

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman John Edmonds at 1:30 P.M. on February 16, 2005 in Room 313-S of the Capitol.

All members were present except:

Representative Kenny Wilk- excused

Committee staff present:

Athena Andaya, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Mary Torrence, Revisor of Statutes Office
Carol Doel, Committee Secretary

Conferees:

Representative Garcia
Representative Ann Mah
R.E. "Tuck" Duncan, Kansas Wine and Spirits Wholesalers Assn.
Norm Jennings, Kansas Grape Growers Assn
Janna Dunbar, Department of Commerce
Rebecca Rice, Beer Wholesalers
Tom Groneman, Alcoholic Beverage Control
Amy Campbell, Kansas Assn. Of Beverage Retailers
John Brewer, Wildwood Wineries

Others attending:

See attached list

Chairman Edmonds called the meeting to order and opened the floor for any bill introductions.

Representative Garcia requested the introduction of a bill concerning notaries public; prohibiting certain acts and providing penalties and remedies for violations.

With no objections, this was accepted for introduction.

Representative Merrick requested the introduction of a bill requiring certain insurance policies to provide for designation of third parties to receive notices.

With no objections, this was accepted for introduction.

Representative Merrick requested the introduction of a bill regarding licensing or occupation fees, and prohibiting thereof for certain persons

With no objections, this was accepted for introduction.

There were no further bill introductions and The Chair opened the meeting for public hearing on **HB 2291** (farm winery shipments of wine within and out of state; reciprocity) and **HB 2292** (purchase and shipping of wine from sellers in other states) with the hearing to be conducted in parallel.

First to address the committee was R.E. "Tuck" Duncan of Kansas Wine & Spirits Wholesalers Association who spoke as a proponent to both **HB 2291** and **HB 2292**. He provided, for committee review, a copy of the oral arguments regarding the importation or sale of liquor which was heard before the United States Supreme Court November 7, 2004. (Attachment 1) Mr. Duncan related that the subject has been discussed around the nation and the statehouse for about a decade. They support a system that provides for the shipment of a product to a retailer where ID's are checked, taxes are paid, and for items not otherwise currently registered in the state. (Attachment 2)

Next to testify before the committee in approval of **HB 2291** was Representative Ann Mah who opined that the farm winery industry in Kansas is one that has great potential for growth, however, it is being stymied in this state due to antiquated laws. This bill would allow Kansas licensed wine manufacturers to sell and ship wine by mail to residents of other states where reciprocal direct shipping laws exist. It also would allow Kansans to purchase wine directly from wineries in these reciprocal states as well as allow farm wineries in

CONTINUATION SHEET

MINUTES OF THE House Federal and State Affairs Committee at 1:30 P.M. on February 16, 2005 in Room 313-S of the Capitol.

Kansas to ship wine directly to Kansas residents. (Attachment 3)

Kansas Grape Growers Association represented by Norman Jennings related that by passing **HB 2291**, Kansas residents seeking wine from other states would be able to legally obtain wine and the Kansas wineries would have instant access to the potential income from shipping to an additional 13 states. He also stated that the impact from this income for the wineries and grape/fruit growers would be very substantial. (Attachment 4)

Mr. Jennings also spoke in opposition to **HB 2292** giving the opinion that as proposed, this bill allows wines from outside Kansas not distributed to reach Kansas residents via shipped means, but does not allow the same right for Kansas wines that are not distributed. It allows for many wineries outside of Kansas to become an instant competitor with customer access not afforded to Kansas wineries which means additional competition which could cause a direct burden on our state wineries. (Attachment 5)

Patty Clark, Director Agriculture Marketing, Kansas Department of Commerce was represented by Janna Dunbar who addressed the committee in opposition to **HB 2292**. It is their feeling that this bill would place Kansas farm wineries at a competitive disadvantage to out-of-state wineries. The bill clearly discriminates against in-state wineries, while allowing the shipment of out-of-state wines into Kansas. (Attachment 6)

Ms. Dunbar also provided, for committee review, response from a survey which was taken January 7, 2005 showing how many acres of various fruits were produced in 2004, how many pounds of different fruits were produced as well as the primary impediments to future growth and success of their winery/vineyard. (Attachment 7)

John Brewer, owner of Wildwood Wineries, addressed the committee relating that the realization that Kansas can make good wine is growing, but that the growers and winemakers are unable to do anything about it because of the current restrictions. He endorses the passage of **HB 2292**. (No testimony)

The Kansas Association of Beverage Retailers was represented by Amy Campbell, Executive Director, who provided testimony regarding **HB 2292** with the thought that this bill offers a creative solution to the barriers some of our customers face when seeking certain limited production and estate wines. KABR supports a progressive look at this issue. (Attachment 8)

Rebecca Rice, Legislative Counsel, Kansas Beer Wholesalers Association, presented testimony in opposition to both **HB 2291** and **HB 2292**. They take the stand that adoption of either bill, without benefit of the Supreme Court decision, could result in the equivalent of deregulation. Ms. Rice provided their opinions regarding the outcomes that would be possible if we proceed without benefit of the Court's pending decision. (Attachment 9) Ms. Rice also presented a CD-ROM entitled "*American Beer Distribution More Relevant Today Than Ever*". (Provided by National Beer Wholesalers Assn. - 1101 King Street, Ste. 600 - Alexandria, Virginia 22314-2944)

Director of Alcoholic Beverage Control, Tom Groneman, addressed **HB 2292** with neutral information as well as recommended language changes for consideration by the committee. (Attachment 10)

Representative McLeland, provided written testimony in support of **HB 2292**. (Attachment 11)

With no other person wishing to address **HB 2291** and **HB 2292**, Chairman Edmonds closed the public hearing on both bills. He further stated that it was his intention to hold these bills at least until such time that the Supreme Court acts.

The Chair expressed to the committee that they would be hearing **HB 2415** on Thursday, February 17th and that since this was one of the major issues of the session, he expected a number of conferees, both proponents and opponents.

With no further business before the committee, The Chair adjourned the meeting.

1 The above-entitled matter came on for oral
2 argument before the Supreme Court of the United States at
3 10:07 a.m.

4
5 APPEARANCES:

6 CLINT BOLICK, ESQ., Washington, D.C.; on behalf of the
7 Petitioners, Jennifer M. Granholm, et al., in
8 03-1274.

9 KATHLEEN SULLIVAN, ESQ., Stanford, California; on behalf
10 of the Respondents, Eleanor Heald, et al., in 03-1116
11 and 03-1120.

12 THOMAS L. CASEY, ESQ., Solicitor General, Lansing,
13 Michigan, on behalf of the Petitioners, Eleanor
14 Heald, et al., in 03-1116 and 03-1120.

15 CAITLIN HALLIGAN, ESQ., Solicitor General, New York, N.Y.;
16 on behalf of the Respondents, Edward D. Kelly, et
17 al., in 03-1274.

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1 P R O C E E D I N G S

2 [10:07 a.m.]

3 JUSTICE STEVENS: We will now hear argument in
4 Granholm against Heald and two related cases.

5 Mr. Bolick.

6 ORAL ARGUMENT OF CLINT BOLICK

7 ON BEHALF OF PETITIONERS IN 03-1274

8 MR. BOLICK: Justice Stevens, and may it please
9 the Court:

10 For 124 years, as state power over alcohol has
11 ebbed and flowed, one principle has remained virtually
12 constant, that states may regulate alcohol by one set of
13 rules, not by two. New York and Michigan consigned out-
14 of-state wine, and only out-of-state wine, to the three-
15 tier system for closing the market to thousands of small
16 family-run wineries and their customers for the benefit of
17 a liquor distributor oligopoly.

18 Discrimination is the core concern of the
19 Commerce Clause, and it sends a powerful signal that the
20 state is engaged, not in legitimate regulation, but in
21 economic protectionism. The states and the liquor
22 distributors make a sweeping argument that this Court has
23 consistently rejected, that the Twenty-First Amendment
24 creates plenary state authority.

25 JUSTICE KENNEDY: Well, under your view, could

1 the three-tier system, itself, be challenged by a New
2 Jersey wholesaler wanting to sell in New York, or a New
3 York wholesaler wanting to sell in New Jersey?

4 MR. BOLICK: Yes, Justice Kennedy.

5 JUSTICE KENNEDY: So, under your view, the whole
6 three-tier system has to go down?

7 MR. BOLICK: No, Justice Kennedy. So long as
8 the state does not discriminate against out-of-state
9 entities, it is free to, as this Court --

10 JUSTICE KENNEDY: Well, under my hypothetical.
11 I don't know exactly how -- the way it works, you have to
12 be a New York wholesaler to sell to a New York retailer.
13 Under your view, a New Jersey wholesaler could sell to a
14 New York retailer.

15 MR. BOLICK: That is -- or a challenge, as you
16 ask the question, Justice Kennedy, could be mounted to
17 that, under the same theory that we're advocating here.
18 The state may have a different set of defenses that it
19 doesn't have here. But --

20 JUSTICE KENNEDY: But so far as -- the rationale
21 is the same.

22 MR. BOLICK: The --

23 JUSTICE KENNEDY: It seems to me that, under
24 your rationale, that that in-state licensing system has to
25 fall if there's a New Jersey wholesaler.

1 MR. BOLICK: It has to pass constitutional
2 muster.

3 JUSTICE BREYER: And when you say there is no
4 precedent -- I mean, I think a much more modest claim than
5 you're making, the claim simply that a state cannot
6 discriminate against out-of-state liquor -- i.e., the
7 physical liquid -- which is really more modest and keeps
8 the three-tier effect -- now, your -- that claim, that
9 they couldn't do that, was really what was advanced in
10 Young's Market. I read the briefs in that case. The
11 briefs presented that Court -- you could have written
12 those briefs. And the difficulty for you is, it
13 articulated that more modest version very clearly, made a
14 tremendously strong case, that was not forbidden by
15 Section 2 of the Twenty-First Amendment. And this Court
16 squarely rejected it.

17 MR. BOLICK: Your Honor, Young's Market -- the
18 result in Young's Market was correct --

19 JUSTICE BREYER: The result, I understand, you
20 could put on the basis of there being no discrimination.

21 MR. BOLICK: Exactly.

22 JUSTICE BREYER: Reading Justice Brandeis'
23 opinion, I can't believe that that was the basis for his
24 result.

25 MR. BOLICK: The -- the cases that followed

1 Young's Market and purported to apply its reasoning took a
2 very sweeping view of the Twenty-First Amendment. The
3 Court began trenching on that very broad view immediately
4 in 1939.

5 JUSTICE GINSBURG: But why wasn't that broad
6 view appropriate, given the difference between the
7 language of the Wilson Act, which has had the words "to
8 the same extent and in the same manner," and the Webb-
9 Kenyon Act, which became the second section of the Twenty-
10 First Amendment, leaves out "to the same extent and the
11 same manner." It just says that "alcoholic beverage so
12 that the state can bar importation for delivery of, or use
13 therein, in violation of laws thereof." It doesn't say
14 "nondiscriminatory laws."

15 MR. BOLICK: Yes, Justice Ginsburg, the -- there
16 was no need for the Webb-Kenyon Act to repeat the language
17 of the Wilson Act. The Wilson Act dealt with the question
18 of discrimination. The Webb-Kenyon Act dealt with
19 questions that arose subsequent to the enactment of the
20 Wilson Act. And as this Court has held in Craig versus --

21 JUSTICE GINSBURG: Well, maybe that's the Act,
22 but when they put it in the Constitution, why didn't they
23 adopt the language, "to the same extent and in the same
24 manner"?

25 MR. BOLICK: I think the reason for that is

1 because it was so obvious that the state could not, prior
2 to prohibition, discriminate. It was not only embodied in
3 the Wilson Act, but it was embodied in at least three
4 cases of this Court.

5 JUSTICE SOUTER: But it was not obvious to the
6 person who at least drafted the Webb-Kenyon in the first
7 instance, because as I -- as I understand it, there was an
8 anti-discrimination provision, and that was then dropped.
9 And do we know why it was dropped?

10 MR. BOLICK: It was dropped essentially because
11 it was redundant.

12 JUSTICE SOUTER: Well, but is that a -- is that
13 on a legislative history record somewhere? Do we know
14 that?

15 MR. BOLICK: No, Justice Souter, that is not
16 expressly on the record. What is on the record, however,
17 is that the Court was aiming -- or, excuse me, the
18 Congress was aiming at specific Supreme Court decisions.
19 There -- and it -- and the one case that was clearest on
20 point on discrimination was Scott versus Donald, applying
21 both the Commerce Clause and the Wilson Act to forbid
22 discrimination. And there was -- there is nothing in the
23 legislative history to indicate that Congress intended to
24 overturn that decision. And as this Court has held in
25 Craig versus Boren, and elsewhere, by enacting the Twenty-

1 First Amendment, Congress clearly intended to incorporate
2 both the Wilson Act and the Webb-Kenyon Act and to restore
3 to the states the police power that they had before
4 prohibition. Emphatically, discrimination was not a part
5 of that police power. It was a very accepted context.

6 So, too, is it today. When the -- when the
7 liquor distributors in the states asked this Court to
8 overturn the Bacchus decision and to adopt a plenary view
9 of the Twenty-First Amendment, it is not just asking you
10 to overturn the Bacchus decision; it is asking you to
11 overturn cases starting with the Midcal decision in 1980,
12 the more recent Healy decision, and others, that have held
13 that the core purposes of the Commerce Clause and the
14 Twenty-First Amendment must be harmonized, that the
15 Commerce Clause was never intended to be obliterated.

