10-1979

California Retail Liquor Dealers Assn. v. Midcal

Lewis F. Powell Jr.

Discuss
I could join 3
to grant

js 8-24-79

Another case in which a court chips away at the "state action" exemption to the Sherman Act articulated in Parker v Brown.
I joined P.S. in her dissent in Cantor v Detroit Edison.
Here state action was more explicit than in Cantor, & the decision in dissent to reconcile with Parker

PRELIMINARY MEMORANDUM

Summer List 23, Sheet 1 — Cert to Cal. Ct. App.
No. 79-97 — (Reynoso; Puglia, Evans, conc.)

California Retail Liquor Dealers Association

v.

Midcal Aluminum — State/Civil — Timely

1. SUMMARY. Petr contends that California courts wrongly held that a "state-sanctioned resale price maintenance scheme for wine" (1) does not fall within the state action exemption to the Sherman Act, and (2) is not protected by the Twenty-First Amendment.

Justice Stewart's dissent in Cantor, in which you joined, suggested that private activity "required" by the state falls within the state action exemption. This opinion seems ~~good~~ of Justice Stewart's Cantor dissent. You may wish to place it on the discuss list. -Jon

2. FACTS AND HOLDING BELOW. California law prohibits the sale of wine from licenses to retailers at a price different from the price contained in a posted price schedule or in a fair trade contract. Calfironia law also prohibits the sale of wine to consumers at a price below the price set in a price schedule or in a fair trade contract. Cal. Bus. & Prof. Code, Div. 9, Chap. II §§ 24682, 24866. Resp sold a retailer 27 cases of Gallo wine at a price less than the posted price schedule, and sold other wine to retailers without the existence of a fair trade contract. The state Department of Alchoholic Beverage Control alleged that resp had violated state law and sought a suspension of resp's license or imposition of a monetary penalty.

The state court of appeal declared the state regulations to be violative of the Sherman Act, and stated that the state's authority to regulate alchoholic beverages under the Twenty-First Amendment was insufficient to support the regulation. The Twenty-First Amendment provides in part that "[t]he transportation of 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 court based both of its holdings upon the state supreme court decision in Rice v. Alchoholic Beverage Control Appeals Board.

In Rice the court declared that similar state regulations controlling the sale of distilled spirits were invalid under federal law. The court found that the retail price maintenance operation was an invalid restraint of trade pursuant to the Sherman Act, a point not contested by petr. The court further found that the regulations

could not be sustained under the state action exemption established in Parker v. Brown, 317 U.S. 341 (1943). See Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia, 421 U.S. 773 (1975). The court noted that in Parker and Bates state action immunized conduct that otherwise would have violated the Sherman Act. In Parker the state adopted a plan to regulate the sale of raisins. The plan allowed a given number of producers in a geographical area to petition for establishment of a marketing plan. If a satate commission approved formulation of a plan, then a committee of producers set a price. If the commission approved or modified the plan, it would be effective upon the approval of the area producers. In Bates a rule of the Arizona Supreme Court prohibiting attorneys from advertising was held to be within the state action exemption. The Court noted that the state court was the ultimate body wielding state control over the practice of law, that the rule represented a clear articulation of state policy, and that the rule was subject to "pointed re-examination" by the state court in enforcement proceedings. It was deemed significant that the state policy "is so clearly and affirmatively expressed and that the state supervision is so active." 433 U.S. at 362.

The state court emphasized that in Parker the prices were set by a state commission, and that in Bates the rule was subject to "pointed re-examination" by the state court. Because the substance of the California regulations, that is the prices for alchoholic beverages, were set by private parties the court believed the regulations differed sufficiently from Parker and Bates to bring them

outside of the state action exemption.

The court recognized the state's authority to regulate alchoholic beverages under the Twenty-First Amendment, but held that "[w]hen a statute enacted pursuant to the Twenty-First Amendment conflicts with an enactment based on the commerce clause, we must balance the policies furthered by each in order to determine which should prevail." In support of its use of a balancing test, the court relied upon its own precedent, see Sail'er Inn Inc. v. Kirby, 485 P.2d 529 (1971), and upon this Court's decisions, see Craig v. Boren, 429 U.S. 190, 206 (1976)("the Twenty-First Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each protection 'be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.'" (quoting Hotstetter v. Idewild Liquor Corp., 377 U.S. 324, 332 (1964))).

The court found that the state regulations inpinged free competition as guarenteed by the Sherman Act because it allowed both horizontal and vertical retraints of trade. The court specifically noted the remarkable similarity in the prices set by competing brands as evidence of the potential for price-fixing based on the posted price schedules. The court examined evidence showing that the state regulations served neither of the purposes behind the statute--promoting temperance and protecting small businesse from predatory competition.

3. CONTENTIONS. Because the court of appeal decision relied so completely on the decision in Rice, petr has directed its arguments toward the two grounds supporting that opinion.

Petr contends that Rice construed the state action exemption too narrowly. Petr argues that Parker itself was a case where private parties exerted considerable control over the content of the regulation, since producers both initiated proceedings and had to approve the commission's decision before it went into effect. Petr emphasizes that the state regulations sanction the price maintanence of wine, and that the state enforces any violations. Because the conduct of resale price maintenance is required by state law, petrs conclude that the regulations fall within the Parker exemption.

Petr also argues that use of a balancing test is incorrect in the circumstances of this case. First, petr argues that balancing is only appropriate when, as in Craig v. Boren, state action pursuant to the Twenty-First Amendment conflicts with the exercise of fundamental rights. Second, petr contends that the Court's expression of a balancing test in Idewild is inapplicable because that case represented the attempts of a state to regulate liquor use outside of its territorial limits. Finally, petrs say that use of a balancing test has been expressly rejected in lower court case summarily affirmed by this Court. National Railroad Passenger Corp. v. Miller, 358 F.Supp. 1321 (D.Kan.) affirmed 414 U.S. 948 (1973). Under the rule of Hicks v. Miranda, 422 U.S. 332, 344 (1975), petr contends that the case forms precedent inconsistent with the California decision.

Petr also states that the issues are certworthy because the state decisions have created uncertainty and confusion. Petr says that the decisions have spawned needless litigation, thet they call into question the validity of similar laws in other states, and that

they place licensees in the unenviable position of having to disobey California law or face anti-trust liability.

4. DISCUSSION. The California court has cut a narrow line to avoid application of Parker v. Brown, but the line is not directly inconsistent with this Court's precedent. The California court correctly notes that the state involvement in regulation was greater in Parker or Bates than in this case. In Parker, for example, the state commission could ensure that prices were not set too high. Here the state does not interfere with the privately chosen price levels.

At the same time the state involvement here is greater than in Cantor or Goldfarb. In Cantor the court held that that the state action exemption did not protect the activites of a utility company that was the sole distributer of electricity and supplied consumers with light bulbs. The charge for the bulbs was included in the general charges for electricity. The rate was approved by the state utility commission and could not be changed without their approval. Nevertheless, the state had not required that the bulbs be provided, nor did it have an independent regulatory interest in the market for light bulbs. 428 U.S. at 584-85; 604-05; 612-14. In Goldfarb the Court held that a minimum fee schedule published and enforced by bar associations did not fall within the exemption because the activities were not required by the state. 421 U.S. at 790-91. In this case, the activities were required by the state even though the state did not require or regulate the particular price levels.

The state court correctly applied a balancing test to weigh the purposes of the Sherman Act against the ability of the state to regulate alchoholic beverage under the Twenty-First amendment.

Although the holding in Craig v. Boren states that the Twenty-First Amendment does not alter the application of equal protection standards, the Court set forth in explcit dicta the standard to be used when state action pursuant to the Twenty-First Amendment runs afoul of federal action taken pursuant to the Commerce Clause. The Court stated that the Amendment created an exception to the normal operation of the Commerce Clause, but it did not repeal it in this area. Rather the interesection of the two provisions demands that each be considered in the light of the other, with recognition of the interests at stake in any case. 429 U.S. at 206. Furthermore, the Court noted that that the state's interest in controlling importation of intoxicants is "transparently clear." In this case, invalidation of the state regulations do not affect its abiity to control the importation of alchoholic beverages.

This case would be a proper vehicle for examination of the Parker issue. The parties have stipulated to all facts, and the state supreme court opinion entensively analyzes the purposes served by regulations of the prices of distilled spirits. Petr has not suggested that regulation of wine is distinguishable from regulation of distilled spirits.

There is a response.

8/24/79 Sallet Ops. in petn.

Review 1/13 - Helpful review down Parker v Brown case

At issue is validity of Calif. law that provides for resale price maintenance contracts by persons in wine business. The contracts are negotiated by private wine growers, wholesalers & retailers — fixing minimum prices. The contracts are filed with a State Commission but State does not pass on reasonableness of price. Does Sherman Act apply?

JS 1/3/80

Joe's views:

1. Parker v Brown issue. Different from Parker because there the State approved (thru a Commission) price of raisins. Also in Bates (where we held no violation of Sherman Act because State approved [redacted] the restrictions re advertising.

This case is controlled by Schwegmann v. Calvert Distillers (#2) that voided a La. law enforcing privately negotiated resale maintenance prices on liquor.

BENCH MEMORANDUM

2. 21st Amend. State interest in private competition not enough under 21st Amend interest.

To: Mr. Justice Powell

Re: No. 79-97, CRLDA v. Midcal Aluminum

1. QUESTIONS PRESENTED: (1) May a state compel private parties to comply with a retail price maintenance plan for the sale of wine under the state action doctrine of Parker v. Brown? (2) May a state compel private parties to comply with a retail price maintenance plan for the sale of wine pursuant to its authority under the Twenty-First Amendment?

2. DISCUSSION.

A. The Evolution of Parker v. Brown. The state action exemption to the Sherman Act received this Court's imprimatur in Parker v. Brown, 317 U.S. 341 (1943). In that case, a California

statute authorized the establishment of a program that would restrict competition and maintain prices in the distribution of raisins. The state created an Agricultural Prorate Advisory Commission. If ten raisin producers petitioned the Commission for establishment of a marketing plan, the Commission could grant the petition and select a program committee, which included producers and processors. The program committee formulated a specific program which the Commission could approve, modify, or reject. A program approved by the Commission would go into effect upon the consent of 65% of the producers in the relevant agricultural area. The program would restrict the marketing of raisins and the price at which they could be sold.

The Court held that the state plan could not be attacked as violative of the Sherman Act. The Court noted that the plan "derived its authority and its efficacy from the legislative command of the state," id., at 350, and that the Sherman Act "gives no hint that it was intended to restrain state action or official action directed by a state." Id., at 351.

In Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), however, the Court held that the Sherman Act preempted a state law that required compliance with a resale price maintenance plan for liquor. Louisiana had a law that enforced any price-fixing contract against all retailers in the state, both signatories of the contract and non-signers. The

Court recognized that the Miller-Tydings Act allowed states to create resale price maintenance plans, but it held that the Act did not permit the State to force non-signers to comply with the plans. The Court cited Parker v. Brown in passing, but it did not discuss possible application of the state action exemption.

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), this Court held that the state action exemption did not protect a minimum fee schedule published by a Country Bar Association and enforced by the State Bar. The Court stated that "[t]he threshold inquiry in determining if an anticompetitive activity is state action...is whether the activity is required by the State acting as sovereign." Id., at 790. The Court found that promulgation of the fee schedule had not been compelled by the State acting through its Supreme Court. Although the State Bar was a state agency, the Court concluded that it "voluntarily joined in what is essentially private anticompetitive activity." Id., at 792.

In Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the Court considered a private antitrust action brought by a retailer of lightbulbs against a private utility which, in accordance with state-approved tariffs, distributed lightbulbs to its customers and included their cost within its general service charge. The Court emphasized that the State had no independent regulatory interest in the market for lightbulbs, and that the utility had proposed the tariff that included the

cost of free lightbulbs. A plurality of the Court also stated that Parker v. Brown was inapplicable to cases involving private defendants, and that there was no other reason to preclude antitrust liablity from attaching to the utility's actions. The Chief Justice and Mr. Justice Blackmun concurred in the result, although each would have applied the Parker v. Brown doctrine.

You joined in Mr. Justice Stewart's dissent. Like the Chief Justice and Justice Blackmun, Justice Stewart would have applied Parker v. Brown. Justice Stewart's conclusion, however, was that the utility's distribution of lightbulbs fell within the state action exemption. Justice Stewart argued that the utility's proposal of a tariff was protected from the antitrust laws under the Noerr-Pennington doctrine, and that the utility's subsequent compliance with the tariff was protected under Parker v. Brown. Reviewing the legislative history of the Sherman Act, Justice Stewart concluded that the intent of the Act was "not to intrude on the soverignty of the States." id., at 635, and that, therefore, conduct which is compelled by the States is exempt from the Act. Because compliance with an approved tariff was compelled by the State, Justice Stewart believed that Parker v. Brown was applicable. In the course of his dissent, Justice Stewart also commented on Schwegmann. He characterized that case as one in which Congress, by passage of the Miller-Tydings Act, had altered the scope of the state action exemption with respect to resale price maintenance plans.

The Court unanimously applied Parker v. Brown in Bates v. State Bar, 433 U.S. 350 (1976). In Bates two young lawyers violated state disciplinary rules against advertising. The Court distinguished Goldfarb on the ground that the no-advertising rules in Bates were required by affirmative command of the state supreme court. The Court distinguished Cantor because (i) the real party in interest was the state supreme court, (ii) the State had an independent regulatory interest in the regulation of bar activities, and (iii) the no-advertising rules were are "clear articulation of the State's policy" which were "subject to pointed re-examination by...the Arizona Supreme Court." Id., at 362.

Finally, the Court applied Parker v. Brown last Term in New Motor Vehicle Board v. Orrin Fox Co., 47 LW 4017 (December 5, 1978). The Court reviewed a California statute which requires an automobile manufacturer to secure the approval of a state administrative agency before opening a retail motor vehicle dealership within the market area of an existing franchise, if and only if that existing franchisee protests the establishment of the competing franchise. The Court, in an opinion by Justice Brennan and joined by the Chief Justice and Justices Stewart, White, Marshall and Rehnquist, rejected the contention that the state scheme was violative of Schwegmann: "The dispositive answer is that the Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively

expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside of the reach of the antitrust laws under the 'state action' exemption." 47 LW at 4021. The Court distinguished Schwegmann as a case in which "the State attempted to authorize and immunize private conduct violative of the antitrust laws." Id. You joined Justice Blackmun's opinion concurring in the result, which did not discuss Parker v. Brown.

