

## CHANGING THE LAW: UPDATE FROM THE WINE WAR

by

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### I. INTRODUCTION

The so-called “wine war”<sup>1</sup> is a very focused example of how people with economic, political, and personal interests can change the law in the United States. The participants in this legal battle are, on one side: (1) owners of small wineries who want to ship wine directly to the homes of consumers throughout the country, and (2) those consumers/oenophiles who do not have many of those limited-production wines available at their local stores;<sup>2</sup> and, on the other side, (3) wholesalers who control the distribution of most alcoholic beverages in this country, and (4) state governments that are concerned with collecting taxes on alcoholic beverages and with preventing underage drinking.<sup>3</sup> The war, which is being waged in courts and legislatures, was precipitated by the existence of state statutes that prohibit the shipment of wine from out-of-state producers directly to the homes of in-state consumers<sup>4</sup> and by the recent proliferation of both interested consumers and small wineries throughout the nation.

State legislatures enacted the statutes after Prohibition when states instituted a three-tier system to keep control over the sale, distribution, and consumption of all alcoholic beverages. 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.<sup>5</sup> Under the 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. 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, and they would be unable to use excessive marketing techniques.<sup>6</sup> The legislatures assumed that consumption of alcohol would decline absent aggressive marketing and price-cutting.<sup>7</sup> Thus, the three-tier system would promote orderly markets and temperance.

When wineries ship wine directly to consumers, they break down the three-tier system by eliminating the wholesaler and the retailer; however, for most small wineries,<sup>8</sup> as a practical matter, the overhead imposed by the three-tier system is too expensive. Furthermore, small wineries generally cannot find wholesalers to carry their wines because there are not enough wholesalers to service them all.<sup>9</sup> By some estimates, the number of wholesalers has declined from a high of 20,000 to fewer than 400,<sup>10</sup> with the top ten wholesalers controlling more than half the market.<sup>11</sup> At the same time, the number of wineries in the United States has grown from under 400 to more than 2,100, about 2,000 of these, small, family-owned businesses that, in total, produce less than five percent of United States wine.<sup>12</sup> About twenty wineries make ninety percent of all the wine produced in this country.<sup>13</sup>

The most cost-effective way that a small winery has for selling its products is direct shipment to the residences of consumers who have visited the winery or have read about it in wine publications or on the Internet.<sup>14</sup> Every case sold directly to a consumer is about twice as profitable as a case sold through the three-tier system.<sup>15</sup> From the consumers’ point of view, direct shipment is also desirable because it is the only way they can have access to many of the wines produced by these small vineyards. These two groups have gotten together to change the law in states that prohibit direct shipment. On the litigation front they have challenged state statutes in eight states: Indiana,<sup>16</sup> Texas,<sup>17</sup> New York,<sup>18</sup> Virginia,<sup>19</sup> North Carolina,<sup>20</sup> Michigan,<sup>21</sup> Florida,<sup>22</sup> and Washington.<sup>23</sup>

The primary basis for the 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.<sup>24</sup> The position of the plaintiffs would probably seem intuitively correct to most consumers because they are so used to ordering every kind of product (except alcohol) on the phone or online from sellers all over the country. It would seem that states could not prohibit an out-of-state producer from sending a legal product into the state. Nevertheless, the defendants defend the right of states to regulate alcoholic beverages in this manner because of rights conferred by Section 2 of the Twenty-First Amendment. Many people remember that the Twenty-First Amendment repealed the Eighteenth Amendment,<sup>25</sup> but they are unfamiliar with Section 2 which says: “The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”<sup>26</sup> What Congress intended in this section is not entirely clear;<sup>27</sup> 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 interests and constitutional mandates.<sup>28</sup> The Court has said

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specifically that “the Twenty-First Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause.”<sup>29</sup>

By 2001 there are significant changes taking place on the legal fronts of the wine war. One of the two cases<sup>30</sup> decided last year that invalidated the state laws prohibiting direct shipment of wine, was overturned on appeal,<sup>31</sup> and the United States Supreme Court denied certiorari.<sup>32</sup> In the second of those cases, the judge denied the plaintiffs' motion for entry of a final judgment and partially granted the state's motion for reconsideration that had been pending for about a year.<sup>33</sup> Other cases brought by consumers and wineries challenging state law prohibitions are going forward in six other states.<sup>34</sup>

Ultimately perhaps more significant than the ongoing litigation are the many bills being offered in state legislatures to change current laws to allow out-of-state wineries to ship directly to consumers.<sup>35</sup> This paper will discuss the proposed legislation after analyzing the one appellate case that has upheld a direct shipment prohibition and reviewing the status of the other pending cases. The purpose of this paper is not to review the history of liquor regulation in this country or the relationship between the Twenty-First Amendment and the Commerce Clause. Those issues have already been discussed by this author and others.<sup>36</sup> The purpose of this paper is to demonstrate the broad national interest in this subject and how that translates into legal changes. It also discusses the reasons wholesalers and states give for prohibiting direct shipment and shows why the reasons are untenable and poor disguises for economic protectionism. The paper concludes that the wine war should end with the demise of state statutes that prohibit direct shipments from out of state, and that both courts and state legislatures should effect that demise.

## II. INDIANA'S PROHIBITION OF DIRECT SHIPMENT UPHELD

At the end of 1999 the United States District Court for the Northern District of Indiana held that the Indiana statute making it unlawful for out-of-staters, but not in-staters, to ship an alcoholic beverage directly to an Indiana residence was unconstitutional.<sup>37</sup> The plaintiffs were all Indiana wine collectors and included a professional wine critic.<sup>38</sup> They asserted that the statute hampered their wine collecting because many wines were not available in Indiana, and the critic claimed that the statute hindered the practice of his profession.<sup>39</sup> The judge concluded that the Indiana statute discriminated between in-state and out-of-state sellers of alcoholic beverages and, thus, violated the Commerce Clause.<sup>40</sup>

The State of Indiana appealed the decision to the United States Court of Appeals for the Seventh Circuit.<sup>41</sup> Judge Easterbrook, writing for himself and one other judge (the third judge on the panel having recused himself),<sup>42</sup> reversed the lower court's decision, reinstating the statute.<sup>43</sup> The opinion is very limited in scope, does not thoroughly analyze the constitutional issues, and demonstrates a lack of knowledge about the new wine industry. Therefore, it will probably have little impact on pending cases in other jurisdictions. Nevertheless, strongly supporting state sovereignty over alcoholic beverage regulation, it may prepage the result if the issue ever comes before the United States Supreme Court.<sup>44</sup>

Judge Easterbrook concluded that the only reason the plaintiffs wanted to invalidate the Indiana statute was so that they could continue avoiding Indiana taxes on wine shipped to them directly from out-of-state wineries.<sup>45</sup> He 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 alike.<sup>46</sup> He completely ignored the fact that many of the wines the plaintiffs want to buy are made by "family-farm" type wineries. Large California wineries may typically make 300,000 cases a year or more. A mid-size winery makes about 50,000 cases a year. A small "family-farm" type winery, like Zahtila in Napa, for example, might make only one or two thousand cases a year. There is no second-tier wholesaler that is going to want to, or be able to, distribute the thousands of wines made by such small wineries.<sup>47</sup> No wholesaler would put resources into efforts to sell those wines.<sup>48</sup> They are typically sold to visitors to the vineyard who taste, enjoy, and then want to ship a case home.<sup>49</sup> They would also be sold to oenophiles who particularly seek out these hard-to-find wines mentioned in wine publications and on Internet sites. Indiana third-tier retailers would also not be selling these small-production wines because they would not have the shelf space to stock them all. The Indiana statute thus, in effect, keeps these wines out of Indiana giving an advantage to Indiana wine retailers, wholesalers, and producers.

In his peculiar opinion, Judge Easterbrook concluded that the plaintiffs did not challenge another Indiana statute that limits alcoholic-beverage-sales permits to Indiana citizens because the only result plaintiffs wanted was to continue buying wine from out-of-state producers who did not have the permits required by Indiana law.<sup>50</sup> His entire focus, in an opinion that is unusually brief for one dealing with complicated constitutional issues, was on the difficulty the state has in enforcing its permit law and collecting taxes from out-of-state shippers.<sup>51</sup> He ruled for the state because in his view the only interest the consumers and out-of-state vineyards have is in avoiding Indiana excise taxes.<sup>52</sup>

The essence of Judge Easterbrook's constitutional jurisprudence explaining the relationship between the Twenty-First Amendment and the Commerce Clause is suggested in the first sentence of his opinion: "This case pits the [T]wenty-[F]irst [A]mendment, which appears in the Constitution, against the 'dormant [C]ommerce [C]lause,' which does not."<sup>53</sup> He made it clear that the Twenty-First Amendment trumps the Commerce Clause, stating that the Amendment authorizes states to regulate alcohol "in ways that it cannot control cheese."<sup>54</sup> Although the plaintiffs were outraged at this decision,<sup>55</sup> and the United States Supreme Court has specifically stated that the Twenty-First Amendment does not remove state regulation of alcoholic beverages from a Commerce Clause compliance requirement,<sup>56</sup> Judge Easterbrook's opinion maintained that Section 2 of the Amendment "closes the loophole left by the dormant [C]ommerce [C]lause . . . : direct shipments from out-of-state sellers to consumers that bypass state regulatory (and tax) systems."<sup>57</sup> 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.<sup>58</sup>

As a practical matter, that declaration is patently silly. The opinion stated that all wine, no matter its origin, is treated similarly because it all has to pass through Indiana's three-tier system. As a matter of fact, however, whereas Indiana vintners too small to be of interest to Indiana wholesalers can obtain an Indiana permit and ship directly to Indiana consumers, the challenged statute prohibits out-of-state vintners from doing likewise. This would seem to be a clear case of economic discrimination.