16 And when you look at the core values of the two
17 clauses, they do not clash. The core purpose of the
18 Commerce Clause is nondiscrimination. The core purpose of
19 the Twenty-First Amendment is temperance. And if you have
20 a discriminatory statute, it sends a very strong signal
21 that, in fact --

22 JUSTICE KENNEDY: Well, it's not only
23 temperance, but it's control over revenues.

24 Can you tell me, is the -- is there a New York
25 State excise tax on alcohol?

1 MR. BOLICK: Yes, Your Honor.

2 JUSTICE KENNEDY: And is it collected by the
3 wholesaler?

4 MR. BOLICK: Yes, it is.

5 JUSTICE KENNEDY: All right. What is it, ten
6 dollars a gallon, or what?

7 MR. BOLICK: It's -- it turns out to --

8 JUSTICE KENNEDY: Is it on one --

9 MR. BOLICK: -- a few cents a bottle, yes.

10 JUSTICE KENNEDY: It is on one --

11 MR. BOLICK: It's on -- it's -- and all alcohol.

12 JUSTICE KENNEDY: Under our cases, can the
13 California winery be required to remit the tax to the New
14 York State revenue authorities?

15 MR. BOLICK: We believe so, Your Honor.

16 JUSTICE KENNEDY: Is that consistent with Quill?

17 MR. BOLICK: It is consistent with Quill. The
18 way that the states -- there are 26 states that allow
19 direct interstate shipment of wine, and the FTC has
20 examined their record to see if they are doing okay. And
21 one of the things that they do -- are able to do is tax
22 collection. New Hampshire, Louisiana, and Nevada do
23 collect taxes. The way they do it is by requiring a
24 permit in order to ship wine into the state. That takes
25 care of a number of problems, including all sorts of

1 accountability concerns that the state may raise.

2 JUSTICE SOUTER: What --

3 MR. BOLICK: Under --

4 JUSTICE SOUTER: -- what do you make of the
5 argument that there's no practical way, except at great
6 expense, to audit compliance if they're out of state?

7 MR. BOLICK: Justice Souter, this is one of the
8 most regulated industries in America, of course, and the
9 model legislation that has been adopted by a number of
10 states includes record-keeping provisions, it requires
11 that wineries --

12 JUSTICE SOUTER: Well, I will grant that's
13 required, but the argument, as I understand it, is, to
14 find out whether they're doing what they are required to
15 do, you've got to drop in unexpectedly and make an audit.
16 And that's one thing in the state; it's another thing
17 across the country.

18 MR. BOLICK: No, it's important to recognize,
19 Justice Souter, that under the three-tier system, which is
20 -- which is where the states of New York and Michigan are
21 saying that the other state wineries have to go -- the
22 three-tier system does not do that. The states already
23 rely on the Federal Government and the other states to
24 police the wineries.

25 JUSTICE SOUTER: So you're --

1 MR. BOLICK: Should they --

2 JUSTICE SOUTER: -- saying they are not dropping
3 in to local wineries to do audits, in fact?

4 MR. BOLICK: They may, in some instances. It is
5 primarily a federal -- a federal activity.

6 JUSTICE SOUTER: What do we have in the record
7 on that?

8 MR. BOLICK: There is not -- there is not a
9 great deal on the record, either way, on that, Your Honor.

10 JUSTICE SCALIA: I don't know what you mean by
11 "it's primarily a federal activity," that the Federal
12 Government polices compliance with the state tax laws?

13 MR. BOLICK: That's correct, Your Honor. Under
14 the --

15 JUSTICE SCALIA: How does that occur?

16 MR. BOLICK: -- under the Federal Alcohol
17 Administration Act, any violation of a state law is a
18 federal offense and it is a violation -- so basically,
19 whether it's under-age access, whether it's taxation,
20 whatever --

21 JUSTICE KENNEDY: But does the federal authority
22 make a routine audit to see that the state tax has been
23 paid?

24 MR. BOLICK: Basically, every single time that
25 there is a transaction, it is recorded by the U.S. Trade

1 and Tax Bureau.

2 And if it may please the Court, I'd like to
3 reserve the rest of my time --

4 JUSTICE STEVENS: Yes.

5 MR. BOLICK: -- for rebuttal.

6 JUSTICE GINSBURG: I have just one further
7 question. Justice Kennedy asked you, "What about the
8 wholesaler? What about the retailer?" What about
9 alcoholic beverages other than wine?

10 MR. BOLICK: Justice Ginsburg, very important
11 question. We are here today because a majority of states
12 have chosen to regulate wine distinctively. And a handful
13 of them, including Michigan and New York, have chosen to
14 do so in a discriminatory manner. So long as states do
15 not discriminate, in terms of direct shipping with regard
16 to other alcohol -- and they don't; there's a flat
17 prohibition across the United States, in terms of beer and
18 other types of spirits -- we will not be here, because
19 there would be no discrimination; there would be a single
20 rule, and that rule would be, no one gets to do it.

21 JUSTICE GINSBURG: Thank you.

22 JUSTICE STEVENS: Ms. Sullivan?

23 ORAL ARGUMENT OF KATHLEEN SULLIVAN

24 ON BEHALF OF RESPONDENTS IN 03-1116 AND 03-1120

25 MS. SULLIVAN: Justice Stevens, and may it

1 please the Court:

2 Nothing in today's case, Justice Kennedy,
3 requires you to take on the three-tier system, for the
4 issue that is presented here is a very narrow one.

5 JUSTICE KENNEDY: Well, it's very narrow, but
6 the rationale is sweeping, and that's why I asked. I just
7 don't know if the in-state licensure system, which is the
8 cornerstone of the three-tier distribution system, can
9 survive under your rationale, assuming the hypothetical
10 where a New Jersey wholesaler has all of the -- you know,
11 the physical facilities and so forth that the New York
12 wholesaler does.

13 MS. SULLIVAN: All that we ask in this case,
14 Justice Kennedy, is that you strike down Michigan and New
15 York's decision to apply the three-tier system to everyone
16 except their own in-state --

17 JUSTICE KENNEDY: Well, I know, but what --

18 MS. SULLIVAN: -- producers of wine --

19 JUSTICE KENNEDY: -- but you're -- all you're
20 asking is for a rationale that's sweeping.

21 MS. SULLIVAN: Justice Kennedy, in our case, we
22 want to suggest that it is -- just as in Healy and Bacchus
23 -- that a law that discriminates in favor of in-state
24 producers and against out-of-state producers loses its
25 immunity afforded by the Twenty-First Amendment. As

1 Justice Scalia said in concurrence in Healy, a liquor
2 law's discriminatory character eliminates the immunity
3 afforded by the Twenty-First Amendment.

4 It's really the state's position, aided by their
5 wholesaler allies, that it is the sweeping one. Their
6 position is that every state law that regulates the
7 importation of liquor is, per se, valid if it has any
8 conceivable rational connection to a state purpose. So,
9 for example, if Michigan wanted to simply bar all
10 California wines, facially exclude California wines,
11 saying, "There are too many of them, it interferes with" -
12 -

13 JUSTICE GINSBURG: Your answer to Justice
14 Kennedy, I glean from what you said, that if New York took
15 away the direct-sale privilege that in-state wineries get,
16 then out-of-state wineries wouldn't be any better off, but
17 they'd have nothing to complain about.

18 MS. SULLIVAN: That's exactly correct, Justice
19 Ginsburg. As you've said in the context of gender
20 discrimination, you can cure an equal-protection problem
21 by leveling up or leveling down. In this case, we would
22 suggest that the principle of free trade that was the
23 reason, the principal reason, for the framing of the
24 Constitution and has been reflected in over a century of
25 dormant Commerce Clause jurisprudence, suggests that you

1 should -- the remedy should be to open the markets to out-
2 of-state producers --

3 JUSTICE GINSBURG: But that's a decision for the
4 state to make. I mean, the -- what --

5 MS. SULLIVAN: Correct, Your Honor.

6 JUSTICE GINSBURG: Not for this Court.

7 MS. SULLIVAN: That's correct, Your Honor.

8 JUSTICE STEVENS: You don't deny that a state --
9 that Michigan could bar all out-of-state wine -- not just
10 -- not just California, but they could bar all out-of-
11 state wines?

12 MS. SULLIVAN: That's correct, Justice Stevens,
13 if it were in aid, and only if it were in aid, of the
14 states -- and necessary to serve the state's internal
15 purposes.

16 JUSTICE STEVENS: The only reason being given to
17 give a monopoly to local producers, that's their --

18 MS. SULLIVAN: That's --

19 JUSTICE STEVENS: -- whole purpose. But could
20 they do that?

21 MS. SULLIVAN: The state can have a monopoly if
22 it's, itself, a market participant. What the state may --

23 JUSTICE STEVENS: No, I'm saying just to look at
24 the -- just limit to the market to -- the only market
25 participants would be Michigan wine --

1 MS. SULLIVAN: Private --

2 JUSTICE STEVENS: -- wineries.

3 MS. SULLIVAN: Justice Stevens, a state may not
4 discriminate against out-of-staters for the sole purpose
5 of economic protectionism.

6 JUSTICE BREYER: Well, I'm trying to think of
7 what Brandeis could have been thinking.

8 MS. SULLIVAN: In Young's Market.

9 JUSTICE BREYER: Yes, that's right. And this is
10 a reconstruction, because I have no doubt, and you have no
11 doubt, that Section 2 was meant to end that part of the
12 dormant Commerce Clause that would come under the name of
13 original package doctrine --

14 MS. SULLIVAN: Correct.

15 JUSTICE BREYER: -- which meant that the foreign
16 liquor has to be treated better than domestic liquor.
17 Now, he's thinking, "Why is that? What is that package
18 doctrine?" And the answer is, the dormant Commerce Clause
19 -- it's part of the dormant Commerce Clause -- the dormant
20 Commerce Clause is the implication from the existence of
21 the commerce power in the Constitution. So if we have an
22 amendment that says "that aspect of the dormant Commerce
23 Clause doesn't apply," that means the dormant Commerce
24 Clause doesn't apply, because you can't divide the dormant
25 Commerce Clause into six different parts, or even two.

1 MS. SULLIVAN: But Justice --

2 JUSTICE BREYER: Now, maybe -- I think that's
3 how he's reasoning.

4 MS. SULLIVAN: But --

5 JUSTICE BREYER: And if he is, and even if he
6 isn't, why isn't that right?

7 MS. SULLIVAN: Justice Breyer, the Young's
8 Market language permitting state discrimination is,
9 indeed, broad, but it's been superceded by 40 years of
10 this Court's jurisprudence harmonizing the Twenty-First
11 Amendment with the rest of the Constitution. Remember,
12 Justice Brandeis, in Young's Market, didn't even think the
13 Equal Protection Clause applied to liquor imports, a
14 position that's inconsistent with Craig against Boren.
15 And nobody would suggest today that equal protection
16 permits a state to import only from male-owned wineries or
17 only import wine from white-owned wineries.

18 So there -- the 40 years of jurisprudence --

19 JUSTICE STEVENS: But Craig against Boren was --

20 MS. SULLIVAN: -- has been --

21 JUSTICE STEVENS: -- had nothing to do with the
22 Commerce Clause.

23 MS. SULLIVAN: Correct, Your Honor, but if -- if
24 there were a law -- the states are claiming that any law
25 governing --

1 JUSTICE STEVENS: Nothing to do with
2 importation, either.

3 MS. SULLIVAN: But the dormant Commerce Clause
4 reflects a fundamental structural principle that is every
5 bit as much a part of the Constitution as the Equal
6 Protection Clause upheld in Craig v. Boren. Indeed this
7 Court, in cases from McCulloch to the Eleventh Amendment
8 cases and state sovereignty cases, has recognized that a
9 principle of the Constitution is no less fundamental
10 because it is a structural implication of the text. So
11 the dormant Commerce Clause stands on the same footing as
12 the affirmative power of Congress and on -- it's the same
13 footing as the Equal Protection Clause at issue --

14 JUSTICE STEVENS: Do you think Congress --

15 MS. SULLIVAN: -- in Craig v. Boren --

16 JUSTICE STEVENS: -- could enact a statute
17 authorizing the states to do just what they've done here?

18 MS. SULLIVAN: Absolutely, but it has not. And
19 the Wilson Act -- to go back to Justice Souter's question
20 and Justice Ginsburg's question -- Congress could
21 authorize it as it has done, for example, in the McCarran-
22 Ferguson Act, allowing the states to discriminate against
23 out-of-state industry with respect to the industry of
24 insurance. It has not done so here. Webb-Kenyon did not
25 authorize discrimination, and the Wilson Act forbade

1 discrimination for just -- reasons Justice Ginsburg
2 described. It said you may regulate imports of liquor in
3 the same manner as local liquor laws. And, of course, the
4 purpose of Section 2 was to allow to the dry states to
5 keep dry by preventing all those original packages from
6 piling up in the railway stations and being open to
7 bootleggers throughout the state, undermining the dry
8 policies of the state. Wilson forbade discrimination.
9 Web Kenyan didn't authorize it.

10 And in Congress' most recent articulation of its
11 view of the harmony between the Twenty-First Amendment and
12 the rest of the Constitution, the Twenty-First Amendment
13 Enforcement Act, passed in 2000, enacted in 2000, Congress
14 has a rules-of-construction section that says, "We view
15 any state plea to the federal courts to enforce their laws
16 as reflecting the jurisprudence of this court." And, in
17 fact, floor debate on that rules-of-construction section
18 reflected allusions to Bacchus, Healy, and the other cases
19 that said dormant commerce -- the negative implications of
20 the Commerce Clause, no less than the Equal Protection
21 Clause or the Due Process Clause or the Establishment
22 Clause, constrain the states in their regulation of
23 importation of liquor.

24 So with all respect to Justice Brandeis, Justice
25 Breyer, the Young's Market statements about discrimination

1 have been superceded.