B. The State Scheme Under Review. As described by the state appellate court, "[u]nder California Business and Professional Code section 24862 no licensee may sell or resell to a retailer, and no retailer may buy any item of wine except at the selling price contained in an effective price schedule or in an effective fair trade contract. No licensee is permitted to sell or resell to any consumer any item of wine at less than the selling or resale price contained in an effective price schedule or fair trade contract. Under section 24866 each grower, wholesaler, wine rectifier or rectifier must make and file fair trade constracts and/or file schedules of the resale prices of wines." Petr for Cert at A-5.

In Baxter v. Rice, in which the California Supreme Court struck down the state resale price maintenance plan for distilled spirits, the court emphasized that the price for distilled spirits was set solely by private parties. The court

stated that the Department of Alchoholic Beverages Control "does not participate in determining the minimum price, but only enforces the price set by producers." Id. at C-9. The state court recognized that the Department has the power to excuse compliance with the resale price maintenance plan, but said that it had never been exercised, and that the Department did not have the authority to set maximum prices. There is "no significant difference[]" between the provisons of the resale price maintenance plan for distilled sprits and for wine. Id., at A-4.

As Goldfarb stated, the threshold question in applying Parker v. Brown is whether the State, acting as sovereign, has compelled private parties to engage in anti-competitive conduct. In this case it is clear that the State does compell sellers of wine to engage in price-fixing. I do not think, however, that this threshold question can be the only question. In Schwegmann, for example, the State "compelled" nonsigners to comply with resale price maintenance plans, but the State law was nonetheless struck down. The Court's most recent reading of Schwegmann characterizes it as a case in which the State merely attempted to authorize or immunize private anti-competitive conduct.

The necessity of looking beyond compulsion arises from the perceived danger that a State could "repeal" the Sherman Act within its borders simply by "compelling" persons to engage in

anti-competitive behavior. The Court has developed two methods of reviewing state action to ensure that it is not tantamount to "repeal" of the Sherman Act. First, as the Court in Cantor suggested, this Court could review each plan to see whether it actually serves an important state interest. If it does not, then the state action is not exempt. The difficulty with this approach is that it allows the federal courts to assess the strength of the state interest in economic regulation.

Second, the Court has emphasized the adequacy of state supervision over state-sanctioned anti-competitive practices. This approach does not review the strength of the state interest in regulation, but it does ensure that state supervision has replaced free enterprise. That is, the Court recognizes the state authority to define economic areas inappropriate for market control, but also recognizes that state supervision must provide a real substitute for the effects of a competitive economic system. Otherise, state "immunity" may simply allow private parties to evade the purposes and policies of the Sherman Act. See Areeda & Turner, Antitrust Law § 213 (1978).

I believe that the second approach is preferable, because it respects the federalism principles that allow a state to decide for itself when anti-competitive practices serve the public welfare. This Court's cases illustrate the difference between adequate and inadequate supervision. In Parker, each aspect of the marketing plan, including price and supply, was

approved by a state commission. In Bates, the rules had been promulgated and were subject to pointed re-examination by the state supreme court. Under Justice Stewart's view of Cantor, the utility was following a tariff that had been explicitly approved by a state regulatory commission. In New Motor Vehicle Board, the state reviewed each claim that establishment of a new franchise would cause economic harm. On the other hand, in Schwegmann, the State statute was struck down because it compelled nonsigners to follow the terms of resale price maintenance plans drawn up by private parties. The state compelled the nonsigners to follow the terms of the contract, but it gave private parties the freedom to decide under what circumstances state compulsion would be employed.

This case is like Schwegmann because the coercive power of the state is employed to carry out the terms of private bargains. Thus, the state has mandated a resale price maintenance scheme, but private parties set the price at which sales can be made. I believe that the state's failure to set the price, as was done in Parker and Cantor, leads to the conclusion that state supervision is inadequate to bring the plan within the state action exemption.

Of course, Schwegmann can be read, as Justice Stewart read it in Cantor, as a case that does not directly effect the scope of the Parker v. Brown exemption. It would still, however, be relevant to this case. The alternative reading of Schwegmann

interprets it as a case in which the Court deferred to Congress' specific decision to supersede the original intent of the Sherman Act through the Miller-Tydings Amendment. If so, then it can be argued that Congress' recent decision to end federal protection of resale price maintenance plans indicates that Congress does not wish such plans to fall within the state acton exemption.

In the Miller-Tydings Act and in the McGuire Act, Congress espressly allowed fair trade laws. In 1975, however, Congress repealed the federal fair trade exemptions from the antitrust laws. The legislative history of the 1975 Act, as recounted in the Amicus Brief of the State of California at 23-25, suggests that Congress expected the repeal of previous law to prevent manufacturers from settings prices under fair trade statutes. Thus, I believe that the 1975 Act may be used to support a holding that Congress intends that fair trade laws not be exempt from the operation of the Sherman Act.

C. The Effect of the Twenty-First Amendment On the State's Ability to Regulate the Price of Alchoholic Beverages. The Twenty-First Amendment repealed Prohibition. § 2 of the Twenty-First Amendment provides that "[t]he 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." If the state regulation of wine is not exempt under the Sherman

Act, and, assuming that the California price-fixing scheme is illegal under the Sherman Act, then it must be decided whether the Twenty-First Amendment precludes enforcement of the anti-trust laws.

The petitioner argues that the Twenty-First Amendment creates an exception to the normal operation of the Commerce Clause and limits federal intervention to those cases in which state regulation runs afoul of other constitutional provisions, or in which the state attempts to regulate liquor that is not consumed within state borders. The respondent argues, however, that the interests of the State must be balanced against the interest of Congress in enforcing the Sherman Act pursuant to its Commerce Clause power.

The petitioner's theory has the potential for creating a rather large gap in federal law because it would hold that any state act regulating the distribution of alchoholic beverages would prevail over any inconsistent federal statute based on the Commerce Clause. Presumably this would allow a state to mandate that persons working in the liquor industry need not be paid federal minimum wage. On the other hand, the realistic potentional for such conflict may be small.

Review of the history of the Twenty-First Amendment is not particularly illuminating. For example, the Brief of Amicus Virginia Wholesalers Association argues that the Congress' rejection of a proposed section 3 to the amendment demonstrates

the breadth of state authority. Section 3 would have provided that "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." Therejection of section 3 also is consistent with a narrower congressional purpose. Although Prohibition was to be ended, the Twenty-First Amendment was designed to allow each state to decide whether it would be "wet" or "dry." Section 3 was inconsistent with that principle insofar as it would have allowed Congress to decide whether alchoholic beverage would be sold within each state. Under this view, the essential purpose of § 2 of the Twenty-First Amendment was to allow each state to decide whether alchoholic beverages would be imported for consumption within each state. State regulation of price, but not consumption, of alchoholic beverages therefore would be entitled to less consideration.

The Court's recently has stated that "the Twenty-First Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision "be considered in light of each other, and in the context of the issues and interests at stake in any concrete case." Craig v. Boren, 429 U.S. 190, 206 (1976), quoting Hostetter v. Idewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964). Although members of this Court have expounded a more expansive view of the Twenty-First Amendment in the past, see United States v. Frankfort Distilleries, 324 U.S. 293, 300-01 (1944)(Frankfurt, J., concurring), it is difficult

difficult to perceive the interests that would be served by an interpretation of the Twenty-First Amendment that gave States the exclusive power to control the price of alchoholic beverages. Of course, a State like Virginia that controls the distribution of alchoholic beverages within its borders is acting within the central purpose of the Twenty-First Amendment.

Assuming that a balancing of state and federal interests is proper when price alone is at issue, I would be reluctant to disturb the state supreme court's view in Rice that state interest's are not substantially furthered by the resale price maintenance scheme. On the other hand, it is clear that price-fixing of this sort runs afoul of the federal interest in free competition. Therefore, I suggest that the interests of the State in fixing the prices of alchoholic beverages in this context by the reach of the antitrust laws.

3. SUMMARY. The state resale price maintenance program does not fall within the Parker v. Brown exemption from the Sherman Act because of the failure of the State to supervise the private choice of the prices at which wine is to be sold in California. Where a state controls the price, but not distribution of alchoholic beverages within its state, the Twenty-First Amendment demands that the state interest be balanced against the federal interest. In this case, the federal interest against price-fixing outweighs the state interests.

JS 1/14/80

SUPPLEMENTAL BENCH MEMORANDUM

To: Mr. Justice Powell

Re: No. 79-97, CRLA v. Midcal Aluminum

The SG has filed an amicus brief, and petr has filed a reply brief.

The SG contends that the state resale price maintenance (RPM) plan violates the Sherman Act and is not protected by § 2 of the Twenty-First Amendment. The SG's reasoning on the Sherman Act question is similar to the analysis in my Bench Memorandum. The SG contends that the distinction between actions that fall within the state action exemption, as in Parker and Bates, and action that does not, as in Schwegman, turns on the existence of state supervision or control over the

substance of the restraint. The SG arques that the state RPM plan does not exert sufficient control because it allows private parties to select the prices at which wine must be sold. The SG derives the requirement of control from the need to reconcile the purpose of the Sherman Act with the interests of the states in a federal system. Aggregations of economic power subject to the control of the state do not pose the same potential for abuse as private anti-competitive action, but state enforcement of private decisions allows private anti-competitive activity to flourish beyond the control of either the federal or state government.

The SG argues that the purpose of § 2 of the Twenty-First Amendment was to guarentee the States the power to regulate liquor in a manner that would otherwise interfere with interstate commerce, but there was no intent that Congress' powers be limited more than required by the langauge of § 2 which gives the States exclusive authority over "[t]he transportation or importation" of alchoholic beverages. The SG notes that Congress passed the Federal Alchohol Administration Act two years after congessional passage of the Twenty-First Amendment. The Alchohol Administration Act imposes federal labeling and consignment sales requirements. The SG states that the debate on that Act demonstrates Congress' belief that such federal regulation is consistent with the Twenty-First Amendment. Furthermore, a decision that the States have plenary

control over all aspects of the liquor trade would allow States to insulate their liquor industries from the reach of such federal laws as the National Labor Relations Act, the Securities Acts, and the requlatons of common carriers under the Interstate Commerce Commission Act.

I believe that the SG's theory is slightly broader than my Bench Memorandum. The SG asserts that any State law that requlates liquor, but not its distribution, is preempted by any contrary federal law. I suggested that States have plenary control over the distribution of liquor, but that the State interests must be balanced against the federal interests when the State regulates other aspects of the liquor industry. The SG's theory would be easier to apply, and would not appear to constitute an overborad reading of federal power so long as this Court emphasizes that the States have exclusive control over the distribution of alchoholic beverages, and that States may prohibit the sale of liquor, requlate the number or location of liquor licenses, operate liquor stores itself, and levy taxes on alchoholic beverages.

The petr's reply brief adds little. On the state action issue, petr emphasizes that liquor distirbutors are required by the State to set prices. The petr disputes the SG's interpretation of § 2 of the Twenty-First Amendment, contending that the States have broad authority. The petr also notes that Congress, when it repealed the Miller-Tydings and McGuire Acts

in 1975, expressly noted that States may enforce RPM laws under the Twenty-First Amendment.

Resp raised the issue of mootness in a motion to this Court, although that issue was not discussed in resp's brief. Petr explains that the California courts have struck down the RPM plan for spirits, and for wine sales to cunsumers, but had not, prior to this case, dealt with price retraints on the sale of wine from wholesaler to retailer. Thus the case would not be moot even if a previous state court decision could bar this Court from considering a constitutional issue. Because I do not believe that a state court can evade the command of this Court by claiming reliance upon an earlier unreviewed state court decision, I don't believe there is a real mootness issue in this case.

September 24, 1979

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 79-97

CA RETAIL LIQUOR ASSN.

vs.

MIDCAL ALUMINUM

Potter agreed with what I said about his case

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.			✓									On second vote - Grant	
Brennan, J.												Out on Recent	
Stewart, J.		✓											
White, J.			✓										
Marshall, J.			✓									On second [redacted] vote: Grant	
Blackmun, J.		Pass on 1st Vote; Second vote - Grant											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										
.....													

79-97 CALIF. RETAIL LIQUOR v. MIDCAL ALUMINUM Argued 1/16/80

Jack Owens case

Childlaw (Peter)

Calif S/Ct in Rice invalidated liquor resale price maintenance (RPM). (No pet. was filed with us from decision in Rice)

Under Calif law:

Wine producers are compelled to fix prices at which wholesalers may sell to retailers and also the minimum price at which retailers may sell to consumers.

The balance of interest test applied by Calif S/Ct is ~~contract~~ contrary to our decisions on 21st Amend. Counsel relies primarily on 21st A.

State interest in pursuit RPM is to prevent discrimination in price - like Robinson Patman.

There is a Calif statute proscribing unfair competition and difficult to enforce.

21st amend's effect is not limited to regulating or controlling imports of liquor.

Roth (Deputy ~~Gen~~ AG of Calif)

Argued Parker v Brown extensively.

Two types of fair trade reg:

1. Non-alcohol business - RPM is optional. A retailer does not have to buy products that are under RPM.

2. Alcohol products are subject to comprehensive compulsory legislation. Wholesalers must set prices.

Only the individual brand owner (producer) sets prices. Each producer sets its own prices. ~~Two~~ Two or more producers could not agree on uniform price.

Q. P. S. What if a producer - to drive competitors out of business sets price very low? Roth said producer could do this

Owens (Resh)

There is a price maintenance statute & not a posting statute. The two are different. Some states require a liquor dealer to post his prices — as determined by him. Here prices as determined by producer must be complied with.

If state has interest in preventing price discrimination, other means are available.

× × ×

In Parker, the state controlled profits of raisin producers. State in effect fixed prices.

Here there is no state control of prices.

N.Y. is only state that has any system like Calif.

Va system is monopoly — covered by Parker v Brown.

The 21st may be more protective of state authority than "state actions" doctrine. 21st may prohibit import of liquor. & State couldn't bar import of other products (even of garbage).

Standard that controls this case under 21st Amend: there must be an accommodation of state & fed interests. Where there is a per se violation of Sherman Act, this controls over 21st Amend. Otherwise, Sherman Act would be at mercy of liquor industry

Answer (cont)

Absence of State control of prices here distinguishes Parker v Brown

Doesn't contend that persons who have complied with Calif law have violated Sherman Act. If there is no conspiracy - only individual actions - there would be no anti-trust violations. Also, as matter of public policy there may be no violations. See Schwegmann

Affirm 7-1

79-97 Calif. Retail Liquor v. Midcal Conf. 1/18/79

The Chief Justice Affirm

No problem under either 21st Amend or "state action."

State could fix prices to promote temperance.

