citizens from a perceived evil should not be taken lightly by the court, but playing on the public's fears of largely speculative and preventable dangers should not be used as a pretext for economic protectionism. Importation and distribution are within a state's Twenty-first Amendment core power to regulate, but the constitutional framework does not absolutely immunize a state from the operation of the Commerce Clause, including the dormant Commerce Clause doctrine. A state that has chosen to allow importation may not legislate outside the established constitutional framework unless justified by an important and legitimate state interest.

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110. Id. at 2.
112. Id. Some states, such as California, have been monitoring this issue for decades.
113. Id.
114. Id.
V. CONSTITUTIONAL REMEDY: STATE CONTROL OR UNREGULATION?

I drink wine when there is an occasion, and sometimes when there is no occasion.

Miguel de Cervantes (1547-1616)

A. THREE STATES TAKE CHARGE

Should a state's regulatory scheme be found unconstitutional, the proper remedy should be, if possible, to restore constitutionality in favor of state control and against the unregulated interstate flow of wine. The Fourth Circuit Court of Appeals found North Carolina's direct shipment prohibition on out-of-state wineries unconstitutional.\(^1\) However, the court reasoned that since (1) the state's alcohol and beverage code ("ABC"), which originally prohibited all direct shipments, had been in effect since 1937; and (2) over forty years had passed before the challenged provisions which provided a local preference for direct shipment were enacted, the appropriate remedy, contrary to what the district court had ordered, was to strike the later-added direct shipment section to restore constitutionality.\(^1\)

North Carolina convincingly argued that the district court order to strike five core statutes prohibiting the direct shipment regulations from the ABC and enjoining enforcement effectively "eviscerates the Twenty-first Amendment insofar as that amendment safeguards North Carolina's right to regulate the transportation and importation of wines by out-of-state dealers. If the Order stands, the State can no more regulate direct shipments of wine by gigantic wine warehouse dealers than it can by little wineries."\(^1\) It described the district court order as unconstitutional itself because "it substantially eradicates the State's authority guaranteed by the Twenty-first Amendment."\(^1\) Although the Fourth Circuit recognized the plaintiffs' frustration and sincere interest in enjoying the direct shipment of out-of-state wine, the court felt bound by comity and harmony to "disturb[ ] only as much of the State regulatory scheme as is necessary to enforce the U.S. Constitution."\(^1\) As such, the court presumed North Carolina would want to preserve the most and destroy the least of its ABC and therefore struck the in-state direct shipment provisions. With this choice of remedy, "North Carolina retains great flexibility to determine what sort of relief to provide to cure the discriminatory treatment."\(^1\) This remedy restored the state to control, avoiding the unregulated flow of wine into the state, while at the same time giving the state the opportunity to legislatively decide whether and how to regulate

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\(^1\) Beskind v. Easley, 325 F.3d 506, 520 (4th Cir. 2003).
\(^1\) Id. at 519.
\(^1\) Id. at 518.
\(^1\) Id.
\(^1\) Id. at 519.
\(^1\) Id. at 520.
direct shipment of wine. Although this may take some time, the judicial remedy of restoring the state to a constitutional state of control enables the state to address importation issues in an orderly fashion without the risks of an unregulated liquor industry.

Interestingly, Virginia argued in the Fourth Circuit the very same day as North Carolina. Seeing the handwriting on the wall, Virginia and South Carolina had just enacted statutes that allowed the direct shipment of wine by out-of-state wineries. North Carolina soon followed. These states, and others like them, are working productively and cooperatively by choosing to regulate out-of-state wineries thoroughly and effectively, but equally and fairly. They have realized the positive economic impact of a thriving wine industry and have not allowed the strong alcohol wholesaler lobby to defeat their citizens' efforts in promoting both their local and the national wine industries by enacting constitutional direct shipment legislation.

