A Toast to the Dignity of States: What Eleventh Amendment Jurisprudence Portends for Direct Shipment of Wine

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NOTE

A TOAST TO THE DIGNITY OF STATES: WHAT ELEVENTH AMENDMENT JURISPRUDENCE PORTENDS FOR DIRECT SHIPMENT OF WINE

"The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."

I. INTRODUCTION

It started out as just a simple bet between the Governors of California and Florida—Governor Gray Davis agreed to send Florida Governor Jeb Bush a case of California cabernet if his state’s Oakland Raiders lost to the Tampa Bay Buccaneers in Super Bowl XXXVII. But this simple bet grew quickly into a snafu when Governor Davis tried to settle the bet and ship a case of wine to Florida, one of thirty-seven states that restrict direct shipping of wine under Prohibition-era laws. When confronted with the legal consequences of violating Florida’s strict direct shipment law, Governor Davis chose to avoid the potential for being extradited and charged with a felony. Instead, he decided he would just have to hand-carry two bottles to Governor Bush at a meeting in Washington, D.C. While Florida’s law may seem bizarre, it represents a common theme that runs through the patchwork of the fifty states’ direct shipment of wine laws. As support for the opposing sides of the direct shipment argument increases and media coverage grows, federal courts around the nation are confronting the contentious issue of

3. See id.
4. See id.
5. See id.
6. See infra Part II.C.
direct shipment of wine that implicates constitutional issues of federalism, states' rights, and Commerce Clause power.

Since William Rehnquist became Chief Justice in 1986, the Supreme Court, in construing the scope of the Eleventh Amendment, has consistently upheld states' rights and has tipped the scales of federalism in the states' favor. This interpretation of the Constitution does not bode well for small wineries and wine aficionados who are fighting against restrictive state shipping laws in courts across the country. Thus far, several federal courts have considered the issue of directly shipping wine to consumers' homes and analyzed it as a tug-of-war between the Commerce Clause and the Twenty-First Amendment. Because the opinions vary on which constitutional provision wins out, it is likely that the United States Supreme Court will make the final decision. What the Court will decide is less of a mystery than might appear at first glance. Recent Eleventh Amendment jurisprudence provides strong hints as to how the Supreme Court would rule on direct shipment prohibitions.

In Part II, this Note will explain the "wine war" that is currently being waged in courts and legislatures in many states. The background of the direct shipment of wine issue will be fleshed out, including a discussion of the players in the legal battle and a summary of the states' regulatory laws on direct shipment. Part III highlights the lower court cases that have already been decided in the "war" and will review commentaries that have been published concerning these decisions. In Part IV, the Supreme Court's emphasis on the sovereignty and the dignity of the States in its recent Eleventh Amendment cases will be used, not for its specific constitutional subject matter, but as evidence of the Court's current approach to issues concerning state power. Part V uses Eleventh Amendment jurisprudence in discussing how the Supreme Court may rule on the direct shipment issue considering its commitment

7. See infra Part IV.
10. The issues surrounding the Eleventh Amendment are very complex and this Note is not intended to explain its complete history and jurisprudence. Many authors and commentators have discussed the complexity of Eleventh Amendment jurisprudence. This Note looks at just a few cases that provide examples of how the court has used the Eleventh Amendment to defend states' rights. For a more complete history and discussion of Eleventh Amendment jurisprudence see infra notes 282 & 291.
to the “dignity” of the state and its recent history of upholding states’
rights.

Part VI concludes that states’ prerogatives under the Twenty-First
Amendment should not overcome the Commerce Clause’s purpose of
eliminating economic protectionism and encouraging a robust national
economy. Nevertheless, if the direct shipment of wine issue reaches the
Supreme Court, it is likely, in light of recent Eleventh Amendment
jurisprudence, that the Court will protect the states’ right to prohibit or
limit direct shipment of wine from out-of-state producers to the homes
of in-state consumers. While this decision would denigrate the negative
implication of the Commerce Clause prohibiting states from putting an
undue burden on interstate commerce, the Court may view the Twenty-
First Amendment as being preeminent in this situation because it
implicates the sovereignty of the states. Throughout United States
history, the law has treated alcohol differently from any other product,
with states having exclusive control over its regulation.1 To diminish
that control could be viewed by the current Supreme Court majority as
diminishing the dignity and infringing on the sovereignty of the states.

II. INTRODUCTION TO THE WINE WAR

Imagine taking a vacation in the Napa Valley, stopping at wineries,
taking tours, and then sampling the wines. You find yourself really
enjoying a bottle of wine and would like to ship some home and to
friends in different states. Yet, thanks to protectionist laws that preserve
the monopoly of wholesalers, it is against the law to ship wines or other
alcoholic beverages from out-of-state to homes in half the states in the
United States.

The last decade has seen a dramatic increase in interest in wine:
buying it, drinking it, and making it.12 Underscoring Americans’

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1. See Thurlow v. Massachusetts, 46 U.S. 504, 539 (1847) (commonly known as the License
Cases). Massachusetts prohibited sales of liquor in quantities less than twenty-eight gallons and
required sellers to obtain licenses. See id. at 505. Chief Justice Taney opines that unless specifically
contradicted by congressional action, states may regulate interstate commerce in exerting their
police power for the general welfare of their citizens. See id. at 514-15. See also Background on
(last visited Aug. 19, 2003) (describing that the common understanding of the Twenty-First Amendment is
that it gives each state the power to regulate alcoholic beverages within its boundaries unhindered by any federal
control).
2. See, e.g., Frank J. Prial, Caugh Between Two Amendments, N.Y. TIMES, Nov. 20, 2002, at
F11 (describing the wine industry’s growth from a cottage industry to a one billion dollar per year
enthusiasm for wine is the tremendous growth in the last decade of the twentieth century in the number of wineries in the United States.\footnote{See Government Obstacles to E-Commerce: Hearing Before the Comm. on House Energy and Commerce Subcomm. on Commerce, Trade, and Consumer Prot., 107th Cong. (2002), available at 2002 WL 100237686 [hereinafter Hearings] (statement of David P. Sloane, President, Am. Vintners Ass'n).} There are more than 2700 licensed wineries in the nation, representing a ninety-three percent increase since 1990 when there were 1400 wineries.\footnote{See id.} Wineries are now a part of the rural farm economy in all fifty states.\footnote{See id.} Many of these wineries are family businesses operating on a small scale.\footnote{See id.} Although California is the premier winegrowing state, comprising roughly half the nation's wineries and over ninety percent of the production, there are many wineries in Washington, Oregon, New York, Ohio, Virginia, Pennsylvania, Texas, Missouri, Colorado, New Mexico, Illinois, and Michigan.\footnote{See id.} Each of these states has a minimum of thirty wineries, with the top three having more than 150 apiece.\footnote{See id.}

As the number of wineries has increased, however, the number of wholesalers has decreased from five thousand in 1950 to less than four hundred today.\footnote{See id.} Following Prohibition, state legislatures instituted a three-tier system to keep control over the sale, distribution, and consumption of all alcoholic beverages.\footnote{See id.} The primary purpose of the system was to keep the liquor industry out of the hands of organized criminals who had controlled liquor empires during Prohibition.\footnote{See id.} Under the three-tier system, all liquor must go from producer to distributor/wholesaler to retailer, with each tier being regulated individually and no owner investing in more than one tier.\footnote{See id.}

The result of the three-tier system is that a relatively small number of wholesalers now determine what wines are available to consumers.\footnote{See id.} Wholesalers have generally been unwilling to represent smaller wineries with limited production capacity—preferring to stick with national enterprise); Alan J. Wax, *Hearty Appetite for Grapes*, NEWSDAY (Nassau), July 12, 1999, at C8, C9 (acknowledging tremendous increase in prices for land with vineyard potential).
brands that generate greater sales volume. 24 Fewer than seventeen percent of wineries are represented by distributors. 25 Each year, wineries in the United States produce many more wines than those represented by wholesalers or sold in retail stores. 26 Consumers who are wine aficionados want to buy those unusual, hard-to-get wines and, based on the wide availability of all kinds of other products, theirs is a reasonable expectation that they should be able to do so. 27 Under current conditions, many cannot. 28

The Internet is an ideal medium for small wineries to showcase their wine. 29 The Internet is also ideal for wine consumers to purchase wines unavailable in their home states. 30 However, in many states, state statutes keep consumers from ordering wine over the Internet and wineries from shipping their product in response. 31 In some states, such as Florida and Maryland, selling or ordering wine from out-of-state over the Internet is a felony, with punishments equal to those handed out to violent criminals. 32

Wine consumers and wine makers are waging a war in state legislatures and federal courts to overturn these prohibitive direct shipment laws. 33 After years of building momentum to convince courts and legislatures to eliminate state shipping bans, consumers and wineries have finally made some headway. 34 However, the powerful wholesaler

24. See id.
26. See id.
27. See id.
28. See id.
29. See Dana Nigro, Tide Turns in Direct Shipping Battle, WINE SPECTATOR, Oct. 21, 2002, at 53-54, available at http://www.winespectator.com/Wine/Main/Feature_Basic_Template/0,1197,1501,00.html [hereinafter Nigro, Direct Shipping Battle]; see also David Post & Bradford C. Brown, On the Horizon: The Internet and the 21st Amendment, at http://www.informationweek.com/story/IWK20021122S0020, Nov. 25, 2002 (describing how the “Internet can do what distributors and wholesalers can’t—provide access to all wineries large and small across all geographic boundaries.”).
30. See, e.g., Caroline E. Mayer, Stopped at the State Line: Cabernet-and-Contacts Coalition Challenges Curbs on E-Commerce, WASH. POST, Oct. 8, 2002, at E1 (describing a Washington D.C. wine lovers’ frustration when trying to order wine over the Internet and how state regulations limit the amount of wine he can receive from out-of-state wineries); see also Tony Mauro, Interstate Wine Sales Start to Flow, USA TODAY, Dec. 15, 2002, at A15 (noting that internet sites like eBay do not auction wines and that most wine websites that wanted to become virtual wine shops have collapsed partly because of the complex laws that govern interstate shipping).
31. See generally Mayer, supra note 30, at E1; Mauro, supra note 30, at A15.
32. See Billingsley, supra note 25, at 1-2.
33. See Nigro, Direct Shipping Battle, supra note 29, at 49.
34. See infra Part III for a discussion of the status of direct shipment cases.
lobby has used its political and financial muscle to protect its lucrative, and virtually monopolistic market.\textsuperscript{35}