2 What New York and Michigan have done here is say
3 that one set of exceptions apply only to in-state
4 producers, just as Connecticut, in Healy, said, "If you
5 just sell beer within our state, you don't have to face
6 price ceilings that you have to face if you do business
7 over in Massachusetts or Rhode Island." Just as in
8 Bacchus, the -- you struck down a decision -- an excise
9 tax exemption that said, "If you're an importer of liquor,
10 you have to pay an excise tax, but if you're a local
11 producer of locally produced wine and spirits, you get out
12 of that restriction."

13 JUSTICE SOUTER: Okay, we've got one difference
14 from Bacchus, because the claim that's being made here,
15 which I gather was not made, or made seriously, in
16 Bacchus, is there really is a need for differential
17 treatment for purposes of enforcement. Go back to the
18 enforcement of the tax law.

19 MS. SULLIVAN: Justice --

20 JUSTICE SOUTER: How are we supposed -- what
21 standard are we supposed to use to judge that argument?
22 And, by that standard, how good is the argument?

23 MS. SULLIVAN: Justice Souter, we believe the
24 standard should be strict scrutiny, though there must be a
25 necessity to serve --

1 JUSTICE SOUTER: Because --

2 MS. SULLIVAN: -- a legitimate --

3 JUSTICE SOUTER: -- it's facial discrimination.

4 MS. SULLIVAN: Because it's facial

5 discrimination. It's absolutely undisputed. Michigan --
6 in fact, Michigan state concedes that they have flatly
7 banned out-of-state wineries from shipping directly to
8 consumers. There's no question that this is facially
9 discriminatory. But even if the standard were a more
10 deferential one in which all the state needed to show was
11 a reasonable need for discrimination, it can't come close
12 to doing that here. Neither Michigan nor New York has
13 shown that the facial discrimination here is necessary to
14 protect minors or to protect the collection of taxes.

15 Let's start with minors. The Michigan claim
16 that it's protecting against under-18 sales is belied by
17 the fact that Michigan is allowing 40 Michigan wineries
18 and, at last count, 7500 Michigan retailers to deliver
19 directly to consumers. The way to protect my -- so just
20 as in Craig v. Boren, the exception for young women to
21 drink 3.2 beer, as opposed to young men, belied the
22 state's interest in temperance. So the pattern of
23 exceptions here that Michigan has created belies any
24 notion that it's protecting under-18-year-olds from
25 drinking. And, of course --

1 JUSTICE SOUTER: But what about audits for
2 revenue --

3 MS. SULLIVAN: On revenue, the nondiscriminatory
4 means that's available to the state that Michigan and New
5 York have not shown any reason to reject -- 26 states have
6 adopted some version of this -- is to require an out-of-
7 state winery to get a permit. And that's a -- Justice
8 Breyer, one thing that's still left of Brandeis. You can
9 require a permit from an out-of-state winery, which would
10 be unusual to acquire from widgets or milk. But you can
11 require a permit, and, as a condition of the permit,
12 Justice Souter. The out-of-state winery has to agree to
13 submit to the state's jurisdiction, to submit to the
14 state's tax jurisdiction.

15 And, Justice Kennedy, whether or not Quill would
16 permit taxation if you were simply sending by common
17 carrier, our clients want to -- want to pay taxes, want to
18 sign up for permits, want to play on a --

19 JUSTICE KENNEDY: Well --

20 MS. SULLIVAN: -- level playing field --

21 JUSTICE KENNEDY: -- well, they do today, I'm
22 sure, but --

23 [Laughter.]

24 MS. SULLIVAN: But, Justice Souter, to -- look
25 at the experience --

1 JUSTICE SOUTER: They -- you say they don't want
2 to go to California to do an audit.

3 MS. SULLIVAN: They certainly don't, Justice
4 Souter, but New Hampshire is a state that has actually --
5 your own state is a state that has on its Web site a set
6 of out-of-state wineries. It requires that they keep and
7 supply sales records on a monthly basis, that they keep
8 those records for three years --

9 JUSTICE SOUTER: Maybe we're getting ripped off.

10 MS. SULLIVAN: I --

11 [Laughter.]

12 MS. SULLIVAN: -- think New Hampshire's done
13 very well collecting taxes from out-of-state producers,
14 Justice Souter. It's a leader --

15 JUSTICE KENNEDY: Ms. Sullivan --

16 MS. SULLIVAN: -- in the field.

17 JUSTICE KENNEDY: -- may I -- may I -- I just
18 want to clarify one point. It was just -- the question
19 Justice Stevens asked. It's your position that if
20 Michigan allows Michigan wines to be sold and possessed
21 and consumed, that it must also allow out-of-state wine to
22 be sold, possessed, and consumed. Would --

23 MS. SULLIVAN: That's correct.

24 JUSTICE KENNEDY: That is your --

25 MS. SULLIVAN: That's correct, Justice Kennedy.

1 But to go back to the physical-presence
2 question, Justice Souter, Michigan is not now -- Michigan
3 officials are not now traipsing up to the upper peninsula
4 and all around the state to inspect wineries. The record
5 is clear on that. What Michigan does is require that
6 wineries in Michigan send samples and records to their
7 offices. And the Internet actually, if anything -- the
8 states say that the Internet increases the danger, but the
9 Internet also increases, in parallel, the power of the
10 states to police out-of-state wineries without an in-state
11 presence. Just as, Justice Stevens, the Internet may make
12 every speaker with a PC a town crier, as you said --

13 JUSTICE SOUTER: Could --

14 MS. SULLIVAN: -- in Reno versus ACLU --

15 JUSTICE SOUTER: -- could a state --

16 MS. SULLIVAN: -- so it makes every interstate
17 --

18 JUSTICE SOUTER: -- could a state require an
19 out-of-state winery to keep its books online, subject to a
20 password, so that, with a password, they could go in and
21 audit the books across the country, by wire?

22 MS. SULLIVAN: Yes, Justice Souter, if it were
23 part of a -- an agreement to a permit that the -- that the
24 out-of-state winery is willing to make, then there's no
25 extraterritorial regulation there, that would be just

1 fine. So, yes, the state can, through Internet, so to
2 speak, -- Internet monitoring, through virtual monitoring
3 -- do all the work it needs to do to make sure that the
4 out-of-state winery is paying taxes.

5 And, by the way, Michigan does not collect
6 taxes, Justice Kennedy, through the distributors.
7 Michigan collects taxes from the wineries, whether they're
8 in-state or whether they're out-of-state wine shippers.
9 So Michigan can give no justification for why out-of-state
10 wineries have to go through the distributors for tax
11 purposes. They're not using the distributors as their
12 tax-collection agents now.

13 JUSTICE KENNEDY: Commerce Clause, in effect,
14 protects consumers in states from entrenched business
15 interests that want to have protectionism, and you're --
16 you object to that and invoke the Commerce Clause to do
17 it. Under that rationale, aren't all the California
18 reciprocity laws invalid, as well?

19 MS. SULLIVAN: Justice Kennedy, reciprocity laws
20 -- yet -- possibly. They may be a necessary requirement
21 now that so many states are closed to states. They may be
22 a necessary mechanism for some states trying to get wines
23 to market in the way that the framers envisaged. It may
24 be a necessary, for now, to get into closed states. In a
25 world that we hope that you create, in which

1 discrimination is not allowed, they would be completely
2 unnecessary and possibly unconstitutional.

3 But to return to the key point here, Michigan
4 and New York may not facially discriminate in favor of
5 their own producers unless they can show that reasonable
6 nondiscriminatory alternatives are unavailable. And here,
7 Justice Souter, on any standard of heightened scrutiny,
8 they have not come close to making that kind of showing,
9 because there are all these other means -- means that have
10 been recognized by the 26 states that don't discriminate,
11 means that have been proven in states from New Hampshire
12 to Virginia, means that are not based on facial
13 discrimination. It's the discrimination that has to be
14 shown to --

15 JUSTICE STEVENS: Let me just --

16 MS. SULLIVAN: -- be necessary here.

17 JUSTICE STEVENS: -- be sure I heard your answer
18 to Justice Kennedy correctly. You'd concede that the
19 reciprocity laws are all unconstitutional?

20 MS. SULLIVAN: Not -- they are subject to
21 heightened scrutiny because they discriminate against out-
22 of-staters in a way that you could not -- for example, in
23 New Energy, you said that you can't have a preference for
24 -- you can't have a discrimination in Ohio in reciprocity
25 for Indiana. Reciprocity laws normally do violate the

1 principle of dormant Commerce Clause invalidation.

2 JUSTICE STEVENS: And you contend that they do
3 -- the liquor reciprocity laws, all of them are
4 unconstitutional.

5 MS. SULLIVAN: Not -- we contend that they would
6 be subject to strict scrutiny, and they could be upheld if
7 the state could show that they are closely tailored in a
8 --

9 JUSTICE STEVENS: They can -- that they can be
10 --

11 MS. SULLIVAN: -- way that these laws are not.

12 JUSTICE STEVENS: -- upheld by making a showing
13 that you say is virtually impossible to make.

14 MS. SULLIVAN: Your Honor, that's not before,
15 and if there were other reasons --

16 JUSTICE STEVENS: No, but I think it is --

17 MS. SULLIVAN: -- the state could --

18 [Laughter.]

19 JUSTICE STEVENS: -- it is an interesting
20 question as to whether that's a -- that's a -- you know,
21 that's a necessary consequence of this decision, in your
22 view.
23 you to reach the question of whether there are other state
24 defenses in other cases. The justifications the states
25 have given here are so terribly weak in relation to their

1 discriminatory laws that you should strike down these
2 laws, you should invalidate them, you should affirm the
3 judgement of the Sixth Circuit and reverse the judgements
4 of the Second Circuit.

5 Thank you very much.

6 JUSTICE STEVENS: Thank you, Ms. Sullivan.

7 Mr. Casey.

8 ORAL ARGUMENT OF THOMAS L. CASEY

9 ON BEHALF OF PETITIONERS IN 03-1116 and 03-1120

10 Mr. Casey: Justice Stevens, and may it please
11 the Court:

12 For more than 70 years, the Twenty-First
13 Amendment has permitted states to restrict the importation
14 and delivery of alcohol by out-of-state vendors. There
15 are substantial differences between licensed in-state
16 vendors of alcohol and out-of-state vendors that are not
17 subject to the full extent of state regulatory and taxing
18 powers. Because of those differences, Michigan requires
19 that sales, including direct shipment of alcohol, be
20 performed only by licensed, strictly regulated, in-state
21 vendors. This importation regulation is a power expressly
22 conferred by the text of the Twenty-First Amendment. It's
23 consistent with the entire history of alcohol regulation
24 in this country, and it's consistent with this Court's
25 jurisprudence interpreting the Twenty-First Amendment --

1 JUSTICE O'CONNOR: Now the Bacchus case cuts
2 against you, to some extent.

3 MR. CASEY: The Bacchus case was a very unique
4 situation that we believe is not in any way controlling in
5 the present case. It was not an importation case; it was
6 an exemption from a state excise tax on wholesalers for
7 alcohol that was already within the state's stream of
8 commerce.

9 JUSTICE KENNEDY: Well, but I think what's
10 fairly implied in Justice O'Connor's question, you have to
11 look at the language of Bacchus, and the language of
12 Bacchus, in effect, restored the anti-discrimination
13 component of the Commerce Clause to liquor control. I
14 think that's a fair and necessary reading of the case.
15 Now --

16 MR. CASEY: I disagree that that is a necessary
17 reading --

18 JUSTICE KENNEDY: And I know it --

19 MR. CASEY: -- of the case.

20 JUSTICE KENNEDY: -- involved pineapple wine and
21 all that. I know that, but --

22 [Laughter.]

23 JUSTICE KENNEDY: -- what we're talking about is
24 the language of the Court in that case.

25 MR. CASEY: Correct, but you're -- you have to

1 understand that language in light of the actual context.
2 There, the state did not even assert a Twenty-First
3 Amendment defense.

4 JUSTICE KENNEDY: Well, then you have to
5 understand Young in the light of its context, where there
6 was no discrimination --

7 MR. CASEY: There was discrimination in Young,
8 Your Honor, and I'd like to get to that. But to focus on
9 Bacchus for a moment, the state never asserted the Twenty-
10 First amendment, and it was undisputed --

11 JUSTICE STEVENS: No, but the question was
12 before the Court, because the dissent certainly raised the
13 question.

14 MR. CASEY: Correct. And we have suggested, in
15 our brief, that the Bacchus case is distinguishable and
16 not controlling here. We have also suggested that Bacchus
17 was incorrectly decided. We can prevail in this case
18 without overruling Bacchus, but we have suggested that --

19 JUSTICE O'CONNOR: Well, why don't you focus on
20 that? Because it's a little hard to plan on overruling
21 that case.

22 [Laughter.]

23 MR. CASEY: Well --

24 JUSTICE O'CONNOR: So why don't you at least
25 address how you would distinguish Bacchus? Because there

1 is a lot of language in there that cuts against your
2 position.

3 MR. CASEY: The only justification for the
4 statute in Bacchus was what the Court characterized as
5 "mere protectionism." That's not the situation with the
6 Michigan statute. Again, the Michigan statute involves
7 the paradigm -- or the quintessential Twenty-First
8 Amendment power of regulating importation; it's not an --
9 attacks on alcohol that's already an exemption from a tax
10 for two particular products.