B. SOUR GRAPES IN TEXAS

1. A State of Unregulation

Quite the contrary has taken place in Texas. Because of the remedy employed by the Fifth Circuit, Texas currently has an unregulated, free flow of direct-shipped wine into the state. With an appellate court injunction preventing the enforcement of challenged direct shipment laws, a state legislature that is out of session until 2005, and a new state constitutional amendment that grants the state legislature the power to override local law, Texas is a mess. Things are further complicated by the existence of “wet” and “dry” areas as a result of local option elections. State officials are threatening prosecution to violators of wine shipment laws, so many wineries and common carriers are refusing to ship into and within the state out of fear of breaking the law—but there is uncertainty and disagreement over what the law is. Even worse, the in-state wineries, which Texas’s citizens agreed were worth a constitutional amendment to protect and promote, are now at a real economic failures.

124. The Texas legislature convenes in regular session on the second Tuesday in January of each odd-numbered year. TEX. GOV'T CODE ANN. § 301.001 (Vernon 2003). In addition, the Texas Alcoholic Beverage Commission will be abolished absent legislative action by a sunset provision on September 1, 2005. TEX. ALCO. BEV. CODE ANN. § 5.01 (Vernon 2003).
125. Tex. Const. art. 16, § 20(d).
126. Telephone Interview with Lou Bright, General Counsel, Tex. Alcoholic Beverage Commun’n (Jan. 2004).
disadvantage.\textsuperscript{128}

2. \textit{The Local Effect of Prohibition}

After the repeal of Prohibition, Texas required local option elections to permit the sale of different classes of alcoholic beverages.\textsuperscript{129} As a result, Texas has a rather confusing hodge-podge of local liquor laws. Some wet counties, justice of the peace precincts, and incorporated cities or towns, depending on the geographic parameters of the local option election conducted often decades ago, permit the sale of wine, while others which are dry do not.\textsuperscript{130} Because of the difficulty in knowing for sure whether a residential address is wet for wine and therefore legal for delivery, some shippers and wineries do not want to assume the risk of criminal liability and loss of license for delivering an "illicit beverage."\textsuperscript{131} Though dry areas may never enjoy direct shipment under the Fifth Circuit ruling, the geographic uncertainty of wet area boundaries has placed a formidable obstacle to Texans' ability to enjoy direct shipment of out-of-state wine even though it is not against the law in wet areas.

3. \textit{Texas Wine Marketing Act and Proposition 11}

In 2001, the Texas legislature began taking the Texas wine industry seriously. Realizing that twenty years ago Texas and Washington State each had twelve wineries with 29,000 acres under production, but that Washington's enactment of favorable legislation had resulted in a $2.5 billion annual economic impact on the state's economy from its local wine industry versus Texas's only $133 million, Texas decided it was time to promote its local wine industry as well.\textsuperscript{132} The Texas Wine Marketing Act was passed, allowing all wineries in the state, whether in wet or dry counties, to sell wine on their premises, called "on-site" or "tasting room" sales, and to direct ship to Texas residents those purchases made in person at the winery.\textsuperscript{133} Purchases made by phone, fax, or e-mail order are shipped to participating package stores which then make arrangements with the purchaser for pick-up or delivery.\textsuperscript{134}

\textsuperscript{128} Matt Stiles, \textit{State wineries feel all bottled up}, \textit{The Dallas Morning News}, Sept. 21, 2003, at 31A.
\textsuperscript{130} \textit{Tex. Gov't Code Ann. §§ 251.01, 251.18, 251.71} (Vernon 2003).
\textsuperscript{131} \textit{Tex. Gov't Code Ann. § 1.04(4)} (Vernon 2003).
\textsuperscript{132} Steven Schafersman, \textit{Texas Wines}, Sept. 13, 2003, available at \url{http://www.texas-wines.org}.
\textsuperscript{133} \textit{Tex. Gov't Code Ann. §§ 110.053(a)(1), 107.12} (Vernon 2003).
\textsuperscript{134} \textit{Id. § 110.053(2).}
Because on-site purchases of wine are considered by statute to be made at the winery, deliveries could be made to residents who live in dry areas without violating local law.135 No distinction is made in the statute whether the purchaser lives in a wet or dry area. In fact, the website of the Texas Department of Agriculture, charged with the implementation of the Wine Marketing Act, clearly states that "Texans who visit a winery and make purchases in person can have them shipped directly home."136

