

TWENTY-FIRST AMENDMENT ENFORCEMENT ACT

JULY 27, 1999.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HYDE, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 2031]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2031) to provide for injunctive relief in Federal district court to enforce State laws relating to the interstate transportation of intoxicating liquor, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Twenty-First Amendment Enforcement Act”.

**SEC. 2. SHIPMENT OF INTOXICATING LIQUOR INTO STATE IN VIOLATION OF STATE LAW.**

The Act entitled “An Act divesting intoxicating liquors of their interstate character in certain cases”, approved March 1, 1913 (commonly known as the “Webb-Kenyon Act”) (27 U.S.C. 122) is amended by adding at the end the following:

**“SEC. 2. INJUNCTIVE RELIEF IN FEDERAL DISTRICT COURT.**

“(a) DEFINITIONS.—In this section—

“(1) the term ‘attorney general’ means the attorney general or other chief law enforcement officer of a State, or the designee thereof;

“(2) the term ‘intoxicating liquor’ means any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind;

“(3) the term ‘person’ means any individual and any partnership, corporation, company, firm, society, association, joint stock company, trust, or other entity capable of holding a legal or beneficial interest in property, but does not include a State or agency thereof; and

“(4) the term ‘State’ means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

“(b) ACTION BY STATE ATTORNEY GENERAL.—If the attorney general has reasonable cause to believe that a person is engaged in, or has engaged in, any act that would constitute a violation of a State law regulating the importation or transportation of any intoxicating liquor, the attorney general may bring a civil action in accordance with this section for injunctive relief (including a preliminary or permanent injunction or other order) against the person, as the attorney general determines to be necessary to—

“(1) restrain the person from engaging, or continuing to engage, in the violation; and

“(2) enforce compliance with the State law.

“(c) FEDERAL JURISDICTION.—

“(1) IN GENERAL.—The district courts of the United States shall have jurisdiction over any action brought under this section by an attorney general against any person, except one licensed or otherwise authorized to produce, sell, or store intoxicating liquor in such State.

“(2) VENUE.—An action under this section may be brought only in accordance with section 1391 of title 28, United States Code, or in the district in which the recipient of the intoxicating liquor resides or is found.

“(d) REQUIREMENTS FOR INJUNCTIONS AND ORDERS.—

“(1) IN GENERAL.—In any action brought under this section, upon a proper showing by the attorney general of the State, the court may issue a preliminary or permanent injunction or other order to restrain a violation of this section. A proper showing under this paragraph shall require clear and convincing evidence that a violation of State law as described in subsection (b) has taken place. In addition, no temporary restraining order or preliminary injunction may be granted except upon—

“(A) evidence demonstrating the probability of irreparable injury if injunctive relief is not granted; and

“(B) evidence supporting the probability of success on the merits.

“(2) NOTICE.—No preliminary injunction or permanent injunction or other order may be issued under paragraph (1) without notice to the adverse party and an opportunity for a hearing.

“(3) FORM AND SCOPE OF ORDER.—Any preliminary or permanent —injunction or other order entered in an action brought under this section shall—

“(A) set forth the reasons for the issuance of the order;

“(B) be specific in its terms;

“(C) describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained;

“(D) be binding upon—

“(i) the parties to the action and the officers, agents, employees, and attorneys of those parties; and

“(ii) persons in active concert or participation with the parties to the action who receive actual notice of the order by personal service or otherwise.

“(e) ADDITIONAL REMEDIES.—

“(1) IN GENERAL.—A remedy under this section is in addition to any other remedies provided by law.

“(2) STATE COURT PROCEEDINGS.—Nothing in this section may be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any State law.”.

**SEC. 3. EFFECTIVE DATE; APPLICATION OF AMENDMENT.**

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendment made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENT.—The amendment made by this Act shall apply only with respect to the importation or transportation of any intoxicating liquor occurring after—

(1) October 31, 1999, or the expiration of the 90-day period beginning on the date of the enactment of this Act, whichever is earlier, if this Act is enacted before November 1, 1999; or

(2) the date of the enactment of this Act if this Act is enacted after October 31, 1999.

**PURPOSE AND SUMMARY**

H.R. 2031 provides that the Attorney General of any state, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States may bring a civil action in United States District Court to enjoin (through injunctive relief in the form of a preliminary or permanent injunction or other order) any person or entity that the Attorney General has reasonable cause to believe is engaged in any act that would constitute a violation of a state law regulating the importation or transportation of any intoxicating liquor. Under H.R. 2031, injunctive relief may be granted by the Federal District Court if the Attorney General makes a “proper showing” that a state law regulating the importation or transportation of an intoxicating liquor has been violated.

**BACKGROUND AND NEED FOR THE LEGISLATION**

In 1913, the Congress enacted the Webb-Kenyon Act (27 U.S.C. § 122). This Act carved out an exception to the Commerce Clause and gave states the power to regulate the importation and sale of alcohol within their own borders. Pursuant to Webb-Kenyon, any shipment or transportation of alcoholic beverages from one state into another in violation of that state’s laws is prohibited.

The Webb-Kenyon Act was reenacted in its current form as section 202(b) of the Liquor Law Repeal and Enforcement Act of 1935 (27 U.S.C. Chapter 7). This followed the adoption of the Twenty-First Amendment which repealed the Eighteenth Amendment (prohibition) and also prohibits 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.”

Under the authority of the Twenty-First Amendment and the Webb-Kenyon Act, states are permitted to regulate the distribution and sale of alcoholic beverages (i.e., distilled spirits, wine and beer) within their borders. Most states employ the so-called “three-tier system” of alcohol distribution to control the distribution and sale of alcoholic beverages within their borders. Under this system alcohol producers go through state-licensed wholesalers, who must go through retailers, who alone may sell to consumers. Most states also either prohibit direct shipment of alcoholic beverages into their state or severely limit the amount of alcoholic beverages that may be shipped directly to any unlicensed individual in their state.

There are three types of direct shipment states. First, there are “express prohibition” states that expressly outlaw direct shipments of alcohol from out-of-state. There are 19 express prohibition states: Arizona, Arkansas, Delaware, Georgia, Indiana, Kansas, Kentucky, Maine, Maryland, Mississippi, Montana, New York, New Carolina, North Dakota, South Dakota, South Dakota, Tennessee, Texas, Utah, and Virginia. Second, “limited personal importation” states permit in-state consumers to purchase alcoholic beverages directly from out-of-state, but permit such purchases for personal consumption only and strictly limit the volume of alcohol that may be purchased. There are 20 limited personal importation states: Alabama, Alaska, Connecticut, District of Columbia, Florida, Hawaii, Louisiana, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Vermont, and Wyoming. Third, there are 12 “reciprocity” states that allow a significant amount of direct shipments from out-of-state producers from states that grant out-of-state sellers the same privilege. These 12 states are California, Colorado, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia and Wisconsin.

