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Section 6: Federalism

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FEDERALISM

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(03-1116)


The court held that Michigan’s regulations governing distribution of alcohol violated the dormant Commerce Clause by preventing out-of-state wineries from shipping wine directly to Michigan consumers. The regulations are facially discriminatory toward out-of-state wine sellers and are not “saved” by the Twenty-first Amendment, which allows states to regulate alcohol distribution and consumption within its borders.

Question Presented: Does a State’s regulatory scheme that permits in-state wineries to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

Eleanor HEALD, et al., Appellants,
v.
John ENGLER, in his official capacity as Governor, et al., Appellees, Michigan Wine and Beer Wholesalers Association, Intervening Appellee

United States Court of Appeals, Sixth Circuit

Decided August 28, 2003

[Excerpt; some footnotes and citations omitted]

DAUGHTREY, Circuit Judge:

In this civil rights action brought pursuant to 42 U.S.C. § 1983, the plaintiffs raise a constitutional challenge to Michigan’s alcohol distribution system, contending that state provisions differentiating between in-state and out-of-state wineries violate the Commerce Clause. These regulations prohibit the direct shipment of alcoholic beverages from out-of-state wineries, while allowing in-state wineries to ship directly to consumers, provided that the in-state wineries comply with certain minimal regulatory requirements. The plaintiffs, who include wine connoisseurs, wine journalists, and one small California winery that ships its wines to customers in other states, claim that this system is unconstitutional under the dormant Commerce Clause because it interferes with the free flow of interstate commerce by discriminating against out-of-state wineries. The defendants, who include Michigan officials (referred to collectively in this opinion as “the state”) and the intervening trade association, argue in response that Michigan’s regulatory scheme is constitutional under the Twenty-first Amendment to the federal constitution.

[U.S. District and Circuit courts have split on this issue, with the 4th and 11th Circuits]
striking down statutes in North Carolina and Florida, respectively, as unconstitutional. The 7th Circuit found Indiana's scheme constitutional, while the S.D.N.Y. and the S.D. Tex. rejected their states' schemes.

The parties filed cross-motions for summary judgment, and the district court granted the state's motion and denied the plaintiff's motion. The plaintiffs then filed a motion to reconsider, arguing that the district court should have addressed cross motions to strike various evidence submitted by the two sides prior to the summary judgment decision. The district court denied the motion to reconsider, noting that it had effectively denied the cross-motions to strike as moot, because it did not consider the challenged evidence in deciding the summary judgment motions.

The plaintiffs now appeal both the grant of summary judgment and the denial of their motion to reconsider. For the reasons set out below, we conclude that the regulations in question are discriminatory in their application to out-of-state wineries, in violation of the dormant Commerce Clause, and cannot be justified as advancing the traditional "core concerns" of the Twenty-first Amendment. We therefore reverse the district court's judgment and remand the case with directions to the district court to enter judgment in favor of the plaintiffs.

I. Procedural and Factual Background

Michigan regulates alcohol sales under a "three-tier system": consumers must purchase alcoholic beverages from licensed retailers; retailers must purchase them from licensed wholesalers; and wholesalers must purchase them from licensed manufacturers. This system is similar to that used by most states. [...]

The plaintiffs allege that Michigan's system discriminates against out-of-state wineries in favor of in-state wineries because it prevents out-of-state wineries from shipping wine directly to Michigan consumers, which in-state wineries are allowed to do. As the district court correctly noted, this distinction between in-state and out-of-state wineries can only be understood by reading a number of provisions in conjunction with each other. [The court cited the applicable Michigan regulations, which provide an out-of-state wine seller the opportunity to obtain an "outstate seller of wine license." This license, however, only permits the seller to ship wine to a licensed wholesaler at the address of the licensed premises. There is no procedure whereby an out-of-state wine seller can obtain approval to ship wine directly to Michigan consumers.]

The plaintiffs contend that this differential treatment of in-state and out-of-state wineries violates the dormant Commerce Clause because it gives in-state wineries a competitive advantage over out-of-state wineries. In-state wineries can, for example, bypass the price mark-ups of a wholesaler and retailer, making in-state wines relatively cheaper to the consumer and allowing them to realize more profit per bottle. In addition, the cost to an out-of-state winery of the license that enables it to sell to a Michigan wholesaler is $300, while a comparable Michigan winery must pay only a $25 license fee to qualify to ship wine directly to Michigan customers. Finally, for customers who desire home delivery, Michigan wineries have a competitive advantage over out-of-state wineries that cannot ship directly to customers. In response, the state argues that the regulations to which an in-state winery is subject "more than offset, both in costs and burden, any nominal commercial advantage given by the ability to deliver directly to customers" and
characterizes the burden on out-of-state wineries as "de minimis."

In its order granting summary judgment to the state and denying summary judgment to the plaintiffs, the district court held that "Michigan’s direct shipment law is a permitted exercise of state power under § 2 of the 21st Amendment" because it is not "mere economic protectionism." In reaching this conclusion, the court found that Michigan’s statutory scheme was designed "to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors."

After this order had issued, the plaintiffs filed a motion to reconsider, asking the district court to rule on the motions to strike before granting either side summary judgment and to "make specific findings of fact based on the record" before reaching a final decision. The plaintiffs argued that the district court’s failure to rule on the motions to strike "left the record devoid of evidence supporting the court’s conclusion that the direct shipment law furthers legitimate 21st Amendment purposes," and that the court had applied the incorrect legal standard in dismissing the complaint. The district court denied the plaintiffs’ motion for reconsideration, saying that it had not considered the challenged evidence in ruling on the summary judgment motions and that the motions to strike were effectively denied as moot.

For the reasons set out below, we reverse the district court’s judgment, vacate the order granting summary judgment in the state’s favor, and remand the case for entry of summary judgment in favor of the plaintiffs.

II. Discussion

The central question in this case is how the "dormant" Commerce Clause and the Twenty-first Amendment interact to limit the ways in which a state can control alcohol sales and distribution. Article I, Section 8, Clause 3 of the United State Constitution grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...” The Supreme Court has long held that “this affirmative grant of authority to Congress also encompasses an implicit or ‘dormant’ limitation on the authority of the States to enact legislation affecting interstate commerce.” *Healy v. The Beer Institute*, 491 U.S. 324, 326 n.1, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989).

[The court reviewed the history of the Supreme Court’s decisions regarding the Twenty-first Amendment. At the beginning, the states were given almost limitless power to regulate alcohol, but in the 1960s, the Court broke with that line of reasoning, eventually adopting a balancing test of the interests of the state in controlling alcohol sales and the interest of the Federal government in regulating interstate commerce. *Capital Cities Cable v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984).]

In subsequent cases, the Supreme Court has continued to analyze challenges to state alcohol laws by determining how closely related the law in question is to the “core concerns” of the Twenty-first Amendment. Shortly after *Capital Cities* was decided, the Court issued *Bacchus Imports v. Dias*, 468 U.S. 263, 104 S.Ct 3049, 82 L.Ed.2d 200 (1984), in which out-of-state wholesalers challenged a Hawaii excise tax exemption for certain locally produced alcohol beverages. The state argued that the statute
advanced legitimate state interests, that is imposed no patent discrimination against interstate trade, and that the effect on interstate commerce was minimal. *Id.* at 270, 104 S.Ct. 3049. The Court rejected these defenses, finding that "the legislation constitutes ‘economic protectionism’ in every sense of the phrase," *id.* at 272, 104 S.Ct. 3049, and noting that “one thing is certain: The central purpose of the [21st Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.” *Id.* at 276, 104 S.Ct. 3049. Instead, the Court considered “whether the principles underlying the [Twenty-first Amendment] are sufficiently implicated by the [tax exemption] to outweigh the Commerce Clause principles that would otherwise be offended.” *Id.* at 275, 104 S.Ct. 3049. In *Bacchus*, the state did not contest that the law’s purpose was “to promote a local industry,” so the Court did not have to engage in the normal Commerce Clause analysis of whether the law was sufficiently closely related to the promotion of lawful interests to vitiate its discriminatory effect. Instead, it found that the law discriminated against interstate commerce in violation of the Commerce Clause and was therefore unconstitutional.

Since *Bacchus*, the Supreme Court has been less than prolific in construing the content of the Twenty-first Amendment’s “core concerns,” addressing the definition of “core concerns,” only once — and then only in a plurality opinion. In *North Dakota v. United States*, 495 U.S. 423, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990), the Court had before it an intergovernmental immunity case, rather than a Commerce Clause challenge. At issue was whether North Dakota’s reporting and labeling requirements were constitutional, despite interfering with contrary federal interests in selling liquor to military personnel. The Court upheld the statute, finding that the state regulations “fall within the core of the State’s power under the Twenty-first Amendment” because they were enacted “[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue....” *Id.* at 432, 110 S.Ct. 1986.

But, because *North Dakota* did not involve a Commerce Clause challenge, the *analysis* in the plurality opinion cannot be taken to control the analysis in this case. That is, we do not interpret the “in the interest of” language to mean that a state need only be *motivated* by the “core concerns” of the Twenty-first Amendment to shield its laws from constitutional scrutiny. Under a Commerce Clause analysis, facially discriminatory laws are still subject to strict scrutiny, meaning that the state must demonstrate that no reasonable nondiscriminatory alternatives are available to advance the same legitimate goals. See, *e.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 336-7, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (finding that, “[a]t a minimum,” a statute that “on its face discriminates against interstate commerce ... invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives”). Likewise, the language in *North Dakota* to the effect that the state had “virtually complete control” over the importation and sale of liquor, although heavily emphasizes by the district court in this case, has little value in a case requiring a Commerce Clause analysis. Because *North Dakota* did not involve interpretation of the Commerce Clause, we reject the implication that a state’s “virtually complete control” over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests. *Bacchus* simply forbids such an analysis.
Given this background, we cannot endorse the district court’s characterization of the regulation in this case as a constitutionally benign product of the state’s three-tier system and, thus “a proper exercise of [Michigan’s Twenty-first Amendment] authority, despite the fact that such a system places a minor burden on interstate commerce.” Instead, we invoke Justice Scalia’s view, expressed in an opinion concurring in the Supreme Court majority’s decision striking down a state price-affirmation statute, in which he explained that:

[The law’s] invalidity is fully established by its facial discrimination against interstate commerce... This is so despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment. 


The proper approach in this case, then, is to apply the traditional dormant Commerce Clause analysis and, if the provisions are unconstitutional under the Commerce Clause, to determine whether the state has shown that it has no reasonable nondiscriminatory means of advancing the “core concerns” of the Twenty-first Amendment.

[The court argued that statutes that facially discriminate are “virtually per se” invalid, and so the starting point for analysis using the dormant Commerce Clause is whether the state regulation directly or in effect purpose treats in-state interests differently than out-of-state interests.]

Here, it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefiting the in-state wineries and burdening those from out of state. As discussed above, Michigan wineries enjoy both greater access to consumers who wish to have wine delivered to their homes, and greater profit through their exemption from the three-tier system. Out-of-state wineries, on the other hand, must participate in the costly three-tier system, to their economic detriment and, although this is not clear from the record, may be shut out of the Michigan market altogether if unable to obtain a wholesaler. The Fourth Circuit reaches a similar conclusion in a case considering North Carolina’s alcohol distribution system, which is nearly identical to Michigan’s. In *Beskind v. Easley,* 325 F.3d 506 (4th Cir.2003), the court found that North Carolina’s alcohol distribution laws, which discriminate against out-of-state wineries in favor of in-state wineries, are unconstitutional unless “the State can show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Id. at 515.*

Having determined that the provision is facially discriminatory, we now turn to the question of whether the regulatory scheme is nevertheless constitutional because it “fall[s] within the core of the State’s power under the Twenty-first Amendment,” having been enacted “in the interest of promoting temperance, ensuring orderly market conditions, and raising revenue,” *North Dakota v. United States,* 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990), and because these interests “cannot be adequately served by reasonable nondiscriminatory alternatives.” *New Energy Co. of Ind. V. Limbach,* 486 U.S. 269, 278, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988).
We conclude, based on the evidence in the record, that defendants have not shown that the Michigan scheme's discrimination between in-state and out-of-state wineries furthers any of the concerns listed above, much less that no reasonable non-discriminatory means exists to satisfy these concerns. This is so even if, taking the evidence in the light most favorable to defendants, we assume that all of the evidence they submitted was admissible. It is important to keep in mind that the relevant inquiry is not whether Michigan's three-tier system as a whole promotes the goals of "temperance, ensuring an orderly market, and raising revenue," but whether the discriminatory scheme challenged in this case—the direct-shipment ban for out-of-state wineries—does so. See, e.g., Beskind, 325 F.3d at 517 ("The question is not whether North Carolina can advance its regulatory purpose by imposing fewer burdens on in-state wineries than out-of-state wineries.... Rather, the question is whether discriminating in favor of in-state wineries... serves a Twenty-first Amendment interest."). Obviously, the state bears the burden of justifying a discriminatory statute, and "the standards for such justification are high." New Energy Co., 486 U.S. at 278, 108 S.Ct. 1803; see also Cooper v. McBeath, 11 F.3d 547, 555 (5th Cir.1994) (describing the burden of proof faced by the state as "towering"); Hughes v. Oklahoma, 441 U.S. 322, 337, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) ("[F]acial discrimination by itself may be a fatal defect.... A minimum [it] invokes the strictest scrutiny.")

The district court correctly recognized that state liquor laws are not completely immune from Commerce Clause challenges, but it placed too much reliance on Supreme Court precedent that has specifically upheld the three-tier distribution system, quoting North Dakota v. United States, 495 U.S. at 431, 110 S.Ct. 1986, for the proposition that the states have "virtually complete control" over the importation and sale of liquor. As we noted above, however, North Dakota involved a Supremacy Clause challenge and did not implicate the Commerce Clause. It therefore cannot be relied on in this case in light of Supreme Court cases that do discuss the interpretation of the Twenty-first Amendment and the Commerce Clause, such as Bacchus.

Nor do we find persuasive the district court's reliance on three additional cases. One, House of York, Ltd. v. Ring, 322 F.Supp 530 (S.D.N.Y.1970), is a district court opinion that pre-dates Bacchus. ZThe second, Bainbridge v. Bush, 148 F.Supp.2d 1306 (M.D.Fla.2001), has subsequently been reversed. See Bainbridge v. Turner, 311 F.3d 1104 (11th Cir.2002) (holding that the state must show that an alcohol-distribution statute that discriminates between in-state and out-of-state wineries furthers core concerns of the Twenty-first Amendment in order to survive a Commerce Clause challenge). The third, Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir.2000), is the sole federal court of appeals decision to find that analogous direct shipment laws are constitutional under the Twenty-first Amendment. However, Bridenbaugh is distinguishable on its facts, and it has been criticized by several federal courts for its failure to engage in the requisite dormant Commerce Clause analysis. See, e.g., Bolick v. Roberts, 199 F.Supp.2d 397, 408 (E.D.Va.2002) (finding Bridenbaugh "improperly decided because it does not rely on the established dormant Commerce Clause analysis"); Dickerson v. Bailey, 212 F.Supp.2d 673, 682 (S.D. Tex.2002) (observing that in its "concentration on Indiana's three-tiered scheme ... [the court] did not discuss the last
forty years of Supreme Court jurisprudence relating to balancing and harmonizing the dormant commerce clause and § 2 of the twenty-first Amendment”), aff’d, Dickerson v. Bailey, 336 F.3d 388 (5th Cir.2003) (finding that Bridenbaugh was factually distinguishable from that case); Bainbridge v. Turner, 311 F.3d 1104, 1114 n. 15 (11th Cir.2002) (commenting that the court “disagree[s] with the analytical framework used in [Bridenbaugh]”).

For example, Bridenbaugh did not involve any out-of-state wineries as plaintiffs, and it thus addressed only whether the Indiana statute discriminated against customers who wanted to have out-of-state wine shipped directly to them. Furthermore, it appears the Indiana statutes differ from the provisions at issue here, as the court found that “Indiana insists that every drop of liquor pass through its three-tiered system and be subjected to taxation.” Bridenbaugh, 227 F.3d at 853. Michigan, on the other hand, effectively exempts in-state wineries from the three-tier system, and exemption it does not extend to out-of-state wineries. Finally, in contrast to this case, the Bridenbaugh plaintiffs were “concerned only with direct shipments from out-of-state sellers who lack and do not want Indiana permits.” Id. at 854. By contrast, the plaintiffs in this case are willing to acquire Michigan permits and pay taxes on wines shipped; they simply want to be eligible for such permits on the same basis as in-state wineries. For all of these reasons, we do not find the opinion in Bridenbaugh persuasive.

The district court in this case was correct in finding that the Michigan alcohol distribution system discriminates between in-state and out-of-state interests to the extent that in-state wineries may obtain licenses to ship wine directly to consumers, but out-of-state wineries may not and are instead required to go through the more costly three-tier system. What the district court did not do was undertake the necessary analysis that follows from such a finding. Instead, it concluded that Michigan’s system “cannot be characterized as ‘mere economic protectionism,’” because the system furthers the “core concerns” of the Twenty-first Amendment. The district court’s observation that “[t]he Michigan Legislature has chosen this path to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors” and its conclusion that “the 21st Amendment gives it the power to do so,” without more, do not constitute strict scrutiny, as required by Supreme Court precedent. It is not enough that the Michigan Legislature has chosen this particular regulatory scheme to further what are legitimate objectives. The proper inquiry, detailed above, is whether it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” New Energy Co. of Ind. v Limbach, 486 U.S. 269, 278, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988). We find no evidence on this record that is does.

III. Conclusion

For the reasons set out above, we REVERSE the judgment of the district court granting summary judgment to the defendants and REMAND the case for entry of judgment in favor of the plaintiffs.
Swedenborg v. Kelly
(03-1274)


The court held that New York’s laws governing the distribution of alcohol were not in violation of the dormant Commerce Clause but were instead properly within the power granted to the states by the Section 2 of the Twenty-first Amendment. Requiring out-of-state wineries to maintain a physical presence in the state is proper in order to prevent tax evasion and ensure that alcohol is not directed into the hands of minors.