\textbf{A. The Players in the Wine War}

The participants in the legal battles are: on one side, owners of small wineries who want to ship wine directly to the homes of consumers throughout the country, and consumers who do not have many of those limited-production wines available at their local stores; and on the other side, wholesalers who control the distribution of most alcoholic beverages in this country, and state governments that are concerned with collecting taxes on alcoholic beverages and preventing underage drinking.\textsuperscript{36}

1. The Winery Owners and the Consumers

Owners of small wineries want people in every state to have access to their wine, and wine consumers want to order their favorite wines from small wine boutique operations wherever they are located.\textsuperscript{37} However, twenty-six states expressly prohibit the direct shipment of wine from out-of-state to consumers; eleven states significantly limit direct shipment; and thirteen states have “reciprocal” shipping laws, meaning that consumers can have wine sent to their homes directly from wineries as long as the seller’s home state allows out-of-state companies to ship wine to its residents.\textsuperscript{38} One owner of a winery in Virginia estimates that she loses about twenty percent of her business in sales each year because she cannot ship to out-of-state customers.\textsuperscript{39} Some small wineries claim that they cannot find or afford wholesale representation in many states, so they get locked out of those markets entirely.\textsuperscript{40}

A wine connoisseur was shocked to receive a “very dramatic” letter from the Maryland comptroller’s office threatening him with criminal prosecution and confiscation of his wines after he joined a wine-of-the

\textsuperscript{35} See infra Part II.A.
\textsuperscript{38} See infra Part II.C. for a more in-depth discussion of the states’ shipping laws.
\textsuperscript{39} See Nigro, Direct Shipping Battle, supra note 29, at 53.
\textsuperscript{40} See id. at 53-54.
month club and received wine from an out-of-state winery. Countless wine drinkers visit wineries and are introduced to new wines they like, but can’t buy in their home state. Another consumer in Montana wanted to make sure that he did everything legally to have wine directly shipped from a California winery. Montana regulators said he had to buy a special state permit—a “connoisseur’s license”—for fifty dollars to have wine shipped directly to his home. The state also required him to keep track of every purchase, give paperwork to regulators, and send semiannual tax filings to the state. In the end, it was such a hassle that he gave up and decided that it was easier to drive to the Napa Valley.

It is not only vineyard owners who are losing customers, but farmers who have added grapes to their repertoire to avoid the dire consequences to more traditional crops during arid growing seasons. Growing grapes has become a way for some farmers to hedge their bets—grapes flourish when other, more water-dependent crops die. It is interesting that while state Alcohol Beverage Control (ABC) agencies have been fighting to preserve prohibitions on wine shipments, state agriculture departments have been fighting to eliminate them.

2. The Wholesalers

Alcoholic beverage wholesaling is big business, and it is clear that powerful liquor wholesalers want to retain their monopoly or near-monopoly advantage. One wholesaler based in Miami, Southern Wine and Spirits, generates annual revenues of $2.3 billion. Other wholesalers who wish to block direct shipment include Peerless Importers Inc., Charmer Industries, Inc., Eber Bros. Wine & Liquor Corp., and Premier Beverage Company LLC. While the current system

41. See id. at 49. After receiving the threatening letter from the state of Maryland, he not only stopped his wine-club orders, he scaled back what was a $4,500-a-year hobby, settling for the limited selection available at his local Maryland stores. See id.
42. See id.
44. See id.
45. See id.
46. See id.
47. See Janet Elliott, Bills Would Let Texans Buy Wine Over the Internet, HOUSTON CHRON., Apr. 1, 2001, at 1.
48. See id.
50. See Billingsley, supra note 25, at 4.
51. See id.
52. See id.
is obviously advantageous to wholesalers, the benefits do not trickle down to consumers. Consumers’ ability to purchase is limited by what wholesalers stock, and many wholesalers do not carry the wines produced by small wineries.

The median production of the 2700 licensed wineries in the United States is approximately 3500 cases of wine per year. The larger California wineries may typically make three hundred thousand cases a year or more. A mid-size winery makes about fifty thousand cases a year. A small boutique winery, or “family-farm” type winery, might make only one or two thousand cases a year. The vast majority of all United States wineries are small, often family-owned businesses. The annual U.S. production exceeds two hundred million cases with the top one hundred wineries, only six percent of all U.S. wineries, producing ninety-five percent of that total. The explosion in the number of small wineries coupled with the tremendous consolidation amongst wholesalers, has locked out hundreds of wineries and their customers from conducting business in many markets.

Consumers also pay higher prices due to the considerable mark-up by wholesalers, roughly eighteen to twenty-five percent more per bottle. In other industries, businesspeople strive to eliminate the middle distribution level to increase efficiency and profitability. In the wine industry, however, eliminating the middle man can be a criminal offense.

The Wine and Spirit Wholesalers of America, an industry association of alcoholic beverage wholesalers, argues that its members support the bans on direct shipment, not to protect their own economic

53. See id.
54. See id.
57. See id. at 68-69.
58. See Interstate Hearings, supra note 55.
59. See id.
60. See id.
61. See Billingsley, supra note 25, at 4.
62. See id.
63. See id.
interests, but to perform important state functions such as encouraging social responsibility in alcohol sales. 64

3. State Governments

Rather than acknowledging simple economic protectionism, which is a Commerce Clause violation, prohibitionist states cast their support for prohibitive laws in moral and fiscal terms. 65 The moral argument against wine sales over the Internet is that such an arrangement would promote drinking by minors. 66 The main fiscal argument is that alcoholic beverages generate much revenue for states, and officials fear that consumers will purchase all their wine and spirits online, depriving the state of lucrative taxes. 67

State legislatures and the wholesalers have aligned themselves with those trying to discourage underage drinking and underage access to alcohol. 68 They conclude that prohibiting direct shipment of wine is an important method of protecting the nation's young people. 69 They cite the large number of high school students who have access to the Internet, and the significant number of students who report that they have engaged in binge drinking. 70 However, one study has shown that approximately sixty-seven percent of high school seniors who say they drink alcohol also say they can buy it locally, and the study concluded that if it is so easy to get alcohol in the neighborhood, young people are not going to wait to have it shipped from out-of-state. 71 Furthermore, California and New York, the two states with the highest wine consumption, have for many years permitted shipments of alcoholic beverages within their states, as have twenty-eight other states. 72 If keeping children from ordering alcoholic beverages online is the true reason for prohibiting direct shipment of wine, it certainly does not make

64. See Nigro, Direct Shipping Battle, supra note 29, at 50.
65. See Billingsley, supra note 25, at 5.
66. See id.
67. See Prial, supra note 12. State taxes on alcoholic products are estimated at nearly ten billion dollars per year. See id.
69. See id.
70. See id.
sense that a child living on Long Island in New York can order wine online from Rochester, New York, but cannot order wine from New Jersey.

State governments have an interest in direct shipment of alcoholic beverages apart from general law enforcement and protection of minors: tax revenue. One estimate has it that in 1998 states lost six hundred million dollars in revenue because of illegal alcohol shipments. The National Conference of State Liquor Administrators has estimated that direct shipment of all kinds of liquor, primarily wine and beer, amounts to three hundred million dollars annually, resulting in losses of state tax revenues in the tens of millions.

The argument that removing the ban on direct shipment of wine would encourage the avoidance of taxes on wine is a mere pretext. Collecting taxes on shipments of wine directly to consumers is not a problem that is specific to wine. It is the same problem states have had with all Internet sales and with mail-order catalogue sales. The emergence of the Internet as a vehicle for retail sales has generated much interest in the collection of state sales taxes. Many journalists and academics have written articles concerning this issue. One study has estimated that in 2003 the total amount of sales and use taxes due on e-commerce transactions but uncollected will be over twenty billion dollars, from a low of about thirty-two million dollars in Vermont to a high of about three billion dollars in California. Thus, it is unreasonable for proponents of collecting taxes on e-commerce transactions to isolate the direct shipment of wine as causing a particular

76. One Dallas wine collector said direct shipments are not a way to save money and that he would be "'be more than happy to pay the sales tax.'" See Nigro, supra note 30. Direct Shipping Battle, supra note 29, at 53-54.
77. See Martin, supra note 56, at 94.
78. See id.
79. See id.
tax collection problem for states. Directly shipped wine would be just a small fraction of all wine purchases and a mere fraction of all directly shipped goods in total. 82 Many states are finally making an attempt to solve the problem of collecting these taxes by making it easier for e-commerce retailers to collect. 83 It is clear that wineries selling directly to consumers should have to collect state taxes, and consumers shopping that way should not be able to avoid taxes. Small wineries should be able to sell their wines, and consumers should be able to buy from them, but neither should have a tax advantage over retail stores. That, however, is the same argument that applies to Amazon.com, Dell.com, or J.Crew.com—the wine industry should not be singled out. The “avoidance of tax” argument used by supporters of a ban on the direct shipment of wine is a red herring that should be discounted by presiding courts.

B. The Legal Battle: Direct Shipment, the Commerce Clause, and the Twenty-First Amendment

Underlying the direct shipment legal battle is the tension between the Commerce Clause of the United States Constitution and the Twenty-First Amendment to the Constitution, which grants to the states the power to regulate the importation and distribution of alcoholic beverages within their borders. 84 The Commerce Clause grants Congress the power “[t]o regulate Commerce . . . among the several States.” 85 Although the clause speaks specifically only to the powers of Congress, it is well settled that there is a “dormant” aspect to the Commerce Clause that prohibits states, while exercising their police power, from putting an undue burden on interstate commerce through economic protectionism. 86 This “negative implication” of the Commerce Clause prohibits economic protectionism through regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. 87

To determine whether state statutes violate the dormant Commerce Clause, the Supreme Court has used a two-tier analysis. 88 If the statute

82. See Martin, supra note 56, at 96.
83. See infra notes 205-06.
85. U.S. CONST. art. 1, § 8, cl. 3.
88. See Brown-Forman Distillers Corp., 476 U.S. at 578-79.
“directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court] ha[s] generally struck down the statute without further inquiry.” Only if such a regulation is shown to “advance[] a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives” will it be upheld. When, however, a statute has only incidental effects on interstate commerce and regulates evenhandedly, the Court has examined whether the State’s interest is legitimate and whether the burden on interstate commerce exceeds the local benefits. Although the two tiers of analysis are not clearly distinguishable, “[i]n either situation, the critical consideration is the overall effect of the statute on both local and interstate activity.”