In recent years, several new players have entered the alcoholic beverage industry. These groups include small wineries and breweries. With the advent of the Internet, they have been able to advertise their product nationally and have been able to widely expand their market access. Because they do not typically produce a large amount of their product, they sometimes depend on direct shipment sales for economic survival. Because most states do not allow unfettered direct alcohol sales and require producers to go through wholesalers, there is a problem of market access for small producers because their production volumes and consumer bases are too small for many wholesalers. That is, except for the limited quantities of alcohol that consumers can purchase directly in limited personal consumption states and alcohol available through direct shipping in reciprocity states, consumers cannot purchase alcohol from any source but state licensed retailers, and retailers cannot purchase from any source but state licensed wholesalers.

The proponents of H.R. 2031 point out that illegal direct shipping is a growing problem, including illegal sales to minors using the Internet to order alcohol. Over the last 2–3 years, several states, including Utah, Florida, and Missouri, have brought legal action against companies illegally shipping alcohol into their state. Neither the Twenty-First Amendment nor the Webb-Kenyon Act includes any criminal or civil penalties for violations of its provisions.

Thus, states wanting to bring an action against violators in federal court cannot obtain jurisdiction over the violators. For example, the State of Florida brought an action in federal court to enjoin the illegal shipment of alcohol into its borders but it was dismissed because the court held it would not imply a right of access to federal court where one was not explicitly stated in the statute. *Florida Department of Business Regulations v. Zachy's Wine and Liquor, Inc., et al.*, 125 F.3d 1399 (11th Cir. 1997), *cert denied*, 118 S.C. 1402, 140 L.Ed. 666 (1998).

Additionally, states which attempt to enforce their liquor laws against out-of-state companies in state courts may find that they do not have jurisdiction over the violators there either or have encountered great difficulty in asserting jurisdiction. In 1997, in *State of Florida v. Sam's Wines and Liquors*, a judge in the Circuit Court for the Second Judicial District in Florida dismissed a case for lack of personal and subject matter jurisdiction over the out-of-state violators of the state's liquor laws.

Confronted with the difficulty of enforcing their laws in court, several states are beginning to take an alternate route to solve the problem of illegally shipped alcohol. Eight states (Florida, Georgia, North Carolina, Kentucky, Tennessee, Indiana, Oklahoma and Maryland) have enacted statutes in the last two years making the illegal shipment of alcoholic beverages into their state a felony. These states have taken this hard-line position in an attempt to ensure that they will have jurisdiction over violators of their state liquor transportation laws. For example, the Utah Court of Appeals recently ruled that the state of Utah could assert jurisdiction in a criminal case against an Illinois company allegedly shipping beer to individuals in Utah in violation of Utah law. The court held that the state had personal jurisdiction over a criminal defendant if that defendant is present in court, that civil concepts of minimum contacts are not applicable in criminal cases, and that the Illinois company is subject to prosecution in Utah for conduct committed in Illinois because its conduct caused an unlawful result in Utah. *State v. Amoroso, Beer Across America*, Case No's 971002970 FS and 1002971 FS, First Amended Criminal Information, Utah Third District Court (Apr. 21, 1997) *reversed* Case No. 971712-CA (Utah Ct. App. Mar. 4, 1999).

If states cannot effectively enforce their laws against illegal interstate shipment of alcoholic beverages, they may also lose some ability to police sales to underage purchasers. Illegal direct shipments also deprive the state of the excise and sales tax revenue that would otherwise would be generated by a regulated sale. Additionally, if direct shippers violate state law, they exclude themselves from other state obligations such as submitting to quality control inspections of their products, licensing requirements, and complying with other statutory restrictions that apply to sellers of alcohol. Some states assert that if the Webb-Kenyon Act or the 21st Amendment or state laws regulating the sale of alcohol are to remain viable, there must be a new means to enforce those laws. If the states continue to lack an effective enforcement method, there will be continual disregard of state laws. In response to these concerns, H.R. 2031 was introduced in order to specifically provide states with access to federal court to enforce their laws regulating

interstate shipments of alcoholic beverages.<sup>1</sup> H.R. 2031 does not change any existing state law nor does it change existing case law interpreting the Commerce clause.

#### HEARINGS

No hearing was held on H.R. 2031 prior to the July 20, 1999 Judiciary Committee markup session.

#### COMMITTEE CONSIDERATION

On July 20, 1999, the Committee met in open session and ordered favorably reported the bill H.R. 2031, as amended, by voice vote, a quorum being present.

#### VOTES OF THE COMMITTEE

Mr. Gallegly and Ms. Lofgren offered an amendment in the nature of a substitute that (1) would have changed Section 2(b) to limit the types of state liquor importation or transportation laws that a state Attorney General could seek to enforce in federal court solely to state laws regarding the sale of intoxicating liquor to persons under the lawful drinking age; (2) offered a standard for a “proper showing” that an Attorney General must meet in order for the court to issue injunctive relief under this section; (3) deleted a subsection of H.R. 2031 allowing consolidation of the hearing for injunctive relief with a trial of the action on the merits; (4) deleted a subsection requiring any action under this section to be tried before the United States District Court Judge and not a jury; and (5) would have limited the venue in which actions under this section could be brought to districts where the person alleged to have violated state law had its principal place of business.

Mr. Scarborough offered a substitute amendment to the Gallegly/Lofgren amendment in the nature of a substitute which incorporates the Gallegly language defining requirements for a “proper showing,” deleting the consolidation subsection, and deleting the subsection denying a right to trial by jury. Mr. Scarborough’s substitute amendment also provides a new section containing a prospective effective date, but unlike the Gallegly substitute, it does not limit venue to the district where the alleged violator resides or limit the scope of actions under the bill solely to violations of state laws regarding the sale of alcoholic beverages to minors. Thus, under the Scarborough substitute, a state Attorney General can go into federal court to seek an injunction against any person they believe is violating *any* state law regulating the importation or transportation of intoxicating liquor.

