



An Analysis of U.S. State Direct Wine Shipment Laws



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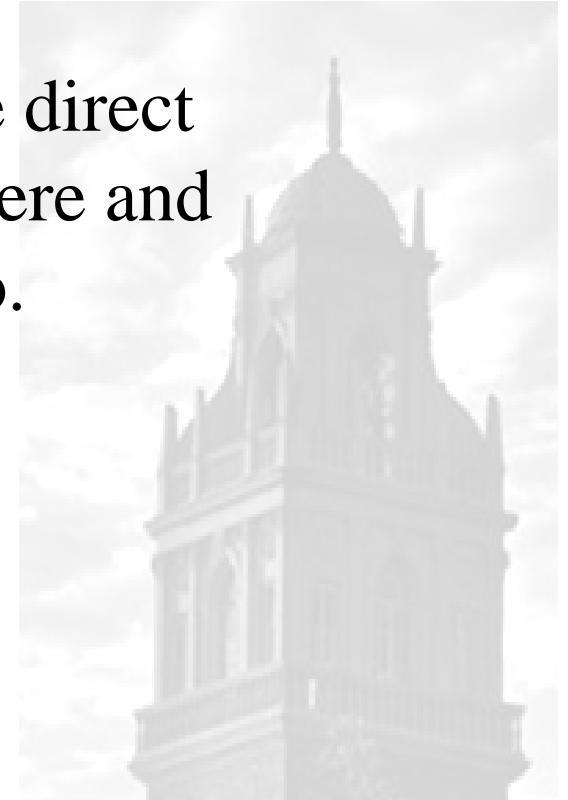
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Analysis of U.S. State Direct Wine Shipment Laws

This presentation will discuss the direct shipment debate; how we got here and where we are likely to go.



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Constitutional Basis

Government regulation of traffic in intoxicating liquor has long been a problem in American constitutional law.

Its roots go as far back as the temperance movement in the mid 1800's.



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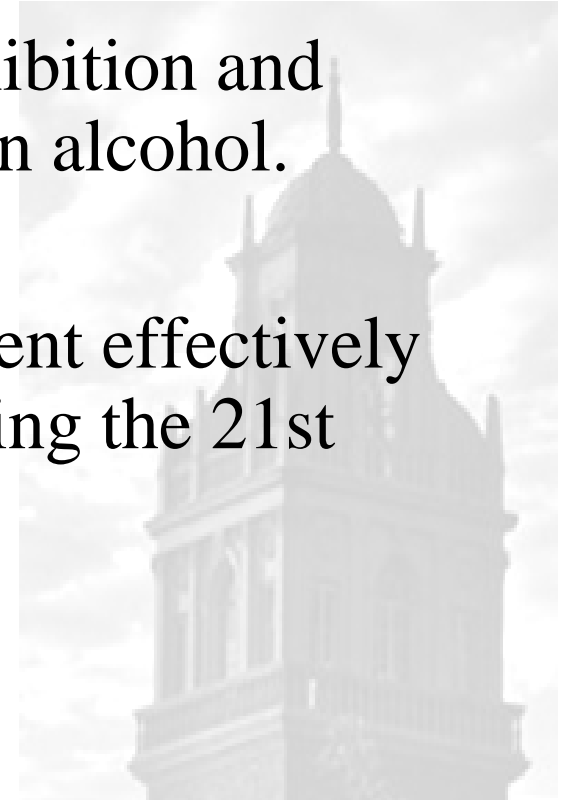
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Constitutional Basis

The 18th Amendment established Prohibition and superseded all previous legislation on alcohol.

Public concern over the 18th Amendment effectively resulted in Congress officially enacting the 21st Amendment in 1933.



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The Twenty-First Amendment

The 21st Amendment gives states a constitutional basis for regulating alcohol distribution by prohibiting the delivery of alcohol, if in violation of such state's laws. Sections 1 and 2 are most important:

- **Section 1.** The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
- **Section 2.** 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.

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The Twenty-First Amendment

In 1935, Congress enacted the Liquor Law Repeal and Enforcement Act to clarify the text of the 21st Amendment.

States argue, the Act conveys unlimited powers to supersede those granted to Congress under the dormant Commerce Clause (Inter-state Commerce).

Courts, however, have noted the Act does not convey power to the states.