Question Presented: Does a state’s regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

Juanita SWEDENBURG, et al, Petitioners
v.
Edward F. KELLY, Chairman of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacities, et al., Respondents

United States Court of Appeals for the Second Circuit

Decided February 12, 2004

[WESLEY, Circuit Judge:

***

This case requires us to reconcile the competing demands of the Twenty-first Amendment’s grant of authority to the states to regulate the intrastate traffic of alcohol, with the power reserved to Congress under the Commerce Clause “to regulate Commerce . . . among the several States.” U.S. Const. art. 1, § 8, cl. 3. Thus, we must determine whether New York’s alcohol regulatory regime, insofar as it relates to the direct shipment of wine to New York consumers, is properly within the scope of section 2 of the Twenty-first Amendment, such that it is exempted from “the normal operation of the Commerce Clause,” or more precisely, the dormant Commerce Clause. Craig v. Boren, 429 U.S. 190, 206, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976). We conclude that the challenged regime is within the ambit of the Twenty-first Amendment and also does not violate the Privileges and Immunities Clause. We hold, however, that section 102(1)(a) of the State’s regulatory regime violates the First Amendment insofar as it prohibits all commercial speech pertaining to the sale of alcoholic beverages directed to New York consumers by unlicensed entities.
Background

A. New York’s Regulatory Regime

Shortly following the ratification of the Twenty-first Amendment, New York, like most states, adopted a three-tiered system for the sale and distribution of alcoholic beverages. See N.Y. Alco. Bev. Cont. Law § 100(1) (McKinney 2000). One of the fundamental principles of the system is that all sales of alcohol within New York must be made to or by state-licensed entities. To this end, section 100(1) of New York’s Alcoholic Beverage Control Law (the “ABC Law”) provides that “no person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.” Id. Section 102(1)(c) of the ABC Law also provides in relevant part that “no a lecholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages.” Id. In addition, the ABC Law prohibits a common carrier or any other person from bringing or carrying any alcoholic beverages into the state “unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages.” Id. § 102(1)(d).

Generally, the license application process is rigorous to ensure that only reputable individuals and their companies enter the alcoholic beverage trade. Applicants must identify any person with an interest in the business along with the sources of funds used in the licensed business. Id. § 110(1)(g). Licensees must also post an appropriate penal bond that may be subject to forfeiture for violation of the ABC Law or State Liquor Authority (“SLA”) regulations. Id. § 112; N.Y. Comp. Codes R. & Regs. tit. 9, §§ 81.1-81.7 (2003). A conviction for a felony or certain misdemeanors precludes a person from obtaining a license, N.Y. Alco. Bev. Cont. Law § 126(1) (McKinney 2000), and any person who commits a violation of the ABC Law cannot obtain a license for a period of two years. Id. § 126(5). Additionally, licensees must maintain adequate books and records on their premises and make them available for inspection by the SLA. Id. §§ 103(7), 104(10), 105(15), 106(12). These requirements facilitate the SLA’s role in generating and collecting tax revenue, and in ensuring that licensees comply with the provisions of New York’s regulatory scheme.

Section 76 of the ABC Law sets forth the requirements for obtaining a New York winery license. As defined under the ABC Law, a licensed winery is one that has paid the required licensing fee, id. §76, and “has and maintains a branch factory, office or storeroom within the state of New York and receives wine in this state consigned to a United States government bonded winery, warehouse or storeroom located within the state.” Id. § 3(37). Licensed wineries enjoy important privileges in New York’s regulatory scheme. For example, a licensed winery may sell and ship its wine to another licensed winery, a wholesaler or a retailer. Id. § 77(1). More importantly, however, a licensed winery may also obtain a retail license, allowing it to sell and ship its wines directly to consumers. Id. §§ 76(4), 77(2). Thus, unlike in other states, out-of-state wineries are permitted to seek and obtain a New York license to distribute and sell alcohol. They must, however, comply with the licensing requirements of the ABC Law, including establishing and maintaining a physical presence in New York.
B. Decision Below

Plaintiffs-appellees, Juanita Swedenburg and David Lucas, proprietors of two out-of-state wineries, and Patrick Fitzgerald, Cortes DeRussy and Robin Brooks, New York wine consumers, filed this action against New York State seeking a declaration that sections 102(1)(a), (c) and (d) of New York’s ABC Law are facially unconstitutional under the Commerce Clause, the Privileges and Immunities Clause, and the First Amendment. Plaintiffs-appellees claim sections 102(1)(c) and (d) violate the dormant Commerce Clause because they prevent the winery plaintiffs-appellees from shipping their wine products directly to New York consumers. The wineries contend that based on their size Swedenburg estimates New York sales of only 120 to 180 bottles of wine a year - direct sales to consumers through a website or the mail are their only possible access to the New York market. Thus, plaintiffs-appellees argue the licensing scheme provides an unconstitutional advantage to in-state wineries and is not “saved” by the Twenty-first Amendment. [...] State defendants and intervening defendants, wholesale distributors of alcohol, (collectively, “defendants-appellants”), argue that the regulatory scheme operates even-handedly with respect to in-state and out-of-state interests, and thus does not improperly discriminate against out-of-state wineries. Defendants-appellants further argue that, in any event, the regulatory scheme is excepted from dormant Commerce Clause scrutiny, as it is a proper exercise of the State’s authority under the Twenty-first Amendment to regulate the importation and distribution of alcohol for delivery or use within its borders.

The district court granted plaintiffs-appellees’ motion [for summary judgment]. See Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y. 2002). Relying on the method of analysis utilized by a number of other federal courts in similar challenges, the district court first found that the New York regime directly discriminated against interstate commerce. Id. at 145. The court then held that the ban on direct shipment of out-of-state wine by non-licensed wineries did not “implicate the State’s core concerns under the Twenty-first Amendment,” and thus, the ban was not insulated from a dormant Commerce Clause attack. Id. at 148.

The court rejected the State's contention that the “presence” requirement of the statute cured its alleged discriminatory effect. “It appears unreasonable to this Court to require that an out-of-state winemaker "become a resident in order to compete on equal terms."” Id. at 146 (quoting Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 72, 10 L. Ed. 2d 202, 83 S. Ct. 1201 (1963)). The district court noted that the Supreme Court has viewed with substantial suspicion state statutes requiring that business operations be performed in the regulating state that could more efficiently be performed elsewhere. Id. [...] ***

Discussion

I. Constitutionality of the Regulatory Scheme Under the Twenty-first Amendment

A. Analytical Framework

[The court reviewed the decisions of five other U.S. Circuit courts on similar cases. It found that all but one had adopted a two-
step approach to the analysis, first determining whether the regulation affected interstate commerce in a discriminating manner and only then looking to the Twenty-first Amendment to "save" the statute, if it advanced one of the Amendment's "core concerns." The court rejected this analysis and adopted the view that the two pieces of the Constitution should be considered in light of each other.

***

B. The Legal History of the Twenty-first Amendment

[The court reviewed the history of the Twenty-first Amendment, noting that Section 2 is what directly gives states the power to regulate the importation of liquor.]

C. Analysis

Section 2 of 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 Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980). This constitutional grant of authority should not, we think, be subordinated to the dormant Commerce Clause inquiry when the two provisions conflict, as they do here. Plaintiffs-appellees argue that the scope of section 2's grant of authority to the states has been narrowed by a series of Supreme Court decisions. The end result, they posit, is that a state law regulating the importation of interstate liquor is a proper exercise of the state's section 2 power only if it regulates in a non-discriminatory manner and is intended to advance the "core concerns" of the Twenty-first Amendment - namely temperance, the promotion of orderly market conditions, and revenue production. See North Dakota v. United States, 495 U.S. 423, 432, 109 L. Ed. 2d 420, 110 S. Ct. 1986 (1990) (plurality opinion).

We disagree with the proposition that the Supreme Court's Twenty-first Amendment jurisprudence confines the scope of section 2 to state regulations that advance so-called core concerns. In our view, although the Supreme Court's Twenty-first Amendment jurisprudence has to some degree cabined the scope of section 2, it has done so only insofar as it has limited section 2's grant of authority to its plain language. That is, the Supreme Court has consistently recognized only that, under section 2, a state may regulate the importation of alcohol for distribution and use within its borders, but may not intrude upon federal authority to regulate beyond the state's borders or to preserve fundamental rights.

1. Early Twenty-first Amendment Jurisprudence

[The court reviewed decision of the U.S. Supreme Court in the years immediately following the ratification of the Twenty-first Amendment, finding that they gave broad powers to states to regulate alcohol traffic, even when out-of-state interests were adversely affected.]

2. Contemporary Twenty-first Amendment Jurisprudence

We acknowledge that more recent cases have recognized that the Twenty-first Amendment is not a plenary grant of authority to states to regulate all activity involving alcohol. As the Supreme Court has noted, "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to
other constitutional provisions becomes increasingly doubtful.” [...] 

Similarly, in Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 12 L. Ed. 2d 350, 84 S. Ct. 1293 (1964, the Court struck down New York’s attempt to prohibit the sale of liquor to internationally-bound travelers at a duty-free airport shop operating under the supervision of the United States Bureau of Customs. Id. at 329. In so holding, the Court rejected the view that “the Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause wherever regulation of intoxicating liquors is concerned.” Id. at 331-32. Such a view, the Court declared, would effectively strip Congress of its “regulatory power over interstate or foreign commerce in intoxicating liquor.” Id. at 332. [...] 

In Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 12 L. Ed. 2d 362, 84 S. Ct. 1247 (1964), the Court invalidated a state law seeking to impose a tax on alcohol imported from Scotland on the ground that it violated the Constitution’s Export-Import Clause. Id. at 346. The Court reiterated it had “no doubt” that Kentucky could regulate alcohol “destined for distribution, use, or consumption within its borders.” Id. Section 2, however, did not give the state the power to impose a tax “clearly of a kind prohibited by the Export-Import Clause.” Id. at 343. [...] 

Two decades after Idlewild and James B. Beam Distilling, the Court reemphasized the view that the Twenty-first Amendment is not without limits when a state regulatory scheme conflicts with valid federal concerns. In California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980), the Court, upon finding that a California wine-pricing program violated the Sherman Act, considered whether section 2 “permit[ted] California to countermand the congressional policy adopted under the commerce power - in favor of competition.” Id. at 106. Ultimately, the Court concluded that because federal antitrust concerns animating the Sherman Act outweighed California’s desire to protect small liquor retailers from predatory pricing schemes of larger retailers, section 2 could not salvage the offending statute. Id. at 114. Four years later, in Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 81 L. Ed. 2d 580, 104 S. Ct. 2694 (1984), the Court echoed Midcal’s refrain, holding unconstitutional an Oklahoma statute that required in-state television operators to delete advertisements for alcoholic beverages contained in the out-of-state signals that they retransmitted by cable to Oklahoma subscribers. In striking down the law, the Court reiterated that the Twenty-first Amendment had not repealed the Commerce Clause, and declared that when a state statute does not directly regulate the sale or use of liquor within the state’s borders, a conflicting exercise of federal authority may prevail. Id. at 713, 104 S.Ct. 2694. 

The Supreme Court has also viewed with caution state attempts to invoke section 2 as a pretext for economic protectionism. In Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 82 L. Ed. 2d 200, 104 S. Ct. 3049 (1984), Hawaii imposed an excise tax on liquor sales at wholesale, while exempting certain locally produced alcoholic beverages. The Court invalidated the Hawaiian tax on the grounds that it was intended to “favor local liquor industries,” and therefore was preempted by “strong federal interests in preventing economic Balkanization” and promoting a unified national market. Id. at 276. In Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S.
the Court struck down a New York statute that required state-licensed distillers to comply with a price schedule that established prices for local liquor sales no higher than the lowest price the distiller charged in other states. The Court recognized that the statute could, in effect, control the prices of alcoholic beverages in neighboring states. *Id.* at 582-84. Thus, the Court concluded that the statute was an impermissible extraterritorial attempt to regulate liquor prices. [...]  

In each of these cases, the Supreme Court was called upon to resolve competing claims of constitutional authority. In each, the Court "limited" the scope of section 2 only insofar as it related to a state's attempt to regulate the traffic of alcohol outside of its borders or in violation of other powers reserved to the federal government. However, in each case, the Court unequivocally reaffirmed the principle that insofar as section 2 permits each state to regulate alcohol traffic within its borders it "primarily created an exception to the normal operation of the Commerce Clause." *Craig,* 429 U.S. at 206. The Supreme Court has neither held nor implied that laws prescribing regulations for the importation and distribution of alcohol within a state's borders "are problematic under the dormant commerce clause." *Bridenbaugh,* 227 F.3d at 853. Indeed, as the language of the Amendment and the Court's jurisprudence amply demonstrate, section 2's powers are directed specifically towards intrastate regulation and traffic of liquor.

This limited interpretation of section 2 is consistent with the political and cultural forces animating Prohibition and its subsequent repeal by the Twenty-first Amendment. That is, the impact of the dormant Commerce Clause has always been an issue relating to state efforts to regulate the flow of liquor within its borders. Following a series of federal statutory efforts to provide states with the legal wherewithal to regulate intrastate alcohol traffic, the Eighteenth Amendment prohibited the flow of alcohol on a national level. With Prohibition's repeal, the drafters of the Twenty-first Amendment crafted section 2 to allow states the authority to circumvent dormant Commerce Clause protections, provided that they were regulating the intrastate flow of alcohol.

3. New York's Regulatory Regime

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 within the state. 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.

Although we are sensitive to the Supreme Court's instruction that "[s]tate laws that constitute mere economic protectionism are ... not entitled to the same deference as law enacted to combat the perceived evils of an unrestricted traffic in liquor," *Bacchus,* 468 U.S. at 276, we find no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests. All wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state. Wine that is delivered to a branch office or warehouse can then be shipped directly to consumers.
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. New York treats wine importers the same as it treats internal sellers; all must either utilize the three-tier system or obtain a physical presence from which the state can monitor and control the flow of alcohol.

We fully recognize that the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol. When a state statute, whether on its face or in effect, discriminates against interstate commerce, it is virtually per se invalid unless the State can justify the discrimination “both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.” *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 353, 97 L. Ed. 2d 383, 97 S. Ct. 2434 (1977).

Here, the requirement that all wine be shipped through a New York warehouse is a precondition to direct consumer sales. We recognize that “state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere ... have been declared to be virtually per se illegal.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970); see also *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 128 L. Ed. 2d 399, 114 S. Ct. 1677 (1994); *South-Cent. Timber Dev. v. Wunnick*, 467 U.S. 82, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984). But business efficiency must give way to valid regulatory concerns in this unique area of commerce. Under this scheme, out-of-state wineries will incur some costs in establishing and maintaining a physical presence in New York, costs not incurred by in-state wineries. These effects, however, do not alter the legitimacy of section 2’s delegation of authority. While it may be an additional expense for out-of-state wineries to be present in New York, they gain access to a market not available to others direct sales to consumers. The fact that some out-of-state wineries will have greater costs than others (out-of-state or in-state) in accessing the market is not determinative. New York has chosen to relax its regulatory grip for wineries to sell directly to consumers. It has not barred out-of-state wineries from the opportunity; it has correlated its relaxation of regulatory scrutiny with a safety net ensuring accountability presence. See *Milton S. Kronheim & Co. v. District of Columbia*, 319 U.S. App. D.C. 389, 91 F.3d 193, 204 (D.C. Cir. 1996).

New York’s desire to ensure accountability through presence is aimed at the regulatory interests directly tied to the importation and transportation of alcohol for use in New York. See *North Dakota*, 495 U.S. at 432 (plurality opinion) (“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 within its borders. That system is unquestionably legitimate.”). All wine will pass through a warehouse located in New York, allowing state officials access to the product. As noted above, every licensee must maintain books and records on premises available for inspection at any time by the SLA.

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. Section 2 does not require that New York bear the burden in attempting to ensure proper compliance with its tax and regulatory system regarding imported wine. New York's "motives of legitimate state interests which would be promoted by requiring [physical presence], e.g., auditing company records, monitoring compliance with the ABC laws, monitoring licenses, checking tax forms for audits, etc., fall[... square]ly within the state's core enforcement powers over alcohol." Kronheim, 91 F.3d at 203-04.

The winery plaintiffs presented compelling proof that boutique wineries with limited production of high quality wine have a niche in an increasingly sophisticated national market of wine connoisseurs. Facility of travel and the Internet have made wineries all over the nation available to those wishing to visit and buy wine personally or in a virtual sense. Indeed, a majority in both houses of New York's legislature felt that New York wineries (the vast majority of which are quite small) would benefit from a reciprocity statute that would allow direct sales to consumers by unlicensed out-of-state wineries from states allowing New York wineries the same opportunity. See S. 3533-A, A-7411, 1995 Senate-Assembly Bill (NY 1995). The governor chose to veto the bill. See Governor's Veto # 76 (NY 1995). Changes in marketing techniques or national consumer demand for a product do not alter the meaning of a constitutional amendment. If New York wishes to further relax its regulatory control of the flow of wine into New York, it can do so.

We hold that the challenged regulatory scheme is within the ambit of the powers granted to states by the Twenty-first Amendment. New York's regulatory scheme allows licensed wineries, whether in-state or out-of-state, direct access to a market of sophisticated oenophiles. The scheme does so in a non-discriminatory manner, while targeting valid state interests in controlling the importation and transportation of alcohol. Accordingly, we conclude that New York has acted within its authority under the Twenty-first Amendment.

Conclusion

The district court's order of December 12, 2002, is hereby AFFIRMED in part and REVERSED in part and the matter remanded for further proceedings in accordance with this opinion.
The U.S. Supreme Court will decide if wine lovers may uncork out-of-state vintages delivered directly via the Internet or by telephone order. The justices said they will review three similar cases involving challenges to regulations on the books in about half the states. Those rules require consumers to buy alcoholic beverages only from licensed in-state retailers. The case pits the Constitution's 21st Amendment, which ended Prohibition in 1933 and gave states regulatory rule over alcoholic beverages, against the Commerce Clause, which gives Congress the power to regulate interstate commerce.

There are more than 2,500 wineries in 49 states, according to one of the filings in the case. As more small wineries seek to expand their markets over the Internet, pressure for deregulation is building. The challengers say the rules violate their rights under the Commerce Clause.

While regulation of alcohol beverages always has been a special case because of public safety concerns, the high court's decision could have an impact on other industries. Steven Simpson, senior attorney for the Institute for Justice, which represents some wineries and consumers in one of the cases, pointed out that some state also require mortgage brokers to have an in-state office in order to do business, as opposed to working over the Internet.

The National Beer Wholesalers Association said in a brief filed in one of the cases that "delicately balanced" state regulations serve such important interests as "preventing illegal sales to minors, inhibiting overly aggressive marketing and consumption, collecting taxes [and] creating orderly distribution." Another brief filed by 36 states warned that deregulation would cut state tax revenues at a time when budgets are pressed.

The court has decided to step into the case in part because of a split among six U.S. appeals courts that have addressed the issue. Four of the six have, to some extent, ruled to overturn regulations. Most of the regulated states use a three-tier system, under which manufacturers sell their products to licensed wholesalers, who sell them to licensed retailers. Certain exceptions allow direct sales.

The justices are expected to rule on the cases during their next term, which begins in October.

[...]
Top court to rule on winery shipping; Small vintners seek end to ban on direct out-of-state sales

The San Francisco Chronicle
May 25, 2004
Carol Emert

Virtually every day, David Jones of Lava Cap Winery gets telephone calls from out-of-staters who have visited his Placerville tasting room and want a few bottles of wine shipped to their homes.

