

*Remarks of William H. Hurd
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Since the end of Prohibition, the Commonwealth of Virginia – like almost all States – has placed special controls on the importation, transportation, and distribution of alcohol. Virginia has done so pursuant to the powers granted to the States under the Twenty-first Amendment, which “created an exception to the normal operation of the Commerce Clause.” *Craig v. Boren*, 429 U.S. 190, 206 (1976). Any discussion about the interstate shipment of wine – and what the FTC should or should not do – must begin by recognizing that federal government does not have the same jurisdiction in this area as it has with other products.

As the Supreme Court recently noted, “Dual sovereignty is a defining feature of our Nation’s constitutional blueprint.” *Federal Maritime Comm’n v. South Carolina Ports Auth.*, 122 S. Ct. 1864, 1870 (2002). In other words, “the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.” *New York v. United States*, 505 U.S. 144, 187 (1992). Today’s “crisis” appears to be the difficulty in ordering a bottle of wine over the Internet. While some might be tempted to solve that crisis with action by the federal

government, such a solution is permissible only if the Constitution places the power to solve it in federal hands. It does not.

The power of the federal government to regulate interstate commerce arises – naturally – from the Commerce Clause, which is part of the federal side of dual sovereignty. While the broad idea of two sovereigns dates back to the Founding, there have been some important alterations in how power is allocated between them. By adopting constitutional amendments, the People have reallocated power between the federal and state government. For example, by “adopting the Fourteenth Amendment, the People required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution” and transferred that sovereignty to the national government. *Alden v. Maine*, 527 U.S. 706, 756 (1992).

On the other hand, by adopting the Twenty-first Amendment, the People returned to the States a portion of the power originally surrendered to the national government under the Commerce Clause. Specifically, the People created an exception to the Commerce Clause so that the States could regulate the importation, transportation and distribution of alcoholic beverages within their borders even if such regulations imposed burdens on interstate commerce otherwise unacceptable under the Commerce Clause.

Indeed, ever since the Twenty-first Amendment was first adopted, it has been “transparently clear,” *Craig*, 429 U.S. at 207, that this measure granted States “unfettered” control, *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), over basic decisions regarding who may import, transport, distribute and sell as well as purchase alcoholic beverages within a State. The Amendment is unambiguous. It gives the States the “plenary power to regulate and control ... the distribution, use or consumption of intoxicants within her territory.” *Dep’t of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964). *See also North Dakota*, 495 U.S. at 424 (plurality opinion) (Twenty-first Amendment gives states “‘virtually complete control’ over the importation and sale of liquor and the structure of the liquor distribution system”) (quoting *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

In short, the Twenty-first Amendment “empowers states to control alcohol in ways that it cannot control cheese.” *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000) (quorum opinion), *cert. denied*, 532 U.S. 1002 (2001). Conversely, the power the federal government may exercise over the interstate shipment of cheese – or automobiles – or eyeglasses – it may not exercise over wine.

The bottom line is this: enhancement of state sovereignty under the Twenty-first Amendment includes the power to bar the direct interstate shipment of wine to

consumers, whether ordered over the Internet, by telephone or through the mail. Whether the policies of particular states may be wise are issues that people are certainly debating and are debating here today, but these are debate that, under our constitutional system, ultimately must be directed to state legislatures.

That said, it may be useful to outline the nature of the three-tiered system, which has been criticized because it does not allow direct sales over the Internet. We have such a system in Virginia and believe we are fairly typical of the other States using such a system. Our ABC Act limits the power of wineries and breweries in the marketplace in order to prevent the rise of producer-controlled entities (“tied-houses”) that in the past had misused their power to allow underage drinking, to encourage excessive consumption, and to avoid payment of taxes. There are numerous ABC regulations that restrain manufacturers and wholesalers from involving themselves in the financial affairs of retail licensees. Because these requirements have prevented large alcohol manufacturers from limiting access of their smaller competitors to retailers, thousands of out-of-state wineries’ products reach Virginia consumers.

As part of our three-tiered system, our ABC Act requires that all persons transporting spirits, wine and beer within or through Virginia have permits from the ABC Board. All imported wine and beer must be consigned to licensees of the Board. Spirits must be consigned to the Board, which then arranges to ship such

spirits to ABC retail stores. Beer and wine wholesale licensees may only operate from approved locations within Virginia, and all licensees, including retailers, must keep an accurate account of the disposition of spirits, wine and beer. These records must include the identity and location of each such transferee of alcohol so that ABC agents can track alcohol shipments and, among other things, assure that the wine and beer excise taxes are collected.

Overall, the Virginia ABC system of regulation of alcohol imports and subsequent transfers is intended to ensure that alcohol – whether imported or locally produced — is not diverted outside a “closed loop” system of licensed sellers. Allowing direct shipment from out-of-state wineries to consumers would allow transactions to occur outside of this closed loop. Such an arrangement would obviously present great difficulties in ensuring the collection of taxes, encouraging temperance and preventing sales to underage drinkers.

As other members of this panel may point out, if a farm winery is based in Virginia, our law does allow it to obtain licenses to engage in direct shipment to consumers. And this is the subject of litigation now pending before the Fourth Circuit. But, this is the exception that proves the rule. Those wineries are *part* of the closed loop. They are located in Virginia where they are within reach of our law and our ABC agents, where any breach of their obligations can lead to the imposition of penalties, and where the revocation of licenses can put them out of

business. These are powerful incentives for wineries to pay very close attention to the law and to make sure they comply with it. Out-of-state wineries are not similarly situated. There are thousands of them. Many are located quite far away, and none are readily subject to our laws. If they were permitted to ship directly to consumers, it would be very difficult if not impossible to ensure compliance.

This is not to imply that we want to exclude their products from Virginia. We do not. Consumer choice is a good thing and, under the present system, Virginians have available many, many choices of out-of-state wine. Our door is open for other wineries to send their products here as well. We ask only two things. First, that they comply with our laws, just as their competitors have. And, second, that any change in those laws be left to the people of Virginia, as the Constitution provides.

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