<sup>1</sup>The federal government has jurisdiction, through Bureau of Alcohol, Tobacco and Firearms (ATF) enforcement of the Federal Alcohol Administration Act (“FAA Act,” 27 U.S.C. § 201 *et seq.*), to revoke the licenses of alcohol producers who are violating state direct shipment laws. The ATF is responsible for administering and enforcing the provisions of the FAA Act. The FAA Act requires a basic permit for those engaging in the business of importing distilled spirits, wine or malt beverages; the business of distilling spirits or producing wine; or the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages. 27 U.S.C. § 203. Breweries and retailers are not required to have a basic permit. These permits are conditioned upon compliance with the Twenty-First Amendment. 27 U.S.C. § 204(d). A violation of the Twenty-First Amendment, or the Webb-Kenyon Act (i.e., a violation of a state law regulating the importation or transportation of any intoxicating liquor), is grounds for the ATF to suspend or revoke the basic permit. 27 U.S.C. § 204(e).

Mr. Watt offered an amendment to the Scarborough substitute to the Gallegly/Lofgren amendment in the nature of a substitute to insert after “evidence” on page 3, line 20, the following “that there is no federal law which takes precedence over the applicable state law and . . . .” Thus, the text of the bill would read, “A proper showing under this paragraph shall require clear and convincing evidence that there is no federal law which takes precedence over the applicable state law and that a violation of State law as described in subsection (b) has taken place.” The amendment failed by a roll call vote of 12 yeas to 18 nays.

Mr. Nadler offered an amendment to the Scarborough substitute to the Gallegly/Lofgren amendment in the nature of a substitute to change language in Section 2(d)(1) of the Act to state that a United States District Court “may” issue an injunction or other order to restrain a violation of state law upon a proper showing by a state Attorney General. The Scarborough language had stated the District Court “shall” issue the injunction. The Nadler amendment was accepted by the Committee.

Ms. Lofgren offered an amendment to the Scarborough substitute to the Gallegly/Lofgren amendment in the nature of a substitute to limit the scope of the Act solely to enforcement of state laws in federal court “regarding the sale of intoxicating liquor to an individual who is not of lawful drinking age in such state.” This amendment essentially represented a scaled down version of the Gallegly/Lofgren substitute. This amendment failed by a roll call vote of 8 yeas to 22 nays.

The Scarborough substitute amendment was agreed to by a roll call vote of 22 yeas to 9 nays. The Gallegly/Lofgren amendment in the nature of a substitute as amended by the Scarborough substitute was adopted by a voice vote.

Lofgren Amendment to the Scarborough Substitute amendment to the Gallegly/Lofgren amendment in the nature of a substitute to H.R. 2031 to strike the words “regulating the importation or transportation of any intoxicating liquor,” on page 2 lines 14–15 and insert “regarding the sale of intoxicating liquor to an individual who is not of lawful drinking age in such state.” By a roll call vote of 8 yeas to 22 nays, the amendment was not agreed to.

## ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner .....		X	
Mr. McCollum .....		X	
Mr. Gekas .....		X	
Mr. Coble .....			
Mr. Smith (TX) .....			
Mr. Gallegly .....	X		
Mr. Canady .....		X	
Mr. Goodlatte .....		X	
Mr. Chabot .....		X	
Mr. Barr .....		X	
Mr. Jenkins .....			
Mr. Hutchinson .....		X	
Mr. Pease .....		X	
Mr. Cannon .....		X	
Mr. Rogan .....			

## ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Graham .....		X	
Ms. Bono .....		X	
Mr. Bachus .....			
Mr. Scarborough .....		X	
Mr. Vitter .....		X	
Mr. Conyers .....	X		
Mr. Frank .....		X	
Mr. Berman .....	X		
Mr. Boucher .....			
Mr. Nadler .....	X		
Mr. Scott .....		X	
Mr. Watt .....		X	
Ms. Lofgren .....	X		
Ms. Jackson Lee .....	X		
Ms. Waters .....	X		
Mr. Meehan .....		X	
Mr. Delahunt .....		X	
Mr. Wexler .....			
Mr. Rothman .....		X	
Mr. Baldwin .....		X	
Mr. Weiner .....	X		
Mr. Hyde, Chairman .....		X	
Total .....	8	22	

Watt amendment to the Scarborough substitute amendment to the Gallegly/Lofgren amendment in the nature of a substitute to H.R. 2031 to insert the following on page 3, line 20 after “evidence”, “That there is no federal law which takes precedence over the applicable state law.” By a roll call vote of 12 yeas to 18 nays, the amendment was not agreed to.

## ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Sensenbrenner .....		X	
Mr. McCollum .....		X	
Mr. Gekas .....		X	
Mr. Coble .....			
Mr. Smith (TX) .....			
Mr. Gallegly .....		X	
Mr. Canady .....		X	
Mr. Goodlatte .....		X	
Mr. Chabot .....		X	
Mr. Barr .....		X	
Mr. Jenkins .....		X	
Mr. Hutchinson .....		X	
Mr. Pease .....			
Mr. Cannon .....			
Mr. Rogan .....		X	
Mr. Graham .....		X	
Ms. Bono .....		X	
Mr. Bachus .....		X	
Mr. Scarborough .....		X	
Mr. Vitter .....		X	
Mr. Conyers .....		X	
Mr. Frank .....	X		
Mr. Berman .....	X		
Mr. Boucher .....			
Mr. Nadler .....	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....	X		
Ms. Jackson Lee .....	X		
Ms. Waters .....	X		
Mr. Meehan .....			
Mr. Delahunt .....	X		
Mr. Wexler .....			
Mr. Rothman .....	X		
Mr. Baldwin .....	X		
Mr. Weiner .....	X		
Mr. Hyde, Chairman .....		X	
Total .....	12	18	

Scarborough substitute amendment, as amended, to the Gallegly/Lofgren amendment in the nature of a substitute to H.R. 2031. By a roll call vote of 22 yeas to 9 nays, the amendment was agreed to.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Sensenbrenner .....	X		
Mr. McCollum .....	X		
Mr. Gekas .....		X	
Mr. Coble .....			
Mr. Smith (TX) .....			
Mr. Gallegly .....		X	
Mr. Canady .....	X		
Mr. Goodlatte .....	X		
Mr. Chabot .....	X		
Mr. Barr .....	X		
Mr. Jenkins .....	X		
Mr. Hutchinson .....	X		
Mr. Pease .....			
Mr. Cannon .....			
Mr. Rogan .....	X		
Mr. Graham .....	X		
Ms. Bono .....	X		
Mr. Bachus .....	X		
Mr. Scarborough .....	X		
Mr. Vitter .....	X		
Mr. Conyers .....		X	
Mr. Frank .....	X		
Mr. Berman .....		X	
Mr. Boucher .....			
Mr. Nadler .....		X	
Mr. Scott .....	X		
Mr. Watt .....	X		
Ms. Lofgren .....		X	
Ms. Jackson Lee .....		X	
Ms. Waters .....		X	
Mr. Meehan .....	X		
Mr. Delahunt .....	X		
Mr. Wexler .....			
Mr. Rothman .....	X		
Mr. Baldwin .....	X		
Mr. Weiner .....		X	
Mr. Hyde, Chairman .....	X		

## ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Total .....	22	9	.....

## COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

## COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2031, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 26, 1999.*

Hon. HENRY J. HYDE, *Chairman,*  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2031, the Twenty-First Amendment Enforcement Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz (for federal costs), who can be reached at 226-2860, and Lisa Cash Driskill (for the state and local impact), who can be reached at 225-3220.