Virtually every day, Jones has to turn down one or more customers from such states as New York and Florida, explaining that their 1930s-era liquor-control laws prohibit his wines from being delivered to their doorsteps.

In a year’s time, the situation could be much better, or much worse, for wineries and consumers. The U.S. Supreme Court agreed Monday to weigh in on the legality of direct alcohol shipping, and laws in at least half-a-dozen states hang in the balance.

“It’s an important issue for all of the wine industry and for consumers,” Jones said. “The people of this country deserve access to all wine, not just what the distributors happen to want to bring in.”

The battle over direct shipping, which has been raging in courts and legislatures across the country, pits wineries and consumers who want to be able to buy and sell wine freely against wholesale distributors and state liquor-control authorities.

Distributors don’t want to cede any of their business to home deliverers like UPS and FedEx, while some regulators worry about sales-tax evasion and fear that minors could order intoxicating beverages over the Internet.

The issue is of particular import to the country’s more than 2,000 small wineries, many of which have trouble attracting the attention of distributors. Not only can some wineries sell more goods by shipping direct, they can double their profits by cutting out wholesalers and retailers.

The Supreme Court accepted both direct-shipping cases it had been petitioned to hear—Granholm vs. Heald in Michigan and Swedenburg vs. Kelly in New York—and consolidated them into one.

The court said it would address the tension in the U.S. Constitution between the commerce clause, which prohibits discrimination in interstate commerce, and the 21st Amendment, which repealed Prohibition and at the same time gave states the authority to regulate beverage alcohol as they wish.

In Michigan, New York and other states where lawsuits have been heard, native wineries are allowed to ship to their state’s residents, but out-of-state wineries must go through the cumbersome and expensive distributor-retailer network.

“It is an unfair situation that people who don’t have access to distributors should be shut out of the market,” said Patrick Campbell, owner of Laurel Glen Winery in...
Glen Ellen and a shipping activist. “That’s not the American way.”

The move toward the high court is the culmination of years of litigation by a grassroots movement of consumers, wineries and attorneys who have been protesting shipping bans in federal courts around the country.

The wholesalers have proven aggressive opponents, countering each new lawsuit with a vengeance.

State attorneys general also have weighed in, asking the Supreme Court for clarity on the issue. Earlier this year, 36 attorneys general—some who favor direct shipping and some who oppose it—filed a brief asking the high court to rule on direct shipping.

While results of the state lawsuits have been mixed, most states have found prohibitions on out-of-state shipping discriminatory. Several anti-shipping laws have been overturned in state legislatures or courts in the last two years, bringing the number of states with legal direct shipping to 26.

The high court’s decision in the matter is expected by the end of June 2005. Depending on how broadly it is written, it could affect pending lawsuits in Florida, Ohio and New Jersey in addition to New York and Michigan. It also could have an impact on Indiana, which upheld a ban on direct shipping several years ago.

Since the Michigan and New York cases deal primarily with the issue of discrimination, the decision won’t have any effect on states such as Pennsylvania that forbid all wineries, both in-state and out-of-state, from shipping to residents.

Craig Wolf, the wholesalers’ attorney who led the charge to the Supreme Court, was unavailable for comment. But a spokeswoman for the Wine and Spirits Wholesalers of America trade association said her members are optimistic.

“We believe it needs to be settled once and for all whether the Constitution says what it says, which is that states need to decide what is in the best interest of their citizens with regard to sales and distribution of alcohol,” said spokeswoman Karen Gravois.

Pro-shipping forces had hoped the Supreme Court would wait to weigh in on the issue until they had more victories in state courts and legislatures. Attorneys also were concerned that a majority of justices favor states’ regulatory rights more than free trade. But yesterday, pro-shipping lawyers said they are ready for the showdown.

While the timing isn’t ideal, “I think we will win the Supreme Court on this issue,” said Alexander Tanford, an attorney in the Michigan case and a constitutional law professor at Indiana University.

Tanford said the wording in the court’s agreement to accept the case made him more confident, because it focuses on the potent issue of discrimination and avoids side issues that might have swayed some justices.

While it is impossible to predict a Supreme Court vote, he said: “I am reasonably confident at this point that there are at least five justices who will, in fact, vote that the 21st Amendment does not give states power to discriminate.”

Wineries have a powerful ally in Kenneth Starr, the former U.S. solicitor general and special prosecutor who is best known for
investigating former President Bill Clinton's White House affair.

Starr, who is helping coordinate the Supreme Court efforts on behalf of the wine industry's Coalition for Free Trade and Family Winemakers of America, said yesterday in a conference call that he is pulling strings in Washington to get support for wine shipping.

Starr said he had already briefed staff at the Federal Trade Commission on Monday. Last year the FTC issued a report concluding that state direct-shipping bans are anti-competitive and finding few problems with underage access to alcohol or tax evasion.

Starr said he would solicit friend of the court briefs from the U.S. solicitor general, the departments of Commerce and Agriculture, the Alcohol and Tobacco Tax and Trade Bureau and senators and representatives who are members of the congressional wine caucus.

The many attorneys involved in the cases now must decide who will argue before the high court.

The top candidates are Starr, who has appeared before the court many times; Tanford; and Clint Bolick, the lead attorney for the Institute of Justice, which brought the New York case.

Separate briefs will be submitted in the Michigan and New York cases, but only one attorney may appear in oral arguments in December, said Tanford.
The Supreme Court agreed Monday to resolve an intensifying debate over whether states can prohibit out-of-state wineries from shipping directly to consumers. The eventual decision could have implications beyond wine sales for Internet commerce in general.

The appeals the justices accepted, from New York and Michigan, are among some two dozen cases now in courts around the country challenging laws that states defend as part of their authority to regulate the liquor industry but that small wineries and consumers have attacked as impermissibly protectionist.

The constitutional doctrines that undergird these positions are complex and contradictory. The 21st Amendment, which repealed Prohibition, gives states broad authority to regulate the sale and use of alcoholic beverages within their borders. But the Commerce Clause, as long interpreted by the Supreme Court, sharply limits the ability of individual states to erect economic barriers at their borders.

Not surprisingly, different courts have reconciled these competing doctrines in different ways, a circumstance that made the Supreme Court’s intervention all but inevitable. The justices consolidated the cases for a single argument to be heard late next fall.

In the Michigan case, the United States Court of Appeals for the Sixth Circuit, in Cincinnati, struck down the state’s interstate-shipment ban last August on the ground that it amounted to unconstitutional discrimination against interstate commerce. Both the state government and the state’s beer and wine wholesalers appealed to the Supreme Court; the cases are Granholm v. Heald [...] and Michigan Beer and Wine Wholesalers Association v. Heald [...].

The United States Court of Appeals for the Second Circuit, in Manhattan, upheld New York’s law in a ruling three months ago. That court placed more emphasis on the state’s 21st Amendment powers and found that the law was valid “within the ambit of that authority.” The court said New York’s law did not discriminate on its face because it permitted any winery with a “physical presence” in the state, such as an office, to ship directly to consumers.

Clint Bolick, strategic litigation counsel of the Institute for Justice, the libertarian public-interest law firm that brought the challenge to the New York law, said in an interview Monday that it was “ludicrous” to suppose that his client, Juanita Swedenburg, proprietor of a small Virginia vineyard, could open an office in New York or any other state.

“If you call her winery, she answers her own phone,” Mr. Bolick said.

The appeal, filed on behalf of Ms. Swedenburg as well as a California winemaker named David Lucas and three New York wine consumers, is Swedenburg v. Kelly [...].
Mr. Bolick said a decision upholding the state laws could permit states to erect "serious barriers to e-commerce in general."

Viet D. Dinh, a law professor at Georgetown University who is representing the wholesale wine and liquor industry in defense of the state laws in these cases, said the Second Circuit's analysis in relying on the states' 21st Amendment authority was clearly correct. In an interview, Mr. Dinh, a former assistant attorney general, said that because alcohol was "unlike any other product," a decision upholding the state laws would not have implications for other types of commerce, on the Internet or elsewhere.

While direct sales from wineries to consumers are growing quickly as states relax their prohibitions or lose court cases, as Texas did last year, they are still a small portion of all wine sales, $200 million out of $18 billion last year. The stakes are obviously high, however, both to the wineries, which are motivated to avoid sharing their profits with wholesalers, and to the states. The National Conference of State Liquor Administrators estimated in 2000 that states were losing tens of millions of dollars in tax revenue from interstate wine sales to consumers. Thirty-six states have joined a brief filed by Ohio in support of Michigan's appeal.

New York's attorney general, Eliot Spitzer, filed a Supreme Court brief agreeing with Ms. Swedenburg that the court should hear the challenge to the New York law in order to clarify the national situation. He urged the court to uphold the law, however. [...]
Supporters of laws that ban wineries from shipping directly to consumers in many states—especially wholesalers who now act as middlemen and would like to have all wine sales continue to go through them—invoke all manner of justification for their position. They say they’re trying to abide by the United States Constitution and to ensure that appropriate sales taxes are collected and, above all, to help states “protect their communities ... [and] safeguard their children ...” as Juanita Duggan, president and CEO of the Wine & Spirits Wholesalers of America, said when the U.S. Supreme Court agreed last month to hear two cases that involve direct shipping.

Right. When all else fails, invoke those poor, helpless kids. If the Supreme Court rules against Duggan and her allies, I can just see all those impatient 14-year-olds e-mailing their orders to Napa and waiting three weeks for their Screaming Eagle to arrive.

When the Supreme Court takes up this case later this year, justices will be reviewing just two states’ laws, but their ruling could affect all 24 states that now forbid direct sales to consumers. These states essentially rely on the 21st Amendment, which repealed Prohibition but threw a legislative bone to the temperance movement by giving states broad authority to regulate the sale of alcoholic beverages within their borders.

I hope the court throws all those states’ laws out the window. I hope the justices rule that wineries in California and elsewhere can ship their wines directly to consumers in every one of the 50 states.

A Federal Trade Commission study last year said consumers could save “as much as 21% on some wines” if they were able to buy them directly from the wineries. That’s why wholesalers oppose the change; they’d lose money if wineries could bypass them and ship directly to individual consumers.

Although consumers in California probably wouldn’t be greatly affected by such a decision—at least not directly—it’s still a huge issue here. California is by far the biggest wine-producing state in the country, accounting for two-thirds of the nation’s wine sales. All the other states combined produce only about 7% of the wine consumed in the United States.

***

Direct shipping throughout the country could be an enormous windfall for California wineries, though, simply because they could sell more wine to more customers. This should make the wineries healthier, and since the wine industry contributes $33 billion to the state’s economy, the state’s economy should get healthier too.

But that’s not why I favor eliminating the ban on direct shipping. The ban just seems discriminatory to me. Over the years, the Supreme Court has generally interpreted the Commerce Clause in the U.S. Constitution in ways that limit such state-by-state
discrimination—“economic Balkanization,” the court called it in another case—and I hope the justices will do likewise now.

If I lived in New York (or Michigan)—the two states whose bans are the basis of the pending Supreme Court case—why should I only be able to direct-order wines made in New York (or Michigan)? Why shouldn't I be able to buy by phone, online or through the mail any wine from California and Oregon and Virginia and any other state that makes wine that appeals to me? And why shouldn't wineries be able to sell to anyone, anywhere, who wants to drink their wines and is willing to pay for them?

Even a favorable Supreme Court ruling wouldn't allow foreign wineries to ship directly to customers in the U.S. because federal import and customs regulations, not state laws, prevent that.

But if, like me, you tend to root for the underdog—the little guy—in most situations, there's another reason to hope the Supreme Court overturns the direct shipping ban within the United States.

**Big fish, little fish**

The big wineries, in California and elsewhere, can survive under the current system. They may not like it. They may be able to make even more money if the system is changed. But at least they're in the game.

The biggest 25% of the country's almost 3,000 wineries sell more than 80% of the wines consumed nationwide, and wholesalers are happy to work with them. Most wineries are small, family-owned operations, though, with volume so slight that wholesalers don't find their business worth taking.

These wineries get shut out of interstate sales altogether under the current system; they can't ship directly to consumers, and they can't ship indirectly, through wholesalers. Collectors and casual drinkers alike should have direct access to these wines.

Direct sales from wineries to consumers are a relatively small piece of the wine pie at present, accounting for only $200 million of last year's $18 billion in total wine sales. But that number would increase significantly if wineries could sell directly to consumers everywhere.

The Supreme Court should make that possible.
Most Americans probably think that legal battles about Prohibition ended decades ago, with the ratification of the 21st Amendment to the Constitution. But two recent cases from federal appeals courts, now headed toward the Supreme Court, show that our legal system is still grappling with issues that it should have settled long ago. As they decide whether to review one of the cases, the justices need to realize that not just regulation of alcohol, but what the Constitution means, is on the line.

Consumers and alcohol providers allege that Michigan’s law [and similar ones, for instance, in Virginia and New York] are protectionist and unconstitutional, because they violate the so-called “dormant commerce clause doctrine.” This judge-made doctrine infers from the Constitution’s grant of congressional power to regulate interstate commerce a corresponding set of restrictions on states. At a minimum, the Supreme Court has instructed, the doctrine prevents states from restricting interstate commerce by passing laws that explicitly discriminate against such commerce, or by passing facially neutral laws that have the same discriminatory effects.

The doctrine is rooted in the presumption that by granting such power to Congress, the Framers intended to establish a national market for goods and services free of parochial or protectionist state barriers. Since many direct-shipment bans, such as Michigan’s, contain exceptions for alcohol produced in the state, those seeking to overturn the laws allege that they represent precisely the sort of blatant protectionism that the dormant commerce clause doctrine forbids. What these arguments overlook, however, is the existence of the 21st Amendment. The amendment authorizes laws like Michigan’s because it was intended, where alcohol is involved, to disable the dormant commerce clause doctrine.

The 21st Amendment, which repealed Prohibition, states in its second section: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” The plain text suggests that recent court decisions are mistaken. Yet the courts tell us that the 21st Amendment is not to be read literally or invoked as a shield for protectionist legislation. Only laws promoting temperance, they say, are protected by the amendment.

Where have courts gotten the idea for this distinction – between “good” alcohol legislation, which furthers the state’s “legitimate” core interest in temperance and related alcohol oversight and taxation, and “bad” legislation motivated by simple economic protectionism? Certainly not from the text of the amendment, which makes no such distinction.

Nor can opponents enlist the aid of the amendment’s framers. The 21st Amendment
was written in part to allay state concerns that they would face renewed constitutional challenges to their regulation of alcohol shipped in interstate commerce, and so constitutionalized state control over alcohol imported into states.

Before Prohibition, in the 19th century, alcohol consumers and shippers successfully invoked the dormant commerce clause doctrine against state attempts to halt the burgeoning mail-order liquor trade. The dormant commerce clause thus essentially rendered dry states powerless to enforce their liquor laws. In response, Congress passed the Wilson Act in 1890 and the Webb-Kenyon Act in 1913, which effectively disabled the dormant commerce clause doctrine as applied to interstate shipments of liquor, and permitted states to enforce their laws.

The Supreme Court upheld this legislation, thus confirming the power of Congress, by affirmatively exercising its power over interstate commerce, to lift the inferred restrictions on the states placed by the dormant commerce clause doctrine. These congressional efforts culminated in the ratification of the 18th Amendment, which inaugurated a 14-year experiment with national prohibition. When enthusiasm for Prohibition waned, state concerns about their ability to control the alcohol trade re-emerged.

THE 21ST AND THE STATES

Both proponents and opponents of repeal agreed that the power to regulate alcohol rightly belonged to the states. They made sure to eliminate a provision from an early version of the amendment that empowered both the federal and state governments to regulate “saloons.” Both wet and dry senators objected, noting the provision would undermine the key purpose of the amendment: to return control over liquor regulation to the states.

With that important change, the “drys” were assured that the dormant commerce clause doctrine would not be revived to strike down state regulatory efforts; the “wets,” too, were provided with constitutional assurances that dry forces could not use federal power to re-establish some form of prohibition in the future. As the participants understood it, the main question regarding alcohol regulation was one of power. The 21st Amendment settled it in favor of the states.

Early Supreme Court cases clearly reflected that understanding. In State Board of Equalization of California v. Young's Market, decided in 1936, Justice Louis Brandeis rejected arguments that the 21st Amendment required a state, if it chose to permit the sale of alcohol at all, to treat all alcohol the same. The plaintiffs in Young’s Market were asking the Court to strike down a $500 license fee imposed on importers of out-of-state beer. Brandeis wrote that to adopt the plaintiffs’ arguments “would involve not a construction of the [21st Amendment], but a rewriting of it.” In three later cases—Mahoney v. Joseph Triner Corp. [1938], Joseph S. Finch & Co. v. Mckittrick [1939], and Indianapolis Brewing Co. v. Liquor Control Commission [1939]—the Supreme Court subsequently applied the core holding of Young's Market.

However, since a 1965 case, Hostetter v. Idlewild Bon Voyage Liquor Corp., suggested that the 21st Amendment had not repealed the commerce clause despite the holding in Young's Market, the Supreme Court has not vigorously defended the power reserved to the states by the amendment. In 1984, the Court in Bacchus Imports Ltd. v. Dias applied to a state law
taxing alcohol the very dormant commerce clause analysis that the amendment was intended to foreclose. At no time has the Court made a convincing case for the correctness of its more recent decisions, and it also has failed to expressly overrule Young’s Market.

Recent lower court decisions, like the 6th Circuit’s Engler and the District Court’s opinion in Swedenburg v. Kelly, have indulged in still broader applications of the Supreme Court’s relatively small encroachments on the 21st Amendment, and erroneously concluded that those high court decisions dictate the wholesale invalidation of state liquor importation laws. The growing market for interstate shipment of alcohol, and the near unanimity of federal courts in their continued assertions of the 21st Amendment’s irrelevance, makes this an appropriate time for a re-examination of the amendment and the Supreme Court’s interpretation of it. Without a reaffirmance of the agreement behind it, the amendment will become a dead letter.

Were the issue simply one of cheap liquor vs. expensive liquor, or whether states ought to protect local economic interests as a matter of policy, one might applaud the actions of the lower courts. After all, the dormant commerce clause doctrine is a powerful judicial weapon designed to enforce the common market vision of the Constitution— and so much the better for the nation.

But, as is often the case when means are subordinated to ends in fashioning constitutional law, there are real costs to the approach the lower courts have adopted. Those costs could amount to de facto alcohol deregulation, which would quite possibly allow for elimination of longstanding, state-based safeguards against underage access, as well as states’ ability to track and tax alcohol sales and ensure product purity.

**PAYING THE CONSTITUTIONAL PRICE**

But there is an even more serious cost to judicial abnegation of the 21st Amendment, a cost to the integrity of the amending process itself. If members of Congress who propose amendments, and those in the states who are called upon to ratify them, cannot be assured that the judiciary will respect the “constitutional politics” of an amendment when interpreting it, then one might forgive them for asking whether it is worth going to the trouble of proposing Article V amendments at all. This would leave the process of constitutional change entirely in the hands of the judiciary and remove an important popular check on the court decisions.