The United States Supreme Court refused to hear the plaintiffs' appeal of the Seventh Circuit decision.<sup>59</sup> It is interesting that people on both sides of the issue were pleased with the Court's denial. The Executive Vice President and Chief Executive Officer of the Wine & Spirits Wholesalers of America, Inc. expressed in a press release her pleasure that the Court "upheld Indiana's laws prohibiting direct shipping"<sup>60</sup> although the Court did no such thing. On the other side, the Wine Institute and the Coalition for Free Trade were also pleased by the Court's refusal to hear the Indiana case.<sup>61</sup> The industry thought this case was too narrow because the plaintiffs were all consumers.<sup>62</sup> The industry views the New York and Virginia cases, for example, as stronger because the plaintiffs include out-of-state wineries as well as in-state consumers.<sup>63</sup> The Coalition for Free Trade filed a brief asking the Supreme Court to deny the certiorari request because the case contained nothing about the economic injury to the wine industry caused by Indiana's prohibition on direct shipping.<sup>64</sup>

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 returning to a system where they could flout Indiana law and avoid paying tax on their wine purchases.<sup>65</sup> Although he noted Indiana's failure to enforce their permit and tax laws,<sup>66</sup> he did not seem to consider that there are ways to enforce such laws without prohibiting out-of-state boutique wineries from shipping to interested Indiana consumers.<sup>67</sup> Many state legislatures are currently considering just that issue. Legislative initiatives will be discussed in Section IV. First, it is instructive to compare an opinion of the federal district court in Kansas concerning prohibitions on alcoholic beverage permits for out-of-state residents.

### III. THE COMMERCE CLAUSE AND THE TWENTY-FIRST AMENDMENT: LIMITING ALCOHOLIC BEVERAGE PERMITS TO STATE RESIDENTS

In January of this year, the United States District Court for Kansas considered the constitutionality of the section of the Kansas Liquor Control Act<sup>68</sup> that requires distributors (as well as manufacturers and retailers) of alcoholic beverages in Kansas to be Kansas residents.<sup>69</sup> Although this was not a "wine" case because the plaintiffs were an out-of-state corporation and out-of-state individuals who wanted to be able to distribute wine, beer, and distilled spirits in Kansas, the statute at issue applies similarly to out-of-state vintners who want to ship directly to consumers. Judge Waxse wrote an opinion in this case that was much more realistic in appraising the factual situation and much more coherent in analyzing the constitutional implications than Judge Easterbrook's opinion in Indiana.

Judge Waxse explained that the Kansas Liquor Control Act established a three-tier system for the manufacture, distribution, and retail sale of alcoholic beverages with a prohibition on "tied houses," that is, one person operating on more than one tier.<sup>70</sup> The Kansas Act requires any person who wants to be a manufacturer, distributor, or retailer in Kansas to get a license, and most categories of license have some kind of residency requirement.<sup>71</sup> For example, an individual who wants a retailer's license must be a current Kansas resident and must have resided in Kansas for the four years immediately preceding application for the license.<sup>72</sup> A wine distributor applicant has a ten-year residency requirement.<sup>73</sup> The plaintiffs claimed that the residency requirements violate the Commerce Clause.<sup>74</sup> The State argued that the Twenty-First Amendment "saved" the statute because of the broad powers it grants to states to regulate alcoholic beverages.<sup>75</sup>

Judge Waxse first explained the "dormant" Commerce Clause, not by noting, as had Judge Easterbrook, that it was not written in the Constitution, but by citing Supreme Court cases which indicate that "the Clause has long been understood to have a 'negative' aspect that denies the states the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."<sup>76</sup> He then concluded that the Kansas residency requirement clearly discriminates against interstate commerce by erecting a substantial barrier to entry to the Kansas market by out-of-state liquor distributors.<sup>77</sup> It was then up to the State to show that the discrimination had a legitimate purpose other than economic protectionism and that the purpose could not be accomplished by nondiscriminatory means.<sup>78</sup> The judge rejected as without "plausible nexus" the State's assertion that the residency requirement was necessary to encourage temperance and to protect the general welfare, health, and safety of the people of Kansas.<sup>79</sup>

The State asserted that the residency requirement aided background investigations to keep criminals out of the industry.<sup>80</sup> The Judge was not persuaded, noting that the national criminal history system would be more effective for that purpose than the Kansas criminal history system which would show only crimes committed in Kansas.<sup>81</sup> Therefore, concluding that the residency requirement was discriminatory and a violation of the Commerce Clause, the Judge proceeded to analyze how the Commerce Clause is harmonized with the Twenty-First Amendment.<sup>82</sup>

The opinion outlined the history of the relationship between the Commerce Clause and the Twenty-First Amendment from the Supreme Court's initial broad reading of the Amendment to more recent decisions holding that state laws constituting mere economic protectionism are not saved by the Amendment from invalidity under the Commerce Clause.<sup>83</sup> The opinion concluded that the Kansas residency requirement was unconstitutional because rather than being directed towards the Amendment's "core

powers” of promoting temperance and avoiding “the evils of unregulated trafficking in liquor,” the requirement “constitutes nothing more than ‘mere economic protectionism’ and works only to insulate Kansas residents from outside competition.”<sup>84</sup>

If the state decides to appeal Judge Waxse’s decision,<sup>85</sup> the Tenth Circuit’s review of the case will be particularly interesting in light of the Seventh Circuit’s decision in the Indiana case. Whether or not there is an appeal, there is good reason for the Supreme Court to revisit the issue of the relationship between the Twenty-First Amendment and the Commerce Clause given the completely different analyses in the Seventh Circuit, on the one hand, and in the district courts in Kansas and Texas, on the other.

In the Texas case, a former Texas state representative and two other Houston men sued the head of the Texas Alcoholic Beverage Commission asserting that the state’s power to protect the health, safety, welfare, morals, and temperance of its citizens did not justify its direct shipment ban which violates the Commerce Clause.<sup>86</sup> The plaintiffs tried to purchase wine that was unavailable in Houston stores from a winery in Arkansas, but the winery refused to ship to them because of the Texas law.<sup>87</sup> The federal district court judge in Houston decided this case just the way her counterpart in the district court did in Indiana.<sup>88</sup> The judge stated that “there is no temperance goal served by the statute since Texas residents can become as drunk on local wines . . . as those . . . kept out of state by statute.”<sup>89</sup> Members of the Texas Alcoholic Beverage Commission voted to appeal the ruling alleging that unrestricted sales of wine by out-of-state sellers would eliminate all effective controls on sales of alcohol to minors and on sales of alcohol in dry areas of the state.<sup>90</sup> The district court judge, however, never entered a final order in the case, and she indicated she would not do so unless the United States Supreme Court refuses to hear the appeal of the Seventh Circuit’s decision in the Indiana case.<sup>91</sup> Now that the Supreme Court has done that and the judge partially granted the state’s motion for reconsideration,<sup>92</sup> some final action in this case should be forthcoming.

In the New York case, Judge Berman issued a Decision and Order denying the defendants’ motion to dismiss.<sup>93</sup> The plaintiffs in the case are an owner of a winery in Virginia, the owner of a winery in California, and three New York consumers.<sup>94</sup> In addition to claiming that New York’s Alcoholic Beverage Control Law (ABC Law) violates the Commerce Clause, the plaintiffs are also claiming that it violates the Privileges and Immunities Clause and the Free Speech Clause of the First Amendment.<sup>95</sup> Under the ABC Law, although the plaintiff winery owners are licensed in their home states to distribute alcoholic beverages to consumers, as out-of-state wineries they are ineligible to obtain a license in New York.<sup>96</sup> Thus, they argue, their ability to pursue their livelihood is significantly impaired and significantly disadvantaged compared to similarly situated New York winery owners violating a fundamental right guaranteed in the Privileges and Immunities Clause.<sup>97</sup> Furthermore, the plaintiffs claim that their free speech rights are violated by the ABC Law’s ban on advertising information about buying wines produced by out-of-state wineries.<sup>98</sup>

After the Seventh Circuit opinion in Bridenbaugh was issued, Judge Berman heard arguments to reconsider his denial of the defendants’ motion to dismiss, but affirmed his ruling. The judge’s schedule calls for plaintiffs’ initial brief to be filed in June 2001, and the defendants’ final reply brief to be filed in October 2001.<sup>99</sup>

In *Bolick v. Roberts*,<sup>100</sup> the Virginia case, cross-motions for summary judgment were made on January 19, 2001 and a decision is expected at any time.<sup>101</sup> In *Heald v. Engler*,<sup>102</sup> the Michigan case, cross-motions for summary judgment and for dismissal will be argued on June 13, 2001.<sup>103</sup> In that case, nine state universities including the University of Michigan, Michigan State University, and Wayne State University filed an amici brief arguing on behalf of the defendant State that the “availability of alcohol through the Internet increases the risk of underage drinking on campus.”<sup>104</sup> In that brief the amici rely on a variety of sources for the propositions that underage drinking is a problem and that college students are prolific users of the Internet, but the only sources they rely on to connect those two propositions (which leads them to the conclusion that direct shipment of wine to consumers will significantly exacerbate underage drinking) are statements and research done by Americans for Responsible Alcohol Access, an organization funded by the alcoholic beverage industry.<sup>105</sup>

In *Bainbridge v. Bush*,<sup>106</sup> the Florida case with plaintiffs who are Florida consumers and out-of-state winery owners, the court issued an order denying the State’s motion to dismiss<sup>107</sup> and denying the motion to intervene made by Wine and Spirits Distributors of Florida, Inc., Florida Beer Wholesalers Association, Inc., Beer Industry of Florida, Inc., and Independent Beverage Dealers, Inc.<sup>108</sup> Cross-motions for summary judgment have been filed in the North Carolina case.<sup>109</sup>

On March 26, 2001 two law students sued the State of Washington challenging its reciprocal direct shipment statute as violative of the Commerce Clause and the First Amendment’s free speech protection.<sup>110</sup> What is particularly unusual about this case is that Washington falls into the group of states with the most liberal laws on direct shipping, as described in the next section.