Sincerely,

DAN L. CRIPPEN, *Director.*

*H.R. 2031—Twenty-First Amendment Enforcement Act.*

CBO estimates that implementing H.R. 2031 would cost less than \$500,000 annually, subject to the availability of appropriated funds. Because enactment of the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. H.R.

2031 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

H.R. 2031 would permit a state to bring a civil action in U.S. district court to obtain an injunction against an entity that has violated a state law relating to the interstate transportation of intoxicating liquor. Implementing this bill would increase costs to federal courts to the extent that states would seek federal jurisdiction in such cases. CBO estimates that any increase in federal costs for court proceedings would be less than \$500,000 a year because of the relatively small number of cases expected and the short period of time required to adjudicate most cases. Any such additional costs would be subject to the availability of appropriated funds.

State tax revenues would increase if civil actions under the bill result in a shift to more legal sales of alcohol, which would be taxable. CBO has no basis for reliably estimating the magnitude of any such increases.

The CBO staff contacts for this estimate are Mark Grabowicz (for federal costs), who can be reached at 226–2860, and Lisa Cash Driskill (for the state and local impact), who can be reached at 225–3220. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

#### CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article III, section 1 of the Constitution.

#### SECTION-BY-SECTION ANALYSIS

*Section 1.* This section provides that the title of the Act is the “Twenty-First Amendment Enforcement Act.”

*Section 2.* This section notes that the Act is amending the “Webb-Kenyon Act,” first enacted in 1913 and reenacted in 1935 after ratification of the 21st amendment. The Webb-Kenyon Act divests alcoholic beverages of their interstate character and prohibits the interstate shipment of these products in violation of state law.

Section 2(b) grants authority to the Attorney General of any state, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States to bring a civil action in United States District Court to seek injunctive relief (including a preliminary or permanent injunction or other order) against any person or entity that the Attorney General has reasonable cause to believe is engaged in any act that would constitute a violation of a state law regulating the importation or transportation of any intoxicating liquor. The Attorney General can seek the injunctive relief to (1) restrain the person from engaging, or continuing to engage, in the violation of the state law and (2) enforce compliance with the state law.

Section 2(c) provides jurisdiction to the District Courts of the United States over any action brought under this section and delineates that venue may be established in accordance with section 1391 of title 28, United States Code, or in the district in which the recipient of the intoxicating liquor resides or is found. Thus, if a

state Attorney General is asserting that an out-of-state company has shipped alcohol illegally to an individual or entity within their state, they can seek injunctive relief in the United States District Court serving the area within their state where the alleged illegal shipment was received.

Section 2(d) states that a preliminary or permanent injunction or other order may be issued by the Federal District Court if the Attorney General makes a “proper showing” that a state law regulating the importation or transportation of an intoxicating liquor has been violated. A proper showing under this section requires the state Attorney General to show clear and convincing evidence that a state law as described in this section has been violated, evidence demonstrating the probability of irreparable injury if injunctive relief is not granted, and evidence supporting probability of success on the merits. These requirements are based on rule 65 of the Federal Rules of Civil Procedure and case law interpreting rule 65.

Section 2(d)(2) states that no preliminary injunction or permanent injunction may be issued without notice to the adverse party and an opportunity for a hearing. Section 2(d)(3) provides that any preliminary or permanent injunction or other order entered in an action brought under this section must set forth the reasons for the issuance of the order, be specific in its terms, describe in reasonable detail the act or acts sought to be restrained, and it must be binding upon the parties to the action (and the officers, agents, employees, and attorneys of those parties) and persons in active concert or participation with the parties to the action who receive actual notice of the order by personal service or otherwise.

Section 2(e) provides that a remedy under this section is in addition to any other remedies provided by law and that nothing in this section may be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any State law.

*Section 3.* This section provides that the amendment made by this Act shall apply only with respect to the importation or transportation of any intoxicating liquor occurring after (1) October 31, 1999, or the expiration of the 90-day period beginning on the date of the enactment of this Act, whatever is earlier, if this Act is enacted before November 1, 1999; or (2) the date of the enactment of this Act if this Act is enacted after October 31, 1999.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

**ACT OF MARCH 1, 1913**

(Commonly known as the Webb-Kenyon Act)

**CHAP. 90.**—An Act Divesting intoxicating liquors of their interstate character in certain cases.

\* \* \* \* \*

**SEC. 2. INJUNCTIVE RELIEF IN FEDERAL DISTRICT COURT.**(a) **DEFINITIONS.**—*In this section—*(1) *the term “attorney general” means the attorney general or other chief law enforcement officer of a State, or the designee thereof;*(2) *the term “intoxicating liquor” means any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind;*(3) *the term “person” means any individual and any partnership, corporation, company, firm, society, association, joint stock company, trust, or other entity capable of holding a legal or beneficial interest in property, but does not include a State or agency thereof; and*(4) *the term “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.*(b) **ACTION BY STATE ATTORNEY GENERAL.**—*If the attorney general has reasonable cause to believe that a person is engaged in, or has engaged in, any act that would constitute a violation of a State law regulating the importation or transportation of any intoxicating liquor, the attorney general may bring a civil action in accordance with this section for injunctive relief (including a preliminary or permanent injunction or other order) against the person, as the attorney general determines to be necessary to—*(1) *restrain the person from engaging, or continuing to engage, in the violation; and*(2) *enforce compliance with the State law.*(c) **FEDERAL JURISDICTION.**—(1) **IN GENERAL.**—*The district courts of the United States shall have jurisdiction over any action brought under this section by an attorney general against any person, except one licensed or otherwise authorized to produce, sell, or store intoxicating liquor in such State.*(2) **VENUE.**—*An action under this section may be brought only in accordance with section 1391 of title 28, United States Code, or in the district in which the recipient of the intoxicating liquor resides or is found.*(d) **REQUIREMENTS FOR INJUNCTIONS AND ORDERS.**—(1) **IN GENERAL.**—*In any action brought under this section, upon a proper showing by the attorney general of the State, the court may issue a preliminary or permanent injunction or other order to restrain a violation of this section. A proper showing under this paragraph shall require clear and convincing evidence that a violation of State law as described in subsection (b) has taken place. In addition, no temporary restraining order or preliminary injunction may be granted except upon—*