11 JUSTICE SCALIA: Well, no -- I mean, that --

12 MR. CASEY: Do you --

13 JUSTICE SCALIA: -- that rather lengthy
14 statement you made earlier, that the Bacchus case didn't
15 involve the importation of alcohol. But it did. I mean,
16 the only reason that the in-state exemption was held to be
17 unconstitutional was because you were treating out-of-
18 state sellers differently. How can you possibly say that
19 --

20 MR. CASEY: It was treating --

21 JUSTICE SCALIA: -- the case didn't involve it?

22 MR. CASEY: -- it was treating two particular
23 items of in-state production differently than all other
24 in-state items and out-of-state items; but it was a
25 taxation issue, not an importation issue. And as the

1 Court said in Bacchus and in Capital Cities, the correct
2 analysis in the -- in evaluating this kind of case is to
3 determine, first, whether the activity of the regulation
4 at issue is an exercise of a power conferred by the
5 Twenty-First Amendment --

6 JUSTICE GINSBURG: Well, why don't we focus on
7 the Court's rationale, which was stated very concisely by
8 Justice White. He said, "Hawaii's discriminatory tax
9 cannot stand." And then he said, "Whatever you can say
10 about the Twenty-First Amendment, one thing is certain,
11 the central purpose was not to empower the states to favor
12 local liquor industries by erecting barriers to
13 competition." That was this Court's explanation for
14 ruling the way it did, even though there was this infant
15 industry of pineapple whatever.

16 MR. CASEY: That was the first stage of the
17 Court's analysis. The Court went on to say it was not
18 supported by any clear concern of the Twenty-First
19 Amendment in combating the evils of an unrestricted
20 traffic in liquor --

21 JUSTICE SOUTER: Well, your opponents have said
22 that there isn't any clear countervailing interest here.
23 They're saying you can't claim you're protecting kids,
24 because you're selling to the kids at home; there's no
25 serious audit-collection problem; and the other regulatory

1 interests -- they didn't say this, but are, sort of, gauzy
2 the way they're stated. I mean, they're saying that, by a
3 process of elimination, what you get down to is nothing
4 but discrimination and protectionism. What is -- what is
5 your answer to that? Where is --

6 MR. CASEY: We --

7 JUSTICE SOUTER: -- the substantial interest?

8 MR. CASEY: -- we disagree wholeheartedly with
9 that. The Michigan --

10 JUSTICE SOUTER: I know, but --

11 MR. CASEY: -- the Michigan regulations do
12 promote the state's interest in temperance. They do give
13 the state a better --

14 JUSTICE SOUTER: Well, you -- I mean, you say
15 that, but how? The very activity that you don't want them
16 to engage in, you're engaging in, or your local wineries
17 are engaging in, for example.

18 MR. CASEY: But the key is, with an in-state
19 licensee, the state has the ability to enforce against
20 that licensee, to inspect, to punish the licensee --

21 JUSTICE SOUTER: Do we --

22 MR. CASEY: -- to hold them accountable.

23 JUSTICE SOUTER: -- do we have a record of what
24 the state is doing with respect to its in-state licensees,
25 indicating what it could not do effectively to out-of-

1 staters? What do we have in the record?

2 MR. CASEY: The record in this case consisted of
3 a small number of affidavits, answers to interrogatories,
4 some surveys that were submitted as exhibits to motions
5 for summary judgment. Both sides submitted that type of
6 evidence. The District Court decided this was a question
7 of law, and specifically said that he did not consider any
8 of the factual evidence. So the record --

9 JUSTICE SOUTER: Well, should --

10 MR. CASEY: -- was not fully developed.

11 JUSTICE SOUTER: -- should we send it back for
12 -- if we disagree with the rationale, should one or the
13 other of these cases go back for evidence on what, in
14 fact, the state is doing in relation to its in-state
15 licensees and evidence that it could not effectively do
16 the same with respect to out-of-staters?

17 MR. CASEY: Yes, if --

18 JUSTICE SOUTER: And what would you show? What
19 do you, in effect -- make an offer of proof.

20 MR. CASEY: We would show that the Michigan
21 requirement limiting sales and direct shipping to in-state
22 licensees is required because the state only has effective
23 enforcement authority over in-state licensees. But --

24 JUSTICE O'CONNOR: Well, but wait a minute. You
25 -- it was suggested that the state could require a license

1 of an out-of-state supplier, and that that license could
2 be conditioned upon submission to Michigan's jurisdiction
3 in all respects. Is that not feasible?

4 MR. CASEY: Michigan does have a current license
5 for out-state seller of wine. You know, these players --

6 JUSTICE O'CONNOR: But could you not require
7 submission to --

8 MR. CASEY: We --

9 JUSTICE O'CONNOR: -- Michigan's jurisdiction
10 for all purposes of enforcement?

11 MR. CASEY: Certainly, we could pass a law to
12 that effect. The problem is --

13 JUSTICE SOUTER: And if you -- if you did that,
14 could you require, as I suggested of Counsel on the other
15 side, that you -- that, as a condition of the licensing,
16 that the business records of these companies be placed in
17 some secure online fashion, that, with a password, you
18 could get into and do an audit across the continent just
19 as readily as you could do an audit next door? Could
20 Michigan not do that?

21 MR. CASEY: But there is no guarantee that such
22 an audit would be just the same as an audit of an in-state
23 --

24 JUSTICE KENNEDY: Well, let me ask, once we
25 accept the proposition -- I think this is the necessary

1 reading of Bacchus -- that the Commerce Clause applies to
2 liquor and prevents discrimination, it seems to me it's
3 just like any other commodity -- food, milk, et cetera --
4 and, in this case, you have a very substantial burden to
5 show that this discriminatory treatment is justified --
6 maybe strict scrutiny, maybe heightened scrutiny. And
7 this trial has occurred. You have had that opportunity.
8 I don't see why you have a right to go back.

9 MR. CASEY: Despite the lack of evidence in the
10 record and the fact that District Court did not consider
11 that evidence, the Sixth Circuit dismissed all of those
12 claims of the state and remanded for entry of judgement on
13 the Plaintiffs without giving us an opportunity to develop
14 that record. I also want to say --

15 JUSTICE SCALIA: See, I don't -- I don't
16 understand. Didn't you have an opportunity to develop the
17 record? I mean, this was --

18 MR. CASEY: There was --

19 JUSTICE SCALIA: -- a discriminatory matter. It
20 was your burden to show that whatever discrimination
21 existed -- assuming that we find the law the way Bacchus
22 seemed to say it is -- it was your burden to show that
23 there was some justification for that discrimination.

24 MR. CASEY: There --

25 JUSTICE SCALIA: You had your chance to show it.

1 MR. CASEY: -- there was evidence in the record.
2 There were affidavits from Michigan enforcement officials
3 about stings, about problem with enforcing --

4 JUSTICE SCALIA: All right, well --

5 MR. CASEY: -- against Internet --

6 JUSTICE SCALIA: -- tell us what those -- what
7 that material is, and if we find that material sustains
8 your burden, that's fine, you win; and if it doesn't, you
9 lose. I don't know why we have to let you go back and --

10 [Laughter.]

11 JUSTICE SCALIA: -- and retry the case.

12 MR. CASEY: Our key position is that before you
13 get to that kind of evidentiary burden, the legal question
14 --

15 JUSTICE SCALIA: That's what I'm interested in.
16 You win, either way. If it -- maybe if the Commerce
17 Clause -- dormant Commerce Clause discrimination principle
18 applies, you win, if we scrutinize strictly and say you
19 have a good justification. Whether you do or not, I guess
20 I'll find out from reading the record, but I'm more
21 interested in the first half, which is -- doesn't apply at
22 all.

23 Now, your opponent said, in response to my
24 pointing to Brandeis on this, that to support you, as to
25 precedent, Bacchus. Young's Market isn't any good

1 anymore. As to concept, you can divide the dormant
2 Commerce Clause into a -- you have to favor out-of-state
3 principle, which was the original package doctrine, which
4 has long since disappeared, and the anti-discrimination
5 principle, which hasn't disappeared. And her third part,
6 implicit, is, historically, this whole Section 2 was aimed
7 at the original package part; there is not a word in any
8 brief I saw that suggests any motive in Section 2 to get
9 rid of the anti-discrimination principle. I haven't found
10 a word in support on your side on that. So she says, "Put
11 those three things together, and we win." That's her
12 point. Now, what's your response?

13 MR. CASEY: We disagree with that entire
14 position. The text --

15 JUSTICE BREYER: I know you do.

16 [Laughter.]

17 MR. CASEY: -- the text of the Twenty-First
18 Amendment -- the text of the Twenty-First Amendment gives
19 states the right to control imports. The history of the
20 Twenty-First Amendment in the Webb-Kenyon Act clearly
21 demonstrate -- the purpose of the Webb-Kenyon Act was to
22 eliminate alcohol shipments from --

23 JUSTICE KENNEDY: Do you think --

24 MR. CASEY: -- the Commerce Clause.

25 JUSTICE KENNEDY: -- that Michigan can prohibit

1 the importation of any wine, but still allow its own wine
2 to be produced, sold, and consumed?

3 MR. CASEY: Yes. That's precisely what
4 situation was with --

5 JUSTICE BREYER: I know you do, but the
6 principle of Webb-Kenyon, which was enacted when the
7 Wilson Act was already there -- very clear -- is to stop
8 the original package doctrine, stop favoritism of the out-
9 of-state liquor shipment, which meant, in a dry state, you
10 had to sell less. I mean, that's what it's there for. I
11 didn't find a word, in other words, contrary to what I've
12 just said; and if there are such words, now is the time to
13 point them to me -- to point them out.

14 MR. CASEY: The title of the Webb-Kenyon Act is,
15 "It is in -- an act divesting intoxicating liquors of
16 their interstate character in certain cases. The clear
17 intent of the Webb-Kenyon Act was to remove alcohol from
18 the Commerce Clause. The Constitution -- the Twenty-First
19 Amendment constitutionalized that Commerce Clause
20 framework." That's what this Court said in Craig v.
21 Boren. Craig v. Boren also said, "The Twenty-First
22 Amendment creates an exception to the operation of -- the
23 normal operation of the dormant Commerce Clause."

24 JUSTICE GINSBURG: Well, then you are asking us,
25 I guess, not only to reject Bacchus, but who was the first

1 one that said that the Commerce Clause remains alive and
2 well? Was it Justice Stewart? And I forgot which case it
3 was. It was --

4 MR. CASEY: That may be. The Commerce Clause
5 remains alive and well, but the Commerce Clause --

6 JUSTICE GINSBURG: In the context of alcoholic
7 beverages.

8 MR. CASEY: In the context of powers expressly
9 conferred upon the states by the Twenty-First Amendment,
10 that's an exception to the operation -- the normal
11 operation of the dormant Commerce Clause. Commerce Clause
12 has to be read in light of the Twenty-First Amendment,
13 just as the Twenty-First Amendment has to be read in light
14 of the Commerce Clause and other provisions of the
15 Constitution.

16 JUSTICE GINSBURG: But that's a different
17 argument than the one you made before, which seems to be
18 saying the Twenty-First Amendment trumps, not that the two
19 have to be harmonized.

20 MR. CASEY: When you read the two in light of
21 each other, the purposes of each, it is clear that the
22 purpose of the Twenty-First Amendment was to remove
23 alcohol from interstate commerce as a constitutional
24 matter, to prevent Congress from tampering with it in the
25 future, to give the judgement to the states as to --

1 JUSTICE KENNEDY: Well, you --

2 MR. CASEY: -- the necessity for --

3 JUSTICE KENNEDY: -- you say further than that;
4 you say the purpose was to allow that the states
5 discriminate in favor of home industry, if it chooses.

6 MR. CASEY: That is one of the purposes, yes.
7 In that -- in the case that was decided immediately after
8 the Young's Market, Mahoney, and Indianapolis Brewing, the
9 Court said, "Discrimination is permissible in this narrow
10 context, where the state is acting pursuant to its Twenty-
11 First Amendment powers and regulating importation of
12 alcohol."

13 JUSTICE O'CONNOR: But that gets us back to
14 Bacchus and what to make of that.

15 MR. CASEY: I -- as I indicated, I don't believe
16 Bacchus overrules those cases; it didn't even cite most of
17 those cases. But --

18 JUSTICE O'CONNOR: Well, the dissent seemed to
19 think so --

20 [Laughter.]

21 JUSTICE O'CONNOR: -- didn't it?

22 MR. CASEY: That's correct. But, as I said, we
23 believe Bacchus is distinguishable, because that was mere
24 protectionism, the state does have other justifications
25 here --

1 JUSTICE KENNEDY: Well, we've also said that
2 mere protectionism is permitted.

3 MR. CASEY: Mere protectionism is permitted. In
4 this case, if we have to present other justifications, we
5 have, and there are other justifications, unlike the
6 situation in Bacchus. So even if the Bacchus rationale is
7 good law, we still prevail on that.

8 Thank you, Your Honor.

9 JUSTICE STEVENS: Ms. Halligan?

10 ORAL ARGUMENT OF CAITLIN HALLIGAN

11 ON BEHALF OF RESPONDENTS IN 03-1274

12 MS. HALLIGAN: Justice Stevens, and may it
13 please the Court:

14 In answer to your question first, Justice
15 Breyer, the Twenty-First Amendment does not propose a
16 nondiscriminatory ban. The Court rejected that position,
17 not just in Young's Market and Mahoney in Indianapolis,
18 but also in Clark Distilling, the case in which the Court
19 upheld the constitutionality of the Webb-Kenyon Act,
20 itself. It held that the Webb-Kenyon Act operated to
21 remove any immunity that had been conferred by the dormant
22 Commerce Clause. Bacchus is not to the contrary. In
23 North Dakota, which follows Bacchus, the Court relied
24 again on Young's Market to say that the states could
25 impose different rules on out-of-state vendors where they

1 were necessary to protect the integrity --

2 JUSTICE KENNEDY: Do you -- do you take the
3 position that your colleague on your same side takes, that
4 a state can permit only the sale, consumption, and -- of
5 its own wines, and bar all out-of-state wines?