#### IV. STATE LEGISLATURES ADDRESS THE DIRECT SHIPMENT ISSUE

Opponents of prohibitions on direct shipment have not only attacked the prohibitions in court, but have lobbied state legislatures to change the laws. Currently, states have a variety of schemes for regulating the direct shipment of wine. In the strictest states, direct shipment from out of state is expressly prohibited. In New York, for example, no alcoholic beverages may be shipped into the state from anywhere in the United States unless they are being sent to a licensed seller.<sup>111</sup> Similar laws exist in Alaska,<sup>112</sup> Arkansas,<sup>113</sup> Kansas,<sup>114</sup> Maine,<sup>115</sup> Massachusetts,<sup>116</sup> Michigan,<sup>117</sup> Mississippi,<sup>118</sup> Montana,<sup>119</sup> Ohio,<sup>120</sup> Oklahoma,<sup>121</sup> Pennsylvania,<sup>122</sup> South Carolina,<sup>123</sup> South Dakota,<sup>124</sup> Texas,<sup>125</sup> Utah,<sup>126</sup> Vermont,<sup>127</sup> and Virginia.<sup>128</sup> Some of these states do allow consumers to *bring* into the state a limited amount of liquor. Arizona would have been on this list, but in 1999 it enacted a new statute that allows a person licensed in another state as a producer of liquor to obtain a direct shipment license in Arizona.<sup>129</sup> In an

unusual arrangement, the direct shipment licensee may not ship to the consumer who places the order, but must ship to a licensed wholesaler who will pay all luxury taxes and who will deliver the liquor to a licensed retailer.<sup>130</sup> The retailer will pay all transaction privilege taxes and will arrange to have the liquor delivered to the consumer.<sup>131</sup>

Four states not only have a statutory prohibition for direct shipment, but have made it a felony to violate the statute. Maryland enacted a statute effective October 1, 1999 that prohibits out-of-state wine sellers from shipping wine into Maryland if they do not have a Maryland license; violation is a felony with a penalty of up to two years in prison and a fine of up to \$1000.<sup>132</sup> Other felony states are Florida,<sup>133</sup> Kentucky,<sup>134</sup> and Tennessee.<sup>135</sup> Similar violations in Indiana<sup>136</sup> and North Carolina<sup>137</sup> are felonies except for those who hold basic permits from the United States Bureau of Alcohol, Tobacco and Firearms.<sup>138</sup> Georgia had a felony law<sup>139</sup> until July 1, 2000 when a bill became effective that allows Georgians to have wine from out of state delivered to their homes.<sup>140</sup>

Florida enacted its felony statute in 1997 after Southern Wine & Spirits of America Inc., the nation's largest wine and liquor wholesaler, engaged in a vigorous lobbying campaign promoting the legislation.<sup>141</sup> During the eighteen months before its passage, Southern donated about \$60,000 to Florida legislators and political parties.<sup>142</sup> The felony statute passed easily in spite of opposition from Florida's Attorney General.<sup>143</sup>

Another group of states allows the direct shipment of wine to consumers by out-of-state producers, if the consumers get a permit to import for their own personal use. In Alabama, for example, a person wishing to import wine for his own consumption must first get written approval from the Alcoholic Beverage Control Board, must have the wine shipped to a Board state liquor store, and then must pay a tax equal to that which would have been paid had the wine been purchased in Alabama.<sup>144</sup> Other states with these kinds of arrangements include New Jersey,<sup>145</sup> Connecticut,<sup>146</sup> Hawaii,<sup>147</sup> Rhode Island,<sup>148</sup> and the District of Columbia.<sup>149</sup> In Delaware a consumer is permitted a daily importation of alcoholic beverages that does not exceed the "amount which the United States government permits to be imported into the United States without payment of any duty," as long as the alcoholic beverages imported are solely for consumption by the person importing it, his family or his guests.<sup>150</sup>

Five states permit out-of-state wine producers to ship directly to consumers with specific limitations. New Hampshire, for example, allows those who are licensed in their own states as manufacturers of alcoholic beverages to apply to the liquor commission for a permit as a direct shipper for a fee of \$228 a year.<sup>151</sup> Direct shippers must clearly mark their packages "Alcoholic Beverages, adult signature (over twenty-one years of age) required," they must use licensed carriers, they may not ship more than sixty liters each of liquor and wine nor more than twenty-seven gallons of beer in one year to one consumer's address, and they must pay a fee of eight percent of the retail price of the products shipped.<sup>152</sup> Louisiana enacted a similar statute in mid 1998.<sup>153</sup> Nebraska<sup>154</sup> and North Dakota<sup>155</sup> allow the direct shipment to consumers of up to nine liters of alcoholic liquor in any one month. Nevada allows twelve cases of wine a year.<sup>156</sup>

Twelve states, California,<sup>157</sup> Colorado,<sup>158</sup> Idaho,<sup>159</sup> Illinois,<sup>160</sup> Iowa,<sup>161</sup> Minnesota,<sup>162</sup> Missouri,<sup>163</sup> New Mexico,<sup>164</sup> Oregon,<sup>165</sup> Washington,<sup>166</sup> West Virginia,<sup>167</sup> and Wisconsin<sup>168</sup> have been called reciprocity states. They allow out-of-state wineries to ship wine into the state. The statutes in these states have the following provisions in common: 1) Shipments may be made only between states that offer each other the same reciprocal privilege; 2) Liquor may be sold only to persons at least twenty-one years old; 3) Packages must be clearly marked to indicate that delivery will not be made to a minor or to an intoxicated person; and 4) The amount shipped is limited to two cases (no more than nine liters each case)<sup>169</sup> per month.

Wyoming has just enacted a statute, effective July 1, 2001, that does not require reciprocity, but does contain the other three provisions noted in the statutes in the reciprocity states.<sup>170</sup> The Wyoming law requires the shipper to obtain a license and pay a license fee of fifty dollars.<sup>171</sup> It also requires the shipper to pay a twelve percent tax of the retail price of each shipment, remitting the tax with a monthly report.<sup>172</sup>

In most of the states that do not permit direct shipment to consumers, bills have been introduced to change that situation.

In Alabama, for example, in February 2001 the Senate Committee on Governmental Affairs reported favorably on a bill that would allow "any person currently licensed in any other state as an alcoholic beverage producer . . . who obtains an out-of-state shipper's license . . . [to] ship up to 24 bottles per month of any table wine directly to a resident of Alabama who is at least 21 years of age for such resident's personal use."<sup>173</sup>

In Arkansas the House has passed a reciprocal shipment bill and, it is being considered in the Senate's Committee on Revenue and Taxation.<sup>174</sup> The bill authorizes sales made by an out-of-state winery of not more than two cases of wine per month for personal use without payment of additional state tax "if the state from which the wine is sent allows its residents to receive wine from [Arkansas] without imposition of state tax."<sup>175</sup> It also contains the age, labeling, and delivery limitations of the other reciprocity states.<sup>176</sup>

Connecticut, which currently allows its residents to bring into the state a limited amount of wine purchased in another state, has a bill pending in the General Assembly that would allow a person with an out-of-state shipper's license to ship up to twenty-four bottles of wine a month to a state resident of at least twenty-one years of age if the recipient signs for the delivery, the shipper reports the shipment to the Department of Consumer Protection, and all taxes are paid.<sup>177</sup>

In Florida, where a felony statute was enacted in 1997, a bill is being considered in three Senate committees that would allow the direct shipping of no more than four cases of wine per year to a state resident.<sup>178</sup> It is interesting to note the differences among the many bills offered in state legislatures because they indicate the concerns of the legislators and their attempts to

eliminate the problems they anticipate with direct shipping. Most statutes or bills permitting direct shipping allow two cases (twenty-four bottles) a month.<sup>179</sup> One can only infer that the same vigorous lobbying by Florida wholesalers that resulted in the enactment of the felony statute is still at work in the state, and that is the reason for the Florida bill's unusually low limit on the number of cases that may be shipped. In addition, instead of requiring an annual report and annual payment of tax revenue to the state by out-of-state shippers, the Florida bill requires a monthly report and monthly payment.<sup>180</sup> Furthermore, the bill requires that prior to receiving a shipment, the recipient register with the Division of Alcoholic Beverages and Tobacco.<sup>181</sup> The bill still makes non-compliance a felony.<sup>182</sup> Such burdensome requirements are bound to make the law, if enacted, a failure. Perhaps that is the goal of some supporters of the legislation.

Other states with restrictive laws are also considering bills which would allow direct shipment but for very small amounts of wine. The Hawaii legislature has a bill pending and the Indiana legislature had a similar one pending last year that would allow manufacturers of wines in states that grant their manufacturers of wine "an equal reciprocal privilege" to ship not more than two cases *per year* to their residents.<sup>183</sup> All of the current "reciprocal" states permit two cases *per month* to be shipped. Indiana's bill was not passed last year. This year Indiana has a new bill that takes a novel approach. It would create a "wine connoisseur's permit."<sup>184</sup> The permit would cost twenty-five dollars a year; it would allow anyone at least twenty-one years of age to purchase wine in another state and ship it home to an Indiana residence; and it would require the permit holder to report annually the dollar amount spent on wine under the permit.<sup>185</sup> The bill seems directed at the Indiana resident who visits an out-of-state winery and, while there, decides to ship wine home. The language of the bill does not, however, make it clear whether the permit holder has to be present in the other state to purchase wine there or whether one can "purchase wine in another state" by phone or Internet in Indiana. It is interesting that, perhaps encouraged by the *Bridenbaugh* cases, legislators in Indiana have recognized the plight of Indiana oenophiles. Nevertheless, this bill does not address what the State, and certainly Judge Easterbrook, asserted was its primary concern in direct shipment, namely the avoidance of taxes.