(A) *evidence demonstrating the probability of irreparable injury if injunctive relief is not granted; and*

(B) *evidence supporting the probability of success on the merits.*

(2) *NOTICE.—No preliminary injunction or permanent injunction or other order may be issued under paragraph (1) without notice to the adverse party and an opportunity for a hearing.*

(3) *FORM AND SCOPE OF ORDER.—Any preliminary or permanent injunction or other order entered in an action brought under this section shall—*

(A) *set forth the reasons for the issuance of the order;*

(B) *be specific in its terms;*

(C) *describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained;*

(D) *be binding upon—*

(i) *the parties to the action and the officers, agents, employees, and attorneys of those parties; and*

(ii) *persons in active concert or participation with the parties to the action who receive actual notice of the order by personal service or otherwise.*

(e) *ADDITIONAL REMEDIES.—*

(1) *IN GENERAL.—A remedy under this section is in addition to any other remedies provided by law.*

(2) *STATE COURT PROCEEDINGS.—Nothing in this section may be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any State law.*

#### ADDITIONAL VIEWS OF HON. JOE SCARBOROUGH

The 21st Amendment Enforcement Act is not about regulating e-commerce or the Internet. In fact the word "Internet" is not even mentioned in the text of the legislation. This bill does not interfere with shipments of alcohol that comply with state law—regardless of how they are ordered—in a corner liquor or wine store, through catalogues or on the Internet. This bill creates no Internet commerce policy nor does it change the state's or the federal government's alcohol policy. Most importantly this bill does not open the door for the taxation of e-commerce or the Internet. There are several companies fulfilling consumer orders of alcohol legally on the Internet and they should be applauded. And their illegal competitors should be shut down through proper enforcement.

Some have argued that this is simply an intra-industry fight. This is not the case. It is a fight between those who comply with state law and some individuals who do not. Nor is this a fight between those who favor direct shipping and those who oppose it. Instead, it is a fight between those attempting to enforce state law and those individuals who are violating state law.

This bill offers a comprehensive solution that bolsters state laws that already are on the books. It does not propose anything new. Many of those who are currently breaking the law are doing so even though they have been notified by the states that they are breaking the law.

This legislation is necessary to reinforce a decision made decades ago by the American people to prevent underage access to alcohol, to carefully control the sale and distribution of alcohol beverages and to license and regulate those who sell these products. These laws are designed to prevent illegal sales to minors and to respect the will of the people regarding such regulations as dry counties.

Unfortunately, a state's ability to exercise these controls is being undermined by vintners, retailers and third-party marketers who are shipping alcoholic beverages direct to consumers in defiance of state laws using orders through telephone, catalogues and the Internet.

This narrowly focused bill will ensure that states have the course of action they need to enforce their alcohol control laws against out-of-state companies, many of whom have shown no interest in preventing sales of alcohol to minors. It would make clear that states have the right, under the Webb-Kenyon Act, to use the federal courts to enforce their laws against individuals who are illegally shipping alcohol products into the state from another jurisdiction.

H.R. 2031 provides an effective, comprehensive solution without interfering with state law, the operation of the Internet, or legal mass marketing technology. Congress must act now and ensure that the laws regulating the interstate shipment of alcohol are not rendered meaningless.

JOE SCARBOROUGH.

## DISSENTING VIEWS

We dissent from the Twenty-First Amendment Enforcement Act, H.R. 2031, because it does not address the problem of underage drinking, it reinforces anti-competitive practices in the alcohol industry and may violate the Commerce Clause, and it places burdensome regulations on the Internet. We dissent because we had a quite effective alternative that does address the problem of underage drinking. We also dissent because there is no need to enlarge unnecessarily the jurisdiction of the federal courts where—as here—state attorneys general are able to enforce their state laws in their own state courts. H.R. 2031 is not supported by Mothers Against Drunk Driving and is also opposed by the American Vintners Association, the Wine Institute, the Electronic Commerce Association, the Association for Interactive Media, and Americans for Tax Reform.

### *I. Background on Twenty-first Amendment, the Webb-Kenyon Act, and State Alcohol Distribution*

Although the legislation is characterized by its proponents as necessary to enforce the Twenty-first Amendment to the United States Constitution, close scrutiny of that Amendment and its enabling legislation reveals the fallacy of that argument. The Twenty-first Amendment ended prohibition in this country and granted States and Territories broad powers to pass laws regulating the importation and transportation of alcohol into their borders.<sup>1</sup> The Webb-Kenyon Act, 27 U.S.C. §122, is an enabling statute to the Twenty-first Amendment, and it prohibits the shipment or transportation of liquor into a state if it is intended to be received, possessed, sold, or otherwise used in violation of the law of the receiving state.<sup>2</sup>

Under the authority of the Twenty-first Amendment and the Webb-Kenyon Act, states are permitted to regulate the distribution and sale of alcoholic beverages (i.e., distilled spirits, wine, and beer) within their borders. Most states' regulations employ the so-

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<sup>1</sup>The Twenty-first Amendment states, in relevant part, "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." U.S. Const. amend. XXI, §2.

<sup>2</sup>The Webb-Kenyon Act states,

The shipment or transportation, in any manner or by any means whatsoever, of any spiritous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spiritous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

called “three-tier system” of alcohol distribution. Under this system, states require alcohol producers to sell their products to state-licensed wholesalers, who in turn sell the alcohol to retailers, who alone are permitted to sell the alcohol to consumers. While some states have enacted laws to prohibit the direct shipment of alcoholic beverages into their borders, most states permit out-of-state producers to directly ship at least limited amounts of alcohol into the state. Significantly, there is nothing in either the Twenty-first Amendment or the Webb-Kenyon Act which mandates that enforcement of these laws occur through the federal courts.

Recently, several new players have entered the alcoholic beverage industry: small- to medium-sized wineries and microbreweries. With the advent of Internet commerce, these alcohol producers have been able to access a market that might otherwise have been closed to them. Through the Internet as well as mail-order catalogues, these producers have been able to advertise their products nationally and expand their market share. Because these small- to medium-sized producers typically do not produce a large amount of their product, they often depend on direct shipment sales for economic survival.

As the market for Internet and mail-order sales of alcohol has grown, some have expressed concerns about these direct marketing strategies. They argue that Internet sales of alcohol will increase underage drinking because of the absence of a face-to-face purchase. They also argue these sales techniques violate state laws that require people to purchase alcohol only from a licensed entity, and that states are unable to enforce these laws in state court because they have difficulty obtaining jurisdiction over out-of-state defendants. Because we are reluctant to interfere in a developing market on behalf of any of the competitors, we dissent.