Not only would the denigration of our amending process be a loss for our constitutional regime, but it might have more ominous consequences for constitutionalism in general. If the judiciary is not bound to respect the words and intent animating a relatively young amendment, then why should the Constitution’s other, older textual boundaries command observance? Thus, when contemplating the fate of the 21st Amendment, it hardly seems alarmist to wonder whether other parts of the Constitution are similarly vulnerable to judicial repeal.
Ashcroft v. Raich
(03-1454)

Ruling Below: (Raich v. Ashcroft, 9th Cir., 352 F.3d 1222, 2003 U.S. App. LEXIS 25317)

The court granted a preliminary injunction to protect users of medical marijuana in California from seizure of their plants and prosecution under the Controlled Substances Act. Emphasizing the intrastate nature of the appellants’ use of marijuana, the court rejected the federal government’s arguments that interstate distribution of controlled substances could not be distinguished from intrastate distribution.

Question Presented: Whether the Controlled Substances Act exceeds Congress’s power under the Commerce Clause as applied to the intrastate possession and manufacture of marijuana for purported personal “medicinal” use or to the distribution of marijuana without charge for such use?

Angel McClary RAICH, et al., Appellants
v.
John ASHCROFT, in his official capacity as United States Attorney General, et al., Appellees

United States Court of Appeals for the Ninth Circuit

Decided December 16, 2003

[Excerpt; some citations and footnotes omitted]

PREGERSON, Circuit Judge:

Two of the appellants, Angel McClary Raich and Diane Monson, are seriously ill Californians who use marijuana for medical purposes on the recommendation of their doctors. Such use is legal under California’s Compassionate Use Act. Monson grows her own medical marijuana. The remaining two appellants, John Doe Number One and John Doe Number Two, assist Raich in growing her marijuana. On October 9, 2002, the appellants filed suit against John Ashcroft, the Attorney General of the United States, and Asa Hutchinson, the Administrator of the Drug Enforcement Administration, seeking injunctive and declaratory relief based on the alleged unconstitutionality of the federal Controlled Substances Act. […]

On March 5, 2003, the district court denied the appellants’ motion for a preliminary injunction because the appellants had not established a sufficient likelihood of success on the merits. That ruling is now before us.

Factual and Procedural History

A. Statutory Scheme
1. The Controlled Substances Act

[The court reviewed the Controlled Substances Act, which makes it unlawful to knowingly or intentionally “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” Marijuana is classified as a controlled substance, and the CSA also addresses the difficulty of determining whether a controlled substance has been distributed or manufactured intrastate or interstate, asserting that even local, intrastate distribution and possession of controlled substances contributes to swelling the interstate traffic in such substances.]

2. California’s Compassionate Use Act of 1996

[The Court reviewed California’s Compassionate Use Act, which allows the use of prescribed marijuana for the treatment of certain illnesses and exempts patients and caregivers from previously applicable California code sections that make use or possession illegal.]

B. Factual Background

Appellants Angel McClary Raich and Diane Monson (the “patient-appellants”) are California citizens who currently use marijuana as a medical treatment. Appellant Raich has been diagnosed with more than ten serious medical conditions, including an inoperable brain tumor, life-threatening weight loss, a seizure disorder, nausea, and several chronic pain disorders. Appellant Monson suffers from severe chronic back pain and constant, painful muscle spasms. Her doctor states that these symptoms are caused by a degenerative disease of the spine.

Raich has been using marijuana as a medication for over five years, every two waking hours of every day. Her doctor contends that Raich has tried essentially all other legal alternatives and all are either ineffective or result in intolerable side effects; her doctor has provided a list of thirty-five medications that fall into the latter category alone. Raich’s doctor states that foregoing marijuana treatment may be fatal. Monson has been using marijuana as a medication since 1999. Monson’s doctor also contends that alternative medications have been tried and are either ineffective or produce intolerable side effects. As the district court put it: “Traditional medicine has utterly failed these women ....”

Appellant Monson cultivates her own marijuana. Raich is unable to cultivate her own. Instead, her two caregivers, appellants John Doe Number One and John Doe Number Two, grow it for her. These caregivers provide Raich with her marijuana free of charge. They have sued anonymously in order to protect Raich’s supply of medical marijuana. In growing marijuana for Raich, they allegedly use only soil, water, nutrients, growing equipment, supplies and lumber originating from or manufactured within California. Although these caregivers cultivate marijuana for Raich, she processes some of the marijuana into cannabis oils, balm, and foods.

On August 15, 2002, deputies from the Butte County Sheriff’s Department and agents from the Drug Enforcement Agency (“DEA”) came to Monson’s home. The sheriff’s deputies concluded that Monson’s use of marijuana was legal under the Compassionate Use Act. However, after a three-hour standoff involving the Butte County District Attorney and the United States Attorney for the Eastern District of California...
California, the DEA agents seized and destroyed Monson’s six cannabis plants.

C. Procedural History

Fearing raids in the future and the prospect of being deprived of medicinal marijuana, the appellants sued the United States Attorney General John Ashcroft and the Administrator of the DEA Asa Hutchison on October 9, 2002. Their suit seeks declaratory relief and preliminary and permanent injunctive relief. They seek a declaration that the CSA is unconstitutional to the extent it purports to prevent them from possessing, obtaining, manufacturing, or providing cannabis for medical use. The appellants also seek a declaration that the doctrine of medical necessity precludes enforcement of the CSA to prevent Raich and Monson from possessing, obtaining, or manufacturing cannabis for their personal medical use.

On March 5, 2003, the district court denied the appellants’ motion for a preliminary injunction. The district court found that, “despite the gravity of plaintiffs’ need for medical cannabis, and despite the concrete interest of California to provide it for individuals like them,” the appellants had not established the required “‘irreducible minimum’ of a likelihood of success on the merits under the law of this Circuit ....” The appellants filed a timely notice of appeal on March 12, 2003. We have jurisdiction to hear this interlocutory appeal pursuant to 28 U.S.C. § 1292 (a)(1).

Analysis

1. Defining the Class of Activities

The district court found that the Commerce Clause supports the application of the CSA to the appellants. Indeed, we have upheld the CSA in the face of past Commerce Clause challenges. See United States v. Bramble, 103 F.3d 1475, 1479-80 (9th Cir. 1996); United States v. Tisor, 96 F.3d 370, 375 (9th Cir. 1996); United States v. Kim, 94 F.3d 1247, 1249-50 (9th Cir. 1996); United States v. Visman, 919 F.2d 1390, 1393 (9th Cir. 1990); United States v. Montes-Zarate, 552 F.2d 1330, 1331 (9th Cir. 1977); United States v. Rodriguez-Camacho, 468 F.2d 1220, 1222 (9th Cir. 1972). But none of the cases in which the Ninth Circuit has upheld the CSA on Commerce Clause grounds involved the use, possession, or cultivation of marijuana for medical purposes.

[...]

[...][H]ere the appellants are not only claiming that their activities do not have the same effect on interstate commerce as activities in other cases where the CSA has been upheld. Rather, they contend that, whereas the earlier cases concerned drug trafficking, the appellants’ conduct constitutes a separate and distinct class of activities: the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient’s physician pursuant to valid California state law.

Clearly, the way in which the activity or class of activities is defined is critical. We find that the appellants’ class of activities—the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a
physician— is, in fact, different in kind from drug trafficking. For instance, concern regarding users' health and safety is significantly different in the medicinal marijuana context, where the use is pursuant to a physician's recommendation. Further, the limited medicinal use of marijuana as recommended by a physician arguably does not raise the same policy concerns regarding the spread of drug abuse. Moreover, this limited use is clearly distinct from the broader illicit drug market—as well as any broader commercial market for medicinal marijuana—insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce.

[The court analogized the instant case to its recent decision in United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003), where it held that a statute purportedly prohibiting the possession of child pornography was unconstitutional as applied to a mother's intrastate possession of a photo of her and her daughter with their genital areas exposed. The photograph never did, nor was ever intended to, reach the stream of commerce.]

Under McCoy, the class of activities at issue in this case can properly be defined as the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law. This class of activities does not involve sale, exchange, or distribution. As was the case in McCoy, the class of activities here represents a substantial portion of the conduct covered by the statute—at the time of the motion for a preliminary injunction, Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington had passed laws permitting cultivation and use of marijuana for medical purposes. See McCoy, 323 F.3d at 1132 ("This class of activity represents a substantial portion of the conduct covered by [the statute].").

2. Substantial Effect on Interstate Commerce

We must now answer the question whether this class of activities has an effect on interstate commerce sufficient to make it subject to federal regulation under the Commerce Clause. See Visman, 919 F.2d at 1392 ("In Perez . . ., the Court ruled that the defendants' local, illegal activity of loan sharking was within a 'class of activity' that adversely affected interstate commerce and Congress had the power to regulate it."). In two recent Commerce Clause decisions, the Supreme Court has refined Commerce Clause analysis. In Lopez 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), the Court struck down the Gun-Free School Zones Act of 1990 as an unconstitutional exercise of power under the Commerce Clause. Lopez set forth three categories of activity that Congress may properly regulate under the Commerce Clause: the "use of the channels of interstate commerce"; the "instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." 514 U.S. at 558-59 (citations omitted). This case involves the third category of activity.

In United States v. Morrison, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000), the Supreme Court clarified Commerce Clause analysis under this third category. In that case, the Court held that the Violence Against Women Act was an invalid exercise of federal power under the Commerce
Clause. 529 U.S. at 627. *Morrison* established a controlling four-factor test for determining whether a regulated activity "substantially affects" interstate commerce: (1) whether the statute regulates commerce or any sort of economic enterprise; (2) whether the statute contains any "express jurisdictional element that might limit its reach to a discrete set" of cases; (3) whether the statute or its legislative history contains "express congressional findings" regarding the effects of the regulated activity upon interstate commerce; and (4) whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated." *Morrison*, 529 U.S. at 610-12; see also *McCoy*, 323 F.3d at 1119. The first and the fourth factors are the most important. *McCoy*, 323 F.3d at 1119.

a. Whether the Statute Regulates Commerce or Any Sort of Economic Enterprise

As applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise. The cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity. Lacking sale, exchange or distribution, the activity does not possess the essential elements of commerce. See BLACK'S LAW DICTIONARY (7th ed. 1999) ("commerce": "The exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations.").

On this point, the instant case is again analogous to *McCoy*. The *McCoy* court concluded "that simple intrastate possession is not, by itself, either commercial or economic in nature, that a 'home-grown' picture of a child taken and maintained for personal use is not a fungible product, and that there is no economic connection — supply and demand or otherwise — between possession of such a picture and the national multi-million dollar commercial pornography industry." *Id.* at 1131.

As the photograph in *McCoy* stood in contrast to the commercial nature of the larger child pornography industry, so does the medicinal marijuana use at issue in this case stand in contrast to the larger illicit drug trafficking industry. And it is the commercial nature of drug trafficking activities that has formed the basis of prior Ninth Circuit decisions upholding the CSA on Commerce Clause grounds. See, e.g., *Tisor*, 96 F.3d at 375 ("Intrastate distribution and sale of methamphetamine are commercial activities. The challenged laws are part of a wider regulatory scheme criminalizing interstate and intrastate commerce in drugs." (emphasis added)); *Kim*, 94 F.3d at 1250 ("After *Lopez*, we again acknowledged that drug trafficking affects interstate commerce." (emphasis added)).

The parties debate whether the "aggregation principle" of *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942), should be employed, presumably to support a finding that the cumulative effect of the activities in this case has a commercial impact. As the regulated activity in this case is not commercial, *Wickard*'s aggregation analysis is not applicable. *Morrison*, 529 U.S. at 611 n.4 ("In every case where we have sustained federal regulation under the aggregation principle in *Wickard* . . . the regulated activity was of an apparent commercial character."); *McCoy*, 323 F.3d at 1120 ("In *Lopez*, the court approved of *Wickard*'s rationale only in relation to activity the economic nature of which was obvious." (citing *Lopez*, 514 U.S. at 558)); *United
States v. Ballinger, 312 F.3d 1264, 1270 (8th Cir. 2002) ("No such aggregation of local effects is constitutionally permissible in reviewing congressional regulation of intrastate, non-economic activity.").

The majority in McCoy went on to examine whether the possession of child pornography at issue in that case could fit within the Wickard analysis, largely because a pre-Morrison Third Circuit decision had done just that. See 323 F.3d at 1121-22. The parties pick up on this discussion and debate whether, unlike the child pornography in McCoy, the marijuana at issue here is "fungible" such that the aggregation principle should apply. This debate is unnecessary in light of Supreme Court precedent suggesting that the aggregation principle should only be applied where the activity's commercial character is apparent. See Morrison, 529 U.S. at 611 n.4. Here it is not. Moreover, McCoy settled the fungibility issue less by looking at whether the item was one that could be freely exchanged or replaced (what one might consider to be the important characteristics of fungibility) and more by simply concluding that the photograph at issue in that case was "meant entirely for personal use, without . . . any intention of exchanging it for other items of child pornography, or using it for any other economic or commercial reasons. Nor is there any reason to believe that [Rhonda McCoy] had any interest in acquiring pornographic depictions of other children." 323 F.3d at 1122. Under these standards, the marijuana at issue in this case is similarly non-fungible, as its use is personal and the appellants do not seek to exchange it or to acquire marijuana from others in a market.

Therefore, we conclude that the first Morrison factor favors a finding that the CSA, as applied to the facts of this case, is unconstitutional under the Commerce Clause.

b. Whether the Statute Contains Any Express Jurisdictional Element That Might Limit Its Reach

The second factor examines whether the statute contains a "jurisdictional hook" (i.e., limitation) that would limit the reach of the statute to a discrete set of cases that substantially affect interstate commerce. See McCoy, 323 F.3d at 1124. No such jurisdictional hook exists in relevant portions of the CSA. See County of Santa Cruz, 279 F. Supp. 2d at 1209. Therefore, this factor favors a finding that Congress has exceeded its powers under the Commerce Clause.

c. Whether the Statute or Its Legislative History Contains Express Congressional Findings Regarding the Effects of the Regulated Activity Upon Interstate Commerce

Congress clearly made certain findings in the CSA regarding the effects of intrastate activity on interstate commerce. These findings do not specifically address the class of activities at issue here. Relevant findings include:

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

21 U.S.C. § 801. As noted above, supra note 4, these findings are primarily concerned with the trafficking or distribution of controlled substances. Nevertheless, they provide some evidence that intrastate possession of controlled substances may impact interstate commerce.

Therefore, the third factor weighs in favor of finding the CSA constitutional under the Commerce Clause. But it is worth reiterating two things in this respect. First, there is no indication that Congress was considering anything like the class of activities at issue here when it made its findings. The findings are not specific to marijuana, much less intrastate medicinal use of marijuana that is not bought or sold and the use of which is based on the recommendation of a physician. Common sense indicates that the findings related to this specific class of activities would be significantly different from the findings relating to the effect of drug trafficking, generally, on interstate commerce.

Second, Morrison counsels courts to take congressional findings with a grain of salt.

The existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in Lopez, simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.

Morrison, 529 U.S. at 614 (citations and quotation marks omitted). As noted above, it is not the existence of congressional findings, but rather the first and fourth factors – whether the statute regulates commerce or any sort of economic enterprise and whether the link between the regulated activity and a substantial effect on interstate commerce is “attenuated” – that are considered the most significant in this analysis. McCoy, 323 F.3d at 1119.

d. Whether the Link Between the Regulated Activity and a Substantial Effect on Interstate Commerce Is “Attenuated”

The final Morrison factor examines whether the link between the regulated activity and a substantial effect on interstate commerce is “attenuated.” The connections in this case are, indeed, attenuated. Presumably, the intrastate cultivation, possession and use of medical marijuana on the recommendation of a physician could, at the margins, have an effect on interstate commerce by reducing the demand for marijuana that is trafficked interstate. It is far from clear that such an effect would be substantial. The congressional findings provide no guidance in this respect, as they do not address the activities at issue in the present case. Although not binding, other judges that have looked at the specific question presented here have found that the connection is attenuated. As one of our colleagues wrote recently: “Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce. Federal efforts to
regulate it considerably blur the distinction between what is national and what is local.” Conant v. Walters, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring) (citation omitted)). The district court in County of Santa Cruz also seriously questioned the strength of the link between such activities and interstate commerce. See County of Santa Cruz, 279 F. Supp. 2d at 1209 (“The fourth factor – whether the link between [medical marijuana use] and a substantial affect on interstate commerce is attenuated – arguably favors Plaintiffs.”). Therefore, we conclude that this factor favors a finding that the CSA cannot constitutionally be applied to the class of activities at issue in this case.

On the basis of our consideration of the four factors, we find that the CSA, as applied to the appellants, is likely unconstitutional. See McCoy, 323 F.3d at 1124 (“It is particularly important that in the field of criminal law enforcement, where state power is preeminent, national authority be limited to those areas in which interstate commerce is truly affected . . . . The police power is, essentially, reserved to the states, Morrison, 529 U.S. at 618 . . . . That principle must guide our review of Congress’s exercise of Commerce Clause power in the criminal law area.”); see also Morrison, 529 U.S. at 610 (“[A] fair reading of Lopez shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.”).

Therefore, we find that the appellants have made a strong showing of the likelihood of success on the merits of their case.

### CONCLUSION

For the reasons discussed above, we reverse the district court. We find that the appellants have demonstrated a strong likelihood of success on the merits. This conclusion, coupled with public interest considerations and the burden faced by the appellants if, contrary to California law, they are denied access to medicinal marijuana, warrants the entry of a preliminary injunction. We remand to the district court for entry of a preliminary injunction consistent with this opinion.

BEAM, Circuit Judge, dissenting:

It is simply impossible to distinguish the relevant conduct surrounding the cultivation and use of the marijuana crop at issue in this case from the cultivation and use of the wheat crop that affected interstate commerce in Wickard v. Fillburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942). Accordingly, I dissent.

***

[The dissent analogized the instant case to Wickard, where an Ohio farmer was convicted of growing additional wheat, in violation of federal regulations aimed at countering price fluctuations. Filburn, the farmer, claimed that the wheat he had grown was only to feed his family, and therefore was not intended to, nor ever did, reach the stream of interstate commerce. The Court rejected Filburn’s claim, asserting that his contribution to the demand of wheat, taken together with that of many others, has a significant effect on interstate commerce. The dissent argued that the plaintiffs’ conduct in the instant case is entirely indistinguishable from that of Filburn’s. The plaintiffs’ case passes the four-factor Morrison test used by the court.]
Is this particular activity economic or non-economic, but necessarily regulated as part of a larger regulatory scheme?