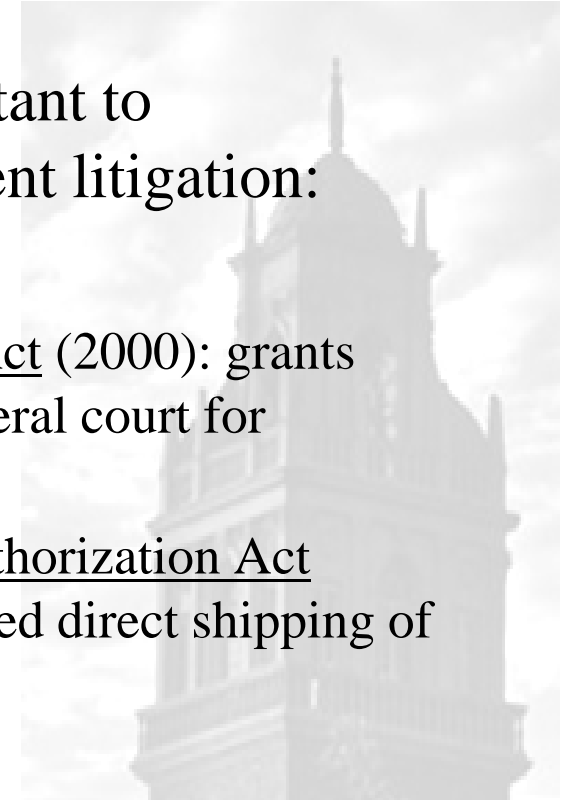
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Two additional congressional acts are important to understating current alcohol direct shipment litigation:

- The Twenty-First Amendment Enforcement Act (2000): grants state attorneys general the power to sue in federal court for injunctive relief against out-of-state violators
- The Department of Justice Appropriations Authorization Act (2002) : contains a provision authorizing limited direct shipping of wine in certain circumstances



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The Dormant Commerce Clause

The Dormant Commerce Clause - limits the power of states to establish legislation impacting interstate commerce.

The basis of the U.S. Constitution reserves for Congress the exclusive power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

Individual states are excluded from, or at least limited in, their ability to legislate such matters.

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How the Courts View the Two Laws

Depends on how Courts' view the interplay with of the 21st Amendment. Courts have generally taken two analytical approaches: a “Broad Standard Rule” or a “Modern Accommodation Standard Rule.”

- ✓ Early Supreme Court - the Broad Standard Rule
- ✓ Recently Supreme Court – the Modern Accommodation Standard Rule



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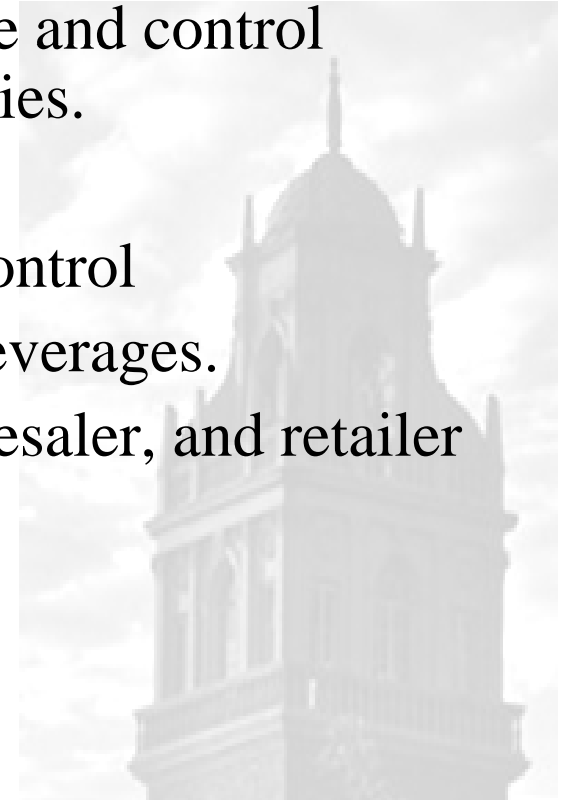


50 Ways to Control Distribution

Each state has the absolute power to regulate and control alcoholic beverages in their own boundaries.

For example, New Hampshire exerts total control over the distribution and sale of alcoholic beverages.