## *II. H.R. 2031 Does Not Address the Problem of Underage Drinking*

Proponents of H.R. 2031 argue that the legislation will help crack down on businesses that sell alcohol to minors over the Internet or via mail-order. There is some anecdotal evidence that minors have successfully been able to order alcohol over the Internet. It is far from clear, however, that this is a widespread problem. What is the likelihood that a minor will be able to obtain a credit card and order wine or beer over the Internet or through mail-order, only to wait 3–5 days to have the product shipped—all without any knowledge by their parents?<sup>3</sup> We know that, unfortunately, young people are already able to obtain alcohol illegally at the corner liquor store in far too many circumstances. There is no systematic evidence that the problem of underage access to alcohol is more severe over the Internet. In California, telephone- and mail-ordered wine deliveries have been legal since 1963, but law enforcement

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<sup>3</sup> One commentator wryly noted, “Wholesalers have very successfully raised harrowing visions of minors receiving crates of mail-order merlot. No doubt that’s what teens do. They make credit card purchases of rare vintages from obscure wineries thousands of miles away and then wait for three days so they can go binge with their pals.” Editorial, *Booze Busters*, *Wall St. J.*, Sept. 26, 1997.

agencies say that this does not pose an enforcement problem for them.<sup>4</sup>

Nevertheless, to the extent that businesses illegally sell alcohol to minors over the Internet and via mail-order, it is a problem that should be addressed. Tellingly, H.R. 2031 does not target this problem specifically. Rather than focusing on the problem of youth access to alcohol, the legislation's overbroad scope permits state attorneys general to come into federal court to enforce *any state law* pertaining to the importation and transportation of alcohol. Because H.R. 2031 does not directly address underage drinking, Mothers Against Drunk Driving ("MADD") refused to endorse the Senate counterpart to H.R. 2031. MADD concluded that the legislation "has implications far beyond [MADD's] concerns and is, in fact, a battle between various elements within the alcoholic beverages industry."<sup>5</sup>

Representatives Gallegly and Lofgren introduced a bipartisan substitute to H.R. 2031 that would have directly targeted the problem of underage drinking by permitting state attorneys general to come into federal court for the purpose of enforcing state laws regarding the sale of liquor to minors. This substitute was defeated, however. If the purpose of H.R. 2031 truly was to crack down on underage drinking, the Gallegly/Lofgren substitute—with its narrowly tailored provisions—would have carried the day.

### *III. H.R. 2031 May Violate the Commerce Clause and Can Aggravate Anti-Competitive Effects of State Importation and Transportation Laws*

This legislation may violate the Commerce Clause of the United States Constitution and can aggravate the anti-competitive effects of state importation and transportation laws. States' direct shipment laws generally fall into three categories. In one category are "reciprocity" laws<sup>6</sup> that allow direct shipments from out-of-state producers whose states grant out-of-state sellers the same privilege. The second category, "limited personal importation" laws, permit in-state consumers to purchase alcoholic beverages directly from out-of-state, but only for personal consumption and only for limited volumes of alcohol.<sup>7</sup> Finally, there are "express prohibition" laws that expressly outlaw direct shipments from other states and instead require that all alcohol producers sell through specified wholesalers and distributors.<sup>8</sup>

It is possible that some of these state policies may adversely affect out-of-state sellers in violation of the Commerce Clause of the

<sup>4</sup> Letter from Manuel R. Espinoza, Chief Deputy Director of California Dept. of Alcoholic Beverage Control, to Representative Mike Thompson and Representative George Radanovich, March 3, 1999.

<sup>5</sup> Letter from Karolyn V. Nunnallee, MADD National President, to Senator Diane Feinstein, May 13, 1999.

<sup>6</sup> There are currently 12 reciprocity states: California, Colorado, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin.

<sup>7</sup> There are currently 20 limited personal importation jurisdictions: Alabama, Alaska, Connecticut, District of Columbia, Florida, Hawaii, Louisiana, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Vermont, and Wyoming.

<sup>8</sup> There are currently 19 express prohibition states: Arizona, Arkansas, Delaware, Georgia, Indiana, Kansas, Kentucky, Maine, Maryland, Mississippi, Montana, New York, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Utah, and Virginia. Because "express prohibition" states require the use of wholesalers and distributors, some argue that the wholesalers and distributors in such states have a state-sanctioned monopoly over the alcohol market.

U.S. Constitution.<sup>9</sup> The Majority has argued that the Twenty-First Amendment renders the Commerce Clause null and void with respect to the state regulation of alcohol. It is uncontroverted, however, that the Supreme Court has clearly held that protectionist state alcohol laws are outside the scope of the Twenty-First Amendment and violate the Commerce Clause.

Thus, for example, in 1984 the Supreme Court in *Bacchus Imports v. Dias*<sup>10</sup> held that a state law which imposed an excise tax on sales of liquor but exempted certain locally produced alcoholic beverages violated the Commerce Clause. The Court concluded that this state legislative scheme was clearly discriminatory legislation and constituted “economic protectionism.” The Court noted that “one thing is certain: The central purpose of the [Twenty-First Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.” The Court held that the state’s law was not designed to promote temperance but was “mere economic protectionism.” The Court has adopted this line of reasoning in striking down numerous other state liquor laws.<sup>11</sup>

In addition to possibly violating the Commerce Clause, some people argue that the state “express prohibition” systems create anti-competitive market effects by limiting the outlets for alcohol sale and distribution.<sup>12</sup> It is not Congress’s role to further entrench this system by providing a federal forum (*i.e.* federal courts) to strengthen their reach by allowing state attorneys general to avail themselves of the broader jurisdiction of the federal courts and, therefore, bring more cases to enforce these state laws. In this regard, we are concerned that the bill is “special interest” legislation,

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<sup>9</sup>The Commerce Clause of the Constitution states that “(t)he Congress shall have power . . . To regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 1, 3. This clause has been read to include a negative corollary: the states may not pass laws which burden interstate commerce.

<sup>10</sup>468 U.S. 263 (1984).