Fearing there was a "legal cloud" over this legislation because it was in direct conflict with local laws that prohibited the sale of wine in dry areas (which is where over half of Texas wineries are located), Texans were asked in 2003 to approve Proposition 11, a constitutional amendment that would give the state legislature the authority to enact laws regulating wineries throughout the state uniformly.137 Over 62% of Texas voters supported the Proposition.138

4. State Control: A Better Approach

In Dickerson, the Fifth Circuit affirmed the district court’s holding that certain Texas Alcohol and Beverage Code ("TABC") provisions were unconstitutional, but only as applied to plaintiffs, who lived in wet areas, and enjoined the state from enforcing discriminatory provisions in the TABC against out-of-state wineries. In crafting a remedy, the court stated, "In cases like this, our constitutional role is clear: We should enforce the constitutional right only by nullifying, or enjoining the enforcement of, the offending statutes."139 With this remedy, the court chose to extend the benefit of direct shipment to out-of-state wineries and to allow the Texas legislature to later choose to impose burdens, (e.g., regulations equally "leaving to Texas's legislature its freedom to act in its proper capacity in deciding whether to restrict or further expand the benefits that it has already created for in-state wineries").140

The problem with this remedy is that until such time as Texas decides what to do, there is absolutely no law in place to control the direct shipment of wine into wet areas, and arguably the entire state. The Texas Wine Marketing Act is still in effect after the Fifth Circuit ruling, so it seems a very strong case could be made that out-of-state wineries should also be permitted to direct ship to Texas residents even in dry areas if they purchased the wine in person at the winery. The fundamental premise underlying Dickerson is that out-of-state wineries must have the same benefits as in-state wineries, and since Texas wineries can direct

135. Id. § 110.053(f).
139. Id. at 409 (emphasis in original).
140. Id.
ship purchases made in-person, out-of-state wineries should be extended
the same privilege. In fact, this was the original interpretation of the
TABC Commission.\textsuperscript{141} It quickly retreated from this position however
and now says that while it cannot stop direct shipments to residents who
live in wet areas like the \textit{Dickerson} plaintiffs, the code provisions are am-
biguous in regard to residents who live in dry areas.\textsuperscript{142}

As a corollary to the unregulated flow of wine into the state, there also
now exists in Texas a "reverse-discrimination" whereby in-state wineries
are subject to regulation, but the out-of-state wineries are not.\textsuperscript{143} Unlike
out-of-state wineries, Texas wineries are heavily regulated under state law
and are unable to direct ship to customers who phone, fax, or e-mail or-
ders.\textsuperscript{144} Even worse, in the absence of state legislation, no applicable
statutory permitting requirements or importation regulations exist for
out-of-state wineries who direct ship into the state. With no state legisla-
ture in session until 2005 and no administrative agency able to enact laws,
one can begin to appreciate the difficulty Texas is having as a result of the
chosen judicial remedy.

The better approach for the Fifth Circuit would have been to restore
constitutional control in favor of the state. This would have allowed the
Texas legislature to determine the best course of action, taking into con-
sideration all of the state's interests while maintaining orderly market
conditions. Of course, the risk of returning power to the state is that the
legislature will never again enact laws to allow for the direct shipment of
wine. The state-mandated control of the importation and distribution of
alcoholic beverages is, bottom-line, big business,\textsuperscript{145} and the wholesaler
lobby has traditionally been very influential politically in trying to protect