- ✓ They are deemed the sole importer, wholesaler, and retailer
- ✓ Must do so through state stores.
- ✓ Control State.



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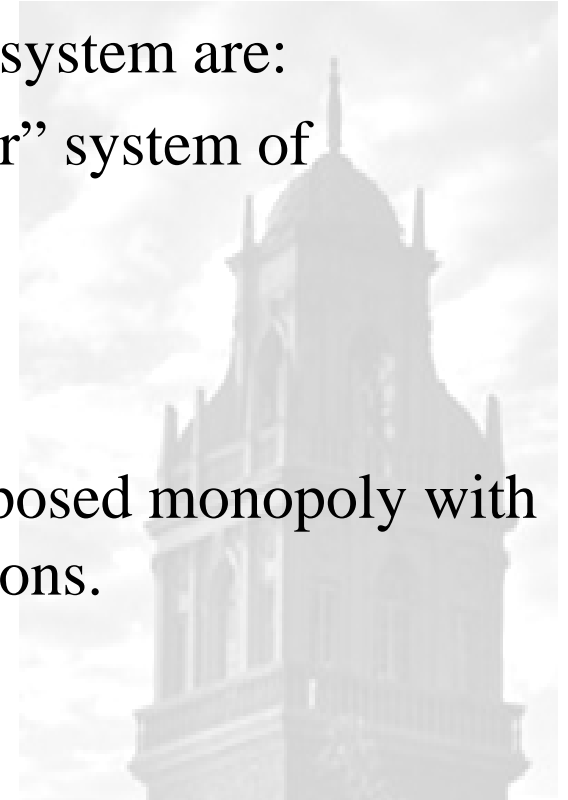
50 Ways to Control Distribution

The beneficiaries of the current distribution system are:

- ✓ wholesalers; middle men in the “three-tier” system of producer, and retail outlet.

Those opposed to change:

- ✓ wholesalers who enjoy a government-imposed monopoly with a stake in the retention of current restrictions.



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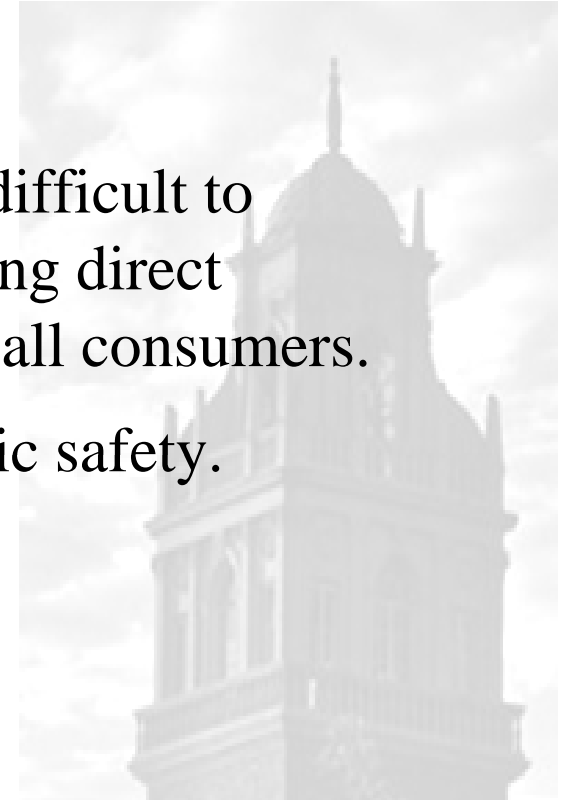
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50 Ways to Control Distribution

Difficulties in implementing change:

- ✓ the varying state regulations that make it difficult to implement "silver bullet" legislation making direct shipment of wine available in all states to all consumers.
- ✓ state statutes are justified in terms of public safety.