In Maryland, a state that makes shipping wine into Maryland without a Maryland license a felony, a bill has been introduced this year that would allow a person in the business of selling or distributing wine in another state to ship no more than two bottles of wine directly to a consumer only if the consumer is a member of a wine club or if the Maryland consumer has purchased the wine on the premises of the seller's winery.<sup>186</sup> This is an attempt, similar to the one in Indiana, of eliminating the prohibition on direct shipment only to the smallest extent possible that might mollify wine collectors without having any significant impact on local wholesalers. A Texas bill incorporates the same idea of making provision for the person who visits a winery and wants to have a case sent home, but does so without putting a limitation on the amount that may be sent. The Texas bill provides that a person may buy wine and have it shipped home as long as the person buys the wine while physically present at the winery and physically present when it is delivered.<sup>187</sup> Another Maryland bill that would have allowed the direct shipment of up to a case a month if the consumer paid a one hundred dollar licensing fee in lieu of taxes has already been rejected by the Maryland Senate's Economic and Environmental Affairs Committee, even though the sponsors offered to amend it so that consumers would also pay an annual twenty-five dollar fee to have the wine shipped, instead of to their residences, to a nearby retailer who would collect taxes and a handling fee.<sup>188</sup> The bill was opposed by the state's comptroller and by liquor wholesalers.<sup>189</sup> The president of a wholesale company testified that the bill threatened the jobs of his four hundred employees,<sup>190</sup> a patently silly assertion in light of the one case a month limitation in the bill. A lobbyist for an industry association testified that the system should not be changed just because his "'yuppie neighbors'" could not buy wines they wanted.<sup>191</sup> Representatives of Maryland's wineries said they would benefit from a reciprocity law because then they would be able to ship to other states, but they did not testify at the hearings for fear of angering the state comptroller, a staunch supporter of the existing felony statute.<sup>192</sup>

Some states have more than one bill pending about direct shipment. Massachusetts, for example, has a bill that would permit direct shipping with the basic limitations set in the reciprocity states: only to residents at least twenty-one years of age for their personal use and not for resale; registration and payment of a modest (\$100) fee; ship no more than twenty-four bottles per month to any person; conspicuously label all shipments "SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY;" report annually the total amount of wine shipped in the prior year; and consent to Massachusetts jurisdiction.<sup>193</sup> Massachusetts has another bill pending that would make it a felony punishable by a fine of up to ten thousand dollars and/or by imprisonment for up to a year, for an out-of-stater to ship wine directly to a Massachusetts consumer.<sup>194</sup> New York also has a bill pending that would make it a reciprocity state,<sup>195</sup> and another pending that would prohibit any wine or liquor shipment into the state that is not delivered to a licensed wholesaler or that is not stored in New York for at least twenty-four hours before being delivered to a licensed retailer.<sup>196</sup>

Montana, a state that already prohibits direct shipment, has a bill pending that reiterates the prohibition as a "declaration of public policy" because the legislature found that the direct shipment by out-of-staters of wine and other alcoholic beverages "poses a serious threat to the public health, safety, revenue, and economy of this state."<sup>197</sup> The bill would also make a violation of the statute a felony punishable by a fine between one and five thousand dollars and/or imprisonment for between one and five years.<sup>198</sup>

Nebraska, another state that prohibits direct shipment, has bills pending with two innovations. One would create a special law allowing direct shipment for anyone selling alcoholic beverages through the Internet,<sup>199</sup> and the other would create a special law for "small, local farm wineries."<sup>200</sup> Farm wineries whose output did not exceed fifteen thousand gallons (approximately 6,667

cases) a year would be allowed to ship wine directly to consumers within and outside Nebraska.<sup>201</sup> The bill does not, however, authorize out-of-state farm wineries to ship directly to Nebraska consumers. In an Opinion Letter requested by the Nebraska Senate General Affairs Committee, the Nebraska Attorney General suggested that the Internet bill could raise Equal Protection problems if there is no rational basis for treating those who sell alcoholic beverages through the Internet differently from those selling alcoholic beverages over the phone, by mail, or through media advertising.<sup>202</sup> In an important aside, the Attorney General noted that he was not “address[ing] the practical difficulties inherent in enforcement of the [tax] requirements which [the bill] would impose.”<sup>203</sup>

A South Dakota bill proposes a system similar to, but even more cumbersome than, the one currently in use in Alabama. A consumer may “purchase and receive wine” that is not distributed in South Dakota if a reciprocal agreement exists between South Dakota and the state from which the wine is being sent, and if the consumer orders it from a licensed South Dakota retailer who will order it from a licensed South Dakota wholesaler.<sup>204</sup> This proposal certainly does not conveniently address the problem of the South Dakota oenophile who visits a California winery and wants to have a case shipped home. It is also not clear why South Dakota retailers and, especially, wholesalers would want to participate in this purchase. No consumer ordering wine under this proposal could purchase more than twelve cases a year<sup>205</sup> so the profit-making possibilities would probably not make up for the inconvenience.

In Texas, where there are at least three bills liberalizing the direct shipment laws currently before the legislature, the lobbying to maintain the status quo is intense and well publicized. One bill introduced in both the House<sup>206</sup> and the Senate<sup>207</sup> is stalled in committee after volatile hearings.<sup>208</sup> The bill would permit Texas residents to have shipped to themselves for personal use three gallons of wine (a little over a case) a month.<sup>209</sup> The direct shipper would have to label the shipment conspicuously requiring the signature of a person at least twenty-one years old, would have to pay an annual fee and all taxes, and would have to submit an annual report indicating how much wine had been shipped and the prices.<sup>210</sup> Another bill would allow only Texas wineries to ship up to two cases of wine in a thirty-day period directly to Texas consumers.<sup>211</sup> The lobbying against these bills is a good example of the nationwide effort to maintain the prohibitions on interstate shipping of wine directly to consumers.

## V. PROTECTING MINORS AND COLLECTING TAXES

The Licensed Beverage Distributors of Texas (LBD), an industry association that represents the four wholesalers that dominate alcohol distribution in Texas, recently sponsored the launching of the Texas Safety Network, an Internet site created to encourage the public to protest any change in the direct shipment law.<sup>212</sup> The visitor to the site first views a cheerful five-year-old boy selling lemonade; at eleven he is selling newspapers.<sup>213</sup> Then a cheerless adolescent is viewed accompanied by the words, “At 14 he’s selling booze he bought on the internet to his friends.”<sup>214</sup> The site then proclaims, “The Texas Legislature wants to make it easier for kids to get alcohol.”<sup>215</sup> The LBD also mailed out postcards with the same story of the “entrepreneurial” youth, and the organization was accused of racism because the young lemonade and newspaper sellers were represented as white boys while the fourteen year old “booze” seller was represented by a black teen.<sup>216</sup>

The LBD, other wholesaler industry groups, some state officials, some church groups, and other opponents of direct shipment give as the reasons for their opposition: 1) it would encourage underage drinking; 2) it allows shippers to avoid taxes; and 3) it allows shippers to ignore dry county laws.<sup>217</sup> Nowhere do wholesalers mention that their willingness to spend so much money on lobbying activities is related to their fear of losing business if out-of-state wineries can bypass the middle distribution tier. Nowhere do opposition legislators mention the political support they have received from the wholesaler industry. Alcoholic beverage wholesalers and retailers in Texas spent about \$330,000, most of it in contributions to candidates, during the 2000 election cycles.<sup>218</sup>

There is support in Texas for the new legislation among owners of small Texas wineries and in the Texas Department of Agriculture.<sup>219</sup> Supporters see an opportunity for rural areas of Texas to develop a new industry, “creating a Texas Napa Valley.”<sup>220</sup>

Grapevines need much less water than other crops; during the drought of 2000, Texas grapes made about \$1,800 an acre, while crops like cotton and corn lost money.<sup>221</sup> In 1982 wineries in Texas produced about 50,000 gallons of wine; today they produce about thirty times that amount.<sup>222</sup> There are forty-six wineries in Texas, but only about ten of them are large enough to have wholesale distributors.<sup>223</sup> Owners of small wineries view the opportunity to ship as more important than resulting competition from California vintners who would be able to ship into Texas.<sup>224</sup> Similar burgeoning wine industries exist in most states.<sup>225</sup>

Supporters of eliminating the bans argue that direct shipment will not lead to more underage drinking. The assistant director of the Texas Alcoholic Beverage Commission has stated that minors are not inclined to order wine on the Internet; they generally want beer, and they want something they can drink immediately.<sup>226</sup> The Deputy Director of the California Alcoholic Beverage Control Commission, in a state where direct shipment has been permitted for at least twenty years, has testified that his department has not experienced any problems with minors importing alcoholic beverages.<sup>227</sup> His studies have shown that approximately sixty-seven percent of high school seniors who say they drink alcohol also say they can buy it locally, leading him to conclude that if it is so easy to get alcohol in the neighborhood, young people are not going to have it shipped in from out of state.<sup>228</sup> 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.<sup>229</sup> If wine shipments are problematic, these

states would know about it and, presumably would have discontinued the practice.<sup>230</sup>

Collecting taxes (including sales or use taxes due on purchases of many different kinds of goods and services, and excise taxes due specifically on alcoholic beverages) on shipments of wine directly to consumers can be a problem, but it is not a new problem, and it is not peculiar to wine. It is the same problem states have had with all Internet sales and with old-fashioned catalogue sales. The emergence of the Internet as a significant medium for retail sales has made interest in the collection of state sales and use taxes explode. Many articles have been written on the subject in both the popular press and in academic journals.<sup>231</sup> Many contain in-depth discussions of sales and use taxes and the constitutional limitations on their collection, but that discussion is beyond the scope of this article. What is relevant to the present discussion is the difficulty states have had in collecting sales or use taxes on goods purchased by residents from out-of-state sellers, their very limited attempts to do so in the past, recent activism to improve the system, and the immateriality for tax collection purposes of whether the goods shipped from out of state are cheese or computers or wine or whether the particular tax is a sales tax, a use tax, or an excise tax.

Forty-five states levy a sales tax.<sup>232</sup> Nevertheless, states have not collected sales tax on many goods shipped to residents by out-of-state-sellers because the Supreme Court has said that a state can require only a seller with a “substantial nexus” to the state, that is, with a physical presence in the state (by, for example, owning property or stationing employees or maintaining a store in the state), to collect sales tax.<sup>233</sup> Every state with a retail sales tax also has a use tax which is owed on goods purchased by consumers from out of state that are used within the state, but on which they have not paid a sales tax<sup>234</sup>. Use taxes are supposed to be remitted by consumers to the state, but few do it<sup>235</sup> and, until recently, states have generally ignored that loss of revenue.<sup>236</sup>

With the emergence of the Internet as a method for buying goods, states have become very interested in collecting these taxes that are owed. 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.<sup>237</sup> In addition, traditional retailers are lobbying for a level playing field on which all sellers of the same goods, no matter their location, are required to collect the same taxes. Therefore, many states are finally making an attempt to solve the problem of collecting these taxes by making it easier for e-tailers and other distance sellers to collect and remit them, and by informing consumers that the law requires their remitting the use tax and making it easier for them to do so.