The primary basis for the direct shipment lawsuits is the plaintiffs’ assertion that the statutes prohibiting the direct shipment of wine by out-of-state producers into the state are unconstitutional because they violate the negative implication of the Commerce Clause. The position of the plaintiffs probably seems intuitively correct to most consumers because they are so used to ordering every kind of product on the phone or online from sellers all over the country. A basic understanding of the Commerce Clause would seem to suggest that states could not prohibit an out-of-state producer from sending a legal product into the state, particularly when in-state producers are allowed to ship directly to consumers’ homes. Nevertheless, the defendants defend the right of states to regulate alcoholic beverages on two fronts. First, the defendants contend that even if the direct shipping ban on wine were found to be discriminatory, it is justified “both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake.” Those benefits are limiting underage drinking and collecting taxes. Second, the defendants contend that Section 2 of the Twenty-First Amendment confers rights that trump the Commerce Clause. Section 2 says: “The transportation or importation into any state, territory, or possession of the United States...”

89. Id. at 579.
90. New Energy Co., 486 U.S. at 278.
91. See Brown-Forman Distillers Corp., 476 U.S. at 579.
92. Id.
93. See Hearings, supra note 13, (statement of David P. Sloane, President, Am. Vintners Ass’n).
95. See, e.g., Swedenburg v. Kelly, 232 F. Supp. 2d 135, 139 (S.D.N.Y. 2002); see also Mauro, supra note 30 (describing the wholesalers’ argument that alcohol is the sole product that has its own constitutional provision—a reflection of the unique history of alcohol in this country).
for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." What Congress intended in this section is not entirely clear. The wholesalers argue that Section 2 of the Twenty-First Amendment gives each state the power to regulate alcoholic beverages within its boundaries unhampered by any federal control. Court decisions rendered shortly after the enactment of the Amendment contributed to that belief.

However, the United States Supreme Court has indicated in recent cases that the Twenty-First Amendment does not give the states unfettered power to regulate alcoholic beverages within their boundaries; that state liquor regulation is not completely free of compliance with other federal rules and constitutional mandates. The Court has said

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97. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) (stating that the Twenty-First Amendment is treated as though it permits states to enact some laws banning the importation of alcoholic beverages even though such laws might, without the Twenty-First Amendment, violate the dormant Commerce Clause). But see Healy v. Beer Inst. 491 U.S. 324, 341-43 (1989) (holding that the Twenty-First Amendment falls short of giving states free rein in regulating the importation of alcoholic beverages). In discussing the confusion surrounding section 2 of the Twenty-First Amendment, Laurence Tribe, a constitutional law scholar wrote:

Section 2 of the Twenty-[F]irst Amendment directly prohibits—talk about prohibition!—the conduct that it was apparently meant to authorize the States to prohibit, freeing them of some (but not all) otherwise applicable limits derived from the rest of the Constitution. As a result, not only does the Amendment do more than its purpose required, it also does less. That is, it fails to specify that the States are authorized by it to do anything at all; that conclusion is evidently thought to follow by some sort of logical necessity. And just what it is they are authorized to do—to prohibit importation of liquor, yes; to use their liquor authority to distort the national liquor market, no—is left largely to the constitutional imagination. Moreover, the two statutes enforcing the Twenty-First Amendment necessarily rest for their underlying authority not on anything added to the Constitution by the Twenty-first Amendment but on the good old Commerce Clause of Article I, Section 8.


99. See, e.g., State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936) (holding that a California license fee for importing beer into the state did not violate the Commerce Clause); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394 (1930) (holding that a Michigan statute prohibiting dealers from selling beer made in a state that discriminates against Michigan beer did not violate the Commerce Clause).
100. See 44 Liquormart, Inc., 517 U.S. at 484 (holding that Rhode Island's ban on price advertising for liquor violated the First Amendment's free speech protection, a protection that is not qualified by the Twenty-First Amendment); Bainbridge v. Turner, 311 F.3d 1104, 1112 (11th Cir. 2002) (holding that the Twenty-First Amendment alters the dormant Commerce Clause in a way that "provides states some added insulation from an otherwise valid attack, but falls short of full immunization").
specifically that “the Twenty-First Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause.” Nevertheless, “not completely free” and “did not entirely remove” leave a great deal of room for the current Court to conclude that a state’s freedom in this area is very close to complete.

C. State Direct Shipment Laws

This country, settled by Puritans who denounced drinking as a sin, then populated by immigrants who viewed wine, beer or spirits as an integral part of their culture, has seen attitudes on drinking swing back and forth over the centuries. The temperance movement led to the ratification of the Eighteenth Amendment banning the manufacture and sale of alcoholic beverages throughout the nation and it set in motion a chain of events that has led to today’s complex system of alcohol regulations.

In order to repeal Prohibition in 1933, Congress had to promise states the means to encourage temperance, allow counties and towns to remain “dry,” keep out organized crime, and prevent the monopolistic practices of the past in which brewer—and distiller—owned retail outlets encouraged abusive consumption habits. The Twenty-First Amendment gave the states broad power to regulate the sale, distribution and importation of alcoholic beverages within and across their borders.

The different state alcohol laws came into effect after Prohibition when State legislatures enacted prohibitive wine shipment statutes and instituted a three-tier system. State legislatures concluded that by prohibiting “tied-house” arrangements, large alcoholic beverage businesses would not be able to dominate local markets through vertical and horizontal integration, or by using excessive marketing techniques. The legislatures assumed that consumption of alcohol

101. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 584 (1986); see also Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 275 (1984); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964) (holding that the Twenty-First Amendment and the Commerce Clause “each must be considered in light of the other”).
102. See Nigro, supra note 29, at 50.
103. See id.
104. See id.
105. See id.
106. See Billingsley, supra note 25, at 5; Prial, supra note 12.
would decline absent aggressive marketing and price-cutting.\textsuperscript{108} Therefore, the three-tier system would promote orderly markets and temperance.\textsuperscript{109} States have dealt with the potential breakdown of the system when out-of-state producers send wine directly to consumers in a variety of statutory ways.

As one commentator has written, “\textquote{W}hen it comes to buying wine, . . . Americans may as well live in [fifty] different countries—some relatively free and open, some so closed they resemble old-style dictatorships.”\textsuperscript{110} Today you can go online to buy books, artwork, computers, clothes, music, and medical prescriptions and have them shipped directly to your home, yet in twenty-six states it is illegal for an out-of-state winery to ship a bottle of wine to a consumer’s address.\textsuperscript{111} Direct-to-consumer wine shipments are prohibited in Alabama,\textsuperscript{112} Arkansas,\textsuperscript{113} Delaware,\textsuperscript{114} Kansas,\textsuperscript{115} Maine,\textsuperscript{116} Massachusetts,\textsuperscript{117} Michigan,\textsuperscript{118} Mississippi,\textsuperscript{119} New Jersey,\textsuperscript{120} New York,\textsuperscript{121} Ohio,\textsuperscript{122} Oklahoma,\textsuperscript{123} South Carolina,\textsuperscript{124} South Dakota,\textsuperscript{125} Utah,\textsuperscript{126} Vermont,\textsuperscript{127}
and Virginia. In New York, for example, currently no alcoholic beverages may be shipped into the state from anywhere in the United States unless they are being sent to a licensed seller. In Florida, Indiana, Kentucky, Maryland, North Carolina, and Tennessee, direct shipment is a felony. Many wineries will not risk shipping to out-of-state sellers and consumers because if they are convicted of a felony, they can lose their federal permit to make wine. In Indiana and North Carolina, it is a felony for those without permits to ship wine directly, and a misdemeanor for wineries. Even those who have purchased wine out-of-state and attempt to ship it to themselves can be charged in some cases, and in some cases a bottle of


125. See S.D. CODIFIED LAWS § 35-4-66 (Michie 2002) (prohibiting direct shipment except for individual transporting into the state one gallon or less of alcoholic beverages).


127. See VT. STAT. ANN. tit. 7 § 63(b) (2002) (prohibiting direct shipment except for personal transportation of up to six gallons from out-of-state with a permit).

128. See VA. CODE ANN. § 4.1-310 (Michie 2002) (prohibiting direct shipment except for personal transportation of up to four liters from out-of-state). A U.S. District Court has overturned this ban, but an appeal is pending. See Bolick v. Roberts, 199 F. Supp. 2d 397, 451 (E.D. Va. 2002), discussed infra Part III(5). On February 5, 2003, the Virginia General Assembly passed measures that would allow the direct shipment of wine in and out of the state. See Steven Ginsberg, Lawmakers Pass Bills on Va. Wine Shipment; Direct Delivery Sought In and Out-of-state, WASH. POST., Feb. 6, 2003, at B1. The final version of the bill needs to be agreed upon by both state houses before the final bill is forwarded to the governor. See id. The legislation would permit the delivery of up to twenty-four bottles a month of out-of-state wine and would allow Virginia vintners to ship directly to consumers in the thirteen states with similar provisions. See id.

129. In a recent decision, however, the Southern District Court of New York held that the ban was unconstitutional. An appeal is pending. See Swedenburg v. Kelly, 232 F. Supp. 2d 135, 152 (S.D.N.Y. 2002), discussed infra Part III(4).

130. See FLA. STAT. ANN. 561.545 (West 2002) (authorizing imprisonment for a violation of direct shipment prohibition).

131. See IND. CODE ANN. §§ 7.1-5-1-9.5, 7.1-5-11-1.5 (West 2002) (authorizing imprisonment for retailers and brewers which do not hold a federal basic permit as wineries do).

132. See KY. REV. STAT. ANN. § 244.165 (Banks-Baldwin 2002) (authorizing imprisonment for a violation of direct shipment prohibition).