6 MS. HALLIGAN: The express terms of the Twenty-
7 First Amendment would allow that if -- particularly if it
8 were necessary to advance the concerns of the Twenty-First
9 Amendment. For example --

10 JUSTICE SCALIA: No, no, don't --

11 JUSTICE KENNEDY: No --

12 JUSTICE SCALIA: -- don't put in the
13 qualifications.

14 JUSTICE KENNEDY: -- just for local
15 protectionism.

16 MS. HALLIGAN: Simply for mere protectionism?

17 JUSTICE KENNEDY: It's just for local
18 protectionism. We want to promote our wines, and not
19 anybody else's.

20 MS. HALLIGAN: The terms of the amendment would
21 allow that, but I don't think the Court needs to explore
22 the outer parameters of the Twenty-First --

23 JUSTICE KENNEDY: Well, I'm trying to understand
24 what your --

25 MS. HALLIGAN: -- the Twenty-First --

1 JUSTICE KENNEDY: -- what your theory is. And
2 so you are in agreement with your colleague that this
3 could be done, if New York chose. You can only drink New-
4 York-grown wines in -- sell and consume -- in the state of
5 New York.

6 MS. HALLIGAN: It could be done, but that
7 question really isn't presented here, because --

8 JUSTICE BREYER: But could Congress pass a law
9 forbidding it?

10 MS. HALLIGAN: That's a difficult question,
11 because --

12 JUSTICE BREYER: Yeah. All right. But I need
13 an answer to it.

14 [Laughter.]

15 JUSTICE BREYER: Because, you see, what's going
16 to come next is, if you say yes, I'm going to say, "Well,
17 didn't it pass that law with the Wilson Act?"

18 MS. HALLIGAN: Let me answer both of those
19 questions, if I can, Your Honor. Certainly, this Court
20 has held, repeatedly, that the Twenty-First Amendment did
21 not, in any substantial way, completely repeal Congress'
22 affirmative power under the Commerce Clause. It said that
23 in *Midcal* and *Capital Cities*. But we would argue that if
24 Congress acted in a way which completely removed state
25 authority to determine whether or not alcohol could be

1 sold and the terms under which it could be sold -- for
2 example, if Congress said all states must be dry -- then
3 we would argue that the Twenty-First Amendment wouldn't
4 allow that, because that would completely eviscerate any
5 state authority.

6 JUSTICE SCALIA: How can that be? I mean, if
7 this is a constitutional elimination of the Commerce
8 Clause, how can Congress bring it back in simply by
9 enacting a statute?

10 MS. HALLIGAN: The legislative history makes
11 clear that the Twenty-First Amendment was intended to
12 eliminate the impediments posed by the dormant Commerce
13 Clause and authorize states to regulate it.

14 JUSTICE SCALIA: But you -- you want us to read
15 it by its terms. It doesn't say anything about the
16 dormant Commerce Clause. If we read it absolutely the way
17 one of your arguments wants us to do, surely it excludes
18 Congress.

19 MS. HALLIGAN: By terms of our --

20 JUSTICE SCALIA: So you don't want us to read it
21 absolutely.

22 MS. HALLIGAN: Your Honor, I don't think that --
23 again, I don't think that you need to decide those
24 questions in this case. This case goes to what's at the
25 very core of the Twenty-First Amendment, whether states

1 can decide who can sell liquor to their citizens and
2 whether or not states --

3 JUSTICE KENNEDY: But it also goes to the very
4 core of the Commerce Clause. And there are really two
5 classifications of dormant Commerce Clause cases. One is
6 -- and I think it's an improper use of the term "dormant
7 clause" -- is where there's discrimination. Only the
8 Congress can allow discrimination against out-of-state
9 products. That's one whole classification. And that's
10 what's -- and that's what's involved here.

11 MS. HALLIGAN: North Dakota indicates otherwise,
12 I believe, Your Honor. In North Dakota, this Court said
13 that, because, when alcohol flows across the border, it
14 poses unique risks to the regulatory regime, because the
15 state can't bring the alcohol within the full extent of
16 its regulatory and supervisory powers, that it may be
17 appropriate and necessary for states to impose unique
18 rules on out-of-state vendors. In North Dakota, the Court
19 did not say --

20 JUSTICE SCALIA: Well, but that's fine. And the
21 other side isn't denying that here, that if, you know,
22 they're -- discrimination means treating out-of-state
23 people differently without good reason.

24 MS. HALLIGAN: But there is good reason --

25 JUSTICE SCALIA: Now, if you're willing to --

1 okay, if you're willing to acknowledge that, then we're
2 halfway there and we're just arguing about whether there
3 is good reason here or not.

4 MS. HALLIGAN: There is good reason here, Your
5 Honor. What's critical about New York's law, as well as
6 Michigan's law, is that it requires that any alcohol
7 vendor have a physical presence in the state. And that's
8 important for a couple of reasons. The state can't
9 meaningfully oversee traffic in alcohol with an out-of-
10 state entity. Petitioner suggested --

11 JUSTICE SOUTER: What is it doing with the in-
12 state entities? I mean, one of the claims is that nobody
13 is posting officers outside the in-state wineries, no
14 one's making substantial physical audits of in-state
15 wineries. Is that wrong?

16 MS. HALLIGAN: It is wrong, Your Honor. It's
17 certainly not the case that we have an SLA inspector
18 outside every entity that sells liquor. That would not be
19 possible. But it is true that the state liquor authority
20 can, and does, physically inspect the premises. They do
21 so to determine whether --

22 JUSTICE SOUTER: What do they inspect them for?
23 Their books, I suppose.

24 MS. HALLIGAN: Well, more than that, and this is
25 why the physical presence is important and why the

1 Internet hypothetical that Your Honor raised would not --
2 would not satisfy the state's concerns. What the state
3 can do is, it can go onto a premises, and it can count
4 whether the bottles on the shelves of that premises match
5 the records. That's the best way to detect whether or not
6 there is evasion. Because if you have --

7 JUSTICE SOUTER: And is there a record that the
8 state is doing that?

9 MS. HALLIGAN: There is not clear evidence in
10 the record with respect to that -- to that level of
11 detail, but that --

12 JUSTICE SOUTER: Well, isn't that the end of
13 that issue, then? I mean, it is your burden, isn't it?

14 MS. HALLIGAN: Your Honor, there is material in
15 the McKeon affidavit, which is in the Joint Appendix --
16 Mr. McKeon is the Chair of the state liquor authority --
17 but it's also the case that to suggest that because there
18 is some option out there -- and there's no firm evidence
19 that a less prescriptive rule would, in fact, satisfy the
20 state's concerns in preventing diversion and tax evasion -
21 -- but the possibility that's there's some rule out there,
22 because other states have adopted more lax rules, is to
23 treat alcohol like any other product. And the Twenty-
24 First Amendment reflects a consensus by this nation that
25 alcohol is unique, that it should not be open to --

1 JUSTICE SOUTER: Well, the Twenty-First
2 Amendment at least recognizes that alcohol can be treated
3 as unique, and the issue here is whether you're really
4 doing that in a way that supports your claim of interest.

5 MS. HALLIGAN: Yes --

6 JUSTICE SOUTER: And, so far, the one specific
7 thing I've heard from you is that state inspectors do go
8 on winery premises, and they count bottles, and they see
9 if they match what's on the written record.

10 MS. HALLIGAN: They also draw on the assistance
11 of local law enforcement. And this is also --

12 JUSTICE GINSBURG: But if that's --

13 MS. HALLIGAN: -- set forth --

14 JUSTICE GINSBURG: -- if that's really what New
15 York's concern is, then why does New York say, "Ah, but
16 out-of-staters, if only you establish an office here --
17 not a winery; an office -- you can operate, and you can
18 make the direct sales from that office, and even in" -- I
19 think your brief told us that, well, these small wineries,
20 out-of-state wineries, haven't got all that much to worry
21 about, because, after all, they could join together -- a
22 group of them could open an office. Now, that office,
23 owned by a group of out-of-state vintners is not going to
24 have bottles on the shelf, is it?

25 MS. HALLIGAN: Yes, Your Honor, it would.

1 That's -- the state laws requires that any licensed winery
2 have a government-bonded storehouse or ware-room --
3 storehouse -- storeroom or warehouse, pardon me --

4 JUSTICE GINSBURG: Well, isn't the --

5 MS. HALLIGAN: The reason for that is because
6 physical products --

7 JUSTICE GINSBURG: How do you envision this
8 combination of small wineries? You said that in-state
9 establishments might be jointly maintained by out-of-state
10 wineries.

11 MS. HALLIGAN: Yes, Your Honor. The state
12 liquor authority has not issued any regulations on this,
13 but presumably what they would say is, you could share a
14 space, provided that the physical property of each winery,
15 the bottles, is segregated so that the states can come in
16 and check whether or not each winery's products conform
17 with their records.

18 There are other reasons why a physical presence
19 is important, as well. First of all, the state draws on
20 local law enforcement extensively to identify illegal
21 activities, and that would not be possible with any entity
22 located out-of-state. Additionally --

23 JUSTICE SOUTER: What illegal -- I'm sorry --
24 you've got to be specific. What illegal activities?
25 Selling to minors?

1 MS. HALLIGAN: It could be selling to minors,
2 but it could also simply be sale out of an unlicensed
3 premises, where you are selling outside the proper hours
4 of sale, or sale outside of the three-tier system --

5 JUSTICE SOUTER: Yeah, but if licensed premises
6 don't serve a state interest, then you can't require a
7 licensed premises, so that argument doesn't get too far.

8 MS. HALLIGAN: But, Your Honor, the principle
9 that having entities that sell liquor be licensed, is one
10 that is at the heart, not just at the --

11 JUSTICE SCALIA: How does -- how does requiring
12 them to have an in-state office somehow prevent them from
13 shipping to minors from out of state --

14 MS. HALLIGAN: It --

15 JUSTICE SCALIA: -- or from shipping to
16 consumers from out of state without paying you their tax?

17 MS. HALLIGAN: It --

18 JUSTICE SCALIA: How does the opening of an --

19 MS. HALLIGAN: Right.

20 JUSTICE SCALIA: -- an office in New York State
21 at all prevent that?

22 MS. HALLIGAN: It can't prevent it a hundred
23 percent, but no --

24 JUSTICE SCALIA: It can't prevent it at all.

25 MS. HALLIGAN: Your Honor, it can deter it, and

1 it can deter it significantly, because, first of all,
2 there is a much more significant opportunity to identify
3 the illegal activities; and, secondly, if a retailer or a
4 wholesaler or a manufacturer knows that, that operates as
5 a powerful deterrent --

6 JUSTICE BREYER: What did --

7 JUSTICE SOUTER: We seem to be talking -- may I
8 just ask one -- we seem to be talking about two different
9 things. Justice Scalia was assuming that, if you have the
10 license and some in-state warehouse, you can ship from
11 outside. And I -- is that the assumption? Or is your
12 argument that New York can require -- does require the in-
13 state warehouse, and you can ship into -- in New York, you
14 can ship only from that warehouse?

15 MS. HALLIGAN: To be clear, the state has not
16 issued regulations that specifically address that point,
17 because --

18 JUSTICE SOUTER: So the -- we don't know yet.

19 MS. HALLIGAN: We don't know. But in talking
20 with the state liquor authority, they have made it clear
21 that their intent would be to require that the liquor come
22 first to the in-state premises --

23 JUSTICE SCALIA: Well, even if -- I'm willing to
24 assume that. How does that guarantee that the out-of-
25 state winery will not, in violation of New York State law,

1 ship directly to minors or ship directly to consumers,
2 just simply bypassing its cache of wine in New York?

3 MS. HALLIGAN: There is no guarantee, Your
4 Honor, but there is never any guarantee --

5 JUSTICE SCALIA: There's no guarantee.

6 MS. HALLIGAN: -- that people won't --

7 JUSTICE SCALIA: It doesn't -- it doesn't enable
8 you to enforce your law any more rigorously than without
9 having a requirement for a local office.

10 MS. HALLIGAN: That, I would respectfully
11 disagree with. It does operate as a powerful deterrent
12 and --

13 JUSTICE SOUTER: Well, your argument there is
14 that --

15 MS. HALLIGAN: -- as an investigative aid.

16 JUSTICE SOUTER: -- if they break the law, you
17 can shut down the warehouse; whereas, you can't
18 effectively do that if the warehouse is in California.
19 Isn't that your point?

20 MS. HALLIGAN: That's one of the points, but
21 also that we're much more likely to be able to identify
22 the illegal activities in the first place. The suggestion
23 that we would send inspectors to California or any other
24 place to look at books and count bottles is completely
25 infeasible. And the Twenty-First Amendment was intended

1 to allow states to deal with the regulatory challenges
2 that are posed when liquor comes across the border. If we
3 had to demonstrate that there was a hundred-percent
4 compliance, then we couldn't have any regulation at all.
5 That's not, I would submit, a --

6 JUSTICE GINSBURG: Well, to what --

7 MS. HALLIGAN: -- reasonable measure.

8 JUSTICE GINSBURG: -- to what extent does New
9 York take account of, say, the rigorous regulation in the
10 states from which this wine is coming? You say we must do
11 this to police for all kinds of things. But don't other
12 states -- California, Virginia -- don't they have laws
13 that their local wineries must meet?

14 MS. HALLIGAN: They --

15 JUSTICE GINSBURG: And is New York just saying,
16 "We're going to treat this thing as though it's totally
17 unregulated, anyway"?

18 MS. HALLIGAN: We're not suggesting that, Your
19 Honor. What we are suggesting is that relying on other
20 states to enforce law violations in New York State is not
21 a very feasible alternative. Additionally, there are 33
22 states that have agreed with New York, a number of whom
23 are states that have either reciprocal or unrestricted
24 shipping statutes, and said to this Court, "Please do not
25 prohibit the kinds of laws that are at issue in New York

1 and Michigan." So it's obviously important to the
2 regulators in those states, as well.