Mr. Justice Brennan

Out of case

Mr. Justice Stewart Affirm

If Hugo Black were here, he would hold that §2 of 21st Amend gave states plenary power. But then as not, was §2 said. (See Hugo's opinion re §3 - there never was adopted). Other opinions (Brandeis) go far towards Hugo's view.

There is a Case or Controversy

Earlier cases can be explained on basis of §2. A state can control import & export of liquor, & regulate price. But cannot ~~apply~~ extend to Sherman Act.

We can't quest. State's view that RPM is desirable. But Sherman Act controls. Parker v. Brown does not apply

Mr. Justice White Affirm

Only Qs brought to me are 21st A & Parker v Brown issue

Agrees with CJ & PS

Mr. Justice Marshall Affirm

No dissent.

Mr. Justice Blackmun Affirm

Calif policy is clear but if it left preemp to private parties. - Parker does not apply.

Balance ~~vote~~ intervenes to conclude that 21st A does not apply.

Mr. Justice Powell Affirm

As the price fixing here is by private parties, Parker v Brown's state action doctrine not applicable.

Nor does 21st amend protect them per se Sherman Act violations. Not within purpose of 21st amend to allow states to control distribution & consumption of alcohol beverages.

Protect, in any op., Va. type regulation.

Mr. Justice Rehnquist Reverse on Parker v Brown

Calif. policy is clear. Fact that fixing price is delegated does not control. State enforced price

Mr. Justice Stevens Affirm

John reply to Brown statement that no one can be held liable.

Schegmann is relevant.

Case is close

lfp/ss 2/7/80

MEMORANDUM

TO: David DATE: Feb. 7, 1980

FROM: Lewis F. Powell, Jr.

79-97 Midical

I commend you first on the promptness with which you have prepared a first draft. It also reflects your usual quality of work.

My comments are as follows:

In the introductory paragraph, would it be helpful to identify Midical as a private wine wholesaler? Perhaps something along the following lines might do:

> "In a private state court action instituted by respondent - a wine producer - California's resale price maintenance and price posting statutes for the wholesale wine trade were held to be violative of the Sherman Act. The issue presented on this appeal is whether, etc., . . ."

Your part I is fine, although it might be well to identify Midical a little more specifically.

Part II is excellent. I suppose we need not say that the California pricing scheme would be a per se violation of the Sherman Act. On page 7, where you cite Schwegmann (which, of course, is the most relevant case) I think it would be helpful to cite additional Sherman Act cases supporting the invalidity of this type of price fixing.

As you have pointed out, Part III - the 21st

Amendment issue - is a bit more difficult. It is not easy to identify, on the basis of prior authority, a consistent and coherent line of analysis. You end up balancing competing state and federal interests. I can think of no better approach.

Yet, I do have the impression that we may overemphasize the weight to be accorded state interest. The discussion begins on page 20. The first point made is the relative indifference of California to this particular case. I really do not view this as significant. Our decision would be the same regardless of the the state's enthusiasm so long as it kept the statute on the books and enforced it. Perhaps we could move this reference to a footnote.

You then rely primarily on the view of the California statute taken by California courts. This is more relevant, but again would not be controlling with me in terms of deciding whether the state interest is sufficient to outweigh the federal interest. Customarily, we look to the brief of the State Attorney General for the state interests served by legislation. I have not checked his brief, but if it identifies state interests you might rely on him for these and on the California court's rebuttal to show how insubstantial they are.

While I certainly would not foreclose the

possibility of state interests outweighing a federal commerce clause interest in a case involving alcoholic beverages, it is difficult for me to imagine such a case involving the Sherman Act and where the state action is not protected in any event under Parker v. Brown.

In sum, take another "swing" at the final five pages (commencing at page 20 of the draft) with the foregoing thoughts in mind.

Without rechecking the draft and accompanying notes, I do not believe you have been quite specific enough in making clear that under the 21st Amendment a state may do as Virginia does: exercise a state monopoly on the importation, distribution and sale of alcoholic beverages. This would be protected both by the 21st Amendment and Parker v. Brown.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 15, 1980

Re: 79-97 - California Retail Liquor Dealers Association v. Midcal Aluminum

Dear Lewis:

Please join me.

Respectfully,

Mr. Justice Powell

Copies to the Conference

Dave - Note

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 19, 1980

RE: No. 79-97 California Retail Liquor Dealers Assn.
v. Midcal Aluminum, Inc., et. al.

Dear Lewis:

Please note that I did not participate in the consideration or decision of this case.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 19, 1980

Re: No. 79-97 - California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.

Dear Lewis:

Please join me.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 20, 1980

Re: No. 79-97, California Liquor Dealers
v. Midcal Aluminum

Dear Lewis,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 20, 1980

Re: No. 79-97 California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., et al.

Dear Lewis:

Although I voted the other way at Conference, I shall, as Byron puts it "acquiesce" in your opinion.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 21, 1980

Re: No. 79-97 - Calif. Retail Liquor Dealers Asso. v. Midcal Aluminum

Dear Lewis:

Please join me.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 23, 1980

Re: 79-97 - California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 28, 1980

Re: 79-97 - Calif. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.

Dear Lewis:

I join.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

lfp/ss 3/1/80 79-97 California Retail Liquor
Dealers v. Midcal Aluminum

This case comes to us from the California Court of Appeal.

California has a resale price maintenance statute for wine. Under this statute, a wine producer may set prices through a fair trade contract. If this is not done, the wholesalers must post a resale price schedule for that producer's brand. Wine merchants are required to sell to retailers only at prices established in this manner.

Respondent, charged with violating established prices, successfully challenged the ~~the~~ California system as violative of the Sherman Act. We granted cert.

The California statute was defended in this Court on two grounds: First, that its program is immune from federal antitrust laws under the "state action" exception - an exception this Court has recognized since ~~the 1943~~ its decision in ~~in~~ Parker v. Brown. in 1943

Secondly, it was argued

Secondly, it was argued that the 21st Amendment, that repealed the Prohibition Amendment, authorized the states to regulate traffic in liquor.

For the reasons stated in the Court's opinion, we reject both of these arguments. Neither the state action doctrine of Parker v. Brown, nor the 21st Amendment, authorizes a state to delegate to private parties the right to fix prices in a manner that would violate federal antitrust laws. We therefore affirm the judgment of the California Court of Appeal.

Mr. Justice Brennan took no part in the consideration or decision of this case.

ORRICK, HERRINGTON, ROWLEY & SUTCLIFFE
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RICHARD J. LUCAS
CARLO B. FOWLER
DONALD A. SUCHTER
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JAMES R. MADISON
DILLMAN C. KINSELL, JR.
WILLIAM L. HOISINGTON
THOMAS R. SHEARER, JR.
CAMERON W. WOLFE, JR.
RALPH C. WALKER
N. PETER LILLEVAND
WILLIAM E. DONOVAN
ROBERT J. GLOISTEIN

W. REECE BADER
PAUL J. SAX
MARYELLEN S. CATTANI
WILLIAM L. RILEY
E. THOMAS UNTERMAN
EDWARD B. RODIN
JACK E. FERGUSON
ALVIN R. FARGO III
JACK B. OWENS
WILLIAM F. ALDERMAN
RICHARD E.V. HARRIS
G. KIP EDWARDS
RAYMOND G. ELLIS
STEVEN A. BRICK
JOHN F. SEEGAL
ROBERT P. FEYER
NORMAN C. HILE
TOWER C. SNOW, JR.
ROGER L. DAVIS
ALAN R. AUSTIN
RALPH H. BAXTER, JR.

March 10, 1980

MAR 14 1980

The Honorable Lewis F. Powell, Jr.
Associate Justice
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., No. 79-97 OT79

Dear Justice Powell:

This letter is written on behalf of my client, Midcal Aluminum, Inc., respondent in the above case, and concerns a brief phrase that appears at page 12 of the slip opinion. With deference, we suggest that a modification of that phrase may be appropriate to minimize any risk of misinterpretation of the scope of the ruling in the case. Mr. Rodak, the Clerk of the Court, informs me that the appropriate way to raise this matter is by letter to you, with copies to him and to the Reporter of Decisions.

At page 12, the slip opinion contains the following sentence:

> "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." (Emphasis added.)

The phrase which is emphasized in the above sentence is the source of our concern. As explained more fully below, there is a risk that the phrase might be cited to attempt to obtain results at odds with the logic of the opinion as a whole and with the basic antitrust principles upheld by the Court.

At page 8, footnote 9, the slip opinion distinguishes and protects "the approach of those States that completely control the distribution of liquor within their boundaries." The note goes on to cite two provisions of the Virginia Alcoholic Beverage Control Code, §§ 4-15 and 4-28. These code provisions deal with the operation of government stores for the retail sale of alcoholic beverages. Footnote 9 leaves little doubt that the States are free to engage themselves in distributing alcoholic beverages.

Judging by the logic of the opinion and the similarity of the language of footnote 9 ("the distribution of liquor within their boundaries") and of page 12 ("the liquor distribution system"), it seems to us that the language of page 12 emphasized above refers to footnote 9 type situations in which the State itself conducts various aspects of the alcoholic beverage business. However, it is possible that the language of page 12 could be read more broadly in an effort to defend situations where the cloak of state authorization is thrown over what are in essence private cartels -- particularly horizontal market division schemes -- in situations that are logically and legally indistinguishable from the price-fixing scheme struck down in the California Retail Liquor Dealers case.

An example may help to illustrate our concern. If the States have "virtually complete control over . . . how to structure the liquor distribution system" (in the literal language of page 12), could they simply authorize suppliers and wholesalers, under the guise of a franchise system, to divide the state up into territories in which the wholesalers would not compete with each other? This would harm someone in Midcal's position, if the effect was to prevent it from selling in new areas. Such a system would be a per se illegal market division conspiracy if engaged in without a "gauzy cloak of state involvement," and the analysis should be identical to the analysis of the conduct at issue in the California Retail Liquor Dealers case. Yet the language of page 12 of the opinion, referred to above, might suggest that such a market division scheme, if authorized by state statute, would be immune from antitrust inquiry. This would be a result that presumably was not intended, would impinge upon legitimate federal antitrust interests, and in any event was not an issue before the Court in our case.

One alternative to clear up the problem discussed above would be to change the phrase "how to structure the liquor distribution system" to read: "over those aspects of liquor distribution within their boundaries which the States conduct themselves." Another alternative, although one I think might be less clear, would be simply to append a footnote to the end of the current phrase. Such a footnote might read: "See note 9, supra."

Needless to say, I am very pleased with the outcome of the case and with your opinion for a unanimous Court. I consider it a great privilege to have been able to argue the case before you.

Respectfully submitted,

Jack B. Owens

Jack B. Owens
An Attorney for Respondent,
Midcal Aluminum, Inc.

JBO/ljj

cc: Honorable Michael Rodak
Clerk, United States Supreme Court

Henry Lind, Esq.
Reporter of Decisions
United States Supreme Court

William T. Chidlaw, Esq.
Counsel for Petitioner

Lawrence G. Wallace, Esq.
Deputy Solicitor General

George J. Roth, Esq.
Deputy Attorney General
State of California

DOS

MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: March 14, 1980

RE: No. 79-97, California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc.

I hope that I am not responding to the Owens letter with instinctive "pride of authorship," but I do not think his point is especially well taken. The phrase at issue on page 12 states that "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." (Emphasis added.) The letter's concern is that this language suggests that the State could delegate liquor distribution to private parties who would be authorized to engage in anticompetitive practices. The example offered is a market-division arrangement. Letter, p. 2. I have several problems with the proposal to rewrite the passage:

1) I believe the passage correctly states the law. The language of the Amendment refers to the "transportation and importation" of liquor. Both terms -- to me, at least -- clearly reflect the intent that the States control the methods of distributing liquor through mechanisms such as "blue" laws limiting

Sunday or evening sales, sales of liquor-by-the-drink, licensing of liquor dealers, or sale of liquor by the State. Such regulations cannot be challenged on Sherman Act grounds. Unless this line is drawn, I believe the Twenty-first Amendment will be reduced to a limitation on state liquor import taxes, and I think State control programs like that in Pennsylvania could be lost. That is why I resisted using the narrower language of the type proposed in the letter. Indeed, there is no direct need to protect the State-store systems with the Twenty-first Amendment because, as the opinion observes in footnote 9, there is Parker v. Brown immunity for such arrangements. I would also point out that our reading of the Twenty-first Amendment is considerably narrower than that offered in California v. LaRue in 1972, involving nude dancing in bars; the Twenty-first Amendment is not yet the toothless hag that the letter (and apparently Justice White) would have it.

2) I do not believe that the dangers seen in the letter are very substantial. The language in dispute was drafted with an eye to the standard distinction in antitrust law between "structural" and "behavioral" features of a market. Although the fit is not perfect between that model and this case, the contrast I hoped to make was between market "structure" -- public v. private, saloons v. package stores -- and behavioral matters such as price-fixing and, to use the letter's example, market-division. The state's freedom to make structural decisions is relatively uninhibited, but there is no State power to authorize anticompetitive behavior. The market-division hypothetical does highlight a stress point in this analysis. Can't market division be viewed as a structural matter? My answer is

simply, "No." Once the State has resolved to permit the sale of liquor by licensed private dealers, it has exhausted its unreviewable discretion under the Twenty-first Amendment. Further regulatory policies must be reviewed under the balancing approach that we outline in Part III of Midcal. The decision to authorize regional monopolies would be subject to that scrutiny.

3) Finally, I believe that the general language and holding of the opinion make clear that the letter's reading of the phrase on page 12 is incorrect. Doubtless lawyers will attempt to twist the language out of context, but the same is true of any number of other statements in the opinion.

Should you wish to proceed with some revision, I will draft some alternatives. I would emphasize, though, that restricting the statement to state-run liquor stores is much more than a cosmetic change.

Yes

LAW OFFICES OF
WILLIAM T. CHIDLAW
A PROFESSIONAL CORPORATION

POINT WEST EXECUTIVE CENTRE
1455 RESPONSE ROAD, SUITE 191
SACRAMENTO, CALIFORNIA 95815
(916) 920-0202

March 17, 1980

Honorable Lewis F. Powell, Jr.
Associate Justice
United States Supreme Court
1 First Street, N.E.
Washington, D. C. 20543

Re: California Retail Liquor Dealers Association
v. Midcal Aluminum, Inc.; No. 79-97

Dear Justice Powell:

This letter to you is prompted by and in reply to a letter dated March 10, 1980, directed to you on behalf of Respondent Midcal Aluminum, Inc. by its attorney. Upon inquiry to the Office of the Clerk of the Court, I was advised that Mr. Rodak had stated that a reply to that letter, directed to you, would be appropriate. The Clerk's office further referred me to your secretary to whom I relayed my intention of replying to the Midcal letter.