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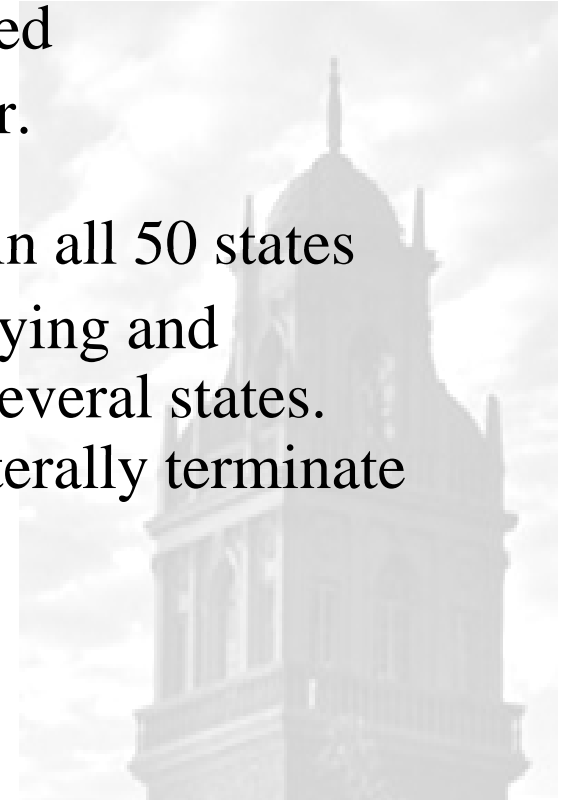
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Three-Tiered System

Alcoholic beverages are sold to a state-licensed distributor that sells to a state-licensed retailer.

- ✓ Few distributors have licensed operations in all 50 states
- ✓ There are high transaction costs for identifying and negotiating marketing agreements across several states.
- ✓ “Franchise laws” make it difficult to unilaterally terminate relations with a distributor.

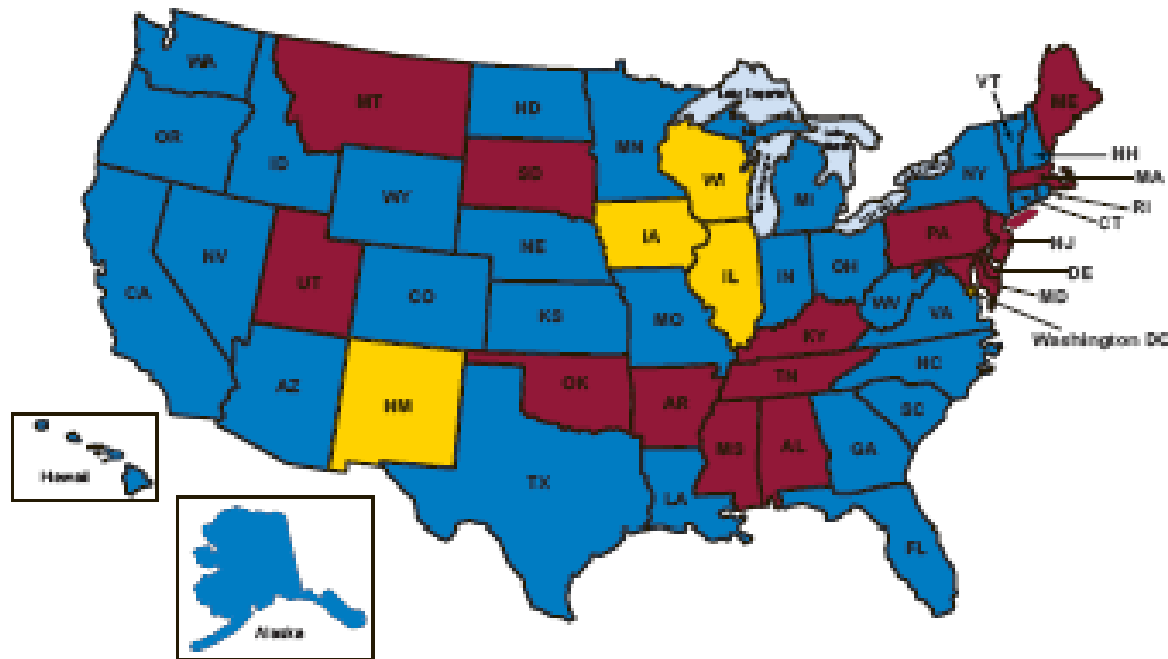


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Direct Shipment Laws by State for Wineries (as of January 2008)



- Limited States
- Reciprocal States
- Prohibited States

Source: Wine Institute

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State Shipping Laws

- As shown on table one, the direct shipment ban is hardly unique. As of January, 2008:
 - ✓ 31 states allowed interstate direct shipments of wine under certain conditions,
 - ✓ 15 prohibited it, with three of these states classifying direct wine shipments as a felony.
 - ✓ 4 states are classified as “reciprocity” states. Reciprocity guarantees that shipping rights from other reciprocal states are acknowledged (Wine Institute, 2006)

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Recent Litigation and Potential Impacts

The United States Supreme Court preventing states from engaging in "the evils of 'economic isolation' and 'protectionism'".