<sup>11</sup>*See, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (relying on *Bacchus*); *Healy v. Beer Institute*, 491 U.S. 324 (1989) (relying on *Brown-Forman*). See also *Capital Cities Cable v. Crisp* (holding that a state statute which banned the transmission of out of state alcoholic beverage commercials by cable television stations in the state violated the Commerce Clause and was outside of the state’s Twenty-First Amendment power); *California Retail Liquor Dealers Ass’n v. Medcal Aluminum* 445 U.S. 97 (1980) (holding that a state wine pricing system violated Sherman Antitrust Act and noting that the “Federal Government retains some Commerce Clause authority over liquor”); *Hostetter v. Idlewild Bon Voyage*, 377 U.S. 324, (1968) (holding that the Commerce Clause prohibited the State of New York from interfering with the sale of alcohol to departing international airline travelers at a New York airport and that the argument that the Twenty-First amendment trumps the Commerce Clause where states regulate alcohol is “patently bizarre,” “an absurd oversimplification,” and “demonstrably incorrect”). See also Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 Va. L. Rev. 353, 372–377 (1999) (hereinafter “Shanker article”).

<sup>12</sup>Moreover, some argue that the consolidation of wholesalers and distributors has further exacerbated anti-competitive effects. Shanker article at 362. Since 1950, for example, the number of national wholesalers has declined from 5,000 to about 250. Chris Knap, *Wine Wars*, Orange County Register, October 23, 1997, at C07 (hereinafter “Knap article”). Twenty wholesalers now control the \$22 billion U.S. liquor wholesaling market, handling 52% of the business. *Id.* Some believe that the decreasing number of distributors has disadvantaged consumers by limiting consumer choice and creating artificially high prices. Knap article; Shanker article. Because the wholesalers sometimes refuse to distribute low-volume, premium wines, some small wine makers rely on direct shipment. In California, for example, the largest 25 brands ship 90 percent of the 400 million gallons exported from the state, while 350 small producers, who make fewer than 5,000 cases for wine each year, struggle to find legal channels to market their products. Knap article.

which may grant an advantage to one business sector over another.<sup>13</sup> We do not want to use the federal courts for this purpose.

*IV. H.R. 2031 Would Represent the First Congressional Regulation of Internet Commerce and Encourage the Imposition of Internet Taxes*

Internet commerce has opened new doors of opportunity for entrepreneurs around this country, as well as provided consumers with a vast new array of choices in goods and services. With the expansion of commerce over the Internet comes the added benefit of greater competition—which leads to lower prices for consumers.

We do not want to burden Internet commerce unnecessarily. Nor do we want to hinder other types of commercial transactions that permit direct contact between producers and consumers. The best marketplace is one that promotes robust competition. Therefore, we want to encourage new entrants to the market—not erect barriers blocking them.

Although the Majority purports to disdain regulation—especially as it pertains to commercial transactions over the Internet—H.R. 2031 actually hinders Internet commerce. The legislation selectively opens up the federal courts to state attorney general actions against small- and medium-sized alcohol manufacturers who sell alcohol over the Internet and who ship their products directly to consumers, without limiting the application of the law to the narrowly proclaimed purpose of curtailing underage drinking. As the Electronic Commerce Association recognized, “The legislation prevents small businesses, including web-based merchants and wineries, from utilizing the [I]nternet as a sales tool while providing no practical remedy for the problems that allegedly exist.”<sup>14</sup>

Arguably, small vineyards, wineries, and microbreweries may not be able to distribute their products through ordinary channels because large wholesalers will not carry their small lots of merchandise. Thus, small businesspeople may utilize and depend upon the Internet to provide their products to customers. Without access to the direct marketing that the Internet enables, small alcohol producers would be forced to rely on local—mostly tourist—sales for revenue. The Internet has provided new markets for these producers, and now, if this bill becomes law, that market may be eliminated. By encouraging legal action against those who would use the Internet to sell their products, H.R. 2031 constitutes the regulation of Internet commerce—plain and simple.

Furthermore, although the Majority claims to be the party of lower taxes, the legislation encourages the taxation of alcohol purchased over the Internet. This is because it will empower state attorneys general to use federal courts to enforce their state sales tax laws against Internet alcohol sales—a power no other industry is subject to. In this regard, the legislation is totally inconsistent with the passage in the 105th Congress of the “Internet Tax Freedom Act,” which places a 3-year moratorium on multiple or discrimina-

<sup>13</sup> In California, the Wine and Spirits Wholesaler’s Association of California and the California Beer and Wine Wholesaler’s Association have contributed \$1.2 million to state politicians and campaigns in the past ten years. Shanker article.

<sup>14</sup> Electronic Commerce Association, News Release, June 15, 1999.

tory taxes on electronic commerce, and expressed the sense of Congress that the Internet should be free of new federal taxes.

In addition to making it easier to enforce state alcohol control laws banning distribution by mail and sales taxes, the legislation raises the ominous specter of even more intrusive regulation of the Internet. For example, H.R. 2031 would appear to sanction future state laws that create on-line service liability for direct alcohol sales or that mandate blocking software on all web browsers, even if the state laws do not go this far yet. Since H.R. 2031 has no limitation on the scope or date of alcohol control laws, the bill could easily permit federal court enforcement of these state Internet regulations.

*V. The Majority's Position Against the Direct Shipment of Alcohol is Contradicted by Its Previous Support for the Direct Shipment of Firearms*

It is ironic that the Majority does not demonstrate the same concern for the dangers of interstate shipment of firearms as it claims to have about the interstate shipment of alcohol. One winery owner recently commented that "[t]hese days you can buy an AK-47 through the mail easier than a bottle of wine."<sup>15</sup> While this is an incorrect interpretation of current law,<sup>16</sup> it is an unintentionally prescient observation. If this bill and the Majority's recent gun show bill (H.R. 2122)<sup>17</sup> became law, it would indeed be the case that a gun could be more easily obtained than alcohol through the mail.

While the Majority has focused on the dangers of Internet alcohol sales, Internet sales of firearms, which evade state and federal gun safety laws, are an increasing concern. Websites offer a number of unsafe weapons for sale, including high capacity ammunition clips and semi-automatic assault weapons. Indeed, one such site, "Guns Unlimited," describes itself as a "virtual gun show."<sup>18</sup> Yet, when Representative Lofgren offered an amendment to extend this bill's prohibitions on interstate shipment to firearms, the Majority asserted a procedural point of order against her amendment that prevented its consideration by the Committee.

Even more puzzling, in arguing for this bill, the Majority has cited the need to use licensed state wholesalers as conduits in interstate shipments of alcohol in order to assure adherence to state alcohol regulations and child safety. Yet, just one month ago, the Majority found these concerns unpersuasive with respect to guns. Current federal law prohibits the direct interstate shipment of firearms and instead requires the use of federally-licensed firearms dealers as conduits.<sup>19</sup> Among the reasons for this law are the need to ensure compliance with state gun safety laws and the need to protect children from misdelivered shipments. However, Representative McCollum, Chairman of the Crime Subcommittee, re-

<sup>15</sup> Knap article.