133. See MD. ANN. CODE art. 2B, § 16-506.1 (2002) (authorizing imprisonment of up to two years and $1,000 fine).

134. See N.C. GEN. STAT. § 18B-102.1 (2002) (authorized imprisonment for retailers and breweries that do not hold a federal basic permit). In a recent decision, however, a U.S. District Court held that North Carolina's ban on direct shipment of wine was unconstitutional. An appeal is pending. See Beskind v. Easley, 197 F. Supp. 2d 464, 475 (W.D.N.C. 2002), discussed infra Part III(6).


136. See Nigro, Crossing State Lines supra note 111, at 60.

137. See IND. CODE ANN. § 7-1-5.1-9.5(b).

138. See N.C. GEN. STAT. § 18B-102.1(e).
wine in luggage can be considered direct shipment.\textsuperscript{139}

There are twelve states that allow consumers to bring in out-of-state wine under certain conditions, typically requiring the seller or consumer to register with the state or pay for a special shipping permit.\textsuperscript{140} These states also generally restrict the amount of wine that a resident can bring in annually and require the winery and consumer to pay taxes and report the transactions.\textsuperscript{141} States that allow limited shipping and require special permits include Alaska,\textsuperscript{142} Connecticut,\textsuperscript{143} Georgia,\textsuperscript{144} Louisiana,\textsuperscript{145} Montana,\textsuperscript{146} Nebraska,\textsuperscript{147} Nevada,\textsuperscript{148} New Hampshire,\textsuperscript{149} North Dakota,\textsuperscript{150} Rhode Island,\textsuperscript{151} Wyoming,\textsuperscript{152} and the District of Columbia.\textsuperscript{153} Arizona,\textsuperscript{154} Maryland,\textsuperscript{155} and Pennsylvania\textsuperscript{156} are “special-

\textsuperscript{139} See Nigro, Crossing State Lines, supra note 111, at 60.
\textsuperscript{140} See id. at 61.
\textsuperscript{141} See id. The statutes usually speak in terms of limiting liters and gallons. One case equals nine liters, or twelve 750ml bottles. Two cases equals about five gallons. See id. at 62.
\textsuperscript{143} See CONN. GEN. STAT. ANN. § 12-436 (West 2002) (limiting direct shipment but allowing consumers to get permits to ship or personally carry in up to four gallons at one time or five gallons within a sixty-day period).
\textsuperscript{144} See GA. CODE ANN. § 3-6-32 (2002) (limiting direct shipment to no more than five cases of wine a year to a consumer who has purchased the wine while on the premises of the winery).
\textsuperscript{145} See LA. REV. STAT. ANN. § 359 (West 2002) (limiting direct shipment to no more than four cases per year from retailers and wineries that do not have a distributor in the state).
\textsuperscript{146} See MONT. CODE ANN. § 16-4-901 (2001) (limiting direct shipment to no more than twelve cases per year from out-of-state wineries, after obtaining a fifty dollar license).
\textsuperscript{147} See WYO. REV. STAT. § 53-194.03 (2002) (limiting direct shipment to no more than nine liters per month from out-of-state wineries).
\textsuperscript{148} See NEV. REV. STAT. ANN. § 369.490 (Michie 2002) (limiting direct shipment to no more than twelve cases per year from out-of-state wineries).
\textsuperscript{149} See N.H. REV. STAT. ANN. § 178:14-a (2002) (limiting direct shipment to no more than five cases per year to any individual consumer and a total of one hundred cases per year in the state).
\textsuperscript{150} See N.D. CENT. CODE § 5-01-16 (2001) (limiting direct shipment to no more than nine liters per month from out-of-state wineries).
\textsuperscript{151} See R.I. GEN. LAWS § 3-4-1 (2002) (limiting direct shipment to on-premises purchases at wineries only).
\textsuperscript{152} See WYO. STAT. ANN. § 12-2-204 (Michie 2002) (limiting direct shipment to no more than two cases per year).
\textsuperscript{154} See ARIZ. REV. STAT. § 4-203.04 (2002) (limiting direct shipment but allows special orders through the three-tier system).
\textsuperscript{155} See MD. ANN. CODE art. 2B, § 16-506.1 (2002) (limiting direct shipment to only those holding the requisite license).
\textsuperscript{156} See 40 PA. CODE §§ 9.41, 9.115 (2002) (limiting direct shipment to only those holding the requisite license but providing exception for gifts of liquor which may be imported into the state).
order” states under the three-tier system. After the order is placed, the wine must be sent through a wholesaler to a retailer for a pickup, where the consumer will be charged state taxes and additional handling fees.

Reciprocity states have another category of state direct shipment laws. In such states, direct shipment is allowed from another state that accords the same privilege. These shipments must be to persons of legal age and are only for personal use, not resale. For example, if you live in Illinois, you can order directly from a California winery because both states allow reciprocal shipping, but you cannot order from a New York winery because New York State has no such law. The thirteen reciprocity states are: California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin.

157. See Nigro, supra note 111, at 61.
158. See id.
159. See id.
160. See id.
161. See id.
162. See id.
163. See id.
164. See CAL. BUS. & PROF. CODE § 23661.2 (West 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
165. See COLO. REV. STAT. ANN. § 12-47-104 (West 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
166. See 2002 Haw. Sess. Laws 281-33.5 (reciprocity state allowing out-of-state wineries to ship two cases of wine per year after registering with the individual island commissions).
168. See 235 ILL. COMP. STAT. ANN. § 5/6-29 (West 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
169. See IOWA CODE ANN. § 123.187 (West 2001) (reciprocity state allowing out-of-state wineries to ship wine into the state).
171. See MO. ANN. STAT. § 311.462 (West 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
172. See N.M. STAT. ANN. § 60-7A-3(E) (Michie 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
175. See W. VA. CODE ANN. § 60-8-6 (Michie 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
176. See WIS. STAT. §§ 125.58, 125.68 (West 2001) (reciprocity state allowing out-of-state wineries to ship wine into the state).
Reciprocal laws do not mean unlimited shipping; some states place stricter limits than others on how many cases can be delivered. For example, in Idaho up to two cases per month from wineries and retailers may be directly shipped, while in Illinois only up to two cases per year from wineries and retailers may be directly shipped.

D. Recent Federal Actions

Congress is also getting involved in the direct shipment issue. In October, 2002, Congress passed a measure that temporarily allows winery visitors to ship wine back home to themselves, provided that the laws in their state of residence permit them to carry alcohol purchases personally across state lines. The new provision, which is part of the much larger Department of Justice Appropriations Authorization Act, applies even to some states that currently ban interstate shipments from a winery directly to the consumer. The wine-shipping provision grew out of the airline security precautions instituted after Sept. 11, 2001, particularly the restrictions on the number, size, and type of carry-on bags. Wineries became concerned that the carry-on restrictions would cut into tasting-room sales. The provision, which applies to wine only, is effective during any period that the Federal Aviation Administration places restrictions on airline passengers to ensure safety. Consumers must still adhere to the restrictions in their home state and an adult must purchase the wine in person at the winery for personal use only. The wine business views this new provision as an important measure because Congress was finally "acknowledging the legitimacy of direct shipments as a means of getting a product from wineries to consumers."

The Federal Trade Commission ("FTC") announced in July 2002 that antitrust regulators will be scrutinizing state laws to see if any are unfairly restricting e-commerce in order to protect local businesses from

See Nigro, supra note 111, at 61.
See id. at 62.
See id.
See id.
See id.
See id.
See id.
See id.
Id. (quoting David Sloane, President, American Vintners Association).
competition. Among the industries the FTC plans to examine are automobile, real estate, and wine.

III. THE WINE WAR AND THE LOWER COURTS

Since the Supreme Court has not specifically addressed state bans on direct shipment of wine, the other federal courts in recent years have grappled with the complex relationship between the dormant Commerce Clause and the Twenty-First Amendment. There is little agreement on what approach should be taken thus far. Court opinions vary but usually depend upon (1) whether the judge interprets the Twenty-First Amendment as providing nearly absolute power to the states, under Section 2, to establish a comprehensive regulatory system to achieve legitimate state interests in promoting temperance, raising revenue, and insuring orderly market conditions, and views any inequitable results as inconsequential burdens on commerce, or (2) whether the judge applies a Commerce Clause balancing test and gives prominence to economic discrimination resulting from a state’s disparate application of its regulatory scheme to favor local wineries over out-of-state wineries.

Consumers and small wineries have gotten together to change the laws in states that prohibit direct shipment. They have challenged state statutes in eight states: Florida, Indiana, Michigan, New York, North Carolina, Texas, Virginia, and Washington. In New York, North Carolina, Virginia, and Texas federal district courts have struck down state restrictions on direct shipment of wine on dormant Commerce Clause grounds, while in Michigan a federal district court upheld such restrictions. All these decisions currently are on appeal. The two Circuit Courts to hear cases thus far have split their decisions, with the Seventh Circuit holding that Indiana direct shipment laws are constitutional and the Eleventh Circuit holding that Florida direct shipment laws are unconstitutionally discriminatory.

186. See Nigro, supra note 29, at 49-50.
187. See id. at 50.
189. See Hearings, supra note 13, (testimony of Ted Cruz, Director, Office of Policy Planning Federal Trade Commission).
190. See id.
191. See id.
192. Compare Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000), with Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002), discussed infra, Parts III(1) & (3), respectively.
1. Indiana

In Bridenbaugh v. Freeman-Wilson, consumers of alcoholic beverages brought suit challenging an Indiana statute prohibiting direct shipments of alcohol from out-of-state to Indiana consumers. The United States District Court for the Northern District of Indiana found the statute unconstitutional. Judge Easterbrook, for the Court of Appeals for the Seventh Circuit, reversed the lower court's decision, reinstating the statute citing constitutional authorization under the Twenty-First Amendment. Judge Easterbrook noted that "[Section] 2 of the [T]wenty-[F]irst Amendment empowers Indiana to control alcohol in ways that it cannot control cheese" and found that Section 2 "enables a state to do to importation of liquor ... what it chooses to do to the internal sales of liquor, but nothing more." He acknowledged that the Supreme Court has held that imports cannot be allowed on discriminatory terms, but got around that problem in Indiana by declaring that there was no discrimination in Indiana against out-of-state wineries.