3 JUSTICE SCALIA: What about the states that do a
4 allow shipment from out of state? They don't care about
5 their --

6 MS. HALLIGAN: I can't --

7 JUSTICE SCALIA: How many are there that allow
8 shipment from out-of-state wineries?

9 MS. HALLIGAN: I believe that the current number
10 is 26 states. I certainly can't speak to the regulatory
11 motivations of each of those states, or the reasons why
12 those laws might have been passed.

13 JUSTICE SCALIA: It certainly suggests that what
14 -- that what you're arguing is not essential to the
15 state's enforcement of its alcohol laws.

16 MS. HALLIGAN: Well, a number of those states
17 have, in fact, joined New York and Michigan in asking the
18 Court not to --

19 JUSTICE SCALIA: States don't like federal
20 regulation --

21 MS. HALLIGAN: -- restrict that.

22 JUSTICE SCALIA: -- of any sort, of course. I
23 know that.

24 [Laughter.]

25 MS. HALLIGAN: Your Honor, I think that all the

1 Twenty-First Amendment requires the states to demonstrate
2 is that the regulatory regime that they have chosen has
3 some relationship to their goals of protecting the
4 integrity of the state's system. And that's certainly
5 what the Court suggested in North Dakota.

6 JUSTICE SCALIA: Well, I'm not sure. When you
7 have facial discrimination against out-of-state products,
8 I think you're -- the bar is a little higher than that.

9 MS. HALLIGAN: Well, that was the case in North
10 Dakota, as well. In North Dakota, the state imposed
11 regulations on out-of-state vendors that were extremely
12 onerous, so onerous that some vendors said they wouldn't
13 ship products at all. That was alcohol that was not even
14 destined for consumption within the state; but on a
15 federal enclave. And the mere risk of diversion into
16 unregulated and unlawful channels was enough to allow the
17 state to impose those discriminatory rules. The same is
18 true here.

19 Justice O'Connor, you also asked about Bacchus,
20 as well, and I would like to take a moment to address
21 that.

22 Bacchus is distinguishable in several ways.
23 First of all, Bacchus was a tax. And while we would argue
24 that taxes could be used to further states' interest in
25 suppressing consumption, for example, it is certainly not

1 at the heart of the -- of the Twenty-First Amendment in
2 the way that the direct regulation of alcohol across the
3 border is.

4 JUSTICE STEVENS: No, but if you can't grant a
5 tax exemption -- and it seems to me, a fortiori -- you
6 can't grant a prohibition about importing at all.

7 MS. HALLIGAN: I, respectfully, would disagree
8 with that, Your Honor. If you can't address the alcohol
9 that flows across the border, which was precisely why the
10 Twenty-First Amendment was enacted, as well as Webb-
11 Kenyon, because the --

12 JUSTICE STEVENS: No, I'm suggesting a tax on
13 imports is less restrictive than a prohibition on imports.

14 MS. HALLIGAN: Well, we would certainly, you
15 know, welcome the authority to do both, but importation is
16 what is at the heart of the Twenty-First Amendment.

17 Bacchus is also different, because, there, the state made
18 no effort whatsoever to defend the statute with reference
19 to any concerns related to the Twenty-First Amendment.
20 And Bacchus --

21 JUSTICE GINSBURG: And according to the District
22 Court, in this very case, the State Attorney General
23 conceded that New York's measure allowing direct sales by
24 in-state wineries was designed to benefit local farmers.

25 MS. HALLIGAN: That was an off-the-cuff remark

1 by a single attorney, Your Honor, and that can't be taken
2 as dispositive, given the state's vigorous defense of this
3 statute. It also was regarding a provision that is not
4 even directly before the Court right now which confers no
5 different shipment privileges than are conferred on any
6 winery, whether in-state or out-of-state, that would
7 obtain a license to sell in New York.

8 JUSTICE STEVENS: Thank you, Ms. Halligan.

9 MS. HALLIGAN: Thank you, Your Honor.

10 JUSTICE STEVENS: Mr. Bolick, you have, let's
11 see, about four minutes left.

12 REBUTTAL ARGUMENT OF CLINT BOLICK

13 ON BEHALF OF PETITIONERS IN 03-1274

14 MR. BOLICK: Thank you, Justice Stevens. Three
15 very brief points.

16 There his a panoply of tools available to states
17 to police out-of-state wineries in direct shipping, as the
18 Federal Trade Commission has recognized. They can, if
19 they issue a permit, revoke that permit. And New York has
20 authority to issue such permits under Section 105-9. The
21 Twenty-First Amendment Enforcement Act, for which the
22 liquor distributors and states lobbied very hard, gives
23 injunction authority in the home federal courts. And, of
24 course, the federal agency, the Tax and Trade Bureau, can
25 revoke a permit if state law is violated. In the --

1 JUSTICE SCALIA: Who's going to count the
2 bottles?

3 [Laughter.]

4 MR. BOLICK: Your Honor, the state -- the
5 Federal Government is able to count those, but the
6 evidence is that they don't. And that goes back to a
7 question, I believe, Justice Souter asked. In the
8 Michigan case, a question was posed in an interrogatory,
9 "What enforcement by -- is done of in-state wineries." In
10 that regard, the answer was, "None."

11 JUSTICE BREYER: How do you count bottles? I
12 would have thought the consumers have all the bottles.

13 [Laughter.]

14 MR. BOLICK: That's exactly right. And,
15 certainly in the directly shipping context in-state, that
16 is emphatically the case.

17 JUSTICE SCALIA: I think they were referring to
18 full bottles. I guess --

19 [Laughter.]

20 MR. BOLICK: With direct shipping --

21 JUSTICE STEVENS: They've all been drinking --

22 [Laughter.]

23 JUSTICE STEVENS: -- to arbitrators.

24 MR. BOLICK: With direct shipping, Justice
25 Scalia, we can personalize things.

1 In terms of the Bacchus case, as Justice
2 Ginsburg pointed out, New York, like Hawaii, conceded
3 protectionism. It is very rife in the legislative record
4 in 1970, when the direct shipping was extinguished. In
5 1995, when Governor Pataki vetoed a bill that would have
6 solved this problem, he said, and I quote -- and this is
7 in the record, the Joint -- the Second Circuit Joint
8 Appendix, at 442 -- he said, and I quote, "Since the vast
9 majority of this country's wines are produced in
10 California, I believe that this bill would inevitably lead
11 to a significant increase in mail-order wines from that
12 state into New York. This increase could, in turn, lead
13 to a decrease in sales for New York liquor stores and
14 their distributors, and shrink New York wineries' market
15 share. That is protectionism."

16 And, finally, the notion that small winemakers
17 could go to all 50 states and open offices in order to do
18 this -- if you could drive out to Middleburg and visit
19 Juanita Swedenburg's winery -- and she invites you to do
20 so --

21 [Laughter.]

22 MR. BOLICK: -- you will find Mrs. Swedenburg
23 selling wine, harvesting grapes, and bottling. This is a
24 ban on -- this is market foreclosure, sure and simple --
25 fewer than 600 wineries are represented on the stores of

1 New York's shelves, out of over 3,000 wineries --

2 JUSTICE STEVENS: The question --

3 MR. BOLICK: -- in the United States.

4 JUSTICE STEVENS: -- really is whether the plain
5 language of the Twenty-First Amendment allows that very
6 protectionism.

7 MR. BOLICK: And I would refer you, in my brief
8 time remaining, to the brief, the Carter-Phillips brief
9 for the Napa Valley Vintners Association, the DKT Liberty
10 brief, which go into the history of the Twenty-First
11 Amendment, which was intended to restore the police power,
12 which did not include the power to discriminate. Our
13 clients cannot compete with the liquor distributors in the
14 political marketplace in their -- in their -- in their
15 home states. They can, however, compete in the economic
16 marketplace. The Commerce Clause protects that right,
17 that level playing field. The Twenty-First Amendment was
18 never intended to take it away.

19 We ask this Court, respectfully, to honor 124
20 years of precedent in the National Economic Union.

21 If there are no further questions, thank you.

22 JUSTICE STEVENS: Thank you, Mr. Bolick. The
23 case is submitted.

24 (Whereupon, at 11:08 a.m., the case in the
25 above-entitled matter was submitted.)

KANSAS WINE & SPIRITS WHOLESALERS ASSOCIATION

To: House Committee on Federal and State Affairs

From: R.E. "Tuck" Duncan, KWSWA



RE: Direct Shipping Legislation

"The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980). (doc: 96 KB)

"The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders . . . Indeed, "[t]his Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." . . . § 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984). (doc: 74 KB)

"The Court has made clear that the States have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets . . . In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor [t]hat . . . is unquestionably legitimate." North Dakota v. U.S., 495 U.S. 423, 413-32 (1990). (doc: 160 KB)

"§ 2 of the twenty-first amendment empowers Indiana to control alcohol in ways that it cannot control cheese. . . No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation. . . Every use of sec.2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then sec.2 would be a dead letter. No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause." Bridenbaugh v. Freeman-Wilson, (pdf: 180 KB) 227 F.3d 848, 851-53 (7th Cir. 2000) cert. denied sub nom Bridenbaugh v. Carter, 121 S. Ct. 1672 (2001). (pdf: 146 KB)

FEDERAL AND STATE AFFAIRS

"Presence ensures accountability. Records of sales and compliance with New York's regulatory requirements must be available for inspection by SLA officials. Violations are subject to disciplinary measures carried out in New York, including fines imposed against the bond all license holders are required to post. . . In 2000 there were over 2,100 wineries in the country, a 275% increase since 1975. Requiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless." Swedenburg v. Kelly, Docket No. 02-9511, 03-7089 Con (2nd Cir, 2004).

"Under section 2, states have the authority to be proactive as well as reactive," and the state has a legitimate interest in requiring a physical presence for the purposes of "auditing company records, monitoring compliance with the ABC laws, monitoring licenses, checking tax forms for audits, etc." Swedenburg v. Kelly, Docket No. 02-9511, 03-7089 Con (2nd Cir, 2004).

"New York's regulatory regime falls squarely within the ambit of section 2's grant of authority. The statutory scheme regulates only the importation and distribution of alcohol in New York. New York's prohibition of the sale and shipment of wine by unlicensed wineries directly to New York consumers serves valid regulatory interests. The statute allows the state to monitor the distribution and sale of alcoholic beverages by permitting such distribution and sale only through state licensed entities supervised by, and accountable to, the SLA." Swedenburg v. Kelly, Docket No. 02-9511, 03-7089 Con (2nd Cir, 2004).

"Changes in marketing techniques or national consumer demand for a product do not alter the meaning of a constitutional amendment." ." Swedenburg v. Kelly, Docket No. 02-9511, 03-7089 Con (2nd Cir, 2004).

Despite a wealth of Supreme Court and appellate court opinions upholding a State's right under the 21st Amendment to control the importation and distribution of alcohol, lawsuits have been filed over the past several years in twelve different States challenging alcohol regulatory systems prohibiting the unlicensed interstate direct shipment of alcohol to consumers.

These include: Arizona, Florida, Indiana, Michigan, New Jersey, New York, North Carolina, Ohio, Rhode Island, Texas, Virginia, Washington.

The proponents of these lawsuits decry direct shipping bans - especially where in-State licensed wineries are permitted to ship directly - and claim violations of the "dormant" Commerce Clause. Should the Supreme Court ultimately accept this notion, it could severely damage the ability of a State to regulate the distribution of

alcohol as it deems appropriate for the protection of its citizenry - especially minors, and to efficiently collect excise and sales tax revenue.

Although the district and appellate court opinions rendered thus far have varied from case to case, and while it will probably take the Supreme Court to finally resolve the issues raised in the direct shipping litigation, the following points can be stated with certainty:

1. The three-tiered system has been upheld as unquestionably legitimate. Though often attacked by the plaintiffs, no court in any action has yet questioned the integrity and constitutionality of the three-tier system, a system noted by Justice Scalia in the North Dakota decision as "unquestionably legitimate."
2. No state ban on direct shipments - standing alone - has been challenged or questioned. The only cases that plaintiffs have brought have involved states where the legislature has determined to enact legislation allowing either in-state wineries or wineries in reciprocal states to ship to consumers. And in those cases, even where the courts have disagreed with allowing in-state direct shipping - the courts have often pointed out that simply banning direct shipping outright is an entirely constitutional and legitimate practice.
3. During the direct shipping litigation battle, wholesalers have taken a position supporting state prerogatives under the 21st Amendment as a matter of principle. For instance, wholesalers oppose reciprocal or other forms of direct shipping laws as bad policy, but support a state's right to enact them.

On December 7, 2004 the United States Supreme Court heard oral arguments in two cases pending before it relating to cases arising from New York and Michigan on this subject. I was present for those arguments. The basic premise put forward by the plaintiffs in these cases is that while the 21st Amendment did to some degree shield states from the scrutiny of the "dormant commerce clause," it did not delete pre-21st Amendment jurisprudence which disallowed "discrimination" by the states in structuring their regulatory systems. The plaintiffs rely predominantly on *Bacchus*, a 1984 case dealing with Hawaii's tax treatment which favored a locally produced wine, which held that "[t]he central purpose of the provision (Section 2 of the 21st Amendment) was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. . . State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote

temperance or to carry out any other purpose of the Twenty- first Amendment, but instead acknowledges that the purpose was "to promote a local industry."