Thirty-two states are participating in the Streamlined Sales Tax Project which they created to “develop measures to design, test and implement a sales and use tax system that radically simplifies sales and use taxes.”<sup>238</sup> Twenty-one states have put a line on their income tax forms requiring taxpayers to indicate how much they owe in use tax.<sup>239</sup> Some southeastern states exchange audit data to help determine where goods have been shipped so they can collect use taxes.<sup>240</sup> Finally, states have asked Congress to enact federal legislation that would subject out-of-state sellers to state sales tax.<sup>241</sup>

Thus, it is unreasonable to single out direct shipment of wine as causing a particular tax collection problem for states. Directly shipped wine would be a very small fraction of all wine purchases and a very minute fraction of all directly shipped goods in total. In fact, collecting taxes on wine shipped directly to consumers might be less of a problem than collecting sales taxes on other goods shipped directly to consumers. Operators of wineries must obtain a Federal Basic Permit (FBP) that is overseen by the Bureau of Alcohol, Tobacco and Firearms (ATF).<sup>242</sup> If a state reported a violation of its laws to the ATF, the ATF could cancel the FBP, and the winery would be out of business. There is certainly no reason why wineries selling directly to consumers should not have to collect state taxes, and there is no reason why consumers shopping that way should get a windfall. 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 and their walk-in customers. That, however, is the same argument that applies to amazon.com or L.L. Bean.

Supporters of the new legislation do not see it threatening dry counties. In Texas, thirty-seven counties allow the sale of alcohol county-wide, fifty-two are dry, and the rest have a combination of wet and dry precincts.<sup>243</sup> Nevertheless, the assistant director of the Texas Alcoholic Beverage Commission has described most dry areas as being in reality “damp,” that is, containing private clubs open to all where visitors can drink as much alcohol as they want.<sup>244</sup>

All proposed legislation prohibits shipping wine to dry precincts. Wholesalers argue that it will be difficult to enforce such a ban if shipping is permitted at all. The argument is, however, disingenuous. They assert that illegal direct shipping occurs now; if that is the case, legalizing direct shipment should not have any greater impact on dry precincts. In fact, if threatened with the loss of their winery licenses that permit them to ship into the state, it would not make business sense for small wineries to violate the law by shipping to dry areas.

## VI. CONCLUSION

The number of the proposals across the country for regulating the direct shipment of wine to consumers indicates the great national interest in the issue. The differences among them illustrate the workings of our federalist system with each state serving as an individual laboratory for achieving successful regulation. It does not seem too difficult, however, to distinguish between those proposals that attempt to satisfy all legitimate interests to some extent and those whose main purpose is to keep local wholesalers happy. It is reasonable for states to want anyone shipping wine into the state to have a local permit; to refuse to ship to minors and to enlist shipping companies that will be diligent about not leaving wine shipments with minors; and to collect taxes equal to those that would be imposed if the wine were purchased from a local retailer through the usual three-tier system.

States should enact legislation that accomplishes all those purposes, and should streamline procedures for collecting retail taxes.

When the issue is thus resolved to allow small out-of-state wineries to ship and consumers to buy a reasonable amount of their wine (two cases a month, for example), there will be no losers. A national industry of small wineries will be stimulated. Wine aficionados will be able to buy wines from all over the country. Underage drinking will not be abetted. States will be able to collect taxes that they were not collecting before. Wholesale and retail liquor dealers will see little change in their business. This country is based on the notion that interstate economic protectionism is bad economically and politically. There is no reason for the business of wine to be exempt from that notion.

#### Footnotes

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<sup>1</sup>See *Wine Wars*, WALL ST. J., July 23, 1999, at A14.

<sup>2</sup>For example, a law professor in Indiana read in a magazine a list of the top 100 wine values of the year, but his local store carried only three and the biggest wine retailer in the state carried only five. Jan Goehring, *Courts Unplug the Wine Debate*, STATE LEGISLATURES, May 1, 2001, at 32, at 2001 WL 12279682.

<sup>3</sup>See Susan Lorde Martin, *Wine Wars—Direct Shipment of Wine: The Twenty-First Amendment, the Commerce Clause, and Consumers' Rights*, 38 AM. BUS. L.J. 1, 3-10 (2000); see also Peter Sinton, *No Wine across the Line -- Vintners Confront States' Shipping Laws*, S.F. CHRON., Jan. 29, 2001, at B1.

<sup>4</sup>See *infra* notes 111-38 and accompanying text; see also Martin, *supra* note 3, at 27-33; Duncan Baird Douglass, *Note, Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1648-51 & nn.134-37 (2000); John Foust, *State Power to Regulate Alcohol under the Twenty-First Amendment: The Constitutional Implications of the Twenty-First Amendment Enforcement Act*, 41 B.C. L. REV. 659, 666-67 & nn.52-55 (2000).

<sup>5</sup>Alix M. Freedman & John R. Emshwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking Its Very Private World*, WALL ST. J., Oct. 4, 1999, at A1.

<sup>6</sup>California Beer Wholesalers Assn. v. Alcoholic Beverage Control Appeals Bd., 487 P.2d 745, 748 (Cal. 1971).

<sup>7</sup>*Id.* at 748 n.7.

<sup>8</sup>Large wineries may sell 100,000 cases a year or triple that or more. Medium wineries frequently sell between 40,000 and 60,000 cases a year. Small wineries may sell several hundred to several thousand cases of wine a year, usually comprised of several different varieties.

<sup>9</sup>Greg Garland, *Holiday Spirits: Return to Sender; Md. Toughens Law against Shipping Alcohol to Customer*, BALTIMORE SUN, Dec. 24, 1999, at 1A (quoting president of the Association of Maryland Wineries). Of the approximately 900 wineries in California, only about 150 have national distributors. Clifford Carlsen, *Wine Sales Turn Web into Battleground for Vintners*, S.F. BUS. TIMES, Nov. 19, 1999, at 22.

<sup>10</sup>145 CONG. REC. S5472 (daily ed. May 18, 1999). Other estimates are significant but not quite as dramatic: from 10,900 in 1963 to 2,828 in 1999. Sinton, *supra* note 3.

<sup>11</sup>Sinton, *supra* note 3.

<sup>12</sup>Sinton, *supra* note 3.

<sup>13</sup>145 CONG. REC. at H6864 (daily ed. May 18, 1999) (statement of Rep. Radanovich of California).

<sup>14</sup>Sinton, *supra* note 3.

<sup>15</sup>Alix M. Freedman & John R. Emshwiller, *supra* note 5; see also *Florida Wine Company Goes Online to Boost Sales*, MIAMI HERALD, Dec. 17, 1999. Another estimate by an opponent of direct shipment is that a case sold directly to the consumer is as profitable as ten or twenty cases sold through the three-tier system. Cora Nucci, *Can't Ship that Wine if It's Bought Online*, CMP TECHWEB, Feb. 12, 2001, at 2001 WL 5990753 (statement of Steve Barsdy of Steve Barsdy and Associates, an alcohol beverage research firm in Columbus, N.C.).

<sup>16</sup>Bridenbaugh v. O'Bannon, 78 F. Supp. 2d 828 (N.D. Ind. 1999), *rev'd*, Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7<sup>th</sup> Cir. 2000), *cert. denied*, Bridenbaugh v. Carter, 121 S. Ct. 1672 (2001).

<sup>17</sup>Dickerson v. Bailey, 87 F. Supp. 2d 691 (S.D. Tex. 2000).

<sup>18</sup>Swedenburg v. Kelly, No. 00-CV-778, 2000 WL 1264285 (S.D.N.Y. Sept. 5, 2000) (denying defendant's motion to dismiss).

<sup>19</sup>Bolick v. Roberts, No. 3:99-CV-755 (E.D. Va. filed Nov. 15, 1999).

<sup>20</sup>Beskind v. Easley, No. 3:00-CV-258-MU (W.D.N.C. filed June 5, 2000).

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<sup>21</sup>Heald v. Engler, No. 00-CV-71438-DT (E.D. Mich. filed Mar. 22, 2000).

<sup>22</sup>Bainbridge v. Bush, No. 8:99-CV-2681-T-27E (M.D. Fla. filed Nov. 24, 1999).

<sup>23</sup>Mast v. Prince, No. CS-01-0091-FVS (E.D. Wash. filed Mar. 26, 2001).

<sup>24</sup>See Martin, *supra* note 3, at 17.

<sup>25</sup>U.S. CONST. Amend. XXI, § 1.

<sup>26</sup>*Id.* § 2.

<sup>27</sup>See Martin, *supra* note 3, at 14.

<sup>28</sup>*Id.* at 14-20.

<sup>29</sup>Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 584 (1986); *see also* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) (holding that the Twenty-First Amendment and the Commerce Clause “each must be considered in light of the other”).

<sup>30</sup>Dickerson v. Bailey, 87 F. Supp. 2d 691 (S.D. Tex. 2000); Bridenbaugh v. O’Bannon, 78 F. Supp. 2d 828 (N.D. Ind. 1999).

<sup>31</sup>Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7<sup>th</sup> Cir. 2000).

<sup>32</sup>Bridenbaugh v. Carter, 121 S. Ct. 1672 (2001).

<sup>33</sup>Order, Dickerson v. Bailey, Civ. No. H-99-1247 (S.D. Tex. Mar. 26, 2001), *available at* <http://www.wswa.org/litigation/>; Russ Bridenbaugh, *The Direct Shipping Controversy*, WINES & VINES, Jan. 1, 2001, *available at* 2001 WL 14085905.

<sup>34</sup>*Id.*; *see supra* notes 17-23 and *infra* notes 86-108 and accompanying text.

<sup>35</sup>See *infra* notes 173-211 and accompanying text.

<sup>36</sup>See, e.g., Douglass, *supra* note 4; Foust, *supra* note 4; Martin, *supra* note 3; Vijay Shanker, *Note, Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 355 (1999).

<sup>37</sup>78 F. Supp. 2d at 832.

<sup>38</sup>*Id.* at 830.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.* at 832.

<sup>41</sup>Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7<sup>th</sup> Cir. 2000).

<sup>42</sup>*Id.* at 848 n.\*.

<sup>43</sup>*Id.* at 854.

<sup>44</sup>The plaintiffs have submitted a Petition for a Writ of Certiorari.