Midcal seeks a substantive change in the language of the opinion which would have the effect of adopting the position argued by Midcal that the Twenty-first Amendment simply authorizes a state to prohibit or restrict the importation of liquor into its territory. This limited effect of the Twenty-first Amendment was effectively rejected in your opinion both by language in the text at page 9 of the slip opinion and the reference to legislative history, contained in footnote 10 also at page 9. The refusal to overrule earlier cases of this Court (e.g., Ziffrin, Inc. v. Reeves) and the rejection of an interpretation that would virtually emasculate the effect of the Twenty-first Amendment on the power of the states to regulate liquor was made clear in that language on page 9 where your opinion analyzed the language of Section 2 of the Amendment in the following manner:

> "... In terms, the Amendment gives the States control over the 'transportation or importation'

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WILLIAM T. CHIDLAW
A PROFESSIONAL CORPORATION

> of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." (Citing Ziffrin case with approval.) (Emphasis added)

It is the position of the California Retail Liquor Dealers Association that although disappointed in the outcome of the case insofar as it specifically affects its members, nevertheless the opinion is clearly written, is consistent within itself, and is not subject to misinterpretation or confusion. The mere fact of change in the opinion in the manner suggested by Midcal would itself be misconstrued and misapplied and undoubtedly the significance of the change itself would be greatly exaggerated in any future applications of the Midcal decision to state court cases involving state liquor statutes or regulations. The purpose of this letter is not to presume to tell you, as the author of the Midcal opinion what you meant, but to simply support the proposition that the meaning is in fact clear, it was carefully thought out and it does not require interpretation.

This Court has furnished guidelines for future application of this opinion in the language contained on page 12 of the slip opinion, and that complete paragraph, from which the sentence quoted in the Midcal letter is taken, is clear in its meaning. The complete paragraph reads:

> "These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" (Citing Hostetter v. Idlewild Liquor Corp., 377 U.S., at 332.)

That the opinion as a whole is consistent with the

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A PROFESSIONAL CORPORATION

above quoted paragraph regarding the states' control over "how to structure the liquor distribution system ..." is illustrated by the quotation from page 9 cited earlier. The opinion correctly recognizes that the states' control over the liquor distribution system cannot logically be separated from its control over importation and transportation of liquor. This is exactly what the opinion plainly recognizes in the above quotation from page 12 in connection with the reference to "the liquor distribution system."

Midcal argues that the phrase "the liquor distribution system" refers only to those states that themselves "control the distribution of liquor within their boundaries" and cites the example of the state government retail stores in Virginia. It is implicit in Midcal's argument that the suggested change will "protect" those states which themselves conduct various aspects of the liquor business. The illogic of the contention is manifest when the whole opinion is considered. The opinion, in the first section on the meaning and effect of the "state action" antitrust immunity makes it abundantly clear that a state, like Virginia, which itself engages in the liquor business, is not affected by the decision. The earlier language of the opinion shows that the Court was well aware of the situation in states like Virginia and therefore the only reasonable conclusion is that the language toward which Midcal directs its suggestion is not the result of careless draftsmanship, but rather clearly defines the boundaries between areas to which the Twenty-first Amendment applies with full force and those to which the Amendment's role has been reduced consistent with the holding of the opinion.

It is clear from your opinion that the Twenty-first Amendment retains vitality, especially in matters involving importation and/or restrictions or prohibitions relating to the sale, and in matters involving the liquor distribution system within a state. It is equally clear that in other matters, the Twenty-first Amendment still has viability insofar as bestowing upon a state the power to regulate liquor but that a state has a lesser degree of power than under the importation, transportation, and distribution categories.

If there is any question, in a specific case, about the

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A PROFESSIONAL CORPORATION

effect of the Twenty-first Amendment on a state's power to regulate liquor it can better be resolved in a future "concrete case" than by the use of a hypothetical example of an alleged potential situation that has no relevance to the opinion in this case and as stated by Midcal at page two of its letter "was not an issue before the Court in our case."

We would respectfully urge that this suggestion by Midcal for a substantive change in language be rejected and the paragraph referred to, on page 12 of the slip opinion, be left in its original form as one which artfully, carefully and accurately describes the future effect to be given the Twenty-first Amendment.

Respectfully submitted,

William T. Chidlaw
Attorney for California Retail
Liquor Dealers Association

WTC:bc

cc: Jack B. Owens, Esq.
Orrick, Herrington, Rowley & Sutcliffe
Eleventh Floor
600 Montgomery Street
San Francisco, CA 94111

Honorable Michael Rodak
Clerk, United States Supreme Court

Henry Lind, Esq.
Reporter of Decisions
United States Supreme Court

Lawrence G. Wallace, Esq.
Deputy Solicitor General

George J. Roth, Esq.
Deputy Attorney General
State of California

Baxter Rice, Director
Department of Alcoholic Beverage Control
State of California

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 20, 1980

79-97 California Retail Liquor Dealers v. Midcal

MEMORANDUM TO THE CONFERENCE:

Counsel for the respondent in the above case, by letter of March 10, requests that we make a change in our opinion. Counsel for petitioner, in a letter dated March 17, opposes the request. I enclose copies of both letters.

Respondent invites our attention to the following sentence at page 12 of the slip opinion:

> "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." (Emphasis added.)

The critical language in the 21st Amendment uses the terms "transportation and importation" of liquor. These terms reflect an intent that the states control the methods of distributing liquor through mechanisms such as laws limiting Sunday sales, sales of liquor by the drink, licensing of liquor dealers, or the sale of liquor by the state (as in Virginia). Such regulations well may be insulated from the Sherman Act by Parker v. Brown immunity, but they also fall within the protections of the 21st Amendment. There may be a better way to make clear that the states have this sort of authority, although none has occurred to me. Moreover, I have thought that our opinion in this case was perhaps a narrower reading of the 21st Amendment than our decision in California v. LaRue.

In sum, I am not disposed to recommend that we make a change.

If there are no contrary views, I will ask Mike Rodak to advise counsel that the Court is not disposed to make a change in our opinion.

L.F.P.

L.F.P., Jr.

ss

March 20, 1980

79-97 California Retail Liquor Dealers v. Midcal

MEMORANDUM TO THE CONFERENCE:

Counsel for the respondent in the above case, by letter of March 10, requests that we make a change in our opinion. Counsel for petitioner, in a letter dated March 17, opposes the request. I enclose copies of both letters.

Respondent invites our attention to the following sentence at page 12 of the slip opinion:

> "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." (Emphasis added.)

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In sum, I am not disposed to recommend that we make a change.

If there are no contrary views, I will ask Mike Rodak to advise counsel that the Court is not disposed to make a change in our opinion.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 20, 1980

Re: No. 79-97, California Retail
Liquor Dealers v. Midcal

Dear Lewis,

I agree with your recommendation that counsel be advised that the Court is not disposed to make a change in its opinion.

Sincerely yours,

P.S.
1.

Mr. Justice Powell

Copies to the Conference

March 21, 1980

79-97 California Retail Liquor Dealers v. Midcal

Dear Mike:

I enclose a copy of my memorandum to the Conference of March 20, together with the letters from counsel referred to therein.

The request by respondent to make a change in our opinion was presented at the Conference today, and you are now authorized to advise counsel by letter that the Court is not disposed to make the requested change in its opinion.

Sincerely,

Mr. Michael Rodak, Jr.

lfp/ss
Enc.

2 copies to M Lind 2/20/80

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
						1/21/80		
Join L/J 2/28/80	out 2/19/80	Join L/J 2/20/80	Join L/J 2/23/80	Join L/J 2/21/80	Join L/J 2/19/80	1st draft 2/15/80	Join L/J 2/20/80	Join L/J 2/15/80
						2nd draft 2/25/80		
						3rd draft 2/29/80		
				79-97 Calif. Retail Liquor v. Midcal				

MASTER -

2/14/80

2-14-80
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First

~~CHAMBERS~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner, *v.* Midcal Aluminum, Inc., et al.	On Writ of Certiorari to the Court of Appeal of California for the Third Appellate District.

[February —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file with the State fair trade contracts or price schedules.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that

[1] The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers."

Cal. Bus. & Prof. Code § 24866 (West 1964).

producer's brands. *Id.*, § 24866 (a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." *Id.*, § 24862 (West Supp. 1979).

For administration of the wine pricing program, the State is divided into three trading areas. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. *Id.*, §§ 24862, 24864–24865 (West Supp. 1979). Similarly, the wine prices posted by a single distributor within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983–984, 153 Cal. Rptr. 757, 762 (1979). A licensee selling below the established prices faces fines, license suspension, or outright license revocation. Cal. Bus. & Prof. Code § 24880.[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

Midcal Aluminum, Inc. is a wholesale distributor of wine in Southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E & J Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then sought to enjoin the State's wine pricing system with a writ of mandate from the California Court of Appeal for the Third Appellate District.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U. S. C. § 1 *et seq.* The court relied entirely on the reasoning in *Rice*

[2] Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damage suits for unfair competition. *Id.*, § 24752.

v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that case, the State Supreme Court found that because the State played only a passive part in wine pricing, there was no *Parker* v. *Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P. 2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California program not only permitted vertical control of prices by producers, but also frequently resulted in horizontal pricefixing. Under the program, many comparable brands of liquor were marketed at identical prices.[8] Referring to congressional and state legislative studies, the court observed that resale price main-

[8] The court cited record evidence that in July 1976, five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 454, and nn. 14, 16, 579 P. 2d 476, 491–492, and nn. 14, 16 (1978).

tenance has little positive impact on either temperance or small retail stores. See [redacted], *infra*.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal. App., at 984, 153 Cal. Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from this Court, did not appeal the ruling in this case.[4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.[5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, — U. S. — (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's [redacted] for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 407 (1911), [redacted] that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." See *Albrecht* v. *The Herald Co.*, 390 U. S. 145 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85 (1920). For many years, [redacted] the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect small

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[4] The State also did not appeal the decision in *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[5] The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.[6] Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); see *Albrecht* v. *The Herald Co., supra; Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *Dr. Miles Medical Co.* v. *Park & Sons Co., supra.* The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition among wholesalers and retailers as effectively as "if they formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U. S., at 408.[7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros.* v. *Calvert Corp., supra; Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

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[6] The congressional reports accompanying the Consumer Goods Pricing Act of 1975, 89 Stat. 801, noted that repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, 94th Cong., 1st Sess., 2 (1975); H. R. Rep. No. 94-341, 94th Cong., 1st Sess., 3, n. 2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.

[7] In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See p. , *supra*, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*." *Midcal Aluminum* v. *Rice*, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker* v. *Brown*, 317 U. S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351. In *Parker* v. *Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.*, at 352.

Under the program challenged in *Parker*, the state Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." *Id.*, at 352. In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted, "[illegible] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.*, at 351.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . .

anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as sovereign." *Id.*, at 791. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 362 (1977).

Only last Term this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978). That program provided that ~~if an automobile franchisee protested against a proposed [illegible] dealership~~, the State would hold a hearing ~~to determine whether there is good cause to block the change~~. *Id.*, at 103. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.*, at 109.

These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.).[8] The California system for wine pricing satis-

[8] See *Norman's On the Waterfront, Inc.* v. *Wheatley*, 44 F. 2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd.* v. *FTC*, 263 F. 2d 502, 509–510 (CA4

fies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does the [illegible] regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[9] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U. S., at 351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that [illegible] repealed the Eighteenth Amendment's prohibition on liquor. The second section reserves to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein

1959); Note, *Parker* v. *Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum. L. Rev. 898, 916 (1977).

[9] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4-15, 4-28 (Repl. Vol. 1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker* v. *Brown*, 317 U. S. 341 (1943), since the State would "displace unfettered business freedom" with its own power. *New Motor Vehicle* [illegible] v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); *See State Board* v. *Young's Market Co.*, 299 U. S. 59, 63 (1936).

of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

A

In determining state powers under the Twenty-first Amendment, the Court has focused on the language of the provision rather than the history behind it. *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936).[10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory powers not strictly limited to importing and transporting alcohol.

[10] The approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to [illegible] the complex currents beneath the congressional resolution proposed the Amendment and the state conventions that ratified it. The Senate sponsor of the resolution said the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that the Amendment was designed only to ensure that "dry" States could not be forced to permit the sale of liquor. See *id.*, at 4140–4151. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of the Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).

Ziffrin, Inc. v. *Reeves*, 308 U. S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market, supra*, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); two others involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, *Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market, supra*, 229 U. S., at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. ~~That provision does not allow the~~ States ~~may~~ tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341 (1964). Nor can ~~the States~~ insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren*, 429 U. S. 190, 204–209 (1976), and due process, *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1970).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the

Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977 (1935). And in *Ziffrin, Inc.* v. *Reeves, supra,* the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. *Id.*, at 139.

The contours of Congress' commerce power over liquor were sharpened in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. See *Craig* v. *Boren,* 429 U. S. 190, 206 (1976).[11]

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[11] In *Nippert* v. *City of Richmond,* 327 U. S. 416 (1946), the Court commented in a footnote:

"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . ." *Id.*, at 425, n. 15.

companies

decisions where the Court held

This pragmatic effort to harmonize state and federal powers has been evident in [redacted] several [redacted] liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945). In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a program similar in many respects to the California [redacted] at issue here. The Court held that the Louisiana statute [redacted] could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966). The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent the enforcement of the Sherman Act" against an interstate conspiracy to fix prices. *Id.*, at 45–46. See *Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

system

because it violated the Sherman Act

liquor

These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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. Although States retain substantial discretion to establish other liquor regulations, those controls may [redacted] be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S., at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Assoc.*, 405 U. S. 596, 610 (1972).

See *Northern Pacific Ry.* v. *United States*, 356 U. S. 1, 4, (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435 (1932); see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 398. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761 and in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d [illegible] 451, 579 P. 2d [illegible] 490 [illegible].[12] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the

[12] [illegible] As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See p. [illegible], *supra;* Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinions cited in text.

↑ at

↑ at

4

As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system.

Twenty-first Amendment. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice* [*supra*]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

In *Rice*, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P. 2d, at 490.[13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 579 P. 2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Program, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." *Ibid.*[14]

no additional state

[13] The California Court of Appeal found only these interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

[14] See *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.*, at 456, 579 P. 2d, at 493.[18] In gauging this interest, the Court adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers. . . ." *Ibid.* The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 per cent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S. Rep. No. 94–466, 94th Cong., 1st Sess., 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see p. [redacted], *supra*, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P. 2d, at 494. The Court of Appeal [redacted] with respect to the wholesale wine trade. 90 Cal. App. 3d, at 983.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the [redacted] resale price maintenance for wine is reasonable [redacted] cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State

[18] The California Supreme Court also stated that orderly market conditions might "reduce excessive competition, thereby encouraging temperance." 21 Cal. 3d, at 456, 579 P. 2d, at 493. The concern for temperance, however, was also considered by the court as an independent state interest in resale price maintenance for liquor.