\begin{thebibliography}{99}
\bibitem{141} Telephone Interview with Sherry Muller, Chief of Staff for Tex. Sen. Frank Madla
(San Antonio) (Jan. 29, 2004).
\bibitem{142} Telephone Interview with Lou Bright, General Counsel, Tex. Alcoholic Beverage
Comm'n (Jan. 2004).
\bibitem{143} Matt Stiles, \textit{State Wineries Feel All Bottled Up}, \textit{The Dallas Morning News},
Sept. 21, 2003, at 31A.
\bibitem{144} \textsc{Tex. Gov't Code Ann.} \S\ 110.053(a)(2) (Vernon 2003).
\bibitem{145} WSWA generates $34 billion in wine and spirit sales to retailers each year and
assists in the annual collection of $3.8 billion in federal tax revenues. WSWA, \textit{Bringing
You Life's Memorable Moments}, available at \url{http://www.wswa.org} (last visited Aug. 31,
2004).

In an attempt to compete with this financial and political clout, small wineries have formed
alliances to aggregate resources. Family Winemakers of California, an association of more
than 600 wineries, many of which are small producers who do not have national distribu-
tion but instead sell their wine through direct shipment and on-site direct sales (sometimes
called "tasting room sales"), provided a grant to enable the Coalition for Free Trade
("CFT"), a non-profit group which coordinates legal challenges to the bans on direct ship-
ment of wine to consumers' homes throughout the nation, to hire Kenneth Starr as a na-
tional legal strategy advisor. Mr. Starr, perhaps best known as the independent prosecutor
during the Clinton presidency, is a former U.S. appeals court judge and also a former U.S.
Solicitor General under former President George Bush who has argued twenty-eight cases
before the Supreme Court, several of which were Commerce Clause cases involving con-
flicts between federal and state law. "Although the [Twenty-first] Amendment grants
states the right to control sales of alcohol within their borders, the constitutional amend-
ment does not abolish the rest of the Constitution," he stated to Wine Spectator. Dana
Nigro, \textit{From Whitewater to Wine: Kenneth Starr Joins Direct-Shipping Fight}, Wine Specta-
their legal monopoly as appointed gatekeepers of the states' alcohol distribution systems. This has resulted in resistance to the enactment of direct shipment legislation in which products and profits completely bypass the wholesale tier. But evidence indicates that the tide is beginning to turn. States across the country are enacting constitutional direct shipment laws. Even Texas came as close as it ever had to enacting such legislation in 2003.\textsuperscript{146} In addition, reciprocity legislation, though not yet constitutionally challenged, is shared by over a dozen states in the nation. Orderly change is taking place across the country.

While it is true that the Fifth Circuit gave Texas citizens in wet areas the ability to access out-of-state wine by direct shipment, the court did much more harm than good by not respecting the state's authority in decisions regarding the importation and distribution of alcohol. No state should ever be put in a position of unregulation and reverse discrimination as long as there is a Twenty-first Amendment.

VI. CONCLUSION

Everyone brings out the choice wine first and then the cheaper wine after the guests have had too much to drink, but you have saved the best until now.

\textbf{John 2:10, NIV}

Michigan and New York are now in the spotlight. While some have forecasted victory for the states based on the composition of the current U.S. Supreme Court and its strong leaning toward state dignity under the Eleventh Amendment,\textsuperscript{147} there is great legal weight and authority, some older than the Twenty-first Amendment itself, that should convince the Court that while state control of the importation and transportation of alcohol should be respected, there are limits on state exercise of power under the Twenty-first Amendment. In addition, any judicial remedy imposed should favor constitutional state control.\textsuperscript{148}

\begin{itemize}
  \item \textsuperscript{146} Telephone Interview with Sherry Muller, Chief of Staff for Tex. Sen. Frank Madla (San Antonio) (Jan. 29, 2004).
  \item \textsuperscript{148} The author wishes to thank Ms. April Hummert, J.D., Mr. Alan Shimer, D.A.D., and those persons, both quoted and not, who generously gave of their time and expertise in contributing to this article.
\end{itemize}