<sup>45</sup>227 F.3d at 854.

<sup>46</sup>*Id.* at 853.

<sup>47</sup>See, e.g., Ted Appel, *Less Whining about Wine; More States Moving to Ease or Eliminate Rules that Prevent Consumers from Buying Wines Directly from Vintners*, PRESS DEMOCRAT, Mar. 4, 2001, at E1.

<sup>48</sup>*Id.* (discussing distributor’s sales force that was more interested in selling familiar, high-volume wines from large wineries like Robert Mondavi than in trying to sell unknown boutique wines).

<sup>49</sup>See, e.g., *id.* (discussing a California vintner who produces 4,000 cases of wine a year and makes sixty to seventy percent of his profit by selling thirty to forty percent of his wines directly to consumers who visit his tasting room, join his wine club, or order by mail, phone or Internet).

<sup>50</sup>Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 854 (7<sup>th</sup> Cir. 2000).

<sup>51</sup>*Id.* at 850 (noting that permit laws are “devilishly difficult to enforce” and that states have “insuperable problems” trying to collect taxes like use taxes).

<sup>52</sup>*Id.* at 854.

<sup>53</sup>*Id.* at 849.

<sup>54</sup>*Id.* at 851.

<sup>55</sup>See, e.g., Bridenbaugh, *supra* note 33.

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<sup>56</sup>Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 275 (1984); *see also* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964) (holding that it would be “patently bizarre” and “demonstrably incorrect” to conclude that Section Two of the Twenty-First Amendment repealed the Commerce Clause with reference to liquor).

<sup>57</sup>227 F.3d at 853.

<sup>58</sup>*Id.* at 853-54.

<sup>59</sup>Bridenbaugh v. Carter, 121 S. Ct. 1672 (2001).

<sup>60</sup>Statement by Juanita D. Duggan Executive Vice President and CEO of Wine & Spirits Wholesalers of America, Inc. on Supreme Court Ruling of April 23, 2001, at <http://biz.yahoo.com/prnews/010424/dctu090.html>.

<sup>61</sup>Jacob Gaffney, *Supreme Court Refuses to Hear Indiana Residents’ Wine-Shipping Lawsuit*, DAILY WINE NEWS, Apr. 23, 2001, at <http://www.winespectator.com/Wine/Spectator/Daily Archive/20010423.news1205>; Len Richardson, *Wine Spin on Supreme Court Ruling*, CALIFORNIA FARMER (2001), at <http://www.farmprogress.com/frmp/articleDetail/0,8055,2220+4,00.html>.

<sup>62</sup>*See supra* note 60.

<sup>63</sup>*See supra* note 60.

<sup>64</sup>Gaffney, *supra* note 61.

<sup>65</sup>227 F.3d at 854.

<sup>66</sup>*Id.* at 850.

<sup>67</sup>*See infra* notes 236-41 and accompanying text.

<sup>68</sup>KANS. STAT. ANN. § 41-311 (Supp. 1999).

<sup>69</sup>Glazer’s Wholesale Drug Co., Inc. v. Kansas, 2001 WL 91616 (D. Kan. 2001).

<sup>70</sup>*Id.* at \*2.

<sup>71</sup>2001 WL 91616 at \*2.

<sup>72</sup>KANS. STAT. ANN. § 41-311 (Supp. 1999).

<sup>73</sup>*Id.*

<sup>74</sup>2001 WL 91616 at \*4.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* (quoting Oregon Waste Systems, Inc. v. Dept. of Env. Quality, 511 U.S. 93, 97 (1994)).

<sup>77</sup>*Id.* at \*5.

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* at \*6.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

<sup>82</sup>*Id.* at \*8.

<sup>83</sup>*Id.* at \*9 (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) and Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)).

<sup>84</sup>*Id.* at \*10-\*11.

<sup>85</sup>Recent reports indicate the Kansas attorney general did not yet know whether the state would appeal the ruling. Kevin Bates, *U.S. Judge Says Kansas Must Allow Out-of-State Liquor Wholesalers*, KNIGHT-RIDDER TRIB. BUS. NEWS, Feb. 15, 2001; Eric Palmer, *Ruling Sets Stage for Liquor Deal; Texas Wholesaler Wants to Purchase Kansas Distributors*, KANSAS CITY STAR, Feb. 15, 2001, at C1.

<sup>86</sup>Dickerson v. Bailey, 87 F. Supp. 2d 691, 696-98, 709 (S.D. Tex. 2000); *see* George Kuempel, *Judge Rejects Texas Law against Interstate Delivery of Beer, Wine*, DALLAS MORNING NEWS, Feb. 15, 2000.

<sup>87</sup>87 F. Supp. 2d at 694; *see* Kuempel, *supra* note 86.

<sup>88</sup>*See* Kuempel, *supra* note 86.

<sup>89</sup>87 F. Supp. 2d at 710.

<sup>90</sup>*Metro & Texas Digest: TABC Will Challenge Ruling on Out-of-State Wine Orders*, FORT WORTH STAR-TELEGRAM, Mar. 1,

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2000, at 3.

<sup>91</sup>Travis E. Poling, *Judge Lets Wine Sale Ruling Age; Resolution of the Dispute over Direct Liquor Shipments May Be Affected by an Indiana Case*, SAN ANTONIO EXPRESS-NEWS, Apr. 3, 2001, at 1E.

<sup>92</sup>See *supra* note 33 and accompanying text.

<sup>93</sup>Swedenburg v. Kelly, No. 00 Civ. 0778(RMB), 2000 WL 1264285 (S.D.N.Y. Sept. 5, 2000).

<sup>94</sup>*Id.*

<sup>95</sup>*Id.* at \*2.

<sup>96</sup>*Id.* at \*1.

<sup>97</sup>*Id.*

<sup>98</sup>*Id.* at \*12.

<sup>99</sup>*Overview of Challenges to State's Rights under the 21<sup>st</sup> Amendment*, at <http://www.wswa.org/litigation/> (updated May 23, 2001).

<sup>100</sup>No. 3:99-CV-755 (E.D. Va. filed Nov. 15, 1999).

<sup>101</sup>See *supra* note 99.

<sup>102</sup>No. 00-CV-71438-DT (E.D. Mich. filed Mar. 22, 2000).

<sup>103</sup>See *supra* note 99.

<sup>104</sup>Brief of Amici Curiae Central Michigan University et al. at 1, Heald v. Engler, No. 00-CV-71438-DT (E.D. Mich. filed Mar. 22, 2000).

<sup>105</sup>Charles Pappas, *Does the Internet Enable Bootleggers?*, YAHOO! INTERNET LIFE, Sept. 1999, at 67 (citing Barry W. McCahill, executive director of Americans for Responsible Alcohol Access, who acknowledges the relationship between his organization and the Wine and Spirits Wholesalers of America industry trade group).

<sup>106</sup>No. 8:99-CV-2681-T-27E (M.D. Fla. filed Nov. 24, 1999).

<sup>107</sup>Order, Sept. 1, 2000, at 5, 7, Bainbridge v. Bush, No. 8:99-CV-2681-T-27E (M.D. Fla. filed Nov. 24, 1999).

<sup>108</sup>*Id.* at 7-10.

<sup>109</sup>See Beskind v. Easley, No. 3:00-CV-258-MU (W.D.N.C. filed June 5, 2000); *Overview of Challenges to State's Rights under the 21<sup>st</sup> Amendment*, at <http://www.wswa.org/litigation/> (updated May 23, 2001).

<sup>110</sup>Mast v. Prince, No. CS-01-0091-FV (E.D. Wash. filed Mar. 26, 2001).

<sup>111</sup>N.Y. ALCO. BEV. CONT. LAW § 102(1)(c) (McKinney 1987). In 1996, Governor George Pataki vetoed legislation that would have permitted direct wine shipment into New York. Similar legislation introduced in 1999 did not emerge from committee. Alan J. Wax & Michael Thier, *Wineries Contest Ban on Shipping*, Feb. 4, 2000, at A50.

<sup>112</sup>1979 WL 22964 (Alaska A.G. Oct. 31, 1979).

<sup>113</sup>ARK. CODE ANN. § 3-7-106(a)(1) (Michie 1997).

<sup>114</sup>KANS. STAT. ANN. § 41-306 (1998).

<sup>115</sup>ME. REV. STAT. ANN. tit. 28-A, § 2077-B (1998) (prohibiting sale or purchase of liquor by mail order). An individual is permitted to transport into the state up to four quarts of spirits for the individual's personal use. ME. REV. STAT. ANN. tit. 28-A, § 2075.

<sup>116</sup>MASS. GEN. LAWS ch. 138, §§ 1,2 (1998).

<sup>117</sup>MICH. COMP. LAWS § 436.1203 (1999) (sale, delivery, or importation of liquor must be made by state commission or commission-authorized agent with exception for individual of legal age who imports from another state not more than 312 ounces of liquor that contains less than twenty-one percent alcohol by volume).

<sup>118</sup>MISS. CODE ANN. § 97-31-47 (1998).

<sup>119</sup>MONT. CODE ANN. § 16-6-301 (1997) (exception for person entering state in possession of not more than three gallons of liquor).

<sup>120</sup>OHIO REV. CODE ANN. § 4301 (Banks-Baldwin 1999) (exception for person entering state in possession of not more than one liter of liquor in any thirty-day period).

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<sup>121</sup>OKLA. STAT. tit. 37, § 505 (exception for person entering state in possession of liquor as long as Oklahoma excise tax has been paid and violation of provisions prohibiting shipping of liquor into the state made a felony if delivery is to a person under twenty-one years of age).

<sup>122</sup>40 PA. CODE §§ 9.41, 11.2 (1999) (permitting liquor purchases only through state store system but providing exception for gifts of liquor which may imported into the state).

<sup>123</sup>S.C. CODE ANN. § 12-21-1610 (Law Co-op. 1998) (exception for person importing wine and beer for personal use up to ten cases upon payment of taxes).

<sup>124</sup>S.D. CODIFIED LAWS § 35-4-66 (Michie 1998) (exception for individual transporting into the state one gallon or less of alcoholic beverages).