<sup>16</sup> Current federal law prohibits the interstate direct shipment of firearms and instead requires that firearms be shipped through licensed firearm dealers. 18 U.S.C. § 922 (1998).

<sup>17</sup> H.R. 2122 would have generally required that some unlicensed firearm dealers conduct criminal background checks of gun purchasers at events where 10 or more "firearm vendors" are selling guns and 50 or more firearms are offered for sale.

<sup>18</sup> <http://guns-unlimited.com/>

<sup>19</sup> 18 U.S.C. § 922 (1998).

cently introduced H.R. 2122, the “Mandatory Gun Show Background Check Act,” which would have permitted the direct interstate shipment of a firearm for the first time since Congress outlawed such shipments in the wake of Lee Harvey Oswald’s assassination of President John F. Kennedy with a mail order rifle.<sup>20</sup>

VI. *H.R. 2031 Is Unnecessarily Overbroad Because State Attorneys General Can Bring Enforcement Actions in State Courts*

As stated, we have suggested a narrow remedy to the presumed problem of underage drinking, the Gallegly/Lofgren substitute. H.R. 2031 is not only unwise in its overbreadth, however, it is also unnecessary because state attorneys general can otherwise bring actions to enforce their state alcohol laws *in state court*. In fact, state courts are the traditional and proper forum in which to enforce state laws.

Proponents of H.R. 2031 argue that state attorneys general are having difficulty enforcing their laws in their own state courts because states are sometimes unable to obtain personal jurisdiction over out-of-state defendants.<sup>21</sup> To the extent that this is true—and it is unclear how widespread this problem is—difficulties in obtaining jurisdiction can be addressed by several legal mechanisms *on the state level*, rather than by further overburdening the federal courts by this overbroad grant of jurisdictional authority.

By way of background, it is important to recognize that—consistent with constitutional due process requirements—states obtain jurisdiction over out-of-state defendants by virtue of their own “long arm” statutes. These long arm statutes vary from state to state, and some are broader than others. For example, whereas some state long arm statutes contain a list of activities that would subject an out-of-state party to jurisdiction in that state’s courts,<sup>22</sup> other states permit their long arm jurisdiction to be co-extensive with the due process limits of the Constitution.<sup>23</sup>

The Supreme Court has held that constitutional due process requirements for personal jurisdiction are met where a party has “minimum contacts” with a state and the assertion of jurisdiction comports with “traditional notions of fair play and substantial justice.”<sup>24</sup> Minimum contacts are established where the party “purposefully avails” itself of the privilege of conducting business within a state.<sup>25</sup> In *Burger King Corp. v. Rudzewicz*, the Supreme Court recognized that

it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which

<sup>20</sup> Fortunately, on June 18, 1999, the House rejected this misguided proposal by a vote of 147 to 280. House Roll Call #244, 106th Congress.

<sup>21</sup> See *Florida Dep’t of Bus. Regulation v. Sam’s Wines & Liquors* (Fla. Cir. Ct. Sept. 3, 1997).

<sup>22</sup> For example, Florida, Illinois, Michigan, New York, and Texas.

<sup>23</sup> For example, California, New Jersey, Oklahoma, Rhode Island, and Wyoming. California’s statute states, “A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” Cal. Civ. Proc. Code § 410.10 (West 1999).

<sup>24</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations and internal quotations omitted). See, e.g., *Asahi Metal Indus. v. Superior Ct. of Calif., Solano County*, 480 U.S. 102, 111–13 (1986); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–76 (1985).

<sup>25</sup> *Asahi*, 480 U.S. at 112; *Burger King*, 471 U.S. at 475; *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

471 U.S. 462, 476 (1985).

Based on the Supreme Court's pronouncements on jurisdiction, it is unlikely that a state's assertion of personal jurisdiction over an alcohol producer who markets, sells, and ships alcohol into that state would be found to violate the Constitution. Nevertheless, if a state's long arm statute is too narrowly drawn, this conduct may not be sufficient to establish personal jurisdiction over the alcohol producer in that state—regardless of the constitutionality of such assertion of jurisdiction.

For example, Florida's long arm statute extends personal jurisdiction over out-of-state persons who are "[o]perating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state."<sup>26</sup> An out-of-state alcohol producer who merely ships alcohol into Florida may not satisfy that statutory requirement and, hence, may not be subject to personal jurisdiction in Florida. By comparison, that same alcohol producer would likely be subject to personal jurisdiction in New York under that State's long arm statute, because it permits the exercise of personal jurisdiction over a party that "transacts any business within the state or contracts anywhere to supply goods or services in the state."<sup>27</sup>

If there are not sufficient contacts to enable a state attorney general to obtain jurisdiction over an out-of-state producer, it is only because that state has determined that a higher threshold of contact is needed as a prerequisite to the exercise jurisdiction. In other words, if a state attorney general cannot obtain personal jurisdiction over an out-of-state alcohol producer, it is the result of *that state's own laws*. There is no constitutional impediment to the assertion of jurisdiction—the state's long arm statute is simply not broad enough to encompass the producer's conduct. Thus, the problem does not appear to be an issue for the federal government to address. Rather, it is purely a problem of state law that can and should be addressed at the state level.<sup>28</sup>

### *Conclusion*

We are concerned about underage drinking in this country and supported an alternative—the Gallegly/Lofgren substitute—that addressed that problem. We should not address this problem with overbroad legislation that opens up the federal courts to a multitude of unnecessary actions by state attorneys general. Before we permit state attorneys general to pursue state causes of action in

<sup>26</sup> Fla. Stat. Ann. § 48.193 (West 1999).

<sup>27</sup> N.Y. Civ. Prac. Law § 302 (McKinney 1999).

<sup>28</sup> If we open the federal courts to state enforcement actions here, this may set a precedent for further expansion of federal court jurisdiction, whenever a state has difficulty enforcing its own laws because of jurisdictional impediments. For example, the same personal jurisdiction argument could be made with respect to a state's enforcement of its own consumer protection statute, where the state attempts to regulate a product shipped into the state from another state. Rather than reforming that state's long arm jurisdiction, there may be an attempt to permit states to enforce those claims in federal court, as well.

federal court, we should ensure that this grant of jurisdiction is necessary and does not reinforce anti-competitive regulations. There is a better way to crack down on illegal underage drinking while maintaining a free and open marketplace. We proposed that alternative. H.R. 2031 goes too far beyond our substitute and common sense and should be rejected.

JOHN CONYERS, Jr.  
HOWARD L. BERMAN.  
JERROLD NADLER.  
ZOE LOFGREN.  
ANTHONY D. WEINER.