The court rejected the plaintiffs' contention that a provision of the Indiana Code that allowed only holders of wine wholesaler or retailer permits to ship wine directly to Indiana consumers' homes was discriminatory. The court noted that permit holders could "deliver California and Indiana wines alike; firms that do not hold permits may not deliver wine from either (or any) source." Thus, the court concluded that there was no discrimination in Indiana. However, while Easterbrook insisted that there was no discrimination against out-of-state wineries because all alcoholic beverages had to pass through Indiana's three-tier system, and, therefore all sellers were being treated equally, he completely ignored the fact that many of the wines the plaintiffs wanted to buy are made by very small wineries. There are no wholesalers that are going to want to put the resources into efforts to sell and distribute the thousands of wines made by such small wineries.

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193. 227 F.3d 848 (7th Cir. 2000).
194. See id. at 849.
195. See id. at 854.
196. See id.
197. Id. at 851.
198. Id. at 853.
199. See id. at 853-84.
200. See id. at 853.
201. Id.
statute, thus, in effect, keeps these wines out of Indiana, giving an advantage to Indiana wine retailers, wholesalers, and producers.

Judge Easterbrook’s opinion suggests that he was determined to find the Indiana statute constitutional because of his conviction that the plaintiffs’ only interest was in flouting Indiana law and avoiding taxes on their wine purchases. 203 Although he noted Indiana’s failure to enforce its permit and tax laws, 204 he did not seem to consider that there are ways to enforce such laws without prohibiting out-of-state wineries from shipping to Indiana consumers. 205 Many state legislatures are currently considering just that issue. 206

The United States Supreme Court refused to hear the plaintiffs’ appeal of the Seventh Circuit decision. 207 Interestingly, the Wine Institute and the Coalition for Free Trade, both advocates of eliminating direct shipment prohibitions, were pleased by the Court’s refusal to hear the Indiana case. 208 Because the Indiana lawsuit did not include any wineries as plaintiffs, unlike similar cases filed later in other states, the Coalition for Free Trade and Wine Institute felt the case was not the strongest among those pending. 209 The advocacy groups believe that the cases pending in six other states (Florida, Michigan, New York, North Carolina, Texas and Virginia) face a better chance if they eventually reach the Supreme Court because the plaintiffs are both consumers and wineries. 210

203. See Bridenbaugh, 227 F.3d. at 854.
204. See id. at 850.
205. See States Pass Streamlined Sales Tax Agreement, Nov. 12, 2002, at http://www.nga.org/nga/newsRoom/1,1169,0,PR%5eD_4632,00,00.html (describing how the Streamlined Sales Tax Agreement, if enacted by ten state legislatures, would establish uniform definitions for taxable goods and would require participating states and local governments to have only one statewide tax rate for each type of product effective 2006); see also supra text accompanying notes 77-82.
206. See STREAMLINED SALES TAX PROJECT, LIST OF PARTICIPATING STATES (as of Mar. 27, 2003), at http://www.nga.org/cda/images/USAMap.gif (last visited Aug. 20, 2003) (listing thirty-eight states that have adopted legislation, one state where legislation has been introduced and is pending approval, three states that are observers, five states that have no sales tax, and three states that are not participating).
209. See id.
210. See id.
2. Texas

Following the Seventh Circuit’s decision in *Bridenbaugh*, Judge Harmon of the United States District Court for the Southern District of Texas granted a motion for reconsideration in *Dickerson v. Bailey*\(^{211}\) to allow the parties to address the impact of *Bridenbaugh*. In *Dickerson*, Texas residents wishing to receive wine shipments directly from out-of-state suppliers sued the administrator of the state Alcohol Beverage Commission (“ABC”), claiming that a Texas statute prohibiting those sales violated the dormant Commerce Clause.\(^ {212}\) Upon reconsideration, Judge Harmon adhered to her prior determination that the statute was unconstitutional, finding that it imposed “differing burdens on in- and out-of-state [wine] producers so as to favor in-state wineries.”\(^ {213}\) Judge Harmon held that Texas’ statutory ban on direct importation of out-of-state wine by Texas residents for personal consumption violated the dormant Commerce Clause.\(^ {214}\) “Because out-of-state producers must go through Texas-licensed wholesalers and retailers to sell wine in Texas, they suffer higher costs which translate into higher prices, which in turn affect their ability to compete with local Texas wineries.”\(^ {215}\) Furthermore, the court held that the Texas ABC law was not “saved” by the Twenty-First Amendment because the state failed “to demonstrate how a statutory exception for local wineries from Texas’ three-tier regulatory system . . . is justified by any of the traditional core concerns of the [T]wenty-[F]irst Amendment.”\(^ {216}\)

In this well-written and convincing opinion, Judge Harmon identified a crucial problem in Judge Easterbrook’s opinion. Easterbrook’s ruling is based on the history of the Twenty-First Amendment, which he limited to before and around the time of its enactment, and on the language of Section 2.\(^ {217}\) Harmon, convincingly, pointed out that both bases of interpretation are incorrect. After reviewing the ratification debates of the Amendment, Harmon drew on academic studies to conclude that the plain meaning of the text and the legislative history “fails to reveal clearly any unified Congressional

\(^{212}\) *See id.* at 674-75.
\(^{213}\) *Id.* at 694.
\(^{214}\) *See id.*
\(^{215}\) *Id.* at 694-95.
\(^{216}\) *Id.* at 695. The “core concerns” of the Twenty-First Amendment are promoting temperance, raising revenue, and insuring orderly market conditions. *See id.* at 682.
\(^{217}\) *See id.* at 680.
intent in enacting . . . section [2].”

Comments of various senators during the ratification debates support three different interpretations of Section 2. At the time of the ratification debates, Section 2 was viewed as primarily a procedural section, necessary to support and implement Section 1. Therefore, if there is no definitive guidance on the issue from the text or the history of the Twenty-First Amendment, then the task of interpretation must be left to the Supreme Court. However, because Easterbrook viewed Section 2 as giving states an absolute right to regulate the importation and distribution of alcohol, “he did not discuss the last forty years of Supreme Court jurisprudence relating to balancing and harmonizing the dormant Commerce Clause and [Section] 2 of the [T]wenty-[F]irst [A]mendment.” Easterbrook determined “that since the establishment of Indiana’s three-tier system was fully authorized by the [T]wenty-[F]irst [A]mendment, . . . no further [Commerce Clause] analysis was necessary.”

In neglecting a dormant Commerce Clause analysis, Judge Easterbrook ignored an important point raised by Judge Harmon—by requiring even small, “family-run” wineries to go through wholesalers, many of them are blocked from access to out-of-state markets, thus discriminating against them. The plight of small, out-of-state wineries was “inconspicuous or insignificant to Judge Easterbrook.” Harmon’s critique of Easterbrook’s flawed analysis is excellent and could serve as a model analysis for other jurisdictions.

3. Florida

In Bainbridge v. Bush, the plaintiffs alleged that the Florida direct shipment law violated the Commerce Clause by discriminating against interstate wine sales and protecting economic interests of in-state business, and by regulating sales transactions that occur in other states. The district judge upheld Florida’s direct shipment law relying on a completely different constitutional analysis than the Seventh Circuit in the Indiana case. Whereas Judge Easterbrook concluded that the

218. Id. at 682.
219. See id. at 680-81.
220. See id. at 681.
221. See id.
222. Id. at 682.
223. Id. at 686.
224. See Bolick, supra note 37.
225. Id.
227. See id. at 1308.
Indiana law was not discriminatory, in Bainbridge the court agreed that the Florida law did discriminate against out-of-state wineries. Nevertheless, the court found that although Florida’s direct shipment law violates the dormant Commerce Clause, it represents a permissible regulation under the Twenty-First Amendment.228 The district court wrote that where there are mixed motives, both legitimate and protectionist, behind the enactment of a facially discriminatory statute regulating alcoholic beverages, the legitimate motives are sufficient to save the statute from being unconstitutional.229 The judge found that Florida’s express goals were to deal with what Florida perceived to be a “threat to the public health, safety, and welfare; to state revenue collections; and to the economy of the state,” all of which fall within the recognized core concerns of the Twenty-First Amendment.230 The court concluded that “the numerous interests promoted by the Florida statutory scheme, including temperance, revenue protection, and the reduction of diversion and bootlegging outweigh the minimal burden placed on interstate commerce.”

The Eleventh Circuit Court, however, vacated and remanded the case, ordering the district court judge to consider more evidence.232 Circuit Judge Tjoflat held that if Florida could demonstrate that its statutory scheme was closely related to the core concern of the Twenty-First Amendment of raising revenue and not a pretext for mere protectionism, Florida’s statutory scheme could be upheld against a dormant Commerce Clause challenge.233 While the court of appeals agreed with the district court’s determination that the Florida direct shipping ban was facially discriminatory, it found that a question of fact remained as to whether the “regulatory scheme is so closely related to the core concern of raising revenue as to escape Commerce Clause scrutiny.”234

In its decision the court dismissed two of the three “core concerns” alleged by the state; it said that the current laws were not the only way of preventing alcohol sales to minors or of ensuring orderly markets. The judges noted that they were not sure exactly what “‘ensuring orderly markets’ ... means, but it certainly does not mean discrimination in a

228. See id. at 1315.
229. See id. at 1313.
230. Id. (internal quotation marks omitted).
231. Id. at 1315 (footnote omitted).
232. See Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002).
233. See id. at 1115.
234. Id.
way that effectively forecloses out-of-state firms from the Florida market.\textsuperscript{235} In addressing the other "core concern" of excise taxes, the court asked, "Why, exactly, must Florida engage in this discriminatory scheme to effectuate its desire to raise revenue?"\textsuperscript{236} These issues will be reconsidered by the district court.