Attorney General has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same statute as the broad goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.[16] The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

[16] Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U. S. C. § 15.

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SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner, v. Midcal Aluminum, Inc., et al.	On Writ of Certiorari to the Court of Appeal of California for the Third Appellate District.

[February —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, ~~or~~ and rectifiers must file with the State fair trade contracts or price schedules.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that

[1] The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers."

Cal. Bus. & Prof. Code § 24866 (West 1964).

David - I prefer to avoid commencing a sentence with a preposition

producer's brands. *Id.*, § 24866 (a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." *Id.*, § 24862 (West Supp. 1979).

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For administration of the wine pricing program, the State is divided into three trading areas. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. *Id.*, §§ 24862, 24864–24865 (West Supp. 1979). Similarly, the wine prices posted by a single distributor within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983–984, 153 Cal. Rptr. 757, 762 (1979). A licensee selling below the established prices faces fines, license suspension, or outright license revocation. Cal. Bus. & Prof. Code § 24880.[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

David - I don't understand. What if there are two or more distributors?

Midcal Aluminum, Inc. is a wholesale distributor of wine in Southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E & J Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then sought to enjoin the State's wine pricing system with a writ of mandate from the California Court of Appeal for the Third Appellate District.

by obtaining ?

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U. S. C. § 1 *et seq.* The court relied entirely on the reasoning in *Rice*

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[2] Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damage suits for unfair competition. *Id.*, § 24752.

"mandate"? Why not say "sought an injunction" against the operation of state system

? See N 16 p. 16

I assume Midcal could go directly to appellate ct.?

sought an injunction directly from the Cal. Ct. of Appeal for the Third A. Dist against enforcement, etc

David - I happily leave this big deal (this sentence) to you.

v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that case, the State Supreme Court found that because the State played only a passive part in wine pricing, there was no *Parker* v. *Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P. 2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California program not only permitted vertical control of prices by producers, but also frequently resulted in horizontal pricefixing. Under the program, many comparable brands of liquor were marketed at identical prices.[3] Referring to congressional and state legislative studies, the court observed that resale price main-

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[3] The court cited record evidence that in July 1976, five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 454, and nn. 14, 16, 579 P. 2d 476, 491–492, and nn. 14, 16 (1978).

tenance has little positive impact on either temperance or small retail stores. See p. —, *infra*.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal. App., at 984, 153 Cal. Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from this Court, did not appeal the ruling in this case.[4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.[5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, — U. S. — (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's ~~policy~~ for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 407 (1911), ~~pointed out~~ that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." See *Albrecht* v. *The Herald Co.*, 390 U. S. 145 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85 (1920). For many years, though, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect small

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[4] The State also did not appeal the decision in *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[5] The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.[6] Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); see *Albrecht* v. *The Heraald Co., supra; Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *Dr. Miles Medical Co.* v. *Park & Sons Co., supra.* The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition among wholesalers and retailers as effectively as "if they formed a combination and endeavored to establish the same restrictons . . . by agreement with each other." 220 U. S., at 408.[7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros.* v. *Calvert Corp., supra; Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

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[6] The congressional reports accompanying the Consumer Goods Pricing Act of 1975, 89 Stat. 801, noted that the repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, 94th Cong., 1st Sess., 2 (1975); H. R. Rep. No. 94-341, 94th Cong., 1st Sess., 3, n. 2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.

[7] In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See p. —, *supra*, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*." *Midcal Aluminum Co.* v. *Rice*, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker* v. *Brown*, 317 U. S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351. In *Parker* v. *Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.*, at 352.

Under the program challenged in *Parker*, the state Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." *Id.*, at 352. In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted, "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.*, at 351.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . .

anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as sovereign." *Id.*, at 791. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 362 (1977).

Only last Term this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978). That program provided that if an automobile franchisee protested against a proposed new or relocated dealership, the State would hold a hearing "to determine whether there is good cause to block the change." *Id.*, at 103. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.*, at 109.

These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.).[8] The California system for wine pricing satis-

[8] See *Norman's On the Waterfront, Inc.* v. *Wheatley*, 44 F. 2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd.* v. *FTC*, 263 F. 2d 502, 509–510 (CA4

fies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does the government regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[9] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U. S., at 351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that constitutional provision repealed the Eighteenth Amendment's prohibition on liquor. The second section reserves to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein

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1959); Note, *Parker* v. *Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum. L. Rev. 898, 916 (1977).

[9] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4-15, 4-28 (Repl. Vol. 1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker* v. *Brown*, 317 U. S. 341 (1943), since the State would "displace unfettered business freedom" with its own power. *New Motor Vehicle Board of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); See *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63 (1936).

of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

A

In determining state powers under the Twenty-first Amendment, the Court has focused on the language of the provision rather than the history behind it. *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936).[10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory powers not strictly limited to importing and transporting alcohol.

[10] The approach is not only supported by sound canons of constitutional interpretation but also demonstrates a wise reluctance to try to interpret the complex currents beneath the congressional resolution, the proposed the Amendment and the state conventions that ratified it. The Senate sponsor of the resolution said the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that the Amendment was designed only to ensure that "dry" States could not be forced to permit the sale of liquor. See *id.*, at 4140–4151. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of the Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).

Ziffrin, Inc. v. *Reeves,* 308 U. S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market, supra,* concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401 (1938); two others involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, *Finch & Co.* v. *McKittrick,* 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n,* 305 U. S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market, supra,* 229 U. S., at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, *Seagram & Sons* v. *Hostetter,* 384 U. S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. That provision does not allow the States to tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Co.,* 377 U. S. 341 (1964). Nor can the States insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren,* 429 U. S. 190, 204–209 (1976), and due process, *Wisconsin* v. *Constantineau,* 400 U. S. 433, 436 (1970).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the

Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977 (1935). And in *Ziffrin, Inc.* v. *Reeves, supra,* the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. *Id.*, at 139.

The contours of Congress' commerce power over liquor were sharpened in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. See *Craig* v. *Boren,* 429 U. S. 190, 206 (1976).[11]

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[11] In *Nippert* v. *City of Richmond,* 327 U. S. 416 (1946), the Court commented in a footnote:

"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . ." *Id.*, at 425, n. 15.

This pragmatic effort to harmonize state and federal powers has been evident in the Court's conclusion in several cases that the liquor industry may be held liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945). In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a program similar in many respects to the California ~~scheme~~ system at issue here. The Court held that the Louisiana statute violated the Sherman Act and could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966). The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent the enforcement of the Sherman Act" against an interstate conspiracy to fix prices. *Id.*, at 45–46. See *Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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. Although States retain substantial discretion to establish other liquor regulations, those controls may also be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S., at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Assoc.*, 405 U. S. 596, 610 (1972).

See *Northern Pacific Ry.* v. *United States*, 356 U. S. 1, 4, (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435 (1932); see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 398. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761 and in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 451, 579 P. 2d 476, 490 (1978).[19] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the

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[19] Our view of California's interests in its wine pricing system is shaped in part by the unusual posture of this case. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See p. —, *supra*; Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinions cited in text.

In the unusual posture of this case attested, the State of California has evidenced less than an enthusiastic interest in its wine pricing system.

Twenty-first Amendment. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice* [*supra*]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

In *Rice*, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P. 2d, at 490.[13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 579 P. 2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Program, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." *Ibid.*[14]

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[13] The California Court of Appeal found only these same interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

[14] See *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.*, at 456, 579 P. 2d, at 493.[15] In gauging this interest, the Court adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers. . . ." *Ibid.* The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 per cent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S. Rep. No. 94-466, 94th Cong., 1st Sess., 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see p. —, *supra*, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P. 2d, at 494. The Court of Appeal made the same finding with respect to the wholesale wine trade. 90 Cal. App. 3d, at 983.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the ~~State's stake in~~ resale price maintenance ~~for~~ wine is reasonable ~~based on the material~~ cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that ~~the wine pricing system~~ helps sustain small retail establishments. Neither the petitioner nor the State

[15] The California Supreme Court also stated that orderly market conditions might "reduce excessive competition, thereby encouraging temperance." 21 Cal. 3d, at 456, 579 P. 2d, at 493. The concern for temperance, however, was also considered by the court as an independent state interest in resale price maintenance for liquor.

Attorney General has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns ~~put forward~~ advanced (relied upon?) in this case simply are not of the same statute as the ~~broad~~ goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.[16] The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

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[16] Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U. S. C. § 15.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

2-14-80

From: Mr. Justice Powell 4

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SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner, v. Midcal Aluminum, Inc., et al. | On Writ of Certiorari to the Court of Appeal of California for the Third Appellate District.

[February —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file with the State fair trade contracts or price schedules.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that

[1] The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers." Cal. Bus. & Prof. Code § 24866 (West 1964).

producer's brands. *Id.*, § 24866 (a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." *Id.*, § 24862 (West Supp. 1979).

The State is divided into three trading areas for administration of the wine pricing program. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. *Id.*, §§ 24862, 24864–24865 (West Supp. 1979). Similiarly, state regulations provide that the wine prices posted by a single wholesaler within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983–984, 153 Cal. Rptr. 757, 762 (1979). A licensee seling below the established prices faces fines, license suspension, or outright license revocation. Cal. Bus. & Prof. Code § 24880.[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

Midcal Aluminum, Inc. is a wholesale distributor of wine in Southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E & J Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then filed a writ of mandate in the California Court of Appeal for the Third Appellate District asking for an injunction against the State's wine pricing system.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U. S. C.

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[2] Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damage suits for unfair competition. *Id.*, § 24752.

§ 1 *et seq.* The court relied entirely on the reasoning in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that case, the court held that because the State played only a passive part in liquor pricing, there was no *Parker* v. *Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P. 2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California system not only permitted vertical control of prices by producers, but also frequently resulted in horizontal pricefixing. Under the program, many comparable brands of liquor were marketed at identical prices.[3] Referring to congressional and state legislative studies, the court observed that resale price main-

[3] The court cited record evidence that in July 1978, five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 454, and nn. 14, 16, 579 P. 2d 476, 491–492, and nn. 14, 16 (1978).

tenance has little positive impact on either temperance or small retail stores. See pp. 14–15, *infra*.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal. App., at 984, 153 Cal. Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from this Court, did not appeal the ruling in this case.[4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.[5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, — U. S. — (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's plan for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 407 (1911), the Court observed that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." See *Albrecht* v. *The Herald Co.*, 390 U. S. 145 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85 (1920). For many years, however, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect

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[4] The State also did not appeal the decision in *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[5] The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.[6] Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); see *Albrecht* v. *The Herald Co., supra; Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *Dr. Miles Medical Co.* v. *Park & Sons Co., supra.* The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition among wholesalers and retailers as effectively as "if they formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U. S., at 408.[7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros.* v. *Calvert Corp., supra; Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

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[6] The congressional reports accompanying the Consumer Goods Pricing Act of 1975, 89 Stat. 801, noted that repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, 94th Cong., 1st Sess., 2 (1975); H. R. Rep. No. 94-341, 94th Cong., 1st Sess., 3, n. 2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.

[7] In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See p. 3, *supra*, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*." *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker* v. *Brown*, 317 U. S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351. In *Parker* v. *Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.*, at 352.

Under the program challenged in *Parker*, the state Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." *Id.*, at 352. In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.*, at 351.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . .

anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as sovereign." *Id.*, at 791. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 362 (1977).

Only last Term, this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978). That program provided that the State would hold a hearing if an automobile franchisee protested the establishment or relocation of a competing dealership. *Id.*, at 103. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.*, at 109.

These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.).[8] The California system for wine pricing satis-

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[8] See *Norman's On the Waterfront, Inc.* v. *Wheatley*, 44 F. 2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd.* v. *FTC*, 263 F. 2d 502, 509–510 (CA4

fies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[9] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U. S., at 351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that Amendment repealed the Eighteenth Amendment's prohibition on the manufacture, sale or transportation of liquor. The second section reserved to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the

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1959); Note, *Parker* v. *Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum. L. Rev. 898, 916 (1977).

[9] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4–15, 4–28 (Repl. Vol. 1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker* v. *Brown*, 317 U. S. 341 (1943), since the State would "displace unfettered business freedom" with its own power. *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); see *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63 (1936).

United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

A

In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it. *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936).[10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol.

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[10] The approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional resolution that proposed the Amendment and the state conventions that ratified it. The Senate sponsor of the resolution said the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that the Amendment was designed only to ensure that "dry" States could not be forced to permit the sale of liquor. See *id.*, at 4140–4151. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of the Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).

Ziffrin, Inc. v. *Reeves*, 308 U. S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market, supra*, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); two others involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, *Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market, supra*, 229 U. S., at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341 (1964). Nor can they insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren*, 429 U. S. 190, 204–209 (1976), and due process, *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1970).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the

Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977 (1935). And in *Ziffrin, Inc.* v. *Reeves*, *supra*, the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. *Id.*, at 139.

The contours of Congress' commerce power over liquor were sharpened in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. See *Craig* v. *Boren*, 429 U. S. 190, 206 (1976).[11]

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[11] In *Nippert* v. *City of Richmond*, 327 U. S. 416 (1946), the Court commented in a footnote:

"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . ." *Id.*, at 425, n. 15.

This pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945). In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a program similar in many respects to the California system at issue here. The Court held that the Louisiana statute could not be enforced against the distributor [redacted] Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966). The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent the enforcement of the Sherman Act" against an interstate conspiracy to fix liquor prices. *Id.*, at 45–46. See *Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S., at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Assoc.*, 405 U. S. 596, 610 (1972).

See *Northern Pacific Ry.* v. *United States*, 356 U. S. 1, 4, (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435 (1932); see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 398. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761 and in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d, at 451, 579 P. 2d, at 490.[12] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the

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[12] As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See p. 4, *supra;* Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Liquor Dealers Association, a prviate intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinion cited in text.

Twenty-first Amendment. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice* [*supra*]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

In *Rice*, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P. 2d, at 490.[13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 579 P. 2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Program, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." *Ibid.*[14]

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[13] The California Court of Appeal found no additional state interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

[14] See *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.*, at 456, 579 P. 2d, at 493.[16] In gauging this interest, the court adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers. . . ." *Ibid.* The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 per cent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S. Rep. No. 94–466, 94th Cong., 1st Sess., 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see p. 5, *supra*, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P. 2d, at 494. The Court of Appeal came to the same conclusion with respect to the wholesale wine trade. 90 Cal. App. 3d, at 983.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for wine is reasonable, and is supported by the evidence cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State

[16] The California Supreme Court also stated that orderly market conditions might "reduce excessive competition, thereby encouraging temperance." 21 Cal. 3d, at 456, 579 P. 2d, at 493. The concern for temperance, however, was considered by the court as an independent state interest in resale price maintenance for liquor.

Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same statute as the broad goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.[16] The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

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[16] Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U. S. C. § 15.

DOS, 2/6/80

No. 79-97, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.

MR. JUSTICE POWELL delivered the opinion of the Court:

In a state court action, respondent presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of Parker v. Brown, 317 U.S. 341 (1942), or § 2 of the Twenty-first Amendment.

I

Under § 24866(b) of the California Business and Professions Code, all wine producers,

schedule for that producer's brands. Id., § 24866(a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." Id., § 24866(a).

For administration of the wine price program, the State is divided into three trading areas. A single fair trade contract or schedule filed within a trading area sets the terms for all wholesale transactions in that trading area involving that brand of wine. Cal. Bus. & Prof. Code Ann. §§ 24862, 24864-24865 (West Supp. 1979). All wholesalers within a trading area are bound by the prices posted by a single distributor. Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d 979, 983-984 (1979). A licensee not meeting these requirements may face fines, license suspension, or outright revocation. Cal. Bus. & Prof. Code Ann. §

was charged by the Department of Alcoholic Beverage Control with selling 27 cases of wine at less than the prices set by the effective price schedule of the E & J Gallo Winery. A second count alleged that Midcal sold wines for which no fair trade contract or schedule had been filed with the State. Respondent stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. Jt. App., at 19-20. Midcal then sought to enjoin the State's wine pricing system with a writ of mandate from the California Court of Appeal for the Third Appellate District.

The state court ruled that the wine pricing scheme restrains trade in violation of the Sherman Act. 15 U.S.C. §§1, et seq. The court relied entirely on the reasoning of the California Supreme Court in Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal. 3d 431, 579 P.2d 476 (1978),

Parker v. Brown immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P.2d, at 486.

Rice also rejected the claim that California's liquor price policies were protected by § 2 of the Twenty-first Amendment, which

in liquor price maintenance -- the promotion of temperance and the preservation of small retail establishments. The state supreme court emphasized that the California program not only permitted vertical control of prices by producers, but also frequently resulted in horizontal price-fixing. Under the program, many comparable brands of liquor were marketed at identical prices. 3/ Referring to congressional and state legislative studies, the court observed that resale price maintenance has little positive impact on either temperance or small retail stores. See p. ___, infra.

In the instant case, the state Court of Appeal found the analysis in Rice squarely controlling and ruled that the system of wine pricing unlawfully restrains trade. 90 Cal. App., at 984. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting

Association (CRLDA), an intervenor. 5/ The California Supreme Court declined to hear the case, and the CRLDA sought certiorari from this Court. We granted the writ, ____ U.S. _____ (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's policy for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 407 (1911), pointed out that such arrangements are "designed to maintain prices . . ., and to prevent competition among those who trade in them." See Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Schrader's Son, Inc., 252 U.S. 85 (1920). For many years, though,

David - the verb "to feel" connotes a physical touching. Yet, we all misuse it - including me

Congress ~~felt~~ thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed Miller-Tydings and related legislation. 6/ Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951). The wine producer holds the power to dictate prices charged by wholesalers and thereby to prevent price competition. As Mr. Justice Hughes pointed out in Dr. Miles Medical Co., such vertical control destroys horizontal competition among wholesalers and retailers as effectively as "if they formed a

See Albrecht v. The Herald Co., 390 U.S. 145 (1961); Kiefer-Stewart Co. v. Seagram & Sons, 340 US. 211 (1951). Dr. Miles Medical Co. v. Parke & Sons Co., supra ⊙

the Sherman Act as regulation with no interstate impact. See Schwegmann Bros. v. Calvert Corp., supra; Burke v. Ford, 389 U.S. 320 (1967) (per curiam).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient under Parker v. Brown to establish antitrust immunity. That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." Parker v. Brown, supra, 317 U.S., at 350-351. In Parker, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against

state Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing ~~and pricing~~ policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program . . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." Id., at 352. In view of this extensive official oversight, the Court wrote, the antitrust laws did not apply. Without such oversight, the result could have been different. The Court expressly noted, "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." Id., at 351.

Several recent decisions have applied

David -
Did the Commission control "prices"? That is implied in the first ~~sentence~~ sentence. But the quoted refers only the undefined "prorate program."

established by the state ~~courts~~ Supreme Court. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as sovereign." Id., at 791. Similarly, in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred by a state agency's passive acceptance of a public utility's tariff. In contrast, the Arizona rules against lawyer advertising were held to be immune from Sherman Act challenge because they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker -- the Arizona Supreme Court -- in enforcement proceedings." Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Only last Term this Court found antitrust immunity for a California program requiring state approval

and affirmatively expressed" goal was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." Id., at 109.

These decisions establish two standards for antitrust immunity under Parker v. Brown. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978). 8/ The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for Parker immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The governmental

is hereby prohibited." U.S. Const., Amend. XXI.

The remaining question before us is whether § 2 permits California to countermand the congressional policy -- adopted under the commerce power -- in favor of competition.

A.

In determining State powers under the Twenty-first Amendment, this Court has focused on the language of the provision rather than the history behind it. State Board v. Young's Market Co., 299 U.S. 59, 63-64 (1936). In terms, the amendment gives the States control over the "transportation or importation" of liquor into the States. Of course, such control logically entails considerable regulatory powers not strictly limited to importing and transporting alcohol. Zifrin v. Reeves, 308 U.S. 132, 138 (1939). We should not, however, lose sight of the explicit

a State from other jurisdictions. Young's Market, supra, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938); two others involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Joseph F. Finch & Co. v. McKittrick, 305 U.S. 395 (1939). The Court upheld the challenged state authority in all four cases, largely on the basis of the amendment's grant of state power over the "importation and transportation" of intoxicating liquors. Yet even in those special circumstances, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the

Sons v. Hostetter, 384 U.S. 35, 45 (1966), but also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. That provision does not prevent federal action with respect to liquor under the Export-Import Clause. Department of Revenue v. James Beam Co., 377 U.S. 341 (1964). Nor can the state insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, Craig v. Boren, 429 U.S. 190 (1976), or due process, Wisconsin v. Constantineau, 400 U.S. 433 (1970).

More difficult to define, however, is congressional control over liquor under its interstate commerce power. Although that power is directly qualified by § 2, the Court has held that the federal government retains some Commerce Clause authority over liquor. In William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939) (per curiam),

Reeves, supra, the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the State program was reasonable. Id., at 139.

The contours of Congress' commerce power over liquor were sharpened in Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 331-332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment somehow operated to 'repeal' the commerce clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the commerce clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be

the commerce clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." Id., at 332. See Craig v. Boren, 429 U.S. 190 (1976).

This pragmatic view as to the need to harmonize state and federal powers has been evident in the Court's treatment of Sherman Act suits implicating state regulation of intoxicating liquor. In United States v. Frankfort Distilleries, Inc., 324 U.S. 293, (1945), the Court permitted the continuation of an antitrust action against a group of liquor dealers. It concluded that the alleged price-fixing was not authorized by state law, because the alleged price-fixing arrangement could not protect the state policy at stake. In Schwegmann Bros. v. Calvert Corp., supra, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance

The Twenty-first Amendment does not insulate the liquor industry from the liquor antitrust laws for anticompetitive actions that are not mandated by when the alleged anticompetitive actions are not authorized by the State.

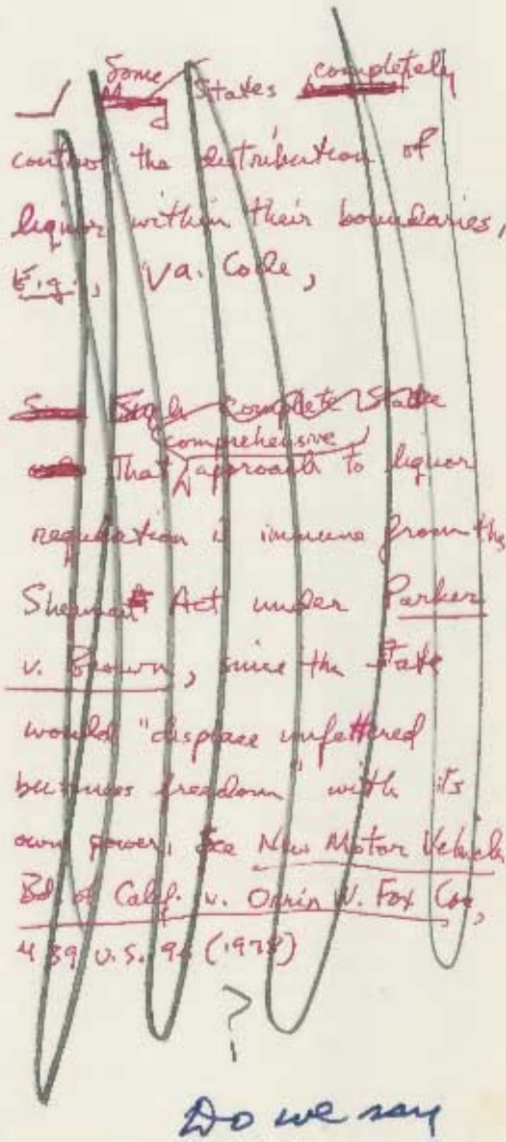
In several instances, the Court has permitted the continuation of antitrust actions against liquor dealers or producers, so long as the alleged anticompetitive acts were extrastate in nature.

David - I don't find this case enormously helpful

see Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951);

violated the Sherman Act and could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge a New York State requirement that liquor dealers attest that their prices were "no higher than the lowest price" charged anywhere in the United States. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966). Although the Court concluded that the statute exerted "no irresistable economic pressure on the appellants to violate the Sherman Act in order to comply," it also pointed out that "[n]othing in the Twenty-first Amendment, of course, would prevent the enforcement of the Sherman Act" against an interstate conspiracy to fix prices. Id., at 45. See Burke v. Ford, 389 U.S. 320 (1967) (per curiam).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the



liquor regulations, but those controls may also be subject to federal commerce power regulation in appropriate situations. In these other areas, the state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." Idlewild, supra, at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

United States v. Topco Assoc., 405 U.S. 596, 610

"exercis[ed] all the power it possessed" under the commerce clause when it approved the Sherman Act. Atlantic Cleaners & Dyers v. United States, 286 U.S. 425, 435 (1932); see City of Lafayette v. Louisiana Power & Light Co., supra, 495 U.S., at 398. We must acknowledge the importance of the Act's procompetition policy.

Our view of California's interests in its wine pricing system is shaped in part by the unusual posture of this case. As we noted, the state agency that administers the program did not appeal the decision of the California Court of Appeal. See p. ___ supra; Tr. of Oral Arg. 20. Instead, this action has been maintained by the CRLDA, a private intervenor. But neither the CRLDA nor the State Attorney General, who filed a brief as amicus curiae in support of the legislative scheme, has quantified the particular state interests protected by the resale price maintenance system.

Court to the extent they undercut state rights guaranteed by the Twenty-first Amendment. See Hooven & Allison Co. v. Evatt, 324 U.S. 652, 659 (1945); Creswill v. Knights of Pythias, 225 U.S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 99 (1938), and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." Fry Roofing Co. v. Wood, 344 U.S. 157, 161 (1952).

The California Court of Appeal stated that its review of the state's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in Rice [v. Alcoholic Beverages Control Board, 21 Cal. 3d 431, 579 P.2d, 476 (1978)]." 90 Cal. App. 3d, at 983. Therefore, we turn to that opinion's treatment of the state

promote temperance and orderly market conditions." Id., at 451; 579 P.2d, at 493. [13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42 % increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. Id. at 457-458, 579 P.2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Program xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." Ibid.

The Rice opinion identified the state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers" and, again, temperance. Id. at 456, 579 P.2d, at 493. The

argument that fair trade laws were necessary to the economic survival of small retailers." Ibid. The Appeals Board had relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. That report found that "states with fair trade laws had a 55 per cent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." Ibid., citing S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, the state Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." Id., at 457, 579 P.2d, at 494. That conclusion was adopted by the Court of Appeal for the wholesale wine trade. 90 Cal. App. 3d., at

in favor of competition. That evaluation of the State's stake in resale price maintenance for wine is reasonable, based on the material cited by the State Supreme Court in Rice, and has not been refuted before this Court. We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.

The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

There is nothing in the record that suggests that the wine pricing system helps sustain effect either the small retail establishments. Equally, neither petitioner nor the State Attorney General has demonstrated that the program inhibits the consumption of alcohol by Californians.

interests in temperance and protection of small retailers

We cannot say whether the state interest would ever prevail against the unsubstantiated federal interest in a competitive economy. But the unsubstantiated concerns put forward in this case must yield to the Sherman Act.

lack the are simply not

broad goals

1/ The statute provides:

> "Each wine grower, wholesaler licensed to sell wine, wine rectifier and rectifier shall:
>
> "(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.
>
> "(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers."

Cal. Bus. & Prof. Code Ann. § 24866 (West Supp. 1979).

3/ The court cited record evidence that in July 1976 five leading brands of gin all sold in California for $4.89 for a fifth of a gallon, and that five leading brands of scotch whiskey sold for either $8.39 or $8.40 a fifth. Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal. 3d 431, 454 & nn. 14, 15, 579 P.2d 476, 492 & nn. 14, 15 (1978).

4/ The State also did not appeal the decision in Capiscean Corp. v. Alcoholic Beverages Control Bd., 87 Cal. App. 3d 996 (1979), which used the analysis in Rice to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

5/ The California Retail Liquor Dealers Association (CRLDA), a trade association of independent retail liquor dealers in California,

repeal of general fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, 94th Cong., 1st Sess. 2 (1975); H. Rep. No. 94-431, 94th Cong., 1st Sess. 3, n.2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, infra.

7/ In Rice, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See p. supra, & n.3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in Rice." Midcal Aluminum Co. v. Rice, 90 Cal. App. 3d 979, 983 (1979).

program.[9/] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As Parker teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S., at 351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that constitutional provision repealed the Eighteenth Amendment's prohibition on liquor. The second section reserves to the States certain power to regulate traffic in liquor.

"The transportation or

[9/] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries, e.g., Va. Code, . Such comprehensive regulation would be immune from the Sherman Act under Parker v. Brown since the State would "displace unfettered business freedom" with its own power. See Lic. Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co., 439 U.S. 96 (1978).