[The dissent argued that because the drugs could be sold in interstate commerce, they are of an economic nature. In addition, the cultivation of the plants for personal use necessarily keeps plaintiffs from obtaining marijuana from an outside source or seeking a substitute such as the legally prescribed drug Marinol. Even if the activity is non-economic, the dissent finds that the regulation is essential to the larger commercial activity. The dissent points out that medical marijuana could be grown and destined for one of the states surrounding California in which it is also permitted, thereby traveling in interstate commerce, even though permitted by state law.]

***

Were there adequate Congressional findings?

[...] Congressional findings contained in 21 U.S.C. § 801(4) specifically state that, "Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." [...] [368]

What is the extent of the attenuation between this conduct and interstate commerce?

Finally, the court contends that circuit precedent dictates that we recognize such a degree of attenuation between the plaintiff’s conduct and interstate commerce that the connection is effectively severed. I disagree. I begin by acknowledging the dicta in the concurring opinion in Conant v. Walters. "Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce." Conant v. Walters, 309 F.3d 629, 647 (9th Cir.2002) (Kozinski, J., concurring), cert. denied, — U.S. —, 124 S. Ct. 387, 157 L.Ed.2d 276 (2003). On the other hand, Congress contemplated individual growers, possessors, and users when it made its findings regarding the CSA. 21 U.S.C. § 801(4). And, in light of the growing interstate community of medicinal marijuana users, the attenuation is not great, even, perhaps, nonexistent. Accordingly, an evaluation of any attenuation factor favors the CSA’s constitutionality.

Plaintiffs, and the court, rely extensively on this circuit’s decision in United States v. McCoy, 323 F.3d 1114 (9th Cir.2003), but the case does not bear the weight the court places on it. It is distinguishable in at least one key respect—marijuana is a cultivated, fungible commodity that has objective and readily transferable value in the marketplace, as compared with the noncommercial aspects of the home photograph taken by Ms. McCoy for her personal use. See id. at 1120. While it is clear that plaintiffs do not propose to sell or share their marijuana with others similarly situated (or even no similarly situated), they could. This is almost certainly not true of the McCoy family photograph.

***

Three out of the four Morrison factors favor regulation, and the conduct in this case is indistinguishable from the conduct at issue in Wickard v. Filburn. Accordingly, I dissent.
The Supreme Court announced Monday that it would hear the Bush administration’s claim that federal drug agents have the authority to arrest seriously ill Californians who use homegrown marijuana to relieve their pain.

The court agreed to hear an appeal filed by Atty. Gen. John Ashcroft, who contends that federal law prohibits the use of marijuana “in all instances.”

The case, to be heard in the fall, is a clash between the strict federal drug laws and the California initiative that allows patients to use marijuana on the advice of their doctor. It will also determine the fate of similar laws in eight other states.

The case focuses not on whether using marijuana makes medical sense, but whether the federal authority extends to regulating a plant that is grown at home.

The U.S. Constitution says Congress and the federal government have the power to regulate “commerce among the states.” This is the basis for most federal regulatory laws.

But defenders of the medical marijuana law in California questioned how that federal power can be extended to cover plants that are grown by a patient for his or her own use.

“It is a pretty far-fetched argument for them to say this involves interstate commerce, because there is no commerce and no interstate activity,” said Oakland attorney Robert Raich, whose wife, Angel, is one of two plaintiffs in the case.

The other, Diane Monson, suffers from a degenerative disease of the spine. Like Angel Raich, who has an inoperable brain tumor, Monson said marijuana had been especially effective at easing her pain and restoring her appetite.

In August 2002, however, U.S. drug agents raided Monson’s home and destroyed her six cannabis plants.

Late last year, the U.S. 9th Circuit Court of Appeals agreed that the federal agents had overstepped their authority and issued an order that bars the Drug Enforcement Administration from enforcing the drug laws against patients whose marijuana is grown at home.

The “noncommercial cultivation, possession and use of marijuana for personal medical purposes” is protected under California law and is beyond the federal authority, said Judge Harry Pregerson in a 2-1 decision. It is “different in kind from drug trafficking,” he added.

The Justice Department appealed that decision, and on Monday the Supreme Court said it would hear the case, Ashcroft vs. Raich, during the court’s next term.

“The Supreme Court has a chance to protect the rights of patients everywhere who need medical cannabis to treat their afflictions,” said Steph Sherer, executive director of the
medical-marijuana advocacy group Americans for Safe Access. “Too many have gone to prison, and too many have been denied access to the medication their doctors recommend.”
The U.S. Supreme Court cast a cloud on the medical marijuana movement’s biggest legal victory Monday when the justices agreed to hear the Bush administration’s appeal of a ruling that protects marijuana patients in California from federal prosecution.

The administration is challenging a decision in December by the Ninth U.S. Circuit Court of Appeals in San Francisco that barred federal drug agents from interfering with the growing and use of marijuana by two women, Angel Raich of Oakland and Diane Monson of Oroville (Butte County).

The court will hear the case in the term that starts in October, with a ruling due by the end of June 2005.

Medical marijuana advocates had hoped the case would end without Supreme Court review. The case may represent their last chance to fend off the federal government’s attack on medical marijuana in California, which followed passage of Proposition 215, the 1996 initiative that legalized medical use of the drug under state law.

Attorneys for medical marijuana advocates then pinned their hopes on the most sympathetic plaintiffs available — individual, seriously ill patients — and on a legal argument that the Supreme Court has favored in other contexts, the limits of Congress’ power to regulate interstate commerce.

Raich, 38, who uses marijuana with her doctor’s approval to treat pain, nausea and seizures associated with a brain tumor and a wasting syndrome, made a fervent plea at a news conference Monday.

“Medical cannabis has saved my life,” she said, but “this case is not just about medical cannabis. It’s about whether or not the federal government in this country has the right to decide who may live and who may die.”

Raich, disabled since 1995, takes marijuana about every two waking hours. Her primary physician, Dr. Frank Lucido of Berkeley, told reporters that Raich needs marijuana to fight off her physical deterioration.

Monson takes marijuana to combat severe back pain and muscle spasms. She also has a doctor’s recommendation for marijuana, as required by Prop. 215.

Both women obtained their marijuana locally and without charge — Raich from two caregivers, Monson from her own garden, at least until federal agents raided her property in August 2002 and seized her six plants.
Those raids were part of the Bush administration's escalation of the federal campaign against California's Prop. 215. The Clinton administration had also fought Prop. 215, reacting to the 1996 measure by moving to shut down clubs that had sprung up around the state to supply marijuana to patients, and by threatening to punish doctors who recommended the drug.

Monson and Raich now have court orders allowing them to continue using marijuana as a result of December's appeals court ruling.

The appeals panel ruled 2-1 that the women were not engaged in interstate commerce, or any kind of commercial activity, and that prosecuting them under federal drug laws would therefore be unconstitutional in a state that has legalized the medical use of marijuana.

"The medical marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce," the court majority said.

The ruling has already had an impact. A federal judge in San Jose has used it to prohibit further federal enforcement action against a Santa Cruz medical marijuana collective that was raided by federal agents in 2002. Earlier this month, the appeals court ordered judges to reconsider two other cases in light of the Raich decision, one of them an attempt by cannabis clubs in Oakland, Ukiah and Fairfax to resume supplying marijuana to patients.

But the Bush administration's Justice Department argues that the Ninth Circuit has once again failed to appreciate the power of Congress to ban illegal drugs.

The appellate ruling "seriously undermines Congress' comprehensive scheme for the regulation of dangerous drugs," government lawyers said in papers filed with the Supreme Court.

The Justice Department cited congressional findings that all illicit drug traffic affects interstate commerce because it increases the demand for drugs, and because drugs sold across state lines can't normally be traced to their origin.

Under the appeals court ruling, government lawyers said, those who want to distribute any illegal drug for free within a state "could function essentially as unregulated and unsupervised drug manufacturers and pharmacies." And, they added, by relying on California's legalization of marijuana for "purported medical purposes," the appeals court ignored the fact that federal law considers marijuana to be a dangerous drug with no legitimate use.

Alaska, Arizona, Colorado, Hawaii, Maine, Nevada, Oregon and Washington state also have medical marijuana laws, though federal enforcement efforts have been largely concentrated on California. All those states except Colorado and Maine are in the Ninth Circuit and thus were covered by December's ruling.

Medical marijuana advocates put the best face possible on the Supreme Court's decision to review the case.

"The Supreme Court has a chance to protect the right of patients everywhere who need medical cannabis to treat their afflictions," said Steph Sherer, executive director of Americans for Safe Access. [...]
The Supreme Court ruled today that federal law does not allow a “medical necessity” exception to the prohibition on the distribution of marijuana. The 8-to-0 decision dealt a setback, but not a definitive blow, to a movement that has passed medical marijuana ballot initiatives in eight states.

The ruling did not overturn the state initiatives or address any question of state law. Rather, the court ruled that marijuana’s listing by Congress as a Schedule I drug under the Controlled Substances Act meant that it “has no currently accepted medical use in treatment in the United States.”

The court said in an opinion by Justice Clarence Thomas that the federal appeals court in San Francisco misread federal law when it ruled last year that an Oakland marijuana cooperative could raise a medical-necessity defense against the federal government’s effort to shut down the pharmacylike cooperative.

The cooperative distributes marijuana to patients whose doctors say they need it to ease the symptoms of cancer, AIDS and other illnesses.

The Justice Department brought the case as a request for an injunction rather than as a criminal prosecution, which would have required a jury trial. Since nearly three-quarters of Oakland’s voters supported California’s Proposition 215, the 1996 initiative that enacted the Compassionate Use Act to permit the medical use of marijuana, the government would have faced – and, indeed, still faces – a daunting challenge in finding a jury willing to convict someone for making marijuana available for that purpose.

The Oakland Cannabis Buyers’ Cooperative was set up with the blessing of the city government and the police department.

The question before the Supreme Court today was a relatively narrow one: not the validity of the California initiative itself but of the federal courts’ response to the government’s request for an injunction. The United States Court of Appeals for the Ninth Circuit ordered the trial judge, Charles Breyer of Federal District Court, to tailor an injunction that would permit those with a serious medical condition that could be alleviated only by marijuana to have continued access to the drug.

The Clinton administration, asserting that the Ninth Circuit had committed a serious error that threatened to undermine federal drug laws, persuaded the Supreme Court to grant a stay of Judge Breyer’s ruling last August. […]

Given the narrowness of the question before the court, the decision today left a number of questions unanswered. Among these were the availability of a medical necessity defense to individual patients who grow or possess marijuana for their own use, as opposed to a mass distributor like the Oakland cooperative, as well as whether state governments could carry out their
medical marijuana initiatives by going directly into the distribution business. Two states, Nevada and Maine, are considering such a system.

Alaska, Arizona, Colorado, Oregon and Washington, in addition to California, Nevada and Maine, have also passed medical marijuana initiatives in the last few years. [...] ***

Advocates of the medical use of marijuana say the drug is effective in combatting the nausea of chemotherapy and the wasting syndrome of AIDS. The California Medical Association, which supports the therapeutic use of marijuana under a doctor's direction, said today it was “very disappointed” in the ruling because of the organization's “core belief that patients should not suffer unnecessarily when other options fail.”

There is a debate over whether a legal drug called Marinol, a synthetic version of the active ingredient in marijuana, offers the relief that some patients find in marijuana.

Kevin Zeese, president of Common Sense for Drug Policy, an advocacy group here, predicted that the decision would “heighten the conflict in both legal and political terms” and could make it difficult for prosecutors to win a conviction in any marijuana case. Mr. Zeese said the distribution clubs were working on such new strategies as maintaining a “grow room” where patients would own their own marijuana plants, thus avoiding the potential legal pitfall of distribution.

Justice Thomas’s opinion, United States v. Oakland Cannabis Buyers' Cooperative, No. 00-151, contained some broad language suggesting that its analysis meant there could be no acceptable medical use of marijuana in any setting, not only in the context of distribution by large organizations. For that reason, Justices John Paul Stevens, David H. Souter and Ruth Bader Ginsburg refused to sign his opinion, writing in a separate concurring opinion that large-scale distribution was the only issue the case presented and on which the court would validly rule.

“Most notably, whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that is not presented here,” Justice Stevens wrote in an opinion that the other two justices joined.

California filed a brief in support of the Oakland cooperative, asserting that the federal law “unduly intrudes into California's traditional right to regulate for the health and welfare of their citizens.”

Justice Stevens said Justice Thomas’s opinion showed inadequate “respect for the sovereign states that comprise our federal union.” This provoked a response from Justice Thomas, who said: “Because federal courts interpret, rather than author, the federal criminal code, we are not at liberty to rewrite it.”

When he was governor of Texas, President Bush said that he was personally opposed to legalizing marijuana for medical use but that states should have the right to decide for themselves. “I believe each state can choose that decision as they so choose,” he said in October 1999, according to an article in The Dallas Morning News that Justice Stevens cited in his opinion today.
Voters Approve Measure to Use Pot as Medicine

*Los Angeles Times*
November 6, 1996
John Balzar

After an upstart campaign that drew the wrath of law enforcement, Californians bucked years of demonizing marijuana and voted yes Tuesday to legalize use of the drug for medical treatment.

Although Proposition 215 was criticized as the wrong message during America’s war against drugs, and full of loopholes to boot, a majority of voters saw it differently in this big surprise.

“Doonesbury won the election!” joked Loyola law professor Laurie Levenson, a former federal prosecutor. “This may be the baby boomers taking control.”

She referred to one of the campaign’s sideshows, in which cartoonist Garry Trudeau publicized the initiative in his “Doonesbury” comic strip and made fun of state Atty. Gen. Dan Lungren’s hard-line stand against medical use of marijuana. At the time, Lungren indignantly responded that the cartoon was trivializing the dire social consequences of drug abuse.

On Tuesday, Lungren sounded slightly flummoxed about the election outcome.

“This thing is a disaster. What’s going to happen? We’re going to have an unprecedented mess,” he said.

In another blow to the anti-drug establishment, voters in neighboring Arizona passed an even broader measure. In that state, Proposition 200 legalizes medicinal use of marijuana as well as other drugs now beyond the reach of doctors. But of more consequence, it specifies that nonviolent drug users convicted of first- and second-time use of recreational drugs be given probation and rehabilitation instead of prison time.

As for California’s vote, its symbolism is sure to be debated for days—just what message are voters sending? Supporters said it should not be interpreted as a vote for drug use, but a vote against government’s anti-drug hysteria. And they vowed to spread their campaign to other states and Congress.

Dave Fratello, spokesman for the Proposition 215 committee, Californians for Medical Rights, said that vote would have only limited effects.

“What we are going to find in California very quickly is that the sky is not going to fall. There is not going to be a wave of new marijuana use prompted by 215,” he said.

Fratello announced that his organization would establish a toll-free hotline Wednesday to counsel doctors and their patients about the initiative.

Gov. Pete Wilson said voters were attempting to be “compassionate” with their vote to help seriously ill patients, such as those with AIDS, alleviate pain. But he said Proposition 215 was poorly worded and would have broader effects.
They didn’t pay attention to the details,” Wilson said of voters. “It is so loose it is a virtual legalization of the sale of marijuana.” In an exit survey of voters statewide, the Los Angeles Times Poll found that not only was Proposition 215 favored by what appeared to be a convincing majority, but also that it was favored by one-third of Republicans and by about 25% of those who described themselves as conservative. As might be expected, there was a generation gap, with voters over 65 opposed to the measure but a majority of other voters appearing to support it.

The practical effect of the vote, however, seems surely to be mired in legal doubt.

Federal law classifies marijuana as a Schedule I drug, a category reserved for the most dangerous of substances that “lack an accepted medical use.” By comparison, opium and cocaine are classified as Schedule II drugs and can be prescribed under supervision of the state medical board.

California’s vote does nothing to alter that, and President Clinton’s drug czar, Barry McCaffrey, has been highly critical of the California and Arizona propositions. Tuesday night, the former Army general’s spokesman, Donald P. Marple, sounded a cautious note, however.

“We’ll save our reaction until we’ve seen the size of the vote,” Marple said.

In a pre-election television interview, McCaffrey had been quoted as saying that the federal government would prosecute doctors who attempted to prescribe marijuana.

But Marple offered a clarification: “What Gen. McCaffrey has said is that the federal government will uphold the law, but that you’ve got to look at any situation on a case-by-case basis.”

“What does it mean in practice? We’ll have to see how they put this into effect first,” Marple said.

The wording of the ballot proposition poses uncertainties. It calls for lifting drug penalties for doctors who “recommend” marijuana for treatment, and for patients who follow the recommendation and use it. Growing marijuana for medical purposes is legal under the proposition, but its sale is not.

Levenson said she doubted if there would be a substantial number of prosecutions.

“I think it’s unlikely the federal government would take resources away from the prosecution of heroin and crack cocaine cases to go after marijuana cases. They might do a few cases to set an example. You have to remember that marijuana cases have not been a priority for the federal government lately, unless it was a boatload or a planeload of marijuana.”

She also said that there is a very practical consideration that prosecutors will have to take into consideration. “You have to try your case to a jury that comes from this electorate. If this many people support this measure, what are your chances of winning?”

Peter Arenella, a criminal law professor at UCLA, said medical patients who use the drug could still risk legal trouble.

“Technically, federal prosecutors retain the power to prosecute some sick individual who is using marijuana to alleviate his discomfort,” he said.
But he added, "Practically, it would make very little sense to use scarce prosecutorial resources on such a case after the passage of this initiative in California. The only purpose for such a prosecution would be to remind Californians that federal law has the last word."

Orange County Sheriff Brad Gates, who chaired the anti-Proposition 215 campaign, said the vote poses "very serious legal problems for the enforcement of drugs."

He said he planned to convene a high-level meeting of federal and state law enforcement officials "to determine what course of action we will be taking in the next several weeks."

Gates and other opponents were sharply critical of the fact that most of the $2 million that supporters raised was from six individuals, five of whom live out of state. Among them is New York philanthropist George Soros, who gave $550,000 to the Proposition 215 campaign and $430,000 to the ballot measure in Arizona.

Gates said the outcome proved that a few "rich people who want to spend their money affecting the social climate and environment of Californians and Arizonans . . . can move to legalize drugs throughout the country."

That said, however, sufferers from AIDS and cancer were among those most strongly seeking Proposition 215—the first statewide vote on marijuana since 1972. Back then, voters soundly rejected legalization of the drug. Last year and also in 1994, the Legislature passed its own versions of Proposition 215 on medical marijuana, but Wilson vetoed them.

In this campaign, medical researchers argued that America's war on drugs had reached such an extreme that even legitimate, supervised research had been closed off.

"The public is ahead of the politicians," said Bill Zimmerman, the Los Angeles political consultant who ran the Proposition 215 campaign.

"People know that the drug warriors are lying about marijuana by lumping it in with heroin and cocaine. There is too much direct experience with marijuana for that to be credible."