4. New York

In Swedenburg \textit{v.} Kelly\textsuperscript{237} the plaintiffs were the owner of a winery in Virginia, the owner of a winery in California, and three New York consumers.\textsuperscript{238} The defendants, the Chairman and Commissioners of the New York State Liquor Authority, were joined by several wholesalers who intervened to file a joint motion to dismiss the plaintiffs’ complaint.\textsuperscript{239} The plaintiffs claimed that a New York state alcohol statute violates the rights of all the plaintiffs to freedom of commerce guaranteed by the Commerce Clause.\textsuperscript{240} In a decisive victory for direct shipment proponents, District Court Judge Berman found for the plaintiffs and held that it is unconstitutional for New York to bar direct shipments of wine to consumers from out-of-state producers while allowing direct sales by wineries inside the state.\textsuperscript{241} In his opinion, Judge Berman stated that "[t]here is evidence that the direct shipping ban was designed to protect New York State businesses from out-of-state competition."\textsuperscript{242} Judge Berman made it clear that New York cannot exercise its power under the Twenty-First Amendment as a pretext for economic protectionism.\textsuperscript{243} Berman rejected the argument that there is any temperance or tax justification for prohibiting direct shipment.\textsuperscript{244} He said that the legitimate state interests protected by the Twenty-First Amendment, such as promoting temperance, banning the sale of wine to minors, and raising tax revenues, could be addressed through other nondiscriminatory means.\textsuperscript{245} In solving the constitutional problem, Berman suggested one possibility would be to eliminate the direct-

\begin{itemize}
\item \textsuperscript{235} \textit{Id.}
\item \textsuperscript{236} \textit{Id.}
\item \textsuperscript{237} No. Civ. 0778, 2000 WL 1264285 (S.D.N.Y. Sept. 5, 2000).
\item \textsuperscript{239} See \textit{id.} at 137.
\item \textsuperscript{240} See \textit{id.} New York state currently allows in-state wineries to ship directly to their New York customers, but prohibits out-of-state producers from doing the same. The latter must distribute all their wine through the three-tier system, selling it to a wholesaler who then resells it to retailers.
\item \textsuperscript{241} See \textit{id.} at 136.
\item \textsuperscript{242} \textit{Id.} at 148.
\item \textsuperscript{243} See \textit{id.}
\item \textsuperscript{244} See \textit{id.} at 148-50.
\item \textsuperscript{245} See \textit{id.} at 150.
\end{itemize}
shipping ban; another would be to eliminate exceptions in the law, like
the one that allows wineries in New York State to sell directly to
consumers. Following his ruling, Judge Berman issued an injunction
preventing New York State from enforcing its current ban on interstate
direct shipments of wine to consumers. This opinion will not change
the situation for consumers immediately because the ruling is stayed
while the defendants prepare their appeal. Judge Berman indicated
that “the issue would ultimately have to be settled by the New York state
legislature.” If the Second Circuit upheld this decision, state
legislators would still have a choice between overhauling their rules on
wine shipping or simply removing the exemption for local wineries.

5. Virginia

In Bolick v. Roberts, consumers of wine in Virginia and out-of-
state growers and producers of wine brought an action against the
Virginia Alcoholic Beverage Control Board, challenging Virginia’s
regulatory scheme involving the shipment and distribution of alcoholic
beverages. District Judge Williams held that the statutory scheme
requiring all liquor to pass through hands of state-licensed entity was
discriminatory and, thus, unconstitutional.

In his opinion Judge Williams noted that the statute was facially
discriminatory because Virginia producer licensees do not have to pass
their products through a wholesale tier although out-of-state entities
must. The court found that Virginia had not established “that there are
no other nondiscriminatory means of enforcing legitimate interests,” and held that the Twenty-First Amendment did not shield the direct
shipping ban.

Judge Williams viewed Easterbrook’s decision in Bridenbaugh as
incorrectly decided because it did not apply established dormant
Commerce Clause analysis and ignored the interstate commerce issues raised by the facts of the case. Williams further concluded that Judge Easterbrook's analysis of the history and the text of Section 2 was very narrow and disregarded the evolution of case law consistent with that text and history in the twentieth century.

6. North Carolina

In Beskind v. Easley, the plaintiffs, comprised of North Carolina residents who enjoy drinking wine and a small California winery, challenged several provisions of North Carolina's ABC laws as unconstitutional violations of the Commerce Clause. District Court Judge Mullen held that the challenged provisions of North Carolina's alcohol statutes directly discriminated against out-of-state wine manufacturers and that the Twenty-First Amendment did not empower the state to favor local liquor industries by enacting barriers to competition. While the court stated that North Carolina was allowed to use the Twenty-First Amendment to protect the overall three-tier system because it promotes the core purpose of the Twenty-First Amendment, the court concluded that North Carolina cannot use the Amendment to protect the direct shipment ban from the Commerce Clause because the ban does not fulfill a purpose of the Amendment. The court enjoined North Carolina from enforcing the provisions of the law "that prohibit or punish out-of-state wine dealers from directly shipping wines to adult North Carolina residents." In an in-depth opinion, Judge Mullen concluded that plaintiffs were not challenging the three-tier system, but rather North Carolina's failure to apply that system uniformly and even-handedly to in-state and out-of-state wineries. Emphasizing that the State failed to present any reason for applying its ABC laws unevenly in its exception for local wineries, Mullen concluded that the only explanation was "protection of local economic interests, which the Commerce Clause will not tolerate."

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257. See id. at 408.
258. See id. at 430-33. In response to Judge Williams decision, the Virginia General Assembly passed measures that would allow the direct shipment of wine in and out of the state. See Ginsberg, supra note 128.
260. See id. at 466.
261. See id. at 475-76.
262. See id. at 474.
263. Id. at 476.
264. See id. at 470.
265. Id. at 472.
his opinion, Judge Mullen applied a balancing test and identified the "correct inquiry" as "whether the interests implicated by a state regulation are so closely related to the powers preserved by the Twenty-[F]irst Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." 266

As a remedy for the violation of the Commerce Clause, Mullen suggests that it is the job of the legislature and not the court, to design a non-discriminatory regulatory structure for the sale of alcoholic beverages in North Carolina. 267 The court enjoined the defendants from enforcing the statutes. 268

7. Washington

In *Mast v. Long*, 269 the plaintiffs are law students who seek to purchase wine directly from sources outside the State of Washington. 270 The plaintiffs allege that the "existing system is unconstitutional because it violates the 'dormant' Commerce Clause and the First Amendment." 271 What is different about this case from the previously discussed cases is that Washington is a reciprocity state, and its laws on direct shipping are among the most liberal. The court in this case abstained from making any decision because the plaintiffs wanted to bring more than the statutory two liters of wine into the State without paying a penalty tax—a State tax issue the court believed belonged in state court. 272 This case is inconsequential in advancing the direct shipment issue.

8. Michigan

In *Heald v. Engler*, 273 the district court found "that direct shipment laws are a permissible exercise of state power under [section] 2 of the [Twenty-First] Amendment." 274 Michigan’s three-tier distribution system contained an "exemption" that allowed in-state wineries, but not out-of-state wineries, to ship directly to consumers. 275 The court determined that because the Twenty-First Amendment gave states

266. *Id.* (citation omitted).
267. See *id.* at 476.
268. See *id.*
270. See *id.* at *1.
271. *Id.*
272. See *id.* at *6.
274. *Id.* at 8.
275. See *id.* at 3-4.
“virtually complete control” over alcohol regulation, a state’s action pursuant to the Twenty-First Amendment would violate the Commerce Clause only if it constituted “mere economic protectionism.” In the court’s opinion, Michigan’s law was not mere economic protectionism because it was designed to “ensure the collection of taxes” and “reduce the risk of alcohol falling into the hands of minors.”

9. Summary of the Decisions

As of the writing of this Note, federal district courts have struck down direct shipment prohibition laws in New York, North Carolina, Texas, and Virginia, while in Indiana, Florida, and Michigan the district courts upheld the states’ rights to prohibit direct shipment of wine. In the first case to reach a U.S. Court of Appeals, the Seventh Circuit upheld Indiana’s ban on out-of-state direct shipping. In Bridenbaugh v. Freeman-Wilson, the Seventh Circuit relied heavily on the Twenty-First Amendment, Section 2 which grants the states considerable authority to regulate alcoholic beverages. The court in Bridenbaugh found that Indiana’s direct-shipping restrictions fall within this authority. In effect, the court concluded that when it comes to alcoholic beverages, states have authority under the Twenty-First Amendment to enact measures that may otherwise violate the Commerce Clause.

However, a more recent Eleventh Circuit decision, handled the constitutional battle between the Twenty-First Amendment and the Commerce Clause very differently. In reviewing a district court decision upholding Florida’s direct-shipping law, the Eleventh Circuit in Bainbridge v. Turner criticized Bridenbaugh and held that the Twenty-First Amendment can trump the Commerce Clause only under limited circumstances. The Eleventh Circuit decision, along with the well-reasoned opinions by Judge Harmon in Texas and Judge Williams in Virginia provide a comprehensive framework for addressing the direct shipment issue.

277. Id. at 10.
278. See Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000).
279. See id. at 854.
280. See Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002).
IV. ELEVENTH AMENDMENT JURISPRUDENCE

This next section is not meant to apply the substance of the Eleventh Amendment to the direct shipment of wine issue. Rather, it is an attempt to use the reasoning of the Supreme Court in recent Eleventh Amendment decisions to predict the outcome if the direct shipment of wine issue comes before the Court. While district court decisions in New York, Texas, and Virginia and the Eleventh Circuit decision make very convincing and logical arguments as to why a state’s ban on the direct shipment of wine is unconstitutional, it would be naive to ignore the weight the Supreme Court has given to protecting states’ rights and the “dignity of the states.” What follows in this section is an analysis of Eleventh Amendment jurisprudence that suggests how the Court views state sovereignty. The Court’s Eleventh Amendment decisions are relevant to the direct shipment cases because they indicate the Court’s predilection for giving the states increased regulatory control. It is a very small step to conclude that the Twenty-First Amendment gives states unfettered control over alcoholic beverage regulation, unhampered by Commerce Clause considerations.

When Justice William Rehnquist became Chief Justice in 1986, the Court embarked on a mission to return power to the states. A slim majority of the Supreme Court has over the past decade expanded states’ immunities against federal authority. Nearly all of the recent Supreme Court cases affecting federalism have been 5-4 decisions, with the majority composed of the Chief Justice and Justices O’Connor, Scalia, Kennedy, and Thomas.

The issue in these cases is one that was debated during our country’s founding—the rights of the individual states versus the power of federal authority. Since Rehnquist’s reign as Chief Justice, the conservative majority has used the Eleventh Amendment to the United States Constitution to justify the expansion of the sovereign immunity enjoyed by the states. The idea that states should be immune from lawsuits comes from the notion that immunity is necessary to preserve

281. U.S. CONST. amend. XI states, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”


283. See generally infra note 286 and accompanying text.

284. See generally id.
the people's idea that the sovereign is "a superior being" and that states' "dignity" must be protected. Promoting the common law doctrine of sovereign immunity, the current Supreme Court has used it to shield states from damages for age discrimination, disability discrimination, and the violation of patents, trademarks, copyrights, and fair labor standards.