The states and wholesaler intervenors counter that the 21st Amendment was designed to overcome commerce clause challenges which had stymied their efforts to control imports until just prior to Prohibition (the Webb-Kenyon Act, upon which the 21st Amendment was modeled, was upheld by the Supreme Court in 1917 - just prior to the institution of Prohibition), that its very words supply the power to control imports as states have done, that Bacchus is inapposite since it did not deal with importation control but with a tax, that bans on direct shipment are entitled to deference since they are designed to "combat the perceived evils of an unrestricted traffic in liquor," and that the evidence in the cases demonstrates that the laws in question are not "mere economic protectionism."

One of the biggest concerns voiced by wholesalers in these cases and the states arising out of this litigation is that the legal framework promoted by the plaintiffs is very broad and that virtually no import control now existing could withstand scrutiny were the courts to accept that perspective. Justice Kennedy, the first of the justices to ask a question, immediately recognized that issue. He asked the Plaintiffs whether the entire three-tier licensing system would necessarily be rendered invalid under his interpretation. He asked specifically why a NJ wholesaler could not sell to NY retailers, or vice versa, if such import controls/distinctions were invalid. Only time will tell how that question might be asked. But until that is decided this legislature probably should await the decision of the U.S. Supreme Court.

For a variety of reasons we oppose the so-called reciprocity bill, as it does nothing to ensure that only persons of age receive the product, that taxes are collected, and that goods are only delivered to "wet" areas. We could support a system that provides for the shipment of product to a retailer where IDs are checked, taxes are paid, and for items not otherwise currently registered in the state.

Thank you for your attention to these matters.

ANN E. MAH

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TOPEKA

HOUSE OF
 REPRESENTATIVES

Testimony HB 2291
Committee on Federal and State Affairs

COMMITTEE ASSIGNMENTS
 EDUCATION
 FEDERAL AND STATE AFFAIRS
 WILDLIFE, PARKS AND TOURISM

Thank you, Mr. Chair and committee for allowing me to testify before you today. House Bill 2291 is an economic development bill. The farm winery industry in Kansas is one that has great potential for growth. It is being stymied in our state due to antiquated laws that we now have the opportunity to address.

HB 2291 allows Kansas licensed wine manufacturers to sell and ship wine by mail to residents of other states where reciprocal direct shipping laws exist.¹ It allows Kansans to purchase wine directly from wineries in these reciprocal states. This bill also allows farm wineries in Kansas to ship wine directly to Kansas residents.

Today, our wineries have customers who visit while on vacation and want to buy our wine when they return home. Under today's law, it is only possible for wineries to ship to the thirteen states with permit procedures. The winery applies for a permit to ship directly to customers in those states. They cannot even ship to Kansas visitors.

There are eight wineries in operation in Kansas. There is the potential for sixteen others to begin operations here in the next five years, if the regulatory climate is right. Industry representatives tell me with this change they would anticipate a 14% growth in sales the first year alone.

In order for us to allow shipping out, we also must allow shipping to come into Kansas. There has been some concern expressed that this would hurt our Kansas wine retailers. I do not believe this to be the case. I believe that interest in out-of-state wines will create an increased interest on the part of consumers to visit their local wine retailer. There is a synergy at play that will increase retail sales, regardless of whether the wine being ordered is already available in-state or not. I do not believe it is necessary to have a wine retailer in Kansas run interference on the delivery. This would only cause Kansas wine customers to be taxed on both ends of the sale and incur the cost of a handling charge from the retailer. This is an unnecessary restriction of trade.

I also understand there is a federal court case about to be determined that may override Kansas law on these matters. However, I believe there is merit in proceeding with our improvements so as to encourage growth in the industry now rather than waiting on federal courts to act.

Thank you for your attention to this issue.

Ann Mah
 State Representative
 District #53

FEDERAL AND STATE AFFAIRS

Date 2-16-05Attachment 3

1. California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin

Kansas Grape Growers & Wine Makers Association

February 14, 2005

To: House Federal & State Affairs Committee

From: Norman M. Jennings

On behalf of: Smoky Hill Vineyards & Winery (Co-owner)

Kansas Grape Growers & Wine Makers Association (Legislative Chair)

RE: HB2291

Mr. Chairman and members of the committee, thank you for the opportunity to offer this testimony. The Kansas Grape Grower & Wine Maker Association (KGGWA) is a state association established by the growers and wineries of Kansas, with the mission statement of furthering the growth and development of both of these industries, and therefore the economic impact in Kansas. The KGGWA represents commercial growers and wineries responsible for approximately 80% of the Kansas wines produced. The grape and wine industry in Kansas is one that has the potential to be a major contributor to the state agritourism and value-added agricultural industries, as well as state alcohol tax revenue sources.

The Kansas Grape Grower & Wine Makers Association supports HB2291. Close to half of the guests stopping at a Kansas farm winery customers are located from other states. We therefore receive many requests to ship our wines to these other states, after these customers return home.

Looking at the shipping laws that exist in other states today, they of are two basic forms. There are states that have permit structures and may require a third party agent for final custody transfer, and there are those that have a simple declaration of reciprocity. The reciprocal laws, as HB2291 is proposed, allow for other states to ship into Kansas as long as Kansas wineries can ship into their state. States that are not reciprocal do not have the right to ship to the current approximate 13 reciprocal states.

By passing HB2291, Kansas residents seeking wine from other states would be able to legally obtain wine and the Kansas wineries would have instant access to the potential income from shipping to an additional 13 states. The impact of this income for the wineries and grape/fruit growers would be very substantial.

We ask for your support of this bill that would support the emerging grape and wine industries in Kansas and would give the citizens of Kansas a straight forward and simple means of legally obtaining wines from out-of-state wineries. We thank you for your time and the opportunity to appear before this committee.

FEDERAL AND STATE AFFAIRS

Date 2-16-05

Attachment 4

Kansas Grape Growers & Wine Makers Association

February 14, 2005

To: House Federal & State Affairs Committee

From: Norman M. Jennings

On behalf of: Smoky Hill Vineyards & Winery (Co-owner)

Kansas Grape Growers & Wine Makers Association (Legislative Chair)

RE: HB2292

Mr. Chairman and members of the committee, thank you for the opportunity to offer this testimony. The Kansas Grape Grower & Wine Maker Association (KGGWA) is a state association established by the growers and wineries of Kansas, with the mission statement of furthering the growth and development of both of these industries, and therefore the economic impact in Kansas. The KGGWA represents commercial growers and wineries responsible for approximately 80% of the Kansas wines produced. The grape and wine industry in Kansas is one that has the potential to be a major contributor to the state agritourism and value-added agricultural industries, as well as state alcohol tax revenue sources.

The Kansas Grape Grower & Wine Makers Association opposes HB2292. Close to half of the guests stopping at a Kansas farm winery customers are located from other states. We therefore receive many requests to ship our wines to these other states, after these customers return home. This bill does nothing to allow for the shipping of Kansas wines to other states and only a reciprocal bill such as HB2291 would.

HB2292 as proposed allows wines from outside Kansas not distributed to reach Kansas residents via shipped means but does not allow the same right for Kansas wines that are not distributed. HB2292 allows for many wineries outside of Kansas to become an instant competitor with customer access not afforded to Kansas wineries (IE – Internet sales), this additional competition could cause a direct burden on the Kansas wineries. HB2292 allows the shipments to be made to retailers so that they can offer other wines for the customers' future purchases, but does not give the wines to be shipped to a Kansas winery.

HB2292 offers a structure of complex hurdles and fees that would ultimately cause the Kansas customer to give-up or obtaining the wine or cause something in the shipment to violate a law, rule or regulation. Although Attorney General Opinion 2004-11 on the structure of this bill states that it would not violate the dormant Commerce Clause, it does clearly point out this legislation would "favor out-of-state wineries over in-state wineries".

Again, because of the discrimination against in-state wineries and the myriad of complex obstacles that a Kansan would face trying to obtain wine, we oppose this bill. We thank you for your time and ask that you strongly consider HB2291, a much simpler method for the Kansas customer that at the same time would provide economic growth for the in-state wineries.

FEDERAL AND STATE AFFAIRS

Date 2-16-05

Attachment 5

House Committee on Federal & State Affairs

February 16, 2005

Testimony by:

**Patty Clark, Director
Agriculture Marketing
Kansas Department of Commerce**

Good afternoon, Chairman Edmonds and members of the committee. I am Patty Clark, Director of the Agriculture Marketing Division of the Kansas Department of Commerce, and I want to thank you for this opportunity to offer our opposition of HB 2292.

House Bill 2292 would place Kansas farm wineries at a competitive disadvantage to out-of-state wineries. Kansas farm wineries are not allowed to ship interstate or intrastate to their customers. This bill clearly discriminates against in-state wineries, while allowing the shipment of out-of-state wines into Kansas.

Our Division has a statutory obligation given by the legislature to assist with the domestic and international marketing of Kansas agricultural commodities and processed food products. Because of that responsibility, we are acutely aware of the obstacles under which our Kansas wineries currently operate.

The growth potential of the Kansas grape and wine industry is immense. The Kansas Grape & Wine Advisory Council conducted a survey in December of 2004. There are currently eight farm wineries in Kansas, and there is the potential for 16 new farm wineries and the addition of 167 acres of grapes in the next five years. Sales of Kansas wine in 2004 were nearly \$1.2 million. The grape and wine industry employed 42 full-time and 66 part-time positions in 2004. Tourism is also an area of great growth. In 2004, 80,235 in-state visitors and 72,033 out-of-state visitors went to a Kansas farm winery.

Our Division is working closely with existing Kansas vineyards and wineries to expand their markets, expand the industry, and garner tourism dollars in our state. The grape and wine industry is important to rural Kansas. The industry is a prime example of specialty crop utilization, value added agriculture and processing, entrepreneurship, rural economic development, and agritourism. Therefore, we ask this Committee to oppose HB 2292. Thank you.

FEDERAL AND STATE AFFAIRS

Date 2-16-05

Attachment 6

Wine Industry Survey Results

01/07/2005

A survey questionnaire was distributed to 51 grape growing and wine making businesses. Thirty-seven of these businesses (72.5%) responded with their answers to the 18 questions.

The first question asks how long they have been in the business. The answers varied from less than a year to 103 years. The largest group (21.6%), consists of 8 respondents, who have been in the business for one year. Five (13.5%) of the respondents have been in the business less than one year, three (8.1%) for two years, five (13.5%) between 3 and 5 years, eight (21.6%) between 6 and 10 years, another eight for more than ten years.

Table 1 shows the responses to the question of how many acres of various fruits they produced in 2004. It is interesting to note that only one respondent indicated that s/he produced 1.5 acres of Elderberries. The respondents indicated that the other fruits included peaches, pears, cherries, strawberries, blackberries and other berries.

Acres	0		<1		1		2		3-5		>5	
	n	%	n	%	n	%	n	%	n	%	n	%
Grapes	12	32.4%	5	13.5%	5	13.5%	7	18.9%	4	10.8%	4	10.8%
Elderberries	0	0%	0	0%	1	100%	0	0%	0	0%	0	0%
Apples	30	81.1%	2	5.4%	0	0%	0	0%	0	0%	4	10.8%
Other Fruits	28	75.7%	3	8.1%	1	2.7%	0	0%	1	2.7%	3	8.1%

Table 2 shows the responses to the question of how many pounds of different fruits they produced in 2004.

Pounds	0		<5,000		5k – 10k		>10k		Total Pounds
	n	%	n	%	n	%	n	%	
Grapes	16	43.2%	11	29.7%	5	13.5%	5	13.5%	242,618
Elderberries	0	0%	0	0%	1	2.7%	0	0%	7,900
Apples	32	86.5%	2	5.4%	0	0%	3	8.1%	1,111,608
Other Fruits	29	78.4%	6	16.2%	0	0%	2	5.4%	110,824

When asked whether they produced wine in 2004 or not, approximately one third (32.4%, n=12) of respondents answered in the positive with the other two thirds (n=24) in the negative while one respondent did not give an answer.

The survey questionnaire also asked those respondents who did not have a winery whether they were planning to open one in the next five years. Of the thirty-seven respondents, six (16.2%) indicated they already have a winery while four did not provide

FEDERAL AND STATE AFFAIRS

Date 2-16-05

Attachment 7

responses. Of the twenty-seven who indicated that they did not have a winery, sixteen (59.3%) respondents expressed their desire to open a winery in the next five years while the other eleven (40.7%) did not have a plan to do so.

Of the twelve respondents who produced wine in 2004, their production varied from 20 to 27,500 gallon. In general, seven (58.3%) respondents said that they produced less than 1,000 gallons of wine, three said they produced between more than 1,000 but less than 10,000, and the remaining 2 produced more than 10,000.

In 2004, three respondents purchased juice from out-of-state sources. Their purchases varied from 100 gallons to 5645 gallons. The total purchases resulted in 11,251 gallons of juice.

Of the twelve who responded in the positive to the question on whether they produced wine in 2004, six reported their sales of wine by dollar amount. The sales ranged between \$1,000 and \$662,176. Three had sales between \$1,000 to \$5,000; one had sales more than \$10,000 but less than \$50,000. The other two had sales more than \$400,000. The total sales of wine reported by the respondents was \$1,198,028.

The majority (n=26, 70.3%) of the respondents did not have full-time employees, and only three of them had 2 to 6 part-time employees. The remaining 11 (29.7%) had between 1 and 19 full-time employees; seven of them also had part-time employees ranging between 0.5 and 21. Further analysis illustrates that among the respondents who had full-time employees, slightly more than half (n=6, 54.5%) had only one full-time employee; only one had more than 10 full-time employees.

Only 12 (32.4%) respondents reported their total payroll amounts. These ranged between \$400 and \$476,897. The respondent who reported the highest number of full-time employees also reported the highest amount of payroll. Half (n=6) reported less than \$10,000 in their payroll, 25% reported their payroll in the range between \$10,000 and \$100,000, and the other 25% reported payroll higher than \$100,000.