Celebrating his victory with 50 boisterous supporters at a downtown Los Angeles hotel, Zimmerman said, "For us, this campaign does not end tonight. There are 49 other states."
Bates v. Dow Agrosciences
(03-388)

Ruling Below: (Bates v. Dow Agrosciences, 5th Cir., 332 F.3d 323)

The court held that the state law claims of 29 Texas peanut farmers against herbicide manufacturer Dow for breach of warranty, fraud, failure to warn, and violation of the Texas Deceptive Trade Practices Act were all preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

Question Presented: Whether FIFRA preempts state law claims concerning labeling requirements for an herbicide?

Dennis BATES, et al., Appellants
v.
DOW AGROSCIENCES, LLC, Appellee

United States Court of Appeals for the Fifth Circuit

Decided June 11, 2003

[Excerpt; some citations and footnotes omitted]

FELDMAN, District Judge:

Dow Agrosciences LLC sought a declaratory judgment against 29 Texas peanut farmers whom were threatening to sue Dow for damages caused by a Dow-manufactured herbicide. Dow sought, among other things, a judicial declaration that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (West 2002), preempts the farmers’ state law claims. The district court denied the farmers’ motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and granted Dow’s motion for summary judgment, holding that FIFRA preempts the farmers’ state law claims. We affirm.

Strongarm is a herbicide produced and marketed by Dow to control the growth of weeds in peanuts. Strongarm is registered with the United States Environmental Protection Agency as required by FIFRA.

In the spring of 2000, many peanut farmers from west and northwest Texas bought Strongarm from local retailers. Many of these farmers contend that Strongarm stunted the growth of peanut plants, caused yellowing, inhibited peanuts from lapping or properly developing foliage, delayed maturity, reduced total peanut production, and increased the expense of harvesting future peanut crops.

[The farmers contend that the retailers failed to disclose that Strongarm damages peanut crops planted in soil with a pH level above 7.0]

Dow struck first, and sued for declaratory judgment against 29 of the farmers. Dow sought a declaration that: [...] FIFRA preempts the farmers’ state law claims [...]. The farmers counter-claimed against Dow for negligence, breach of implied and express warranties, fraud, fraud in the inducement, defective design, estoppel, and waiver.

A. Subject Matter Jurisdiction

[The court addressed the claim of the farmers that federal diversity jurisdiction did not exist over their lawsuit because three of the farmers’ claims failed the meet the $75,000 amount-in-controversy requirement. The court held that the availability of treble damages and the inclusion of attorney's fees would allow all claims to satisfy the requirement.]

B. Abstention

[The court addressed the farmers’ claim that the district court should have abstained from taking jurisdiction, because Dow’s lawsuit was filed in anticipation of a lawsuit by the farmers and was done in large part in order to select a favorable forum (in this case, federal court). The court rejected this claim, finding Dow’s actions permissible under St. Paul Ins. Co. v. Trejo, 39 F.3d 585 (5th Cir.1994).]

C. FIFRA Preemption

Appellants also contend that the district court erred when it decided, by way of summary judgment, that FIFRA preempted their state law claims. Our review of a district court’s grant of summary judgment is de novo. See Young v. Equifax Credit Information Services, Inc., 294 F.3d 631, 635 (5th Cir. 2002).

Preemption analysis proceeds from “the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605, 115 L. Ed. 2d 532, 111 S. Ct. 2476 (1991). Preemption may nonetheless occur in one of three ways: it may be expressed by the federal statute, it may be implied from the terms or structure of a federal statute, or it may arise in a situation where a conflict between state and federal regulations makes compliance with both a physical impossibility. See id. The district court found that FIFRA expressly preempted the farmers’ state law claims. We agree.

FIFRA is a comprehensive regulatory scheme aimed at controlling the use, sale, and labeling of pesticides. See id. at 601. FIFRA requires, among other things, that manufacturers submit proposed product labels for EPA approval. See 7 U.S.C. § 136a(c)(1)(C) (West 2002).

Section 136v of FIFRA announces:

(a) In General
A State may regulate the sale or use of any federally registered pesticide or device in the
State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity
Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

The Court has addressed the scope of §136v(b) many times. See Hart v. Bayer Corp., 199 F.3d 239 (5th Cir. 2000); Andrus v. Agrevo USA Co., 178 F.3d 395 (5th Cir. 1999); MacDonald v. Monsanto, 27 F.3d 1021 (5th Cir. 1994). Our decisions reveal three clear principles. First, FIFRA does not completely preempt all state or local regulation of pesticides. See Hart, 199 F.3d at 244 (rejecting an attempt to premise federal question jurisdiction on a claim of complete preemption). Second, FIFRA does not preempt common law that is unconcerned with herbicide labeling, nor does it preempt those state laws concerned with herbicide labeling that do not impose any requirement in addition to or different from the FIFRA requirements. See Andrus, 178 F.3d at 398; see also Hart, 199 F.3d at 245 (“FIFRA preemption does not extend to non-labeling state common-law causes of action.”). Finally, FIFRA preempts state laws that either directly or indirectly impose different labeling requirements. See MacDonald, 27 F.3d at 1025.

The district court found that each of the farmers’ state claims were preempted under §136v(b) because they constituted “requirements for labeling and packaging in addition to those required under” FIFRA. Appellants advance two arguments against preemption. First, they contend that state labeling requirements related to product effectiveness are not within the scope of FIFRA’s express preemption clause.

Second, they assert that their claims are not sufficiently related to the content of the Strongarm label. We reject each argument.

1) State Labeling Requirements Related to Product Effectiveness are Within Scope of FIFRA’s Express Preemption Clause

Appellants urge that their product effectiveness claims, even those which impose a labeling requirement, are not within the scope of FIFRA’s express preemption clause. Their argument suggests that FIFRA preemption of performance-related claims requires the existence of conflicting EPA enactments.

In Cipollone v. Liggett Group, Inc., the Supreme Court held that, as long as a federal statute contains an express preemption clause, it is wholly unnecessary and inappropriate to import notions of implied preemption through conflict into the express preemption analysis. 505 U.S. 504, 517, 531-32, 544, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992)(plurality opinion). Nowhere in FIFRA’s text is §136v(b)’s express preemptive command, or §136v(a)’s savings clause, linked to the interplay of EPA regulations. 7 U.S.C. § 136 (West 2002); see also Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, 981 F.2d 1177 (10th Cir. 1993)(“We believe Congress circumscribed the area of labeling and packaging and preserved it only for federal law ... with the same stroke, Congress banned any form of state regulation, and the interdiction law is clear and irrefutable.”)(emphasis added).

Although FIFRA’s text does not define the scope of FIFRA’s preemption clause to be a function of existing EPA regulations, appellants nonetheless insist that an implied conflict preemption analysis must be imported into §136v(b). To support their
claim, they rely primarily on the Texas Supreme Court's decision in *American Cyanamid Co. v. Geye*, which held that the EPA's decision to not regulate product labeling "with respect to how well a product works" meant that "state common-law claims about target area crop damage are not preempted." 79 S.W.3d 21, 23, 45 Tex. Sup. Ct. J. 761 (Tex. 2002). The Texas high court reasoned, "EPA regulations define the domain expressly preempted" by FIFRA because Congress gave the EPA the "role of evaluating and determining the content of pesticide labels." *Id.* at 24 (citing 7 U.S.C § 136w(a)(1) (West 2002))(internal quotation omitted).

We find *Geye* unhelpful because it did not address the principal issue: whether the scope of FIFRA's express preemption clause includes product effectiveness claims which relate to product labeling. *Geye* holds only that the specific Texas state-law claims for crop damage did not present a problem of conflict preemption under the applicable EPA regulations. In other words, *Geye* proceeds from the assumption that the claims at issue did not relate to product labeling and that FIFRA's express preemption clause did not apply.

The scope of FIFRA's express preemption clause is defined by the simple text of § 136v. That the EPA has not elected to impose labeling regulations concerning product effectiveness does not alter the plain meaning of § 136v(b) nor avoid preemption of a claim that has the effect of imposing labeling requirements. For a state to create a labeling requirement by authorizing a claim linked to the specifications of a label, even where the EPA has elected not to impose such labeling requirements, would clearly be to impose a requirement "in addition to or different from those" required under FIFRA. See 7 U.S.C. § 136v(b). Thus, the farmers' claims, including those which challenge Strongarm's effectiveness, are within the scope of FIFRA's express preemption clause if they are related to the content of the Strongarm label.

2) The Farmers' Claims are Sufficiently Related to the Content of Strongarm Label

The farmers argue that their claims are not related to the Strongarm label. This argument betrays the facts and it betrays common sense. We have observed that FIFRA's express preemption clause is self-executing. Thus, the farmers' claims are expressly preempted under § 136v(b) if a judgment against Dow would induce it to alter its product label. See *Andrus*, 178 F.3d 395, 399 (5th Cir. 1999) (finding that state law claims that herbicide had "failed to perform as specified pursuant to the label" were preempted by FIFRA because the plaintiff's success on such claims would necessarily have had the effect of "imposing additional labeling standards").

The facts aside for one moment, a claim's relatedness to a product label may be determined simply by reference to the party's pleadings. See *id.*, at 399. Unlike *Andrus*, where the plaintiff's complaint specifically referenced "specifications set forth in the label," the farmers' counterclaim simply asserts in general that the label did not include a valid disclaimer or limitation of remedies. We, therefore, look at each of the farmers' state claims to determine whether a judgment against Dow would cause it to need to alter the Strongarm label. See *MacDonald*, 27 F.3d at 1024 ("Courts must compare the particular language of a statute's preemption provision with each common law claim asserted to determine whether the common law claim is in fact preempted.").
a) Breach of Warranty, Fraud and DTPA

The farmers base their breach of warranty, fraud, and DTPA claims on misleading comments made by Dow retailers. Claims for breach of warranty based upon an “off label” representation are preempted by FIFRA only if the representation deviates from the contents of the product label. See Andrus, 178 F.3d at 399. Success on such an “off label” claim would provide a manufacturer with a strong incentive to alter its label to avoid future liability. See id.

The district court found that the farmers failed to establish a genuine issue of material fact that the Dow retailers’ comments differed or strayed in any material manner from the contents of the Strongarm label. After reviewing the record, we agree with the district court. Thus, the farmers’ warranty claims are preempted under § 136v(b). See id. at 400 (refusing to overturn a grant of summary judgment on a defense of preemption where the plaintiffs failed to establish that the representations forming the basis of the claim differed from the contents of the FIFRA label).

The farmers’ fraud claims, based upon the same “off label” statements by Dow representatives, are subject to an identical analysis. Because no evidence was presented demonstrating that the retailer statements deviated from the contents of the Strongarm label, the fraud claims are similarly preempted by § 136v(b).

The DTPA does not create a warranty; rather, it establishes a remedy for the breach of an independent warranty. See Contex Homes v. Buecher, 95 S.W.3d 266, 269, 46 Tex. Sup. Ct. J. 294 (Tex. 2002). Because the only warranty at issue is based upon these “off-label” comments, the farmers’ success on a DTPA action would also induce Dow to alter its label. The DTPA claim is thus necessarily preempted by FIFRA § 136v(b).

b) Defective Design

Defectively manufactured or designed products properly labeled under FIFRA are generally subject to state regulation. See Netland v. Hess & Clark, Inc., 284 F.3d 895, 899 (8th Cir. 2002). Dow, however, correctly contends that the farmers’ defective design claim is merely a disguised claim for failure to warn. See Grenier v. Vermont Log Buildings, Inc., 96 F.3d 559, 564 (1st Cir. 1996) (“Merely to call something a design or manufacturing defect claim does not automatically avoid FIFRA’s explicit preemption clause.”). One cannot escape the heart of the farmers’ grievance: Strongarm is dangerous to peanut crops in soil with a pH level over 7.0, and that was not disclosed to them.

In Netland, the Eighth Circuit evaluated a FIFRA preemption defense to a strict liability claim. See Netland, 284 F.3d at 899. The Netland court found that the plaintiff’s expert testimony was insufficient to establish a design defect, and that the claim was obviously more directed to deficiencies in the EPA-approved label. See id. at 900-01.

Netland is a good guide for us. The farmers’ counterclaim presents a straightforward design defect claim, that Strongarm was unreasonably dangerous at the time it left Dow’s control. Nonetheless, the farmers did not claim that Strongarm is unreasonably dangerous for use on all peanut crops; rather, they asserted that Strongarm is dangerous when applied to crops in soil with high pH levels. See Grenier, 96 F.3d at 565 (finding plaintiff’s claim that a product was
defectively designed because it was foreseeable that it would be used in a particular way "is effectively no more than an attack on the failure to warn against [that] use and therefore is a preempted claim ").

We find that the farmers’ strict liability counterclaim is functionally a disguised claim for failure to warn. It is inescapable that success on this claim would again necessarily induce Dow to alter the Strongarm label. The district court did not err in ruling that FIFRA expressly preempts the farmers’ defective design claim.

c) Negligence

The farmers also maintain that Dow was negligent in the testing, manufacture, and production of Strongarm. They overlook that a negligent testing claim is, as a matter of Texas law, a variation of an action for failure to warn. See American Tobacco Co. v. Grinnell, 951 S.W.2d 420, 437, 40 Tex. Sup. Ct. J. 658 (Tex. 1997). We agree with the district court that the farmers’ negligent manufacture claim was, again, simply a disguised claim for failure to warn and is preempted by § 136v(b).

Each of the farmers’ claims exceeded the $75,000 statutory requirement for federal diversity jurisdiction. Moreover, the district court conducted a proper Trejo abstention analysis. Given that the balance of the Trejo factors does not appear to point clearly toward abstention, we find that the district court did not abuse its discretion by entertaining the declaratory judgment action. We reiterate that, because FIFRA’s express preemption clause is self-executing, FIFRA preemption of performance-related state law claims is not dependent upon the existence of conflicting EPA regulations. Moreover, the farmers’ claims for breach of warranty, fraud, DTPA, defective design and negligence are all preempted by FIFRA’s express preemption clause because success on such claims would necessarily induce Dow to alter its product label. AFFIRMED.
Supreme Court to consider FIFRA tort preemption

Pesticide & Toxic Chemical News
July 5, 2004
Maureen Conley

The U.S. Supreme Court June 28 agreed to review a lower court decision on FIFRA tort preemption, which attorneys familiar with the case say represents the first time the nation’s highest court will weigh in on the matter.

At issue is a 2002 decision from the Fifth Circuit Court of Appeals in Bates v. Dow Agrosciences, which upheld the principle that section 136v(b) of FIFRA preempts any damages claims stemming from allegations regarding the adequacy or accuracy of the information on an EPA-approved pesticide label. Lawrence Ebner, an industry lawyer who has worked on FIFRA preemption cases for 30 years, says all nine federal appeals courts “have held that the section expressly exempts any and all ‘failure to warn’ claims against pesticide manufacturers and distributors.” The Supreme Court has declined several times to review appeals of those decisions.

This time, the court agreed to undertake a review at the request of plaintiffs and over the objections of the U.S. Solicitor General. Ebner told Pesticide & Toxic Chemical News there was no reason for the Supreme Court to take a FIFRA tort preemption case before, “in light of the vast, overwhelming body of federal and state case law establishing” the preemption principle.

The case now pending before the court presents a narrower question of whether failure-to-warn claims involving agricultural crop damage are excluded from FIFRA tort preemption on grounds that EPA has discretion in whether it reviews efficacy or phytotoxicity information before approving a pesticide’s label.

The only decision to hold that such claims are excluded came from the Texas Supreme Court, which ruled in favor of plaintiffs in American Cyanimide v. Geye. EPA has discretion to demand data on efficacy or phytotoxicity, and the Texas court held that manufacturers cannot stand behind FIFRA if EPA does not require them to produce that data as a prerequisite for obtaining registration. Ebner, an attorney with the law firm McKenna, Long & Aldridge, argued the case on behalf of American Cyanamide. In 2003, the Supreme Court declined to review that case on procedural grounds.

The case now before the Supreme Court began after the 2000 growing season. Peanut farmers faced peculiarly harsh climatic conditions, according to Dow attorney Guy Ralford. When Dow became aware they had concerns that Dow’s Strongarm herbicide may have contributed to their crop losses, the company entered a voluntary mediation program.

“We did everything we could to compensate farmers who thought they were affected” by the product, he told Pesticide & Toxic Chemical News, adding that the company reached settlement agreements with every farmer who participated in the program. While the sum paid out is confidential, Ralford said settlements were reached with about 100 farmers in Texas and Oklahoma.
But some 80 farmers declined to participate in the mediation program and instead told Dow they planned to sue. Dow then filed two motions for declaratory judgment in federal district courts in Oklahoma City and Lubbock, Tex., Ralford said, asking the courts to declare Dow had no liability. Dow won summary judgment in both cases in 2002 based on FIFRA preemption.

Plaintiffs appealed to the U.S. Court of Appeals for the Fifth Circuit, which upheld the lower court decisions. Plaintiffs then filed a petition for certiorari with the U.S. Supreme Court.

The high court's review offers an opportunity to resolve some ambiguities that have arisen in the case law in recent years, Ralford said. In addition to the Texas Supreme Court case, the Montana Supreme Court created an "outlier" when it relied on a now-repudiated amicus brief filed in California by the federal government during the Clinton administration. That brief, filed in Etcheverry v. Tri-Ag Service, argued FIFRA's preemption clause does not encompass tort claims.

While the California Supreme Court rejected the argument, the Montana Court relied upon it in a suit against Dow that was decided several years ago. That decision was the only one in years that did not uphold FIFRA preemption, so Ralford said Dow is hopeful the Supreme Court will clarify the ambiguity when it rules on Bates v. Dow.

Ralford said the court has discretion to make its ruling as broad or as narrow as the justices would like. He said he will argue that "Congress stated very clearly in section 136(v)(b) of FIFRA that states may not impose requirements on pesticide labeling or packaging beyond those contained in FIFRA." Case law supports the idea that state law-based tort litigation attacking the adequacy of a pesticide label constitutes a requirement prohibited under FIFRA, he said. As far as carving out an exception, he said, "FIFRA says what is says, it is not selective as to what kinds of claims are prohibited."

Attorneys for the plaintiffs did not return several phone calls seeking comment. Plaintiffs opening briefs are due 45 days from the June 28 court order. Dow's reply brief will be due 30 days after that. The court could issue a decision by the end of the year.
Federalism's Frontier

The Supreme Court's federalism, like Gaul, falls into three parts. One set of cases and doctrines revolves around "moral federalism"—that is, the authority of state and local governments to regiment or, as the case may be, improve their citizens' social mores. A second set of cases governs the national entitlement state. The central question in this arena is the extent to which the private beneficiaries of the welfare state may sue in court to enforce federal rights, mandates, and policies against the states. A third set of cases and doctrines deals with the regulatory state—that is, the authority of the states and the national government, respectively, to muck around in the economy. [...] The judicial record on regulatory programs and competencies is not heartening. The profederalist justices recognize that more "states' rights" in this area might turn federalism, and the economy, into a playpen for trial lawyers, ambitious state attorneys general, and parochial state legislatures. The place where the spirit of federalism meets the fear of balkanization is federal preemption—that is, the question of when and to what extent federal law trumps contravening state law. Preemption will prove the central federalism question during the coming term—and beyond.