As one commentator has written, the Eleventh Amendment is a mess—it is the "home of self-contradiction, transparent fiction, and arbitrary stops in reasoning." Furthermore, "[a]ny hope of doctrinal stability is undermined by shifting paradigms, as the Eleventh Amendment is inconsistently conceptualized as a form of sovereign immunity, as an exception to federal jurisdiction, and as a structural constraint on the powers of the national government." Understanding this confusion is important because the Eleventh Amendment is a vital element of federal jurisdiction that defines the federal system and affects the balance of power between the United States and its states.

For much of the twentieth century, the Supreme Court interpreted the Constitution to empower the federal government to deal with national problems. Now, though, the Court is restricting congressional powers and aggressively protecting state governments from lawsuits by private individuals. This shift in constitutional law jurisprudence has generated many articles concerning federalism, state sovereign immunity, and the expansion of the Eleventh Amendment. As a result of reviving federalism as a constraint on national power, dozens of federal laws are now being challenged in federal court. The newly expanded concepts of sovereignty and sovereign immunity have become the Court's way of restricting the powers of Congress and enlarging the

285. See John T. Noonan, Jr., Narrowing the Nation's Power: The Supreme Court Sides with the States, 41-57 (2002).
286. See David G. Savage, Strongly Stated: In Win for Federalism, State's Can't Be Brought to Administrative Hearings, ABA J., July 2002, at 29.
288. Id. (footnotes omitted).
290. See id. at 1012-13.
292. See infra notes 300-305 and accompanying text.
areas where the states can escape effective control by Congress. Under Congress' express constitutional powers, Congress can create standards that are as applicable to the fifty states as they are to any individual. The standards apply to the states, but as the Supreme Court has now determined, they cannot be enforced by a private person seeking damages from the states. The standards exist, giving rights to private persons but without providing them a remedy. A right without a remedy is the odd consequence the Supreme Court has endorsed by protecting the sovereignty of the states.

The history of Eleventh Amendment jurisprudence from inception until the present day makes it clear that the Supreme Court has extended the scope of state sovereign immunity and has limited Congress's power to authorize suits against the states. Specifically, the Court has thrown out suits brought by a Florida State University professor who said he was paid less because of his age, an Alabama hospital nurse who said she was demoted after battling breast cancer, and a Maine probation worker who was not paid for his overtime work. The Court also barred suits against state agencies over stolen patents, trademarks, or copyrights, all violations of federal law. Thus, although Congress has attempted to give individuals federal statutory rights against the states, the Supreme Court's view of the Eleventh Amendment and sovereign immunity has foreclosed much of the judicial relief that gives meaning to those federal rights.

Starting in 1890 in *Hans v. Louisiana*, the Supreme Court grappled with the question of whether the Eleventh Amendment barred a citizen from suing his or her own state in federal court, even though the Amendment itself makes no mention of this scenario. Quoting Alexander Hamilton from Federalist Number 81 the Court stated, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." Therefore, the Court concluded that

293. See NOONAN, supra note 285, at 4-5.
294. See id.
295. See id.
296. See id. at 4.
297. See id.
301. See Bohannan, supra note 294, at 274.
302. See id.
303. 134 U.S. 1 (1889).
304. See id. at 4.
305. Id. at 13. (italics omitted).
the Eleventh Amendment bars individuals from suing their own states. 306 This decision was particularly significant because it was the Court’s first departure from the literal text of the Eleventh Amendment. 307 In addition to making state immunity central, Hans brought into the discourse of the Supreme Court the opinions on immunity of Alexander Hamilton, James Madison, and John Marshall, providing the modern Court a reference and precedent for expanding the sovereign immunity doctrine. 308

After Hans, it appeared unlikely that a federal court could ever compel a state to act, even if the state violated the Constitution or a federal statute. 309 To get around Hans, when shareholders of several railroads alleged that a Minnesota statute regulating railroad rates violated the Fourteenth Amendment, they sued not the state, but the state’s Attorney General, Edward Young, for a temporary restraining order prohibiting him from enforcing the legislation in question. 310 Young claimed that the Eleventh Amendment barred the suit, but the Supreme Court held that “[t]he State has no power to impart to [the Attorney General] any immunity from responsibility to the supreme authority of the United States.” Therefore, Ex parte Young held that the Eleventh Amendment applies only to the states themselves, and plaintiffs could obtain injunctive (prospective) relief against a state by suing a state official. 311 This decision gave private citizens a way to challenge unconstitutional state action by “stripping” officers of the state of their official status.

More than half a century later, the ability of private citizens to challenge unconstitutional state action was severely limited in Edelman v. Jordan 313 when the Supreme Court began to lay down new restrictive interpretations of what the Eleventh Amendment proscribed. In Edelman, the Court held that a class of intended welfare recipients could not sue state officials for retroactive payment of benefits. 314 Edelman held that the Eleventh Amendment barred an action against a state official that resulted in retrospective monetary awards likely to be paid

306. See id. at 16.
308. See NOONAN, supra note 285, at 75.
309. See Kenny, supra note 307, at 2.
310. See Ex parte Young, 209 U.S. 123, 126 (1908).
311. Id. at 160.
312. See id. at 167-68.
314. See id. at 678.
by the State. The Court stated that a suit “seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.” The effect of that decision was to permit federal courts to require state officials to comply in the future with claims payment provisions of the welfare assistance sections of the Social Security Act, but federal courts could not entertain claims seeking payment of funds found to be wrongfully withheld in the past. Conceding that some of the characteristics of prospective and retroactive relief would have the same effects on the state treasury, the Court suggested that retroactive payments were equivalent to the imposition of liabilities that must be paid from public funds in the state treasury, and that this was barred by the Eleventh Amendment. In describing why it drew the line between prospective and retrospective relief, the Court said that remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law whereas a compensatory or deterrence interest is insufficient to overcome the dictates of the Eleventh Amendment. Accordingly, this case held that suits against states and their officials seeking damages for past injuries are firmly foreclosed by the Eleventh Amendment.

Congress’ power to abrogate a state’s sovereign immunity under the Commerce Clause and hold states to federal legislative requirements took a hard hit in the landmark decision Seminole Tribe of Florida v. Florida. Seminole cut deeply into the powers of Congress over the states. Even where the Constitution vests in Congress complete lawmaking authority over a particular area, the Court declared that the states cannot be made liable for damages when they violate federal law. The Seminole Tribe filed suit against the State of Florida in federal court to compel negotiations under the Indian Gaming Regulatory Act (“IGRA”). IGRA was enacted pursuant to the Commerce Clause and authorized suits against states in federal court. The Court rejected the plaintiff’s argument that Congress could abrogate state sovereign immunity to enforce legislation enacted pursuant to the

315. See id. at 667.
316. Id. at 663 (citation omitted).
317. See id. at 668.
318. See id.
319. See id.
320. See id. at 663.
322. See id. at 47, 72.
323. See id. at 51-52.
324. See id.
Writing for the Court, Chief Justice Rehnquist concluded that “[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.” Rehnquist further stated that, “Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.” The Court explained that Congress could, however, still abrogate a state’s sovereign immunity pursuant to Section 5 of the Fourteenth Amendment because it was adopted after the Eleventh Amendment and that the sole focus of Section 5 is legislation directed at the states. The Court concluded that Article I powers such as the commerce power, on the other hand, do not override the Eleventh Amendment. Since Seminole Tribe was decided in 1996, the Supreme Court has been moving to reduce the accountability of the states for not complying with federal legislation.

In 1999, the Supreme Court drastically expanded state sovereign immunity in Alden v. Maine. In Alden, a group of probation officers sued their employer, the State of Maine, for monetary damages in federal court alleging that the State had violated the overtime provisions of the Fair Labor Standards Act (“FLSA”). The District Court dismissed the action after the Supreme Court in Seminole Tribe ruled that Congress could not subject unconsenting states to suit in federal court pursuant to its Article I powers. The petitioners then filed the suit in state court pursuant to language in the FLSA purporting to authorize private actions against states in their own courts, a practice not banned by Seminole Tribe or the Eleventh Amendment. Closing this abrogation loophole, the Court held that “the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.” What was particularly notable about Alden was that for the first time the Court recognized state sovereign immunity existing
independent of the Eleventh Amendment. Justice Kennedy wrote: “[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment” but rather “‘the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution . . . .” 336 This new conception of sovereign immunity not directly derived from the Eleventh Amendment helps the Court expand the scope of the immunity and also opens the Court to greater criticism for its judicial activism. As one commentator has noted, “the Supreme Court has failed to adequately explain how the immunities derive from the text of the Constitution . . . . [T]he texts of the Tenth and Eleventh Amendments simply do not provide for such immunities and constitutional structure, while a useful aid to interpretation, is not itself text.” 337

The Supreme Court’s policy considerations for making law regarding states’ sovereign immunity are explicitly mentioned in its most recent decision concerning sovereign immunity. 338 In May of 2002, the Court’s conservative wing continued to enhance the immunity of the states and to curtail Congress’ power when it extended the principle of sovereign immunity from lawsuits in federal court to adjudicative hearings by federal agencies. 339 The dispute arose when the South Carolina State Ports Authority (“SCSPA”) refused to berth a cruise ship that offered gambling. 340 Officials said they did not want gambling ships operating out of Charleston, but the ship’s sponsors countered that another shipping line berthed two ships that offered casino gambling. 341 The cruise ship company filed a complaint against the SCSPA with the Federal Maritime Commission (“FMC”), seeking reparations and injunctive relief for alleged violations of the Shipping Act of 1984. 342 Writing for the majority, Justice Thomas held that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a non-consenting State. 343 Because “administrative proceedings bear a remarkably strong resemblance to civil litigation in federal courts[.]” the same rule of state immunity should apply to both, stated Justice Thomas speaking for the 5-4 majority. 344 He was joined by

336. Id. at 713.
337. Shaffer, supra note 289, at 1022 (alteration in original) (citation omitted).
339. See id. at 747.
340. See id.
341. See id. at 748.
342. See id.
343. See id. at 768-69.
344. Id. at 757.
Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. According to Thomas, it would be an "affront to the state's dignity" to force it to respond to complaints by individuals and private companies. Thomas emphasized that the primary purpose of the Eleventh Amendment was to preserve a state's dignity, not its treasury. Thomas stated that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."