<sup>125</sup>TEX. ALCO. BEV. CODE ANN. § 107.07 W9 (West 1999) (exception for Texas resident importing into the state and personally accompanying not more than three gallons of wine in any thirty-day period, paying the state tax and a fifty cent administrative fee).

<sup>126</sup>UTAH CODE ANN. § 32A-12-503 (1999).

<sup>127</sup>VT. STAT. ANN. tit. 7, § 63(b) (1999) (penalty for violation: not more than one year in prison and/ or fine of not more than \$1000; exception for person importing in his or her own private vehicle or actual possession not more than six gallons of wine).

<sup>128</sup>VA. CODE ANN. § 4.1-310 (Michie 1998) (exception for person importing in his personal possession not more than one gallon of alcoholic beverages).

<sup>129</sup>ARIZ. REV. STAT. ANN. § 4-203.04 (1999).

<sup>130</sup>*Id.*

<sup>131</sup>*Id.*

<sup>132</sup>MD. ANN. CODE art. 2B, § 16-506.1 (1999); *see also* Greg Garland, *Holiday Spirits: Return to Sender; Md. Toughens Law against Shipping Alcohol to Customer*, BALTIMORE SUN, Dec. 24, 1999, at 1A (noting that when the offense of shipping wine into Maryland was only a misdemeanor, out-of-state shippers were not deterred because it is hard to reach someone in another state for a misdemeanor, but under the new felony law a person can be extradited to face prosecution and a conviction could cost a seller its federal permit). The person receiving the alcohol is still guilty of a misdemeanor for receiving an untaxed product with a penalty of up to two years in jail and a \$1000 fine. *Id.*

<sup>133</sup>FLA. STAT. ch. 561.545 (1999) (similar penalty, up to five years in prison, as for burglarizing a home).

<sup>134</sup>KY. REV. STAT. ANN. § 244.165 (Banks-Baldwin 1998).

<sup>135</sup>TENN. CODE ANN. § 57-3-401 (1998).

<sup>136</sup>1998 Ind. Legis. Serv. 121 (West). *See supra* notes 37-59 and accompanying text for citation and discussion of a recent case in which a federal district court judge declared the Indiana statute unconstitutional, a decision that was overturned by the Seventh Circuit.

<sup>137</sup>N.C. GEN. STAT. § 18B-102.1 (1998).

<sup>138</sup>The Federal Alcohol Administration Act requires a basic permit to engage in the business of producing wine. 27 U.S.C. § 203 (1998).

<sup>139</sup>GA. CODE ANN. § 3-3-27 (1999) (authorizing penalty of imprisonment for not less than one nor more than five years).

<sup>140</sup>1999 Ga. H.B. 1273, Ga. 145th G.A., Reg. Sess. Under the new law an individual may transport into the state a half gallon of wine or, upon payment of excise taxes, two cases of wine for personal or household use. *Id.* §§ 3-3-8(a)(1)(C), 3-3-8(a)(2)(C). A shipper may make direct shipments of up to 50 cases of wine per year to consumers, but no more than five cases to any one individual, after obtaining a special order shipping license from the Georgia Department of Revenue. *Id.* § 3-6-31(a), (c)(2). An out-of-state winery without a special license (but holding a federal basic wine manufacturing permit) may ship up to five cases of wine a year to a consumer who has purchased the wine while on the premises of the winery. *Id.* § 3-6-32.

<sup>141</sup>Alix M. Freedman & John R. Emshwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking Its Very Private World*, Oct. 4, 1999, at A1. Southern has \$2.8 billion in annual revenue and a market share of about 11.8% of all domestic wine and liquor, far more than any other wholesaler. *Id.*

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* Attorney General Bob Butterworth wrote to the Governor that the statute “is bad for Florida consumers, is bad for the state’s business reputation, and it is bad for State government’s ability to collect revenue. It harms so many people, only to

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benefit a small group of individuals who control Florida's alcoholic beverage industry." Letter from Bob Butterworth to Governor Chiles (May 19, 1997), *available at* <http://www.freethegrapes.org/html/print.html>.

<sup>144</sup>ALA. CODE § 20-X-8-.03 (1998).

<sup>145</sup>N.J. STAT. ANN. § 33:1-2 (West 1998).

<sup>146</sup>CONN. GEN. STAT. § 12-436 (1999) (allowing individuals who purchased liquor in another state to import up to five gallons in any sixty-day period for their own consumption).

<sup>147</sup>HAW. REV. STAT. § 281-33.1 (1998).

<sup>148</sup>R.I. GEN. LAWS §§ 3-1-1, 3-4-1 (1998).

<sup>149</sup>D.C. CODE ANN. § 25-137 (1998) (up to one gallon at any one time).

<sup>150</sup>DEL. CODE ANN. tit. 4, § 501(c) (1998).

<sup>151</sup>N.H. REV. STAT. ANN. § 178:14-a (1998).

<sup>152</sup>*Id.*

<sup>153</sup>1998 La. Acts 71 (applying to direct shipment of wine and requiring payment of taxes, for personal consumption of consumer, total amount shipped not to exceed forty-eight 750 ml. bottles per year, seller to hold license in own state, package prominently labeled as containing alcoholic beverage, and shipped to and received by person at least 21 years of age)

<sup>154</sup>NEB. REV. STAT. § 53-194.03 (1998).

<sup>155</sup>1999 N.D. Laws 69 (or 288 ounces of beer and requiring conspicuous label saying "Signature of person age 21 or older required for delivery").

<sup>156</sup>1999 Nev. Stat. 450.

<sup>157</sup>CAL. BUS. & PROF. CODE § 23661.2 (West 1997).

<sup>158</sup>COLO. REV. STAT. § 12-47-104 (1998).

<sup>159</sup>IDAHO CODE § 23-1309A (1998).

<sup>160</sup>235 ILL. COMP. STAT. § 5/6-29 (West 1998).

<sup>161</sup>1996 Iowa Acts 1101 (not requiring special labeling on package).

<sup>162</sup>MINN. STAT. § 340A.417 (1998).

<sup>163</sup>MO. REV. STAT. § 311.462 (1994).

<sup>164</sup>N.M. STAT. ANN. § 60-7A-3(E) (Michie 1998).

<sup>165</sup>OR. REV. STAT. § 471.229 (1998).

<sup>166</sup>WASH. REV. CODE §§ 66.12.190, 66.12.200 (1999).

<sup>167</sup>W. VA. CODE § 60-8-6 (1998).

<sup>168</sup>WIS. STAT. §§ 125.58, 125.68(10)(bm), 139.035 (1999).

<sup>169</sup>In general a case consists of twelve 750 milliliter bottles or nine liters.

<sup>170</sup>2001 Wyo. Sess. Laws 132 (to be codified at WYO. STAT. ANN. § 12-2-204).

<sup>171</sup>*Id.* §12-2-204(c)(i), (ii).

<sup>172</sup>*Id.* §12-2-204(v).

<sup>173</sup>S. 211, Reg. Sess. § 1(a)(1) (Ala. 2001). The bill requires any such shipper to file and application with the Alabama Alcoholic Beverage Control Board, pay a \$100 application fee, conspicuously label all shipments "CONTAINS ALCOHOLIC BEVERAGE: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY," annually report the total amount of table wine shipped in the prior year, annually pay all taxes (calculated as if purchase had been made at point of delivery), and consent to Alabama jurisdiction. *Id.* §§ (b) (1)-(7).

<sup>174</sup>H.B. 1673, 83d Reg. Sess. (Ark. 2001).

<sup>175</sup>*Id.* § 1(a)(1).

<sup>176</sup>*Id.* § 1(b).

<sup>177</sup>H.B. 5280, G.A. Reg. Sess. (Conn. 2001). A second bill contains the provision that the shipper must pay an annual \$100 fee.

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H.B. 5289, G.A. Reg. Sess. (Conn. 2001).

<sup>178</sup>S. 656, 103d Reg. Sess. (Fla. 2001). Louisiana also permits the direct shipment of only four cases per year. 1998 La. Acts 71.

<sup>179</sup>*See supra* notes 157-69 and accompanying text; *see also* H.P. 972, 120<sup>th</sup> Legis., 1<sup>st</sup> Reg. Sess. (Me. 2001) (Maine bill authorizing direct shipment of wine to residents and limiting shipment to twenty-four 1.5 liter bottles a month); H.B. 1580, 182d Gen. Ct., Reg. Sess. (Mass. 2001) (Massachusetts bill authorizing direct shipment of wine to residents under conditions similar to those in the reciprocity states, but not requiring reciprocity); H.B. 285, Legis., Reg Sess. (Miss. 2001) (Mississippi bill authorizing direct shipment of wine to residents under conditions similar to those in the reciprocity states, but not requiring reciprocity; first violation punishable by a fine of not more than \$5,000; second violation, a felony, punishable by a fine of up to \$25,000 and/or by imprisonment of between one and five years); H.B. 922, 185<sup>th</sup> G.A., Reg. Sess. (Pa. 2001) (Pennsylvania bill authorizing direct shipment of wine to residents under conditions similar to those in the reciprocity states, but not requiring reciprocity); H.B. 5854 Legis. Sess. (R.I. 2001-2002) (Rhode Island bill authorizing direct shipment of wine to residents under conditions similar to those in the reciprocity states, but not requiring reciprocity, and limiting shipment to one and a half cases per month). *But see* H.B. 132, 56<sup>th</sup> Legis. (Wyo. 2001) (Wyoming bill that would authorize the direct shipment of not more than two cases (eighteen liters) of wine a year).

<sup>180</sup>*Id.* § 1(4), (5) (Fla. 2001).

<sup>181</sup>*Id.* § 1(7).

<sup>182</sup>*Id.* § 1(8).

<sup>183</sup>H.B. 423, 21<sup>st</sup> Legis. (Haw. 2001); S. 153, 111<sup>th</sup> G.A. (Ind. 2000).

<sup>184</sup>H.B. 1281, 112<sup>th</sup> G.A. (Ind. 2001).

<sup>185</sup>*Id.* §§ 1-4.

<sup>186</sup>H.B. 962, 415<sup>th</sup> G.A., Reg. Sess. (Md. 2001).

<sup>187</sup>H.B. 3462, 77<sup>th</sup> Legis. (Tex. 2001).