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Commerce?

Unlike entitlements and mandates, where federalism unmistakably points in one direction, regulatory issues implicate two problems that appear to require different solutions—one federalist, the other nationalist. The first problem is federal meddling in corners of the economy that should, as a matter of constitutional principle and public policy, be left to the states. That problem calls for decentralization and federalism. The second problem is the states' tendency to bury the economy under a flood of conflicting regulations. That tendency can be arrested only by a central authority, usually Congress. Parochialism calls for federal preemption and for judicial doctrines that facilitate preemption—a distinctly nationalist solution, at least at first sight.

On the question of federal overreach, the division on the Court is clear. The Fab Four believe that no such thing exists, at least not in a judicially recognizable form. The Federalist Five hold that federal meddling ought to stop at the water's edge of economic regulation: a federal regulation that is "economic" in character is ipso facto constitutional, whereas "noneconomic" conduct is beyond the scope of the commerce clause. This line was established in United States v. Lopez (1995) and United States v. Morrison (2000), and the Court has shown no inclination to revisit it. The central commercial federalism question, then, comes down to the federal (constitutional or statutory) preemption of state regulation.

The Fab Four want no constitutional limits on Congress's regulatory authority and no
judicial rule that would facilitate congressional preemption. Federalism, on their theory, work best when governments at all levels operate without constraint. Individual justices will occasionally defect from this regulation-maximizing rule. Justice Breyer may permit preemption upon a showing that the federal regulators are, or acted as if they were, as smart as he is; Justice Stevens turns aggressively preemptive when he himself, rather than some mere legislator or bureaucrat, does the preempting. Still, the regulation-maximizing default rule is clear. The Federalist Five, in contrast, are torn between their states'-rights impulse and the recognition that a collection of fifty regulatory fiefdoms—the natural result of a narrow preemption doctrine—cannot really be the face of modern federalism nor, for that matter, what the Founders had in mind.

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The Stakes

Three considerations render preemption, and in particular the federal preemption of state tort law, the most serious federalism issue on the horizon. First, plaintiffs’ lawyers and state attorneys general constitute a serious threat to a functioning economy—more serious than state legislatures and far more serious than creative accountants. (The exploits of the attorneys general and the trial lawyers are technically legal.) Second, the Supreme Court’s doctrines on the federal preemption of state law, including and especially tort law, are confused and incoherent. (No lawyer, judge, or legal scholar would contest the point.) Third, the doctrines—such as they are—are on a collision course with the rest of the Supreme Court’s federalism, in spirit and in point of doctrine. Sooner or later, something will have to give, and preemption will be it.

Extant preemption law, for example, encompasses something called “implied preemption,” meaning that the intent to preempt need not be stated explicitly. [...] We know, however, on the excellent authority of a slew of precedents, that Congress may not impose regulatory obligations under federal entitlement statutes unless those obligations are clearly stated in the law. The obligations may not be implied. Why then should Congress or federal agencies be allowed to preempt state regulation without a comparably clear statement?

The Supreme Court has never articulated a clear answer to that question. Waffling and indecision at this front, though, will eventually have fateful consequences. Were the Court’s “clear statement” rule, as applied in entitlement cases, to spill over into preemption, almost no federal statute would preempt much of anything at all. That result will obtain whenever one or more of the Federalist Five conclude that state impositions on interstate commerce are the price we must pay for “states’ rights” and, on those grounds, defect to the four regulation maximizers. [...] Averting that threat will ultimately require a set of preemption-related constitutional and interpretive doctrines that are consistent with the Supreme Court’s federalism, without laying waste to interstate commerce in the process. In going about that daunting enterprise, the justices would greatly benefit from outside assistance—specifically, parties and lawyers who present the right cases and the right arguments with consistency and force. Unfortunately, help may not be forthcoming.

Helpless

The importance of supply-side guidance is
illustrated by the Court's coherent and principled entitlement jurisprudence. Among
the reasons for that salutary development is the fact that those cases have a ready-made
constituency—the states and in particular state attorneys general. The attorneys
general are repeat players in case after case, and they coordinate their litigation activities
(for example, through the National Association of Attorneys General). So the
cases keep coming, and they tend to reach the Court in roughly the right order—one
incremental step after another toward the well-defined federalism objective of state
immunity against private lawsuits.

Preemption litigation presents an entirely different picture. Here, too, the states are
repeat players. But they (and their trial lawyer clientele) will insist on their
parochial advantages. Balkanization suits them just fine, and they will actively resist
any move toward legal doctrines that forestall that result. Corporations, for their
part, rarely look beyond the immediate case at hand and are in any event compelled to
argue within the confines of the extant, confused law. To expect coordination and
strategic sense from that quarter is to hope against evidence and logic.

The one institution that could provide guidance and a broader view is the U.S.
Department of Justice—specifically, the Office of the Solicitor General. The solicitor
general participates in every preemption case, and since those cases turn on the
interpretation of federal statutes, his views are accorded special weight. Lo, the Bush
administration has taken a somewhat consistent stand on federalism issues. Unfortunately, though, it is a shade to the
left of Justice Souter.

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While the administration will occasionally get a case right (for example, when the feds' own money, rather than the states’ or corporate America’s, is on the table), the administration has on the whole adopted litigation positions that promote nationalization and regulatory balkanization at the same time. [...] [A] possible explanation can be found—outside the solicitor general’s office, in White House policy.

To wage war against terrorism, the administration believes that it must avoid undue strife and challenges at the domestic front. That often means pacifying noisy constituencies, especially those that might swing closely contested states and districts. That is how we got an education “reform” written by Senator Edward Kennedy and the National Education Association, a farm bill of European proportions, and a steel tariff. Like John Wayne, the administration protects its back by sitting up against the wall—except it never shoots the evildoers who barge in through the barroom door. It buys them a drink.

[...] The path of least resistance is to let the rapacious interests run riot in the states. The solicitor general is just the guy to perform that maneuver—because he can and because nobody notices when he does.

[...] Preemption [...] ultimately involves the larger question whether we really want to hand the trial lawyers—and the state judges and politicians they have bought and paid for—the keys to the national economy. The answer should be obvious. The solicitor general’s office is no place to launch a federalism or any other revolution. Neither, however, need the tenth justice limp behind, let alone impede, the constitutional procession that may at long last be getting on its way. [...]
THE REHNQUIST COURT'S FEDERALISM REVIVAL: A STATUS REPORT

Pulling Its Punches; The Court took on big issues but rendered few big decisions

Legal Times
July 5, 2004
Tony Mauro

Just before the Supreme Court convened for its final sitting of the term on June 29, Solicitor General Theodore Olson was asked how long it would take for him to recover from the defeats the Court had handed him the day before on the legal rights of enemy combatants and Guantanamo detainees. “I don’t know,” was Olson’s half-smiling reply. “I’m not out of the operating room yet.”

Indeed, the Court wasn’t finished conducting major surgery on the government’s positions. Minutes later, Olson listened as the Court announced decisions that rejected his stance on the Child Online Protection Act and did not go as far as Olson wanted in discouraging foreigners from bringing tort claims in U.S. courts.

Yet, as seemed typical for this term, neither of the Court’s final-day rulings had much finality to them. [...]

The decisions symbolized a term in which the Court left many key issues unresolved and paused in some of its other notable trends - most prominently, federalism.

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In the area of federalism, the Court in Tennessee v. Lane offered the clearest signal this term that its pro-state preferences have limits. The Court said that when it comes to physical access for the disabled to state courthouses, the Americans With Disabilities Act of 1990 trumps state sovereign immunity. The 5-4 ruling found that imposing accessibility requirements on states was a valid exercise of congressional power under the 14th Amendment.

In a number of other cases, the Court was also content to allow federal courts or laws to dominate over state actions. In Hibbs v. Winn, the Court ruled that state tax credits for parochial school tuition can be challenged in federal court. In Engine Manufacturers Association v. South Coast Air Quality Management District and Alaska Department of Environmental Conservation v. EPA, the Court decided that the federal Clean Air Act pre-empted state regulations that were in one instance stricter than federal standards and in the other less strict. Less surprisingly, in Aetna Health Inc. v. Davila, the Court found that the Employee Retirement Income Security Act, with its explicit pre-emption provisions, trumps state tort law.

In these cases and others, the pro-federal outcomes were often welcomed by the business community, which usually argues that it prefers a single federal regulatory regime over 50 different state ones. University of Notre Dame law professor Richard Garnett also sees this term’s rulings in Blakely v. Washington and Locke v. Davey through a federalism lens. Blakely rejects state experimentation in sentencing, imposing a federal standard that requires
juries, not judges, to decide facts that increase sentences, even within statutory maximums. The impact of the ruling will be felt for years at both the state and federal levels.

Locke v. Davey, on the other hand, gives states a somewhat freer hand to experiment with policies that test the limits of the First Amendment's religion clauses. Rehnquist wrote the majority finding that the free exercise clause did not bar Washington state from designing its college scholarship program to ensure that the state did not financially support the training of ministers. But overall, Garnett proclaims that "if there ever was any revolution" toward state-oriented federalism, "it's over and in full retreat."

Michael Greve, who heads the American Enterprise Institute's Federalism Project, does not go that far, but agrees that in the term just ended, federalism cases were "not as prominent" as they have been in many recent years. Greve thinks the federalism jurisprudence of the last decade may have reached "its natural limits," or that it may have fallen victim to post-Sept. 11 desire for a strong federal government. "We're in a war," Greve says, so the Court's attitude may be that "federalism is a luxury we cannot afford."

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The Court's Faux Federalism

A Year at the Supreme Court (2004)
Ramesh Ponnuru

Speaking soon after the end of the 2002 Supreme Court term, Justice Ruth Bader Ginsburg said, “Federalism this term was the dog that did not bark.” The expression traces back to the Sherlock Holmes story “The Adventure of Silver Blaze,” where the dog’s silence provides evidence about a theft. Have the justices carted off the Rehnquist Court’s federalism revolution while we weren’t looking?

The states did not fare well in the Court’s last term. The case most widely taken as a defeat was *Nevada Department of Human Resources v. Hibbs*, in which a six-justice majority led by Chief Justice William Rehnquist ruled that Congress had the power to subject state governments to lawsuits under the Family and Medical Leave Act. The states might have thought this would be an easy win, based on previous Court rulings restricting the ability of Congress to authorize lawsuits against state governments. The majority found, however, that the Family and Medical Leave Act was meant to combat an “invalid gender stereotype” (specifically, the view that mothers are more likely than fathers to stay home to take care of their children, which we all know is a ludicrous folk belief based on no underlying reality). As such, the act fell within the scope of Congress’s power, under section five of the Fourteenth Amendment, to enforce the egalitarian requirements of that amendment on the states. This reasoning would doubtless have come as a surprise to most of the congressmen and senators who voted for the act, who thought they were merely mandating a popular benefit rather than striking a blow for feminism.

*Franchise Tax Board of California v. Hyatt* was the next most prominent federalism case that went badly for the states. Hyatt had left California for the friendlier tax climate of Nevada. The California tax authorities pursued him there, allegedly committing torts against Hyatt in both states. Hyatt sued, and the Nevada Supreme Court found that the suit should proceed under Nevada law. California, backed by most state attorneys general, protested that Nevada’s courts had to give weight to California law. The U.S. Supreme Court turned back the AGs, affirming the Nevada court’s decision.

*State Farm Mutual Automobile Insurance Co. v. Campbell* was another nationalist win: The Supreme Court restricted state courts’ ability to impose punitive damages. *Hillside Dairy v. Lyons* reaffirmed the “dormant commerce clause”: State governments may be barred from interfering with interstate commerce even when Congress has not explicitly acted to bar them. In *Pierce County v. Guillen*, Congress was allowed to order state courts (as well as federal courts) not to accept certain kinds of evidence. This order was designed to restrain litigation that would adversely affect interstate commerce, and was thus held to be a legitimate exercise of Congress’s commerce-clause powers. In *American Insurance Association v. Garamendi*, the Court said that a presidential agreement with a foreign country could pre-empt state law—even if the agreement itself does not say that
it pre-empts state law, and even if there is no formal agreement at all.

There were a few cases on the other side of the ledger. The Court's decisions regarding affirmative action granted states some autonomy in setting the admissions policies at state universities: The Court neither required nor prohibited preferential affirmative action. In *Pharmaceutical Research and Manufacturers of America v. Maine*, the Court upheld a Maine program that pressured drugmakers to hold prices down. *Kentucky Association of Health Plans v. Miller* read federal law to allow states more freedom to regulate health insurance. In *Sprietsma v. Mercury Marine*, the Court rejected a claim that federal regulation preempted state lawsuits. As barks go, these were rather quiet.

It would go too far to say that the 2002 term means that the federalist revolution is over. The near-landmark decisions associated with that revolution have neither been overruled nor rendered dead letters; the Court has left itself the freedom to invalidate future congressional acts for trampling on the states. The Court has not retreated entirely from the "clear statement" rule announced a decade ago: To pre-empt state law, Congress has to say that's what it's doing. It could even be argued that the 2002 term represented a continuation, or rather a consolidation, of the federalist revolution: By signaling that this revolution would not go too far, the swing justices were trying to get the nationalist judges to make their peace with it.

But perhaps the federalist revolution is neither ending nor being consolidated. There is a third alternative: There never was a federalist revolution—or, at least, the revolution was never what it was cracked up to be.

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III. HITTING A WALL

For all the fears the Court's federalist turn inspired, there was a natural limit to how far it could go. Three constraints were bound to affect the Court eventually. In 2002-2003, the Court ran into all three of them.

The first constraint is a straightforward political one: The Court cannot implement a federalism agenda that is seen as rolling back either the New Deal or civil rights in any serious way. Moreover, the Court has no interest in doing so—perhaps in part because key justices do not want their federalist turn to be interpreted as an attack on the New Deal or civil rights. Obviously, however, this limit means that a vast range of federal action will be untouched by the Court's federalism.

The Court is not going to get back into the business of distinguishing between intrastate and interstate commerce, and invalidating congressional regulation of the former; it left that field for good in the 1930s. It is not going to distinguish "commerce among the states" from manufacture. Most federal economic regulation will be upheld.

This reluctance to go too far politically may explain why the Court did what it did in *Hibbs*. *Morrison* implicated civil rights at least as much as *Hibbs* did, of course, but only in a symbolic way. *Hibbs* involved an intersection of an alleged civil-rights concern and a federally-mandated economic benefit. That may have been too much for the Court to threaten. If the distinction between *Hibbs* and *Morrison* is hard to ascertain, however, it is less difficult to see what separates it from the other sovereign immunity cases. The Court is willing to
protect states from lawsuits in federal court—unless those lawsuits allege particular kinds of state discrimination. Specifically, lawsuits are allowed to combat discrimination against groups that the Court itself has identified as “suspect classes”: women, racial minorities, and (weirdly enough) railroads. When states enact laws that discriminate against these classes, the Court subjects those laws to “strict scrutiny” and will generally invalidate them. Evidently, the Court will also subject lawsuits concerning state discrimination against other classes—e.g., the old and the disabled—to what might be called a kind of strict scrutiny. In *Kimel v. Florida Board of Regents* (2000), states were held to be immune from lawsuits under the Age Discrimination in Employment Act even when Congress was found to have sought to abrogate their immunity. In *Board of Trustees of the University of Alabama v. Garrett* (2001), states received immunity from Americans with Disabilities Act lawsuits, too. The rule that women and racial minorities can sue and other groups can’t is, in my view, the most plausible reading of *Hibbs*.

The second constraint is the Court’s own confusion about what federalism is. The Court’s federalism cases are replete with references to the “dignity,” “status,” and “interests” of states. The states are, in this view, an interest group with a special claim on kind treatment from the federal government. But this is not the only way to conceive of federalism. Federalism could be about dividing governmental responsibilities and ensuring political accountability, and there is much in the writing of the Founders to indicate that these imperatives were on their minds. Insisting on a federalism of this sort could—would—place limits on state governments and lead to results they would find most undignified. You could call it a federalism for citizens rather than states. Or, perhaps, a libertarian federalism.

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Finally, the federalist turn faces a third powerful constraint: The Court’s unwillingness to police the boundaries of federalism against itself. We forget, sometimes, when we speak of the Supreme Court’s restricting or expanding what government can do, that the Court is itself part of the federal government. For the Supreme Court to protect the states from the federal government, it must not only restrain Congress (and the president). It must restrain itself. It must reduce its own power. This it has shown no interest in doing.

As has often been noted, none of the landmark Warren and Burger Court individual rights cases, most of which undermined state autonomy, have been overturned. What may be more important is the reason for the Court’s reluctance to revisit these issues. There is some evidence that the Court’s is motivated by a concern for its own institutional authority as much as for legal stability. The Court has said as much in one high-profile case, *Planned Parenthood v. Casey*, the 1992 case reaffirming the “central holding” of *Roe v. Wade* (1973).

The *Casey* Court begins by noting the scandal of disagreement:

*Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, *Roe v. Wade*, 410 U.S. 113 (1973), that definition of liberty is still questioned. Joining the respondents as amicus curiae, the United States, as it has done in five*
other cases in the last decade, again asks us to overrule Roe.

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An intolerance for national division, for conflict, is not the most promising of mindsets for the agents of a federalist revolution to have. Nor is the sense that our national identity is as fragile as the Casey plurality believes it to be. To the extent that Roe itself generated fierce political conflict, the Court has started an “implosive cycle”: the Court’s centralizing moves produce conflict, which then justify further assertions of the Court’s national authority.

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The great federalist case of the 2002 term was thus not Hibbs but Lawrence v. Texas. State laws against sodomy were dying off, as they should have been. But the Court was not willing to wait. Instead, it issued an expansive ruling about liberty “in its spatial and more transcendent dimensions.” Nobody was sure what to make of that phrase, or agree on the implications of the ruling for other policy issues. But it is clear that the decision was not good news for social conservatives, even those who held no brief for sodomy laws themselves. Once again, the Court has taken sides in the culture wars—and taken the same side.