The Commerce Clause legal theory: state laws and economic disadvantage more vulnerable to constitutional challenge than evenhanded state laws.



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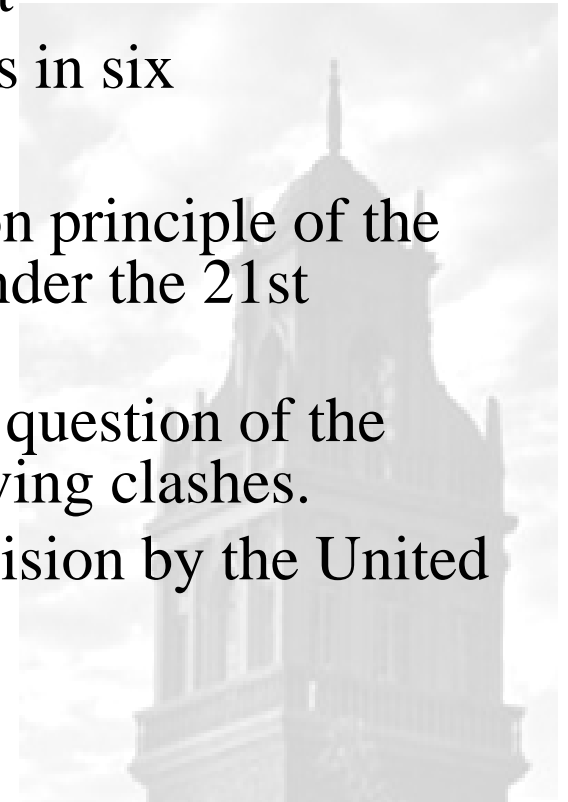
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Recent Litigation and Potential Impacts

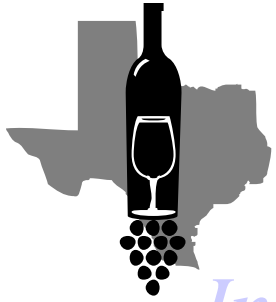
Litigation concerning the direct shipment controversy has yielded judicial decisions in six states.

- ✓ Each case argues the nondiscrimination principle of the Commerce Clause with state power under the 21st Amendment.
- ✓ There is a conflict of opinion over the question of the proper analytical framework for resolving clashes.
- ✓ setting the stage for the May 2005 decision by the United States Supreme Court.



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Recent Litigation and Potential Impacts

Indiana (Seventh Circuit)

Florida (Eleventh Circuit)

Texas (Fifth Circuit)

North Carolina (Fourth Circuit)

Michigan (Sixth Circuit)

New York



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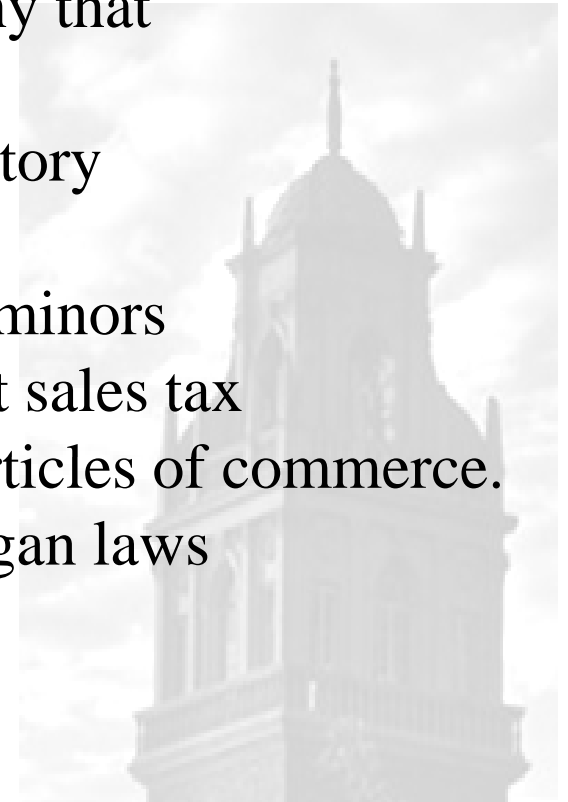
The Recent US Supreme Court Ruling

On May 16, 2005 ruled states may not deny that right to out-of-state producers.