Sixteen (43.2%) respondents reported no in-state visitors to their operation while 22 reported no out-of-state visitors. The in-state visitors ranged from 4 to 25,000 and the out-of-state visitors ranged from 1 to 40,243 totaling 152,259 visitors from both in-state and out-of state to the Kansas winery operations.

When asked to provide the number of points of sale, one person did not provide a valid answer, twenty-three (63.9%) of the respondents reported no sales point, 10 respondents (27.8%) reported having 1 sales point, and the remaining three reported having 2 to 3 sales points.

Eighteen respondents did not respond to the question on activities they offer for visitors. Among the remaining 19, 7 (36.8%) offered one type of activity, 4 (21.1%) offered 2 types of activities, another 4 (21.1%) offered 3, 1 (5.3%) offered 4 and 2 (10.5%) offered all five types of activities to their visitors. Further analysis shows that 13

respondents offered “wine tasting or retail store,” 11 offered “grape picking,” 5 offered “dinner event,” 4 offered “banquet room(s),” and 13 offered other activities such as fruit picking, school field trips, tours, nature trails, picnicking, fishing, hunting, wild flower tour, grape growing seminars, winemaking classes, hayrack rides, bonfires, etc.

When selecting the marketing tool that worked BEST for them, 6 respondents gave invalid answers (having selected more than one choice). Of the 31 valid responses, 17 (54.8%) selected none of the choices provided and did not provide their own answer, 3 (9.7%) thought newspaper was the best marketing tool, 0 selected radio, 1 (3.2%) selected Internet, 3 selected newsletter/direct mail, and 7 selected “other” category. They further specified their choices as the best marketing tool to be “word of mouth,” “billboards,” “TV,” sales directly to wineries, phone calls and drive-by.

When asked whether they have business-expansion plans for the next 5 years, 4 respondents did not answer the question. Of the 33 who provided responses, 26 (78.8%) answered in the positive while 7 (21.2%) answered in the negative.

The responses to the importance of some state regulations are mixed and varied. The answers are listed in Table 3. The importance for each regulation is numbered from 1 to 7 with 1 as the most important and 7 as the least important.

Table 3

Importance	Herbicides/ Pesticides		Shipping		No. of Outlets		Gallons to Produce		Property Taxes		Conduct Tasting		Minority Ownership	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
1	14	45.2%	3	10.7%	3	10.3%	2	7.4%	5	16.1%	4	14.3%	1	3.7%
2	4	12.9%	8	28.6%	4	13.8%	2	7.4%	7	22.6%	5	17.9%	0	0%
3	3	9.7%	7	25.0%	1	3.4%	3	11.1%	9	29.0%	7	25.0%	0	0%
4	6	19.4%	3	10.7%	4	13.8%	4	14.8%	5	16.1%	4	14.3%	1	3.7%
5	2	6.5%	2	7.1%	10	34.5%	4	14.8%	1	3.2%	4	14.3%	4	14.8%
6	0	0%	2	7.1%	7	24.1%	9	33.3%	2	6.5%	4	14.3%	3	11.1%
7	2	6.5%	3	10.7%	0	0%	3	11.1%	2	6.5%	0	0%	18	66.7%
Total no. of Respondents	32		28		29		27		31		28		27	

The respondents were asked to list, by their importance, the primary impediments to future growth and success of their winery/vineyard. Again, they were asked to number the importance for each impediment from 1 to 7 with 1 as the most important and 7 as the least important. The results are shown in Table 4.

Table 4

Importance	Lack of Capital		Herbicide Damage		Lack of Market		Restrictive Regulations		Lack of Technical Knowledge		Lack of Grape Varietals		Lack of Vineyard Knowledge	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
1	16	50%	6	20.6%	2	7.1%	5	17.2%	1	4%	0	0%	2	7.7%
2	5	15.6%	8	27.6%	4	14.3%	5	17.2%	5	20%	1	4%	3	11.5%
3	3	9.4%	7	24.1%	2	7.1%	5	17.2%	4	16%	2	8%	3	11.5%
4	3	9.4%	2	6.9%	4	14.3%	4	13.8%	3	12%	4	16%	4	15.4%
5	0	0%	3	10.3%	2	7.1%	5	17.2%	5	20%	7	28%	3	11.5%
6	2	6.3%	2	6.9%	3	10.7%	3	10.3%	2	8%	6	24%	7	26.9%
7	3	9.4%	1	3.4%	6	21.4%	2	6.9%	5	20%	5	20%	4	15.4%
Total no. of Respondents	32		29		28		29		25		25		26	



The Kansas Association of Beverage Retailers

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Martin Platt, President

Amy A. Campbell, Executive Director

**TESTIMONY PRESENTED TO THE
HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS
FEBRUARY 16, 2005
BY AMY A. CAMPBELL, EXECUTIVE DIRECTOR**

Thank you, Chairman and members of the Committee. My name is Amy Campbell and I appear before you today on behalf of the Kansas Association of Beverage Retailers to speak regarding HB 2292. The bill offers a creative solution to the barriers some of our customers face when seeking certain limited production and estate wines. KABR supports a progressive look at this issue, and hopes to participate in an eventual solution - however there are aspects to this bill which cause some concern.

Retail liquor store licensees are very concerned that the State of Kansas proceed cautiously when considering allowing alcoholic liquor to be delivered directly into the state. As the licensed point of sale in Kansas, retailers meet a long list of State imposed standards and regulations. This role should be preserved for the best interests of Kansas as it pertains to collecting and remitting State enforcement taxes and safely delivering the product to legal consumers. HB 2292 preserves that point of sale and insures payment of the taxes on the product.

There is a case pending before the United States Supreme Court on this issue. **KABR would prefer to wait for the ruling in this case in order to insure that we do not create a system which will have to be dismantled within a year.**

Purchase Provisions: The bill does not specify how the retailer is to know the price paid on the product. This is important as to the calculation of the 8 percent enforcement. This bill seems to indicate the retailer would collect the purchase price of the product. We are not comfortable with the idea that retailers would pay out of state vendors for product which may or may not be retrieved by the purchaser. Will out of state vendors ship product without being paid at the time of the order?

Dispensing Out of State Product: If a customer does not pick up the product within 30 days, what happens? Can the retailer sell it? The bill recommends the Secretary provide rules and regulations for this situation - but we would like to have an indication of the writers' intent.

Handling Fee: During discussions of similar proposals, the handling fee of \$5.00 was discussed. Unfortunately, \$5.00 for a bottle or two is one thing. \$5.00 for a case of wine is quite another. Since last year, a number of retailers have provided input regarding this fee and have indicated that it falls short. Space is at a premium in many stores. Certainly, retailer profit on a case of wine from the store inventory must exceed \$5.00 - and the retailer is not required to maintain two years of new paperwork. Therefore, if this bill were to move forward, we would ask the fees to be amended.

Records: What is the purpose of these records? Last year, it was suggested that a new line would be added to the Department of Revenue forms on which retailers submit their enforcement taxes. That information alone will inform the State of the value of wine being sold in this manner. Why on earth does anyone need information about the purchaser, the date of the transaction, etc? Why does it need to be kept for two years? The off premise sale of adult beverages is highly regulated - this seems like an unnecessary burden

FEDERAL AND STATE AFFAIRS

Date 2-16-05

Attachment 8

Two years ago, KABR testified in support of House Concurrent Resolution 5016 which charged the Attorney General and the Division of ABC with the task of studying wine shipment laws and reviewing the potential impact to Kansas. After the Supreme Court issues its decision, reviewing and comparing the systems of other states most similar to Kansas will provide the background that is so important when considering possible change and avoiding lengthy and costly federal court battles. There are no simple answers to the questions that arise related to direct shipment, and we are willing to participate in a cooperative process to review the options and learn from the errors of others.

KABR would appreciate being included in any discussions related to the regulation and daily business of State licensed retail liquor stores.

Without some reassurance as to the risks presented by the bill, KABR is uneasy about supporting any change in Kansas prohibition against direct shipments by common carrier. The study recommended in HCR 5016 may help us to move toward a model which preserves the important relationship between the licensee and customers, open access to less available products, and maintains the partnership between the State and its licensees.

Testimony Presented to
House Federal & State Affairs Committee
re: HB 2291 and 2292

by Rebecca Rice, Legislative Counsel
Kansas Beer Wholesalers Association
February 16, 2005

Thank you, Mr. Chairman, for allowing me to appear in opposition to both HB 2291 and 2292. My name is Rebecca Rice and I appear before you today on behalf of the Kansas Beer Wholesalers Association.

As we have explained to the legislature for the last few years, the issue of what exceptions can be made between suppliers, retailers and products will be decided by the U.S. Supreme Court. Although we suspect some legislators were uncertain of the quality of our information, we can now assure the legislature that a decision is eminent.

Assuming the legislature does not want to deregulate the liquor industry, we request the legislature wait until the court issues their opinion. Adoption of either bill – without benefit of the Supreme Court decision – could result in the equivalent of deregulation. Until we know how the Supreme Court will further interpret the 21st Amendment, we do not know the affect of adopting yet more “exceptions” to the liquor control act.

What outcomes are possible if we proceed without benefit of the Court's pending decision? A few might be:

- That all products classified as alcoholic liquor could be given the same privileges that are limited to wine consumers in these two bills.
- Elimination of the arbitrary 2 case limit. (The limit is basically unenforceable under 2291 so any effort at enforcement would surely bring legal arguments regarding the lack of a rational basis - if the 21st amendment is given a narrow interpretation.)
- Elimination of the reciprocity requirement (HB 2291).
- Elimination of the requirement that licensees accept any shipment of wine on behalf of a Kansas citizen.

(Whether or not the court rules that the states have full authority under the 21st amendment, this provision raises constitutional questions. Just as a lawyer can not be forced into involuntary servitude through court-ordered representation, I question whether the state can order a retailer to take possession of a product for the convenience of another; order the retailer to collect taxes for the benefit of the state on a product the retailer didn't sell or be subject to criminal and administrative sanctions; order the retailer to warehouse the product for 30 days; order the retailer to insure the age of the shipper prior to relinquishing possession or be subject to criminal and administrative sanctions; restrict the acceptance of such shipment to hours of sale or be subject to criminal and administrative sanctions; to indefinitely warehouse the product – without compensation - until the state disposes of the property; and to maintain records for two years for the benefit of the state without compensation or be subject to administrative sanctions.)

- Extending beyond “out-of-state-licensees”, the declaration that two cases shipped to a consumer does not constitute a sale in Kansas.

There are many other possible “unintended consequences” from adoption of either of these bills. Therefore, Mr. Chairman, we respectfully request the committee not recommend these bills favorably.

Testimony on House Bill No. 2292
Concerning wine;
Providing for certain purchases from persons licensed in other states;
Prescribing certain restrictions thereon
To
The House Committee on Federal and State Affairs
By
Tom Groneman, Director
Alcoholic Beverage Control

February 16, 2005

Mr. Chairman, members of the committee, thank you for the opportunity to appear before you today regarding House Bill 2292. HB 2292 would allow a person 21 years of age or more to purchase wine, whether or not such wine is otherwise available for sale under the Kansas liquor control act. The “whether or not” provision would be a major departure from the current practice by allowing brands registered with Kansas and supplied through a franchised distributor to be purchased by a resident directly from the manufacturer. ABC was recently named in a lawsuit regarding a dispute over franchise rights to brands of alcoholic liquor and to prevent the possibility of future suits we ask that the wine available for purchase be limited to only brands not otherwise available in Kansas.

In addition, we would ask that you consider the following amendments: on page 1, line 36 insert after **collect** the words **and remit** so it would read **(2) Collect and remit all taxes imposed**; on line 41 change the length of time records are to be retained from “at least two years” to **three years** which is the time period retailers are required to keep other liquor related records; on line 43 insert after (C) **the alcohol content**, the type...the alcohol content is important to determine the correct gallonage tax rate.

Also, we ask that the effective date of the bill be no sooner than January 1, 2006. This will give us the needed time to create a reporting process for collecting taxes and adopt the necessary rules and regulations to implement and enforce the provisions of the bill.

FEDERAL AND STATE AFFAIRS

Date 2-16-05

Attachment 10

JOE MCLELAND
REPRESENTATIVE, 94TH DISTRICT
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COMMITTEE ASSIGNMENTS
MEMBER: APPROPRIATIONS
EDUCATION AND
LEGISLATIVE BUDGET
ETHICS AND ELECTIONS

TOPEKA
—
HOUSE OF
REPRESENTATIVES

To: Representative John Edmonds
Chairperson, House Federal and State Affairs Committee

From: Joe McLeland
State Representative, District #94

Date: February 16, 2005

Re: **HB 2292 - Purchase and shipping of wine from sellers in other states**

Mr. Chairman, as you know wine is an interesting beverage. It comes in different colors, different tastes, and different smells. The properties of a bottle of wine are influenced by the grapes (or other berries), weather conditions, growing region, and many other factors. I am not here today to discuss the qualities of a good bottle of wine. I am here to ask you to support **HB 2292**.

Many good wines are only available for purchase from the winery. Wine makers take pride in the quality of their product and only produce a limited amount. Others do not have the resources for a national distribution of their product. Many good wines are not available for purchase in Kansas.

Not being able to ship wine into Kansas causes a problem for the State of Kansas and it's citizens. The problem is wines are purchased and shipped into Kansas every day; the State receives no revenue on these wines, and the citizens break the law. **HB 2292** resolves this problem. It will be legal to ship wine into Kansas; the State of Kansas will receive the liquor taxes due on the wine. The liquor store will receive revenue for handling the wine and collecting the taxes, and finally the citizens will not be breaking the law.

I urge you to support **HB 2292**, work the bill, and pass it out of this committee favorably.

FEDERAL AND STATE AFFAIRS

Date 2-16-05

Attachment 11