<sup>188</sup>Michael Dresser, *Md. Import Curbs Cause Wine Lovers' Ferment; Licenses Proposed to Allow Shipments for Personal Use; Schaefer Opposes Change*, BALT. SUN, Mar. 6, 2001, at 1C; *Business Digest: Panel Kills Bill to Let People Order Out-of-State Wines*, BALT. SUN, Mar. 17, 2001, at 20C.

<sup>189</sup>Dresser, *supra* note 188.

<sup>190</sup>*Id.*

<sup>191</sup>*Id.*

<sup>192</sup>*Id.*

<sup>193</sup>H.B. 1580, 182d Gen. Ct., Reg. Sess. (Mass. 2001).

<sup>194</sup>H.B. 3706, 182d Gen. Ct., Reg. Sess. (Mass. 2001).

<sup>195</sup>A.B. 5739, 224<sup>th</sup> Legis. Sess. (N.Y. 2001).

<sup>196</sup>A.B. 2095, 224<sup>th</sup> Legis. Sess. (N.Y. 2001).

<sup>197</sup>S. 48, 57<sup>th</sup> Legis., Reg. Sess. (Mont. 2001).

<sup>198</sup>*Id.* § 3.

<sup>199</sup>L.B. 671, 97<sup>th</sup> Legis., 1<sup>st</sup> Reg. Sess. § 1(4) (Neb. 2001).

<sup>200</sup>L.B. 572, 97<sup>th</sup> Legis., 1<sup>st</sup> Reg. Sess. (Neb. 2001).

<sup>201</sup>*Id.* § 2(1)(c).

<sup>202</sup>Constitutionality of LB 671 (2001 Legislative Session), Op. Att'y Gen. 01009 (Neb. Mar. 12, 2001), *available at* 2001 WL 276851.

<sup>203</sup>*Id.* at \*1.

<sup>204</sup>H.B. 1295, 76<sup>th</sup> Legis. Ass., Reg. Sess. (S.D. 2001).

<sup>205</sup>*Id.* § 1.

<sup>206</sup>H.B. 1076, 77<sup>th</sup> Legis. (Tex. 2001).

<sup>207</sup>S. 489, 77<sup>th</sup> Legis. (Tex. 2001).

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<sup>208</sup>Travis E. Poling, *Judge Lets Wine Sale Ruling Age; Resolution of the Dispute over Direct Liquor Shipments May Be Affected by an Indiana Case*, SAN ANTONIO EXPRESS-NEWS, Apr. 3, 2001, at 1E. The web site address is <http://www.texassafetynetwork.org>. *Id.*

<sup>209</sup>S. 489, § 2.

<sup>210</sup>*Id.* § 3.

<sup>211</sup>H.B. 892, 77<sup>th</sup> Legis. (Tex. 2001).

<sup>212</sup>See *LBD: Texas Lawmakers Should Not Open Pandora's Box; Newly Introduced Legislation Could Create a Flood of Unregulated Alcohol*, U.S. NEWSWIRE, Feb. 19, 2001, available at 2001 WL 4140118.

<sup>213</sup><http://www.texassafetynetwork.org> (visited Apr. 11, 2001).

<sup>214</sup>*Id.*

<sup>215</sup>*Id.*

<sup>216</sup>Janet Elliott, *Bills Would Let Texans Buy Wine over the Internet; The Issue Has Become One of the Strongest Controversies to Come before This Session of the Legislature*, HOUSTON CHRON., Apr. 1, 2001, at 1.

<sup>217</sup>See <http://www.texassafetynetwork.org> (visited Apr. 11, 2001); *LBD: Texas Lawmakers Should Not Open Pandora's Box; Newly Introduced Legislation Could Create a Flood of Unregulated Alcohol*, U.S. NEWSWIRE, Feb. 19, 2001, available at 2001 WL 4140118.

<sup>218</sup>Elliott, *supra* note 216, at 1.

<sup>219</sup>Laylan Copelin, *Will Texas Allow Wine Shipments?* AUSTIN AMERICAN-STATESMAN, Feb. 20, 2001, at B1.

<sup>220</sup>*Id.* (quoting Martin Hubert, the deputy agriculture commissioner).

<sup>221</sup>Elliott, *supra* note 216, at 1.

<sup>222</sup>Laylan Copelin, *Hoping to Order Wine Online? Plan on Texas Vintage; Bill to Allow State's Wineries to Ship Directly Gains Support*, AUSTIN AMERICAN-STATESMAN, Feb. 24, 2001, at B1.

<sup>223</sup>Copelin, *supra* note 219. In 1973 there were eighteen wholesalers in Texas. Elliott, *supra* note 216. Today there are four, three competing statewide, and one competing in the Dallas area only. *Id.*

<sup>224</sup>Copelin, *supra* note 219 (quoting the owner of a small winery near Austin).

<sup>225</sup>See Martin, *supra* note 3, at 2 n.3.

<sup>226</sup>Elliott, *supra* note 216, at 1.

<sup>227</sup>*Testimony of Hon. Mike Thompson, First Congressional District of California, before the U.S. Senate Committee on the Judiciary—Direct Shipping of Wine: Fostering Consumer Choice and Fair Competition*, 106<sup>th</sup> Cong. (1999), available in 1999 WL 130100 [hereinafter *Thompson Testimony*].

<sup>228</sup>*Id.*

<sup>229</sup>145 CONG. REC. H6856-02, H6865 (1999) (statement of Rep. Radanovich of California). If states are sincere about their concern for minors and intoxicated persons having wine delivered to their homes then they would have to do what Kentucky has done. Kentucky prohibits not only out-of-staters from delivering alcoholic beverages to Kentucky residences, but also prohibits any in-state retailer from delivering or advertising the delivery of alcoholic beverages. KY. REV. STAT. ANN. §§ 244.165, 244.350 (Banks-Baldwin 2000). Current law in Texas is similar, that is, not permitting any shipment either within or into the state.

<sup>230</sup>The Chief Deputy of the California Alcoholic Beverage Control Agency has said that California has not had any problems because the state allows remote sales of liquor. *Id.*

<sup>231</sup>See, e.g., George B. Delta, *State Taxation of the Internet; A Review of some Issues*, 7 WILLAMETTE J. INT'L L. & DISP. RESOL. 136 (2000); Steven J. Forte, *Use Tax Collection on Internet Purchases: Should the Mail Order Industry Serve as a Model?* 15 J. MARSHALL J. COMPUTER & INFO. L. 203 (1997); Jenine Elco Graves, *Comment, Physical Presence in cyberspace: As Electronic Commerce Takes Off, Does Quill Leave Local Merchants in the Dust?* 37 DUQUESNE L. REV. 261 (1999); Megan E. Groves, *Note, Where There's a Will, There's a Way: State Sales and Use Taxation of Electronic Commerce*, 74 IND. L.J. 293 (1998); David E. Hardesty, *Sales and Use Tax and E-Commerce*, 570 PRAC. L. INST. PAT., COPYRIGHT, TRADEMARKS, & LITERARY PROP. HANDBOOK SERIES 1189 (1999); Walter Hellerstein, *State Taxation of Electronic Commerce*, 52 TAX L. REV. 425 (1997); Rich McKeown, *Questioning the Viability of the Sales Tax: Can It Be Simplified to Create a Level Playing Field?* 2000 BRIGHAM YOUNG UNIV.

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L. REV. 165; PAULL MINES, *Commentary Conversing with Professor Hellerstein: Electronic Commerce and Nexus Propel Sales and Use Tax Reform*, 52 TAXL. REV. 581 (1997); *Editorial & Comment: Digging Deeper*, COLUMBUS DISPATCH, Jan. 10, 2001, at 8A; Jason Gertzen, *Project Strives to Collect Sales Tax from Online Purchasers*, MILWAUKEE J. SENTINEL, Jan. 4, 2001; Amy Higgins, *Ohio Seeks to Net Online Sales Tax: Income Tax Returns Will Figure It In*, CINCINNATI ENQUIRER, Feb. 24, 2001, at A1; Richard Wolf, *Status of Use Tax Likely to Rise; Levy Could Make Up for Lost Revenue*, USA TODAY, Apr. 11, 2000, at 4A.

<sup>232</sup>*Statement of the Federation of Tax Administrators Before the Subcomm. on Commercial & Admin. Law of the House Comm. on the Judiciary*, 107<sup>th</sup> Cong. (2000).

<sup>233</sup>*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967).

<sup>234</sup>*Statement of the Federation of Tax Administrators Before the Subcomm. on Commercial & Admin. Law of the House Comm. on the Judiciary*, 107<sup>th</sup> Cong. (2000).

<sup>235</sup>*See, e.g.,* McKeown, *supra* note 231 (former chair of the Utah State Tax Commission noting that very few Utahns who purchase goods on a remote basis remit the use tax they are legally obligated to remit to Utah).

<sup>236</sup>*See, e.g.,* *Editorial & Comment: Digging Deeper*, COLUMBUS DISPATCH, Jan. 10, 2001, at 8A.

<sup>237</sup>*Statement of the Federation of Tax Administrators Before the Subcomm. on Commercial & Admin. Law of the House Comm. on the Judiciary*, 107<sup>th</sup> Cong. (2000).

<sup>238</sup>STREAMLINED SALES TAX PROJECT, STRUCTURE AND OPERATING RULES (adopted Mar. 30, 2000), *available at* <http://www.geocities.com/streamlined2000/oprules.html>. Participating states are Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. STREAMLINED SALES TAX PROJECT, LIST OF PARTICIPATING STATES (adopted Mar. 30, 2000), *available at* <http://www.geocities.com/streamlined2000/participatingstates.html>.

<sup>239</sup>*Digging Deeper*, *supra* note 231.

<sup>240</sup>*See* Wolf, *supra* note 231.

<sup>241</sup>*See* *Hearing on Internet Tax Before the Senate Comm. on Commerce, Science, and Transportation*, 108<sup>th</sup> Cong. (2001) (statement of Senator John McCain, Chair).

<sup>242</sup>Alcohol Administration Act, 27 U.S.C. § 203 (1998).

<sup>243</sup>Copelin, *supra* note 222.

<sup>244</sup>Elliott, *supra* note 216.