The States arguments to justify discriminatory restrictions :

- ✓ preventing the direct sale of alcohol to minors
- ✓ improving the ability of states to collect sales tax
- ✓ alcohol is simply different than other articles of commerce.

Ruling struck down New York and Michigan laws



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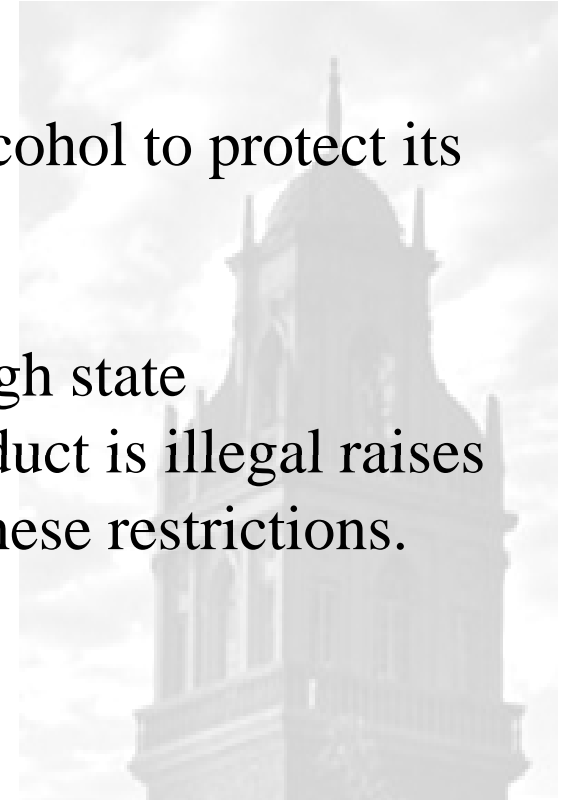


CONSULSION – WHAT'S NEXT

Do state laws dealing with direct wine shipment interfere with interstate commerce?

Should States control the distribution of alcohol to protect its citizens from alcoholic abuses?

To imply a product is legal if it went through state distribution system while the identical product is illegal raises the question of how a state benefits from these restrictions.



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CONSULSION – WHAT'S NEXT

The real impact of the Supreme Court decision:

- ✓ will only be known once States choose to rewrite their laws.
- ✓ how lower courts apply the decision to future challenges

As part of any new legislation the wholesalers' lobby will work hard to insure states include:

- ✓ onerous paperwork
- ✓ licensing and fee requirements
- ✓ making it as difficult and costly as possible to direct ship.

The more challenging the paperwork and licensing the higher the fees, the less opportunity wineries will have to improve their market position through direct sales.

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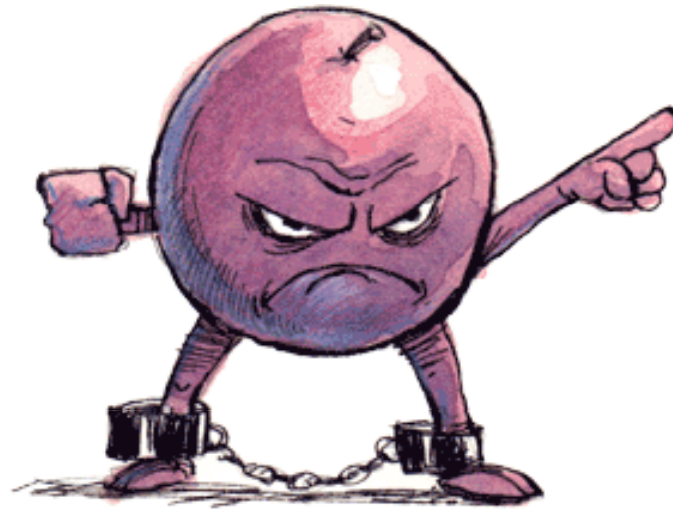
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- *www.hs.ttu.edu/texaswine*
- *<http://www.texaswineeducation.com>*
- Email: *texaswine@ttu.edu*



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FREE THE GRAPES!