Justice Thomas concluded that "[b]y guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, such as sovereign immunity, we strive to maintain the balance of power embodied in our Constitution and thus to 'reduce the risk of tyranny and abuse from either front.'" This decision highlights how the majority is adamant in protecting state's rights—the majority immunized states from certain proceedings before federal administrative agencies which, as part of the executive branch, do not even exercise the "judicial power" to which the Eleventh Amendment is addressed. The Court mentioned "that [w]hile state sovereign immunity serves the important function of shielding state treasuries and thus preserving 'the States' ability to govern in accordance with the will of their citizens,'" the doctrine's central purpose is to "accord States the dignity that is consistent with their status as sovereign entities." The Court made it clear that the relief sought by a plaintiff suing a state is irrelevant to the question of whether the suit is barred by the Eleventh Amendment. It is clear that this Court is committed to a policy of federalism allowing states to govern themselves with as little interference from the federal government as possible.

The dissent in many of the sovereign immunity cases questions where the majority finds in the Constitution the principle of law that allows the expansion of states' sovereign immunity. Led by Justice Souter, the dissenters in these cases argue that the "interpretation of the Eleventh Amendment that a majority of this Court has embraced is fundamentally mistaken." Justice Souter has stated that Alden's

345. Id. at 760.
346. See id. at 769.
347. Id. at 760 (citation omitted).
348. Id. at 769 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1998)).
349. Id. at 765 (quoting Alden v. Maine, 527 U.S. 706, 750-51 (1999)).
351. See id. at 766.
A TOAST TO THE DIGNITY OF STATES

“conception of state sovereign immunity . . . is true neither to history nor to the structure of the Constitution.” 353 Furthermore, Souter asserted in Seminole Tribe that the “indignity” rationale is “embarrassingly insufficient.” 354

Justice Breyer’s dissent in Federal Maritime Commission notes that the practical result of the Court’s current policy is to keep citizens from acting as private attorney generals to enforce federal law. 355 Although the Justice Department and federal agencies can themselves bring actions against States for violating federal law, as a practical matter, they do not because they lack the resources to do so. 356 As Breyer points out, federal agencies would have to rely heavily upon their own informal staff investigations in order to decide whether a citizen’s complaint has merit. 357 “The natural result [of this] is less agency flexibility, a larger federal bureaucracy, less fair procedure, and potentially less effective law enforcement.” 358

Siding with the dissent in opposing the Court’s expansion of the state’s immunity from the reach of federal law, one commentator has written that this expansion has occurred “without justification of any kind,” 359 threatening “intolerable injury to the enforcement of federal standards,” 360 and warning of the “danger to the exercise of democratic government.” 361 Furthermore, no justification for the immunity accorded to the fifty states has been shown. 362 Using City of Boerne v. Flores 363 as an example, author and federal judge for the Ninth Circuit John Noonan contends that the Supreme Court, as the devotee of dignity, “has embraced with mistaken enthusiasm a doctrine of state immunity that is overextended, unjustified by history, and unworkable in any consistent way.” 364 Judge Noonan calls into question the Supreme Court majority’s argument that immunity is important because “the dignity of the state

356. See id at 781-82.
357. See id. at 785.
358. Id.
359. NOONAN, supra note 285, at 154.
360. Id. at 155.
361. Id. at 140.
362. See id. at 10.
363. 521 U.S. 507 (1997) (holding the Religious Freedom Restoration Act unconstitutional as applied to state and local governments and that Congress cannot expand rights or create new rights pursuant to Section 5 of the Fourteenth Amendment).
364. NOONAN, supra note 285, at 11.
demands it." States are not people; people have dignity Noonan contends, and thus, the argument that state immunity has a moral quality of dignity is "inexplicable." Since states can't blush, all the attributes of dignity that are attributed to a person do not make sense when applied to a fictional entity. The claim that the sovereignty of the states is constitutional rests on the pretense that the idea of state sovereignty is somehow incorporated in the Eleventh Amendment. The constitutional connection referring to state sovereignty as an Eleventh Amendment matter is imaginary. Neither the text nor the legislative history of the Eleventh Amendment supports this claim. In his conclusion, Noonan harshly criticizes the Supreme Court's protection of the immunity of the states when he writes:

No reason in the [C]onstitution or in the nature of things or in the acts of Congress supplies an answer [to the question of why a state should have immunity]. The states are permitted to act unjustly only because the highest court in the land has, by its own will, moved the middle ground and narrowed the nation's power.

V. ANALYSIS: THE WINE WAR OUTCOME IN LIGHT OF CURRENT ELEVENTH AMENDMENT JURISPRUDENCE

In light of recent Eleventh Amendment jurisprudence where the Supreme Court has tipped the scales of federalism in favor of states' rights and states' sovereign immunity, it is unfortunate but likely that the Court, if it chooses to hear one of the several cases challenging the right of states to prohibit the direct shipment of wine from out-of-state producers to the homes of in-state consumers, would hold that the prohibitory statutes are constitutional.

Given the circuit court splits on the issue of the direct shipment of wine and the growing publicity of the issue, the stage is now set for the direct shipment battle to move to the Supreme Court. The reasoning in the New York, Texas, and Virginia cases are most persuasive, particularly because they demonstrate how Section 2 of the Twenty-First

365. Id. at 154.
366. Id.
367. See Power to the State (roundtable discussion), ABA J. 39, 42 (Jan. 2003) (comments by Erwin Chermerinsky, Professor of Law).
368. See NOONAN, supra note 285, at 151-52.
369. See id. at 152.
370. See id.
371. Id. at 156.
Amendment can be harmonized with the dormant Commerce Clause. As discussed in those cases, the Twenty-First Amendment was not meant to trump the Commerce Clause whenever a conflict arises. The Commerce Clause should trump Twenty-First Amendment regulation if permissible goals such as temperance or revenue-raising are accomplished by in-state favoritism when they can be accomplished by other means. With the issue of direct shipment, it is clear that the state laws prohibiting direct shipment are a vestigial structure remaining from the days following Prohibition and are perpetuated by state legislatures only for economic protectionism and encouraged by wholesalers to increase profits. Because other, non-discriminatory methods can be used by the state to regulate alcohol, the state direct shipment laws violate the Commerce Clause, and the Twenty-First Amendment does not make that violation constitutional.

Nevertheless, based on this nation's history of alcohol regulation and the present Court's interest in promoting states' rights as evidenced by recent Eleventh Amendment jurisprudence, it is far from clear that if faced with the direct shipment issue, the Supreme Court would decide against the states. The dissent in *Bacchus Imports, Ltd. v. Dias* (the Hawaii liquor tax case) may be particularly useful in understanding how the Court might view the direct shipment issue. The three dissenters in that case in 1984 were Justices Stevens, Rehnquist, and O'Connor, all of whom are still on the Court. The majority, none of whom are now on the Court, held that Hawaii's tax exemption for pineapple liquor violated the Commerce Clause because it discriminated in favor of in-state products and that the tax was not saved by the Twenty-First Amendment. In contrast, the dissenters asserted that the Commerce Clause claim was foreclosed by the Twenty-First Amendment, and they would have affirmed the constitutionality of the tax with its exemption. If Justices Stevens, Rehnquist, and O'Connor would still hold these opinions, it is likely they would be joined by Justices Scalia,

372. 468 U.S. 263 (1984). In *Bacchus*, the state of Hawaii acknowledged that it exempted okolehao and pineapple wine from its liquor tax in order "to promote a local industry." *Id.* at 276 (quoting Brief for Appellee Dias). The Court held that Hawaii liquor tax imposed on wholesale sales of liquor but exempting certain locally produced beverages was an unconstitutional violation of the Commerce Clause. *See id.* The Court noted with certainty that the purpose of the Twenty-First Amendment was not to give states the authority to favor local liquor industries at the expense of out-of-state competitors. *See id.*
373. *See id.* at 278.
374. *See id.* at 273-74.
375. *See id.* at 279.
Kennedy, and Thomas, creating a majority to uphold states’ prohibitions on direct shipment of wine.

Therefore, given the makeup of the Supreme Court and the Court’s recent Eleventh Amendment jurisprudence, it is likely that the Court will, unfortunately, uphold the power of the states to prohibit and limit the direct shipment of wine from out-of-state. While some commentators, including the author, may argue that prohibitions violate the Commerce Clause, the Court, given its mission to protect the “dignity” of the states, may interpret the Twenty-First Amendment as trumping the Commerce Clause and allowing states to restrict and limit the direct shipment of wine. If the “judicial power” of the Eleventh Amendment can be equated with administrative proceedings in order to allow states to avoid federal mandates, then surely dormant Commerce Clause concerns (which do not appear in the text of the Constitution) can fall to the Twenty-First Amendment in order to allow states unfettered control over alcoholic beverages.

VI. CONCLUSION

Small wineries and wine consumers want the option of selling and buying wine across state boundaries, and their demand is causing a grassroots legal battle—one in which wineries have teamed with consumers and free-trade groups against the alcoholic beverage distributors and wholesalers. The main argument that opponents of state bans on interstate shipments use is that the regulations violate the Commerce Clause, which gives Congress the authority to regulate interstate commerce and prohibits state discrimination against nonresident businesses. Proponents of bans on direct shipment of wine rely on the Twenty-First Amendment. The balance between the Commerce Clause and the Twenty-First Amendment is currently unclear. The differing approaches taken by the Seventh and Eleventh Circuits increase the likelihood that the Supreme Court will eventually take up the issue. While it seems like the “correct” constitutional methodology for evaluating the direct shipment of wine issue lies in the opinions of the district courts in New York, North Carolina, Texas, and Virginia, (as well as the Eleventh Circuit opinion) the Supreme Court’s protection of the “dignity” of the states emphasized in recent Eleventh
Amendment jurisprudence indicates that the Twenty-First Amendment may trump the Commerce Clause and the economic protectionism of state direct shipment laws will endure until legislatures change them.

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