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The Supreme Court may very well impose more marginal restrictions on congressional power against the states in the 2003 term and in terms to come. (It will always be possible to distinguish away Hibbs when the Court has the inclination to do so. The Court can just manipulate the level of deference to Congress to reach the desired result.) The sovereign-immunity doctrine may expand. But after two decades, we have an answer to one question. Is the Supreme Court likely to lead a revival of the federalism contemplated by the Founders? The answer is no. That dog will not bark again.
What Brown Teaches Us About the Rehnquist Court’s Federalism Revival

PS
April 2004
Neal Devins

[...][R]ecent Rehnquist Court decision-making invalidating federal statutes is also tied to social and political forces. This seems especially true of the Court’s pursuit of federalism-related innovation, although the forces contributing to this federalism revival help explain the Court’s willingness to strike down several other statutes.

First, unlike social issues, lawmakers barely mentioned federalism in the confirmation hearing, committee reports, or floor debates concerning any member of the Rehnquist Court. For example, the Senate Judiciary Committee never pressed Sandra Day O’Connor about states rights—even though O’Connor asserted that her “experience[s] as a State court judge and as a state legislator” gave her “a greater appreciation of the important roles that States play in our federal system.” Correspondingly, there are virtually no mentions of federalism in interest group testimony and written submissions. With no interest group constituency pressuring Congress on federalism issues, the Senate has not used its confirmation power to push the Court to embrace pro-Congress positions in federalism cases.

Second, Congress is widely held in disrepute, partly because of the well known inclination of candidates to run for Congress by running against it. As compared to respondents in 1964 (when 76% of those polled though that the federal government could be trusted “just about always” or “most of the time”), 27% of respondents in 2001 think the government trustworthy. By a 74% to 17% margin, a 1997 poll revealed that Americans think that members of Congress care more about making themselves look better than making the country better. In 1992, 82% of those polled thought that people elected to Congress “lose touch with the people pretty quickly.”

Relatedly, Republicans took over Congress in 1994 by running on the “Contract with America.” Seeking to capitalize on widespread vote dissatisfaction, the Contract pledged a smaller federal government and a larger role for the states. The Contract promised: item veto legislation (because Congress could not be trusted to enact responsible spending bills); unfunded mandate reform (because Congress could not be trusted to respect state prerogatives); and a vote on a constitutional amendment to establish term limits (because members of Congress quickly lost touch with their constituents).

Third, Congress has signaled to the Court that it has little institutional stake in federalism issues and that the Court will pay little, if any, institutional price when invalidating legislation on federalism-related grounds. In the wake of recent rulings limiting congressional power, there has been no talk of stripping the Court of jurisdiction, of amending the Constitution, or of enacting legislation at odds with these decisions. Indeed, there has been virtually no talk at all; the precedential effects of Court decisions limiting federal power are rarely mentioned in the Congressional Record or in political discourse more generally.
Moreover, with the exception of Court rulings invalidating the Violence Against Women Act and the Religious Freedom Restoration Act, no more than four comments exist about the wisdom of the Court's federalism-related decisions. Furthermore, these decisions played no role in the 2000 elections. Finally, Congress has shown relatively little interest in rewriting the statutes, and when Congress has revisited its handiwork, lawmakers have paid close attention to the Supreme Court's ruling, limiting their efforts to revisions the Court is likely to approve.

Rehnquist Court innovation in the federalism arena has also been incremental. Only after the 1994 election did the Court launch its counterrevolution, and even then it moved gingerly, striking down relatively few laws on somewhat ambiguous grounds. Today, however, the Court seems more aggressive, and with good reason. Congress certainly accepts and may even approve of Court efforts to curtail federal power. Moreover, there is little reason to fear a populist backlash. The Court remains politically popular and somewhat middle of the road on divisive social issues. Also, when the Court strikes down a law, it typically leaves Congress room to revisit the issue.

When striking down federal and state legislation, the Supreme Court is often described as "countermajoritarian." Such decision making, as Alexander Bickel put it, "thwarts the will of representatives of the actual people of the here and now; [the] Court exercises control, not in behalf of the prevailing majority, but against it." Warren Court school desegregation decision making and Rehnquist Court federalism rulings, purportedly classic examples of countermajoritarian behavior, are, on closer examination, very much tied to majoritarian social and political forces. Both *Brown* and the federalism revival match changes in public opinion and signals sent to the Court by Congress, the White House, and the American people. Likewise, social and political forces help explain both the Rehnquist Court's willingness to extend its federalism revolution and the Warren Court's decision to steer clear of school desegregation for the decade following *Brown*.

Parallels between the Warren and Rehnquist Courts are hardly surprising. When striking down legislation, the Supreme Court almost always takes its cues from elected officials, the public, or elites (academics, journalists, and other opinion leaders). Court behavior in the two eras move in different directions, to be sure. *Brown* advanced civil rights interests and Rehnquist Court federalism decisions have invalidated legislation protecting the interests of religious minorities, the elderly, the disabled, and victims of domestic violence. But both suggest a Court operating within boundaries established by social and political context.
He'll Look Better When He’s Gone

_The Washington Post_
June 8, 2003
Simon Lazarus

Whether Supreme Court Chief Justice William H. Rehnquist resigns at the end of the court’s term this month or waits until a second Bush term, his reign is likely to look kinder and gentler in retrospect than the one his liberal critics have often described. In 1986, Senate Majority Leader George Mitchell urged his fellow Democrats to oppose Rehnquist’s elevation from associate to chief justice because he considered the nominee “totally hostile to the rights of women and minorities,” with a mind “closed on the issues of race.” Last year, American University constitutional law expert Herman Schwartz lamented that under Rehnquist’s leadership, “Ronald Reagan’s efforts to reshape the American judiciary have succeeded.”

But in time, the critics will mellow as it becomes clear that the Rehnquist term has sustained, not overturned, the major works of his predecessors, Chief Justices Earl Warren and Warren Burger. More important, the Rehnquist term will appear more pragmatic and centrist than it does now because the court under his successor is likely to lurch much further to the right.

What Rehnquist has done over the past decade by expounding his philosophy of “federalism,” which shifts power from the government to the states, is to lay the doctrinal groundwork for a genuinely radical transformation of the federal government’s authority to make and enforce social policy. He has set the table. The feast awaits his successor.

To put the Rehnquist record in perspective, recall the great constitutional controversies of the past half-century: Forty years ago, “Impeach Earl Warren” bumper stickers were ubiquitous, in response to three blockbuster decisions – Brown v. Board of Education (1954), which mandated racial desegregation in public schools; Baker v. Carr (1962), which required all legislative election districts to be apportioned equally on a one-man, one-vote basis; and Miranda v. Arizona (1966), which declared that confessions in criminal cases must be excluded unless the suspect had first been warned of his right to counsel and to remain silent. The Burger Court’s blockbuster was Roe v. Wade (1973), which legalized abortion. Despite the bumper stickers, and the campaign promises of presidents Nixon and Reagan to select judges who would overturn Miranda and Roe, all four of those precedents stand today.

Today Brown, of course, enjoys iconic status (though in 1953, while serving as a Supreme Court law clerk, Rehnquist recommended against outlawing segregation). Baker is so uncontroversial that few remember that Congress nearly passed a constitutional amendment to overturn it. Miranda was reaffirmed in 1999, in a 7-2 decision written by Rehnquist himself. His court has twice reaffirmed Roe, though Rehnquist himself dissented.

 Barely a week ago, the contrast between the court’s pragmatic present and its potentially doctrinaire future was vividly displayed when the chief justice stunned observers by
writing a 6-3 decision not to block state government workers from suing their employers for violating the 1993 Family and Medical Leave Act (FMLA). Since the mid-1990s, the five “conservative” justices (Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy and Sandra Day O’Connor) had stuck together in decision after decision to pare back congressional authority over the states. In 2000 they invalidated provisions of the 1967 Age Discrimination in Employment Act empowering state employees to sue their employers for violations. A year later, the same majority stripped state employees of their right to sue for violations of the Americans with Disabilities Act. So this year, most observers expected the majority to make short shrift of the attempt of a Nevada state employee to sue when he was fired in alleged violation of the FMLA, in Nevada Department of Human Resources v. Hibbs.

Certainly nothing in the chief justice’s record suggested that he would vote to subordinate state sovereignty to the FMLA, much less write the opinion. He is the principal architect of the court’s current drive to strengthen state “sovereignty” and “dignity,” as he and his colleagues often put it in decisions, and to limit congressional authority to powers specifically “enumerated” in the Constitution. It is the only real innovation of his tenure. Until the mid-1990s, when Rehnquist assembled his pro-states’ rights majority, his court played only defense – reacting to the civil rights and liberties doctrines of the Warren-Burger Court agenda. But since 1995, the conservative majority has been on the offense with an agenda of its own.

So why did Rehnquist abruptly switch sides in the Hibbs case? The most plausible reason is a simple one: damage control. Rehnquist probably figured he had lost O’Connor’s vote to her often-expressed aversion to gender discrimination. Hence, his side would lose 5-4 anyway. If he went along with the majority, it wouldn’t change the result but would give him the chance to name who wrote the opinion. (The chief justice has that privilege for whichever side he is on.) So he could name himself and keep one of the opponents of his federalism cause from writing an opinion that might do it more long-term harm. And, indeed, Rehnquist’s opinion is laced with deft caveats and qualifications that could make it comparatively easy for future courts to distinguish this case, and treat it as an aberration rather than a significant precedent.

But if Rehnquist appears in the Hibbs case as a pragmatic and judicious moderate, his dissenting colleagues on the right – Justices Scalia, Thomas and Kennedy – showcase the historic sweep of their uncompromising assault on congressional power. Particularly revealing is Kennedy’s scornful dismissal of FMLA, which requires employers to grant a minimum of 12 weeks of unpaid leave per year for “family and medical” reasons. Kennedy called this an unjustified “entitlement program” – an affirmative grant of rights – rather than a legitimate remedy for discrimination.

This argument echoed the decisions of a Supreme Court majority just after the Civil War that were aimed at shelving the 14th Amendment and blocking development of a nationwide code of federally protected individual rights. The current majority has recently revived some of these long-dormant cases of the 1870s and 1880s, which undermined Reconstruction.

Most remarkably, in his Hibbs dissent, Justice Kennedy directly attacked a
landmark precedent from the modern civil rights era. He quoted at length (and cited as if it were law) a 1966 dissenting opinion that disputed the legality of the nationwide ban on voter literacy tests.

These sparks from the Hibbs debate about Congress’s power to enforce civil rights shed light on the president’s oft-repeated pledge to nominate judges like Scalia and Thomas. To the devoutly conservative administration lawyers who recommend judicial candidates to the president, this is not simply a campaign slogan. To them, it means like Scalia and Thomas and not like Souter or O’Connor or even Rehnquist.

The odds are that the Senate will soon have a chance to determine whether the Supreme Court will continue in the mold of the Rehnquist Court – usually to the right of center but cautious, sometimes messy, and in major cases, often unpredictable – or whether the next chief justice will have the inclination and the votes to take the court, and the country, in a very different direction.
Steady Rationale at Court Despite Apparent Bend

*The New York Times*
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Linda Greenhouse

At first glance, the Supreme Court appeared to have been overcome on Tuesday by a belated case of judicial modesty.

The court stepped back unexpectedly from the brink of confrontation with Congress to which a series of recent decisions had brought it, holding in an opinion by Chief Justice William H. Rehnquist, no less, that Congress had an adequate basis for opening the states to suits by their employees under the Family and Medical Leave Act of 1993.

The law, allowing both women and men to take up to 12 weeks of unpaid leave a year to care for a sick relative, was a valid antidote to the “pervasive sex-role stereotype that caring for family members is women’s work,” the chief justice said. If Congress chose to make the states accountable to their workers under this provision, it was justified in doing so.

Not only the result, but the tone was far different from decisions in 2000 and 2001 that rejected Congressional efforts to permit elderly and disabled workers to sue their state government employers under two federal antidiscrimination laws that command widespread popular and Congressional support.

But rather than an instance of the court blinking, tacking strategically in the face of mounting grumbling from Congress, the decision this week in *Nevada Department of Human Resources v. Hibbs* can be seen as a demonstration of the court’s continued power and its determination to continue dominating the constitutional conversation with the supposedly co-equal branch of government across the street.

The deeper message of Chief Justice Rehnquist’s opinion was that Congress was free to exercise the discretion the court chose to give it, and no more. The difference between the age and disability discrimination statutes on the one hand and the family leave act on the other was that the court had, for the last several decades, identified sex discrimination as a problem for which, as with race discrimination, Congress simply had more freedom to devise remedies.

If the remedy extended to permitting suits against states that would otherwise be entitled under the 11th Amendment to claim immunity from private lawsuits, so be it, as long as Congress provided sufficient evidence that the states themselves were part of the problem.

Several aspects of this latest decision made clear the degree to which it represented continuity rather than a change in the court’s recent direction. While its subject was the Family and Medical Leave Act, the decision’s analytical core was an interpretation of Section 5 of the 14th Amendment, under which Congress “shall have the power to enforce, by appropriate legislation” the amendment’s substantive guarantees of equal protection and due process. The constitutional question was whether the family leave act’s explicit abrogation of the states’ 11th Amendment
immunity from suit was “appropriate legislation” within the scope of Congress’s power under Section 5.

The last time the Supreme Court paid sustained attention to Section 5 of the 14th Amendment was during the civil rights era of the 1960’s, and the difference between then and now is striking. In the earlier decisions, the court’s stance toward Congress was one of deference, starting from the presumption that Congress was acting within the scope of its authority not only to enforce but, at least to some degree, also to define the constitutional right at issue.

In the Rehnquist court’s revisiting of Section 5, the burden has shifted. Now, the presumption is the opposite: that Congress has to prove that it is acting within the scope of its authority, a constricted scope that is limited to enforcement and must stay clear of any effort at definition. “We distinguish appropriate prophylactic legislation from substantive redefinition of the 14th Amendment right at issue,” Chief Justice Rehnquist said on Tuesday.

Because under the court’s equal protection doctrine, official discrimination on the basis of age or disability is almost never unconstitutional, the burden of proof that the current approach places on Congress proved insurmountable when it came to extending the Age Discrimination in Employment Act and the Americans With Disabilities Act to the states.

But because sex discrimination, subject to “heightened scrutiny” under the court’s precedents, is presumed to be unconstitutional, Congress could meet the burden of showing that the Family and Medical Leave Act was a “congruent and proportional” response to a pattern of constitutional violations by the states. The burden in all cases was the same, as was the court’s insistence on “a monopoly of interpretive authority over Congress,” as Robert C. Post and Reva B. Siegel describe the current situation in a forthcoming article in the Yale Law Journal.

Further evidence that the decision did not signal a retreat came from a concurring opinion by Justices David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. Along with Justice John Paul Stevens, who concurred separately, these three had dissented in every one of the 11th Amendment immunity decisions. They made it clear that while they were happy enough to join the Rehnquist opinion, they saw little to embrace in its analysis.

“Even on this court’s view of the scope of Congressional power under Section 5 of the 14th Amendment, the Family and Medical Leave Act is undoubtedly valid legislation and application of the act to the states is constitutional,” Justice Souter wrote for the three. He added: “I join the court’s opinion here without conceding the dissenting positions” that he and the others had expressed in the previous cases.

As Justice Souter implied, those dissenting voices may well be raised again. While there are no other federalism cases on the docket now, one issue now in the lower courts is likely to make its way there soon. The question is whether Congress acted appropriately under Section 5 in permitting states to be sued for failing to provide accessible public services – transportation, voting, education and the like – for people with disabilities.

The public services provisions are in Title II of the Americans With Disabilities Act; the court’s decision on the act two years ago
granted the states immunity under Title I, which covers employment. Earlier this term, the court agreed to decide a Title II case, but dismissed it in March when California, under strong lobbying by the disability rights community, abandoned its Supreme Court appeal. That action bought time but not – at least on the basis of the ruling this week – a change of heart.
Most Americans believe that politics should not be part of Supreme Court jurisprudence. But the Supreme Court is unavoidably a political as well as a legal institution. And the current Supreme Court has a definite political agenda — one devoted chiefly to reallocating governmental power in ways that suit the views of its conservative majority.

The court’s recent decision in Board of Trustees of the University of Alabama v. Garrett, which ruled that state employees may not sue their states under the Americans With Disabilities Act, is but the latest example of the court’s assertion of the primacy of its views over those of Congress. The 14th Amendment was adopted primarily to empower Congress to address civil rights abuses in the states. The courts also had a role, but for institutional reasons that role called for deference to legislative judgments in all but the most serious cases, like those involving race.

In the Garrett case, the conservative majority decided that Congress had not persuaded it that federal legislation was really necessary. In effect, the court took institutional restraints originally placed on judges to preserve legislative authority and imposed them on the legislature to preserve judicial authority.

The Garrett ruling is not really surprising. For nearly a decade, the court’s five conservative justices have steadily usurped the power to govern by striking down or weakening federal and state laws regulating issues as varied as gun sales, the environment and patents — as well as laws protecting women and now the disabled. Not in every situation, of course, but the general blueprint is unmistakable. Rather than serving to chasten the conservative court, the experience of deciding Bush v. Gore may have further emboldened it.

Protest against this seizure of legislative authority has been muted and sporadic, apparently reflecting the general assumption that not much can be done. Not so. Presidents and Congresses in the past never hesitated to reprimand an overreaching court.

Under Thomas Jefferson’s guidance, Congress punished the Supreme Court by delaying its term for a year, threatening to impeach judges and ordering the justices to travel around the country hearing minor disputes. Andrew Jackson and Abraham Lincoln ignored what they regarded as unsupportable decisions. Franklin Roosevelt proposed increasing the size of the court to dilute an errant five-member majority. And the Constitution gives Congress control over the court’s budget and its jurisdiction, powerful tools that the framers deliberately left in political hands.

Our system of separation of powers depends on balance among the branches. It does not give any branch license to run roughshod over the others. When the court upsets this balance, the other branches have a duty to respond, not necessarily through extreme tactics, but at least through trenchant public
criticism. Yet the conservative court’s decisions have met with only tepid responses from critics in the rest of government. This may be because liberals and moderates are inhibited by a false belief that the Supreme Court is a fragile institution that needs to be protected from public censure. Liberals are largely responsible for promoting this myth in the years after Brown v. Board of Education, in reaction to the relentless conservative attack on the court in the days of Chief Justice Earl Warren. Many liberals now assume that criticizing the court plays into the conservatives’ hands.

Precisely the opposite is true. Conservatives never hesitate to attack a court that does things they don’t like. Just ask the justices of the Florida Supreme Court. Liberals never used to hesitate, either. By sitting on their hands now, critics merely encourage the court’s conservative majority.

The court has survived, and thrived, for more than two centuries, despite regular confrontations with the other branches of government. It cannot and should not be treated as if its rulings are not political or are above censure. No one is suggesting that we savage the court every time it renders an unpopular decision. But vocal opposition is appropriate when the court consistently interprets the Constitution in a way that does not protect individual rights, but limits the ability of Congress to do so.

The conservative justices seem to have grown comfortable reading the Constitution in ways that ignore precedent, past practice and the considered judgment of other government institutions. This must be resisted. We need to hear from our political leaders.