Wine Institute (2008)

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End of Presentation



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Indiana (Seventh Circuit)

Indiana law provides that it is unlawful for persons who sell alcoholic beverages in other states to ship such beverages directly to consumers in Indiana, while Indiana sellers may do so. Indiana consumers brought suit, claiming that such differential treatment was unconstitutional.

The district court held that this law violated the dormant Commerce Clause, but was reversed by the court of appeals. [On March 24, 2006](#) new direct-to-consumer permit legislation was signed by Governor Daniels.

The law, which places strict restrictions on direct shipment, limits the number of cases a winery can ship direct to a consumer with limits. Applications and registration information is still in process.



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Florida (Eleventh Circuit)

Florida law prohibited any person from shipping alcohol from out-of-state directly to consumers, but allowed Florida wineries to do so.

The district court followed the previously established cases by the United States Supreme Court. It concluded this law discriminates against out-of-state wineries and Florida can be adequately served by reasonable nondiscriminatory alternatives.

This was resolved by requiring out-of-state wineries to collect Florida taxes. Effective [February 16, 2006](#) wineries may legally ship wine to consumers in Florida.



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Texas (Fifth Circuit)

Texas prohibits out-of-state firms from shipping alcohol directly to consumers, while allowing Texas wineries.

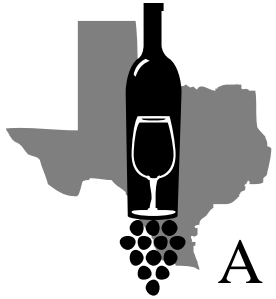
The district court initially held the Texas law violated the Commerce Clause and was not protected by the Twenty-first Amendment. But because Indiana's ban was upheld, the district court in Texas reconsidered its decision.

Direct shipments permitted in 2003 with certain restrictions. On August 1, 2005, the Texas Alcohol Beverage Commission issued clarification regarding the issuance of permits and rules governing shipments while processing a permit application.



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Texas (Fifth Circuit)

A lawsuit was filed in U.S. District Court on April 3, 2006, Seeking an injunction barring their enforcement on grounds they discriminate against interstate commerce by authorizing in state wine retailers to ship wine directly to Texas consumers while denying out-of-state wine retailers the same right.

The Texas Alcoholic Beverage Commission agreed to a preliminary injunction on May 22, 2006. Out-of-state retailers may ship wine to adult Texas consumers without applying for or obtaining a permit from the Texas Alcoholic Beverage Commission

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North Carolina (Fourth Circuit)

North Carolina prohibits direct shipment to consumers from out-of-state vendors while permitting in-state wineries to do so.

In ensuing litigation, the Fourth District court found that North Carolina's law discriminates against out-of-state producers.

Rather than applying strict scrutiny to the justifications for this discrimination, the court concluded this was direct discrimination against interstate commerce.

The court then applied the established Twenty-first Amendment core analysis and determined that the state had not demonstrated any reason for the favorable treatment afforded in-state wineries and thus concluded that [North Carolina's](#) law is unconstitutional.



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Michigan (Sixth Circuit)

Michigan prohibits out-of-state wineries from shipping directly to consumers in Michigan, but allows Michigan wineries to do so with minimal regulatory oversight.

The Sixth Circuit concluded the discrimination violated the dormant Commerce Clause. The discrimination lay in the facts that Michigan wineries could avoid price mark-ups of wholesalers and retailers whereas out-of-state wineries could not.

Michigan appealed to the United States Supreme Court.

December 15, 2005 Michigan Governor Granholm signed into law the new direct-to-consumer wine shipping law. The new statute allows for a winery anywhere in the US that obtains a direct shippers permit. [Recent Litigation and](#)



[Potential Impacts](#)

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New York

A Federal District court in New York ruled New York's prohibition against direct shipment discriminates against interstate commerce.

In-state wineries are allowed, but requires all out-of-state wines to pass through New York's three-tier system.

The court found that the express purpose of allowing instate wineries to ship was to confer an economic benefit on them, which is not a central concern of the Twenty-first Amendment.

[New York](#) appealed to the United States Supreme Court. On August 5, 2005 direct shipments to consumers in New York state were allowed, with some restrictions.



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