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No. 79-97, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of Parker v. Brown, 317 U.S. 341 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866(b) of the California

trade contract, wholesalers must post a resale price schedule for that producer's brands. Id., § 24866(a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." Id., § 24862 (West Supp. 1979).

For administration of the wine pricing program, the State is divided into three trading areas. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. Id., §§ 24862, 24864-24865 (West Supp. 1979). Similarly, the wine prices posted by a single distributor within a trading area bind all wholesalers in that area. Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d 979, 983-984, 153 Cal. Rptr. 757, 762 (1979). A licensee selling below the established prices faces fines, license suspension,

dealers.

Midcal Aluminum, Inc. is a wholesale distributor of wine in Southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E & J Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19-20. Midcal then sought to enjoin the State's wine pricing system with a writ of mandate from the California Court of Appeal for the Third Appellate District.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U.S.C. § 1 et seq. The court

the sale of distilled liquors. In that case, the state Supreme Court found that because the State played only a passive part in wine pricing, there was no Parker v. Brown immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P.2d, at 486.

from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance -- the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California program not only permitted vertical control of prices by producers, but also frequently resulted in horizontal price-fixing. Under the program, many comparable brands of liquor were marketed at identical prices. 3/ Referring to congressional and state legislative studies, the court observed that resale price maintenance has little positive impact on either temperance or small retail stores. See p. ___, infra.

In the instant case, the state Court of Appeal found the analysis in Rice squarely controlling. 90 Cal. App., at 984, 153 Cal. Rptr, at 760. The court ordered the Department of

appeal the ruling in this case. 4/ An appeal was brought by the California Retail Liquor Dealers Association, an intervenor. 5/ The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, ____ U.S. (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's policy for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 407 (1911), pointed out that such arrangements are "designed to maintain prices . . ., and to prevent competition among those who trade in [competing goods]." See Albrecht v. The Herald

permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation. 6/ Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951); see Albrecht v. The Herald Co., supra; Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951); Dr. Miles

Dr. Miles, such vertical control destroys horizontal competition among wholesalers and retailers as effectively as "if they formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U.S., at 408. 7/ Moreover, there can be no claim that the California program is simply intrastate regulation beyond th reach of the Sherman Act. See Schwegmann Bros. v. Calvert Corp., supra; Burke v. Ford, 389 U.S. 320 (1967) (per curiam).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under Parker v. Brown, 317 U.S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may

v. Brown, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. Id., at 352.

Under the program challenged in Parker, the state Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program . . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." Id., at 352. In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been

Id., at 351.

Several recent decisions have applied Parker's analysis. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the state Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as sovereign." Id., at 791. Similarly, in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because they "reflect[ed] a

proceedings." Bates v. State Bar of Arizona, 433 U.S. 350, 362 (1977).

Only last Term this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co., 439 U.S. 96 (1978). That program provided that if an automobile franchisee protested against a proposed new or relocated dealership, the State would hold a hearing "to determine whether there is good cause to block the change." Id., at 103. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." Id., at 109.

These decisions establish two standards

supervised" by the State itself. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of BRENNAN, J.). 8/ The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for Parker immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does the government regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. 9/ The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing

351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that constitutional provision repealed the Eighteenth Amendment's prohibition on liquor. The second section reserves to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the United States for delievery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy -- adopted under the commerce power -- in favor of competition.

history behind it. State Board v. Young's Market Co., 299 U.S. 59, 63-64 (1936). 10/ In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory powers not strictly limited to importing and transporting alcohol. Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. Young's Market, supra, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938); two others involved "retaliation"

305 U.S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." Young's Market, supra, 229 U.S., at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, Seagram & Sons v. Hostetter, 384 U.S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. That provision does not allow the States to tax imported liquor in violation of the Export-Import Clause. Department of Revenue v. James Beam Co., 377 U.S. 341 (1964).

Constantineau, 400 U.S. 433, 436 (1970).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the Court has held that the Federal Government retains some Commerce Clause authority over liquor. In Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939) (per curiam),this Court found no violation of the Twenty-First Amendment in a whiskey labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977 (1935). And in Ziffrin, Inc. v. Reeves, supra, the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the State program was reasonable. Id., at 139.

The contours of Congress' commerce power over liquor were sharpened in Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 331-332 (1964).

liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." Id., at 332. See Craig v. Boren, 429 U.S. 190, 206 (1976). 11/

This pragmatic effort to harmonize state

Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945). In Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a program similar in many respects to the California scheme at issue here. The Court held that the Louisiana statute violated the Sherman Act and could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966). The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that

U.S. 320 (1967) (per curiam).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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. Although States retain substantial discretion to establish other liquor regulations, those controls may also be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." Hostetter v. Idlewild Liquor Corp., 377 U.S., at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Assoc., 405 U.S. 596, 610 (1972)

See Northern Pacific Ry. v. United States, 356 U.S. 1, 4, (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932); see City of Lafayette v. Louisiana Power & Light Co., 435 U.S., at 398. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90

those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the Twenty-first Amendment. See Hooven & Allison Co. v. Evatt, 324 U.S. 652, 659 (1945); Creswill v. Knights of Pythias, 225 U.S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100(1938), and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952).

The California Court of Appeal stated that its review of the state's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in Rice [supra]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761. Therefore, we turn to that opinion's treatment of

"to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P.2d, at 490. 13/ The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42 % increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. Id., at 457-458, 579 P.2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Program, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." Ibid. 14/

The Rice opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." Id. at 456, 579 P.2d, at 493. 15/ In gauging this interest,

necessary to the economic survival of small retailers. . . ." Ibid. The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 per cent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." Ibid., citing S. Rep. No. 94-466, 94th Cong., 1st Sess., 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see p. ___, supra, the state Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P.2d, at 494. The Court of Appeal made the same finding with respect to the

national policy in favor of competition. That evaluation of the State's stake in resale price maintenance for wine is reasonable based on the material cited by the state Supreme Court in Rice. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State Attorney General has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same statutre as the broad goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first

Affirmed.

1/ The statute provides:

//"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers."

//Cal. Bus. & Prof. Code § 24866 (West 1964).

2/ Licensees that sell wine below the prices

3/ The court cited record evidence that in July 1976, five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of scotch whiskey sold for either $8.39 or $8.40 a fifth. Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal. 3d 431, 454, and nn. 14, 16, 579 P.2d 476, 491-492, and nn. 14, 16 (1978).

4/ The State also did not appeal the decision in Capiscean Corp. v. Alcoholic Beverage Control Appeals Bd., 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), which used the analysis in Rice to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

5/ The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over

noted that the repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, 94th Cong., 1st Sess., 2 (1975); H. Rep. No. 94-341, 94th Cong., 1st Sess., 3, n.2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, infra.

7/ In Rice, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See p. —, supra, and n.3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in Rice." Midcal Aluminum Co. v. Rice, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

State Action Doctrine After Goldfarb, Cantor, and Bates, 77 Colum. L. Rev. 898, 916 (1977).

9/ The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. E.g., Va. Code §§ 4-15, 4-28 (Repl. Vol. 1979). Such comprehensive regulation would be immune from the Sherman Act under Parker v. Brown, 317 U.S. 341 (1943), since the State would "displace unfettered business freedom" with its own power. New Motor Vehicle Board of Calif. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978); See State Board v. Young's Market Co., 299 U.S. 59, 63 (1936).

10/ This approach is not only supported by sound canons of constitutional interpretation but also demonstrates a wise reluctance to try to interpret the complex currents beneath the congressional

control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that the Amendment was designed only to ensure that "dry" States could not be forced to permit the sale of liquor. See id., at 4140-4141. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of the Idaho Convention); id., at 191-192 (Darnall, President of Maryland Convention); id., at 247 (Gaylord, Chairman of Missouri Convention); id., at 469-473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See

Beverage Laws -- Experience Under the Twenty-first Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).

11/ In Nippert v. City of Richmond, 327 U.S. 416 (1946), the Court commented in a footnote:

> "[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . . "

Id., at 425, n.15.

12/ Our view of California's interests in its wine pricing system is shaped in part by the unusual posture of this case. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court

the State Attorney General, who filed a brief amicus curiae in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinions cited in text.

13/ The California Court of Appeal found only these same interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760-761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." Ibid.

14/ See Seagram & Sons v. Hostetter, 384 U.S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of

competition, thereby encouraging temperance." 21 Cal. 3d, at 456, 579 P.2d, at 493. The concern for temperance, however, was also considered by the court as an independent state interest in resale price maintenance for liquor.

16/ Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U.S.C. §15.

2-13-80

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner, *v.* Midcal Aluminum, Inc., et al.	On Writ of Certiorari to the Court of Appeal of California for the Third Appellate District.

[February —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, or rectifiers must file with the State fair trade contracts or price schedules.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that

[1] The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers."

Cal. Bus. & Prof. Code § 24866 (West 1964).

producer's brands. *Id.*, § 24866 (a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." *Id.*, § 24862 (West Supp. 1979).

For administration of the wine pricing program, the State is divided into three trading areas. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. *Id.*, §§ 24862, 24864–24865 (West Supp. 1979). Similarly, the wine prices posted by a single distributor within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983–984, 153 Cal. Rptr. 757, 762 (1979). A licensee selling below the established prices faces fines, license suspension, or outright license revocation. Cal. Bus. & Prof. Code § 24880.[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

Midcal Aluminum, Inc. is a wholesale distributor of wine in Southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E & J Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then sought to enjoin the State's wine pricing system with a writ of mandate from the California Court of Appeal for the Third Appellate District.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U. S. C. § 1 *et seq.* The court relied entirely on the reasoning in *Rice*

[2] Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damage suits for unfair competition. *Id.*, § 24752.

v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that case, the State Supreme Court found that because the State played only a passive part in wine pricing, there was no *Parker* v. *Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P. 2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California program not only permitted vertical control of prices by producers, but also frequently resulted in horizontal pricefixing. Under the program, many comparable brands of liquor were marketed at identical prices.[3] Referring to congressional and state legislative studies, the court observed that resale price main-

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[3] The court cited record evidence that in July 1976, five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 454, and nn. 14, 16, 579 P. 2d 476, 491–492, and nn. 14, 16 (1978).

tenance has little positive impact on either temperance or small retail stores. See p. —, *infra*.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling, 90 Cal. App., at 984, 153 Cal. Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from this Court, did not appeal the ruling in this case.[4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.[5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, — U. S. — (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's policy for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 407 (1911), pointed out that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." See *Albrecht* v. *The Herald Co.*, 390 U. S. 145 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85 (1920). For many years, though, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect small

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[4] The State also did not appeal the decision in *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[5] The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.[6] Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); see *Albrecht* v. *The Heraald Co., supra; Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *Dr. Miles Medical Co.* v. *Park & Sons Co., supra.* The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition among wholesalers and retailers as effectively as "if they formed a combination and endeavored to establish the same restrictons . . . by agreement with each other." 220 U. S., at 408.[7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros.* v. *Calvert Corp., supra; Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

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[6] The congressional reports accompanying the Consumer Goods Pricing Act of 1975, 89 Stat. 801, noted that the repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, 94th Cong., 1st Sess., 2 (1975); H. R. Rep. No. 94-341, 94th Cong., 1st Sess., 3, n. 2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.

[7] In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See p. —, *supra*, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*." *Midcal Aluminum Co.* v. *Rice*, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker* v. *Brown*, 317 U. S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351. In *Parker* v. *Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.*, at 352.

Under the program challenged in *Parker*, the state Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." *Id.*, at 352. In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted, "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.*, at 351.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . .

anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as sovereign." *Id.*, at 791. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 362 (1977).

Only last Term this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978). That program provided that if an automobile franchisee protested against a proposed new or relocated dealership, the State would hold a hearing "to determine whether there is good cause to block the change." *Id.*, at 103. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.*, at 109.

These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.).[8] The California system for wine pricing satis-

[8] See *Norman's On the Waterfront, Inc.* v. *Wheatley*, 44 F. 2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd.* v. *FTC*, 263 F. 2d 502, 509–510 (CA4

fies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does the government regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[9] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U. S., at 351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that constitutional provision repealed the Eighteenth Amendment's prohibition on liquor. The second section reserves to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein

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1959); Note, *Parker* v. *Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum. L. Rev. 898, 916 (1977).

[9] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4-15, 4-28 (Repl. Vol. 1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker* v. *Brown*, 317 U. S. 341 (1943), since the State would "displace unfettered business freedom" with its own power. *New Motor Vehicle Board of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); See *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63 (1936).

of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

I'd put it later, where it becomes relevant

A

In determining state powers under the Twenty-first Amendment, the Court has focused on the language of the provision rather than the history behind it. *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936).[10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory powers not strictly limited to importing and transporting alcohol.

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[10] The approach is not only supported by sound canons of constitutional interpretation but also demonstrates a wise reluctance to try to interpret the complex currents beneath the congressional resolution the proposed the Amendment and the state conventions that ratified it. The Senate sponsor of the resolution said the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that the Amendment was designed only to ensure that "dry" States could not be forced to permit the sale of liquor. See *id.*, at 4140–4151. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of the Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).

Ziffrin, Inc. v. *Reeves*, 308 U. S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market*, *supra*, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); two others involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, *Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market*, *supra*, 229 U. S., at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. That provision does not allow the States to tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341 (1964). Nor can the States insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren*, 429 U. S. 190, 204–209 (1976), and due process, *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1970).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the

Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977 (1935). And in *Ziffrin, Inc.* v. *Reeves, supra,* the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. *Id.*, at 139.

The contours of Congress' commerce power over liquor were sharpened in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. See *Craig* v. *Boren,* 429 U. S. 190, 206 (1976).[11]

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[11] In *Nippert* v. *City of Richmond,* 327 U. S. 416 (1946), the Court commented in a footnote:

"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . ." *Id.*, at 425, n. 15.

This pragmatic effort to harmonize state and federal powers has been evident in the Court's conclusion in several cases that the liquor industry may be held liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945). In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a program similar in many respects to the California scheme at issue here. The Court held that the Louisiana statute violated the Sherman Act and could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966). The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent the enforcement of the Sherman Act" against an interstate conspiracy to fix prices. *Id.*, at 45–46. See *Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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. Although States retain substantial discretion to establish other liquor regulations, those controls may also be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S., at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Assoc.*, 405 U. S. 596, 610 (1972).

See *Northern Pacific Ry.* v. *United States*, 356 U. S. 1, 4, (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435 (1932); see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 398. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761 and in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 451, 579 P. 2d 476, 490 (1978).[12] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the

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[12] Our view of California's interests in its wine pricing system is shaped in part by the unusual posture of this case. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See p. —, *supra*; Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinions cited in text.

Twenty-first Amendment. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice* [*supra*]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

In *Rice*, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P. 2d, at 490.[13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 579 P. 2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Program, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." *Ibid.*[14]

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[13] The California Court of Appeal found no additional ~~only these same~~ interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

[14] See *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.*, at 456, 579 P. 2d, at 493.[15] In gauging this interest, the Court adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers. . . ." *Ibid.* The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 per cent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S. Rep. No. 94–466, 94th Cong., 1st Sess., 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see p. —, *supra*, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P. 2d, at 494. The Court of Appeal made the same finding with respect to the wholesale wine trade. 90 Cal. App. 3d, at 983.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the State's stake in resale price maintenance for wine is reasonable based on the material cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State

[15] The California Supreme Court also stated that orderly market conditions might "reduce excessive competition, thereby encouraging temperance." 21 Cal. 3d, at 456, 579 P. 2d, at 493. The concern for temperance, however, was also considered by the court as an independent state interest in resale price maintenance for liquor.

Attorney General has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same statute as the broad goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.[16] The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

[16] Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U. S. C. § 15.

2-13-80

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner, v. Midcal Aluminum, Inc., et al. | On Writ of Certiorari to the Court of Appeal of California for the Third Appellate District.

[February —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file with the State fair trade contracts or price schedules.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that

[1] The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers."

Cal. Bus. & Prof. Code § 24866 (West 1964).

producer's brands. *Id.*, § 24866 (a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." *Id.*, § 24862 (West Supp. 1979).

For administration of the wine pricing program, the State is divided into three trading areas. A single fair trade contract ~~or schedule~~ for each brand sets the terms for all wholesale transactions in that brand within a given trading area. *Id.*, §§ 24862, 24864–24865 (West Supp. 1979). Similarly, the wine prices posted by a single ~~distributor~~ within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983–984, 153 Cal. Rptr. 757, 762 (1979). A licensee selling below the established prices faces fines, license suspension, or outright license revocation. Cal. Bus. & Prof. Code § 24880.[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

Midcal Aluminum, Inc. is a wholesale distributor of wine in Southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E & J Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then sought to enjoin the State's wine pricing system with a writ of ~~mandate~~ from the California Court of Appeal for the Third Appellate District.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U. S. C. § 1 *et seq.* The court relied entirely on the reasoning in *Rice*

[2] Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damage suits for unfair competition. *Id.*, § 24752.

v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that case, the State Supreme Court found that because the State played only a passive part in wine pricing, there was no *Parker* v. *Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P. 2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California program not only permitted vertical control of prices by producers, but also frequently resulted in horizontal pricefixing. Under the program, many comparable brands of liquor were marketed at identical prices.[3] Referring to congressional and state legislative studies, the court observed that resale price main-

[3] The court cited record evidence that in July 1976, five leading brands of gin each sold in California for $4.59 for a fifth of a gallon, and that five leading brands of scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 454, and nn. 14, 16, 579 P. 2d 476, 491–492, and nn. 14, 16 (1978).

tenance has little positive impact on either temperance or small retail stores. See [redacted], *infra*.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal. App., at 984, 153 Cal. Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from this Court, did not appeal the ruling in this case.[4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.[5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, — U. S. — (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's [redacted] for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 407 (1911), [redacted] that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." See *Albrecht* v. *The Herald Co.*, 390 U. S. 145 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85 (1920). For many years, though, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect small

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[4] The State also did not appeal the decision in *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[5] The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.[6] Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); see *Albrecht* v. *The Herald Co., supra; Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *Dr. Miles Medical Co.* v. *Park & Sons Co., supra.* The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition among wholesalers and retailers as effectively as "if they formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U. S., at 408.[7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros.* v. *Calvert Corp., supra; Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

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[6] The congressional reports accompanying the Consumer Goods Pricing Act of 1975, 89 Stat. 801, noted that the repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94–466, 94th Cong., 1st Sess., 2 (1975); H. R. Rep. No. 94–341, 94th Cong., 1st Sess., 3, n. 2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, *infra.*

[7] In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See p. [illegible], *supra*, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*." *Midcal Aluminum* [illegible] v. *Rice*, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker* v. *Brown*, 317 U. S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351. In *Parker* v. *Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.*, at 352.

Under the program challenged in *Parker*, the state Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." *Id.*, at 352. In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted, "[T]he state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.*, at 351.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . .

anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as sovereign." *Id.*, at 791. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 362 (1977).

Only last Term this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978). That program provided that if an automobile franchisee protested against a proposed new or relocated dealership, the State would hold a hearing "to determine whether there is good cause to block the change." *Id.*, at 108. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.*, at 109.

These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.).[8] The California system for wine pricing satis-

[8] See *Norman's On the Waterfront, Inc.* v. *Wheatley*, 44 F. 2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd.* v. *FTC*, 263 F. 2d 502, 509–510 (CA4

fies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does the government regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[9] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U. S., at 351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that constitutional provision repealed the Eighteenth Amendment's prohibition on liquor. The second section reserves to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein

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1959); Note, *Parker* v. *Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum. L. Rev. 898, 916 (1977).

[9] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4–15, 4–28 (Repl. Vol. 1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker* v. *Brown*, 317 U. S. 341 (1943), since the State would "displace unfettered business freedom" with its own power. *New Motor Vehicle Board of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); *See State Board* v. *Young's Market Co.*, 299 U. S. 59, 63 (1936).

of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

A

In determining state powers under the Twenty-first Amendment, the Court has focused on the language of the provision rather than the history behind it. *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936).[10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory powers not strictly limited to importing and transporting alcohol.

[10] The approach is not only supported by sound canons of constitutional interpretation but also demonstrates a wise reluctance to [redacted] the complex currents beneath the congressional resolution [redacted] proposed the Amendment and the state conventions that ratified it. The Senate sponsor of the resolution said the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that the Amendment was designed only to ensure that "dry" States could not be forced to permit the sale of liquor. See *id.*, at 4140–4151. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of the Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).

Ziffrin, Inc. v. *Reeves*, 308 U. S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market, supra*, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); two others involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, *Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market, supra*, 229 U. S., at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. That provision does not allow the States to tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341 (1964). Nor can the States insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren*, 429 U. S. 190, 204–209 (1976), and due process, *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1970).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the

Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977 (1935). And in *Ziffrin, Inc.* v. *Reeves*, *supra*, the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. *Id.*, at 139.

The contours of Congress' commerce power over liquor were sharpened in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. See *Craig* v. *Boren*, 429 U. S. 190, 206 (1976).[11]

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[11] In *Nippert* v. *City of Richmond*, 327 U. S. 416 (1946), the Court commented in a footnote:

"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . ." *Id.*, at 425, n. 15.

This pragmatic effort to harmonize state and federal powers has been evident in several cases in which the liquor industry was held liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945). In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a program similar in many respects to the California scheme at issue here. The Court held that the Louisiana statute violated the Sherman Act and could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966). The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent the enforcement of the Sherman Act" against an interstate conspiracy to fix prices. *Id.*, at 45–46. See *Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S., at 332.

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The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Assoc.*, 405 U. S. 596, 610 (1972).

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[12] As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See p. , *supra*; Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinions cited in text.

As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system.

Twenty-first Amendment. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice* [*supra*]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

In *Rice*, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P. 2d, at 490.[13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 579 P. 2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Program, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." *Ibid.*[14]

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[13] The California Court of Appeal found only these same interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

[14] See *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.*, at 456, 579 P. 2d, at 493.[15] In gauging this interest, the Court adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers. . . ." *Ibid.* The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 per cent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S. Rep. No. 94-466, 94th Cong., 1st Sess., 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see p. —, *supra*, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P. 2d, at 494. The Court of Appeal made the same finding with respect to the wholesale wine trade. 90 Cal. App. 3d, at 983.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the [redacted] resale price maintenance for wine is reasonable based on the material cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State

[15] The California Supreme Court also stated that orderly market conditions might "reduce excessive competition, thereby encouraging temperance." 21 Cal. 3d, at 456, 579 P. 2d, at 493. The concern for temperance, however, was also considered by the court as an independent state interest in resale price maintenance for liquor.

Attorney General has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns [redacted] in this case simply are not of the same statu[redacted]e as the [redacted] goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.[16] The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

[16] Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U. S. C. § 15.

D. Stewart
23073

~~2-11-80~~
2-25-80

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: FEB 15 1980

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2d

~~1st~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner, v. Midcal Aluminum, Inc., et al. | On Writ of Certiorari to the Court of Appeal of California for the Third Appellate District.

[February —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file with the State fair trade contracts or price schedules.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that

[1] The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers." Cal. Bus. & Prof. Code § 24866 (West 1964).

producer's brands. *Id.*, § 24866 (a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." *Id.*, § 24862 (West Supp. 1979).

The State is divided into three trading areas for administration of the wine pricing program. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. *Id.*, §§ 24862, 24864–24865 (West Supp. 1979). Similiarly, state regulations provide that the wine prices posted by a single wholesaler within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983–984, 153 Cal. Rptr. 757, 762 (1979). A licensee seling below the established prices faces fines, license suspension, or outright license revocation. Cal. Bus. & Prof. Code § 24880.[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

Midcal Aluminum, Inc. is a wholesale distributor of wine in Southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E & J Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then filed a writ of mandate in the California Court of Appeal for the Third Appellate District asking for an injunction against the State's wine pricing system.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U. S. C.

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[2] Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damage suits for unfair competition. *Id.*, § 24752.

§ 1 *et seq.* The court relied entirely on the reasoning in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that case, the court held that because the State played only a passive part in liquor pricing, there was no *Parker* v. *Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P. 2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California system not only permitted vertical control of prices by producers, but also frequently resulted in horizontal pricefixing. Under the program, many comparable brands of liquor were marketed at identical prices.[3] Referring to congressional and state legislative studies, the court observed that resale price main-

[3] The court cited record evidence that in July 1976, five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 454, and nn. 14, 16, 579 P. 2d 476, 491–492, and nn. 14, 16 (1978).

tenance has little positive impact on either temperance or small retail stores. See pp. 14–15, *infra*.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal. App., at 984, 153 Cal. Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from this Court, did not appeal the ruling in this case.[4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.[5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, — U. S. — (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's plan for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 407 (1911), the Court observed that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." See *Albrecht* v. *The Herald Co.*, 390 U. S. 145 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85 (1920). For many years, however, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect

[4] The State also did not appeal the decision in *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3d 906, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[5] The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.[6] Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); see *Albrecht* v. *The Herald Co., supra; Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *Dr. Miles Medical Co.* v. *Park & Sons Co., supra.* The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition ~~among wholesalers and retailers~~ as effectively as "if ~~they~~ formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U. S., at 408.[7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros.* v. *Calvert Corp., supra; Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

[6] The congressional reports accompanying the Consumer Goods Pricing Act of 1975, 89 Stat. 801, noted that repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, 94th Cong., 1st Sess., 2 (1975); H. R. Rep. No. 94-341, 94th Cong., 1st Sess., 3, n. 2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.

[7] In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See p. 3, *supra*, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*." *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker* v. *Brown*, 317 U. S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351. In *Parker* v. *Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.*, at 352.

Under the program challenged in *Parker*, the state Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." *Id.*, at 352. In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.*, at 351.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . .

anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as sovereign." *Id.*, at 791. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 362 (1977).

Only last Term, this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978). That program provided that the State would hold a hearing if an automobile franchisee protested the establishment or relocation of a competing dealership. *Id.*, at 103. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.*, at 109.

These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.).[5] The California system for wine pricing satis-

[5] See *Norman's On the Waterfront, Inc.* v. *Wheatley*, 44 F. 2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd.* v. *FTC*, 263 F. 2d 502, 509–510 (CA4

fies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[9] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U. S., at 351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that Amendment repealed the Eighteenth Amendment's prohibition on the manufacture, sale or transportation of liquor. The second section reserved to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the

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1959); Note, *Parker* v. *Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum. L. Rev. 898, 916 (1977).

[9] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4–15, 4–28 (Repl. Vol. 1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker* v. *Brown*, 317 U. S. 341 (1943), since the State would "displace unfettered business freedom" with its own power. *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); see *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63 (1936).

United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

A

In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it. *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936).[10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol.

[10] The approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional resolution that proposed the Amendment and the state conventions that ratified it. The Senate sponsor of the resolution said the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that [illegible] was designed only to ensure that "dry" States could not be forced to permit the sale of liquor. See *id.*, at 4140–4141. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of the Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).

Ziffrin, Inc. v. *Reeves*, 308 U. S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market, supra*, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); two others involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, *Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market, supra*, 229 U. S., at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341 (1964). Nor can they insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren*, 429 U. S. 190, 204–209 (1976), and due process, *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1970).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the

Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977 (1935). And in *Ziffrin, Inc.* v. *Reeves*, *supra*, the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. 308 U.S., at 139.

The contours of Congress' commerce power over liquor were sharpened in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. See *Craig* v. *Boren*, 429 U. S. 190, 206 (1976).[11]

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[11] In *Nippert* v. *City of Richmond*, 327 U. S. 416 (1946), the Court commented in a footnote:

"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . ." *Id.*, at 425, n. 15.

This pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945). In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a program similar in many respects to the California system at issue here. The Court held that the Louisiana statute could not be enforced against the distributor [redacted] Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966). The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent the enforcement of the Sherman Act" against an interstate conspiracy to fix liquor prices. *Id.*, at 45–46. See *Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S., at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Assoc.*, 405 U. S. 596, 610 (1972).

See *Northern Pacific Ry.* v. *United States*, 356 U. S. 1, 4 (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435 (1932); see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 398. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761 and in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d, at 451, 579 P. 2d, at 490.[12] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the

[12] As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See p. 4, *supra*; Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Liquor Dealers Association, a prviate intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinions cited in text.

Twenty-first Amendment. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice* [*supra*]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

In *Rice*, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P. 2d, at 490.[13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 579 P. 2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Program, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." *Ibid.*[14]

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[13] The California Court of Appeal found no additional state interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

[14] See *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.*, at 456, 579 P. 2d, at 493.[15] In gauging this interest, the court adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers. . . ." *Ibid.* The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 per cent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S. Rep. No. 94–466, 94th Cong., 1st Sess., 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see p. 5, *supra*, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P. 2d, at 494. The Court of Appeal came to the same conclusion with respect to the wholesale wine trade. 90 Cal. App. 3d, at 983.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for wine is reasonable, and is supported by the evidence cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State

[15] The California Supreme Court also stated that orderly market conditions might "reduce excessive competition, thereby encouraging temperance." 21 Cal. 3d, at 456, 579 P. 2d, at 493. The concern for temperance, however, was considered by the court as an independent state interest in resale price maintenance for liquor.

Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same statute as the [redacted] goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.[16] The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

[16] Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U. S. C. § 15.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

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2-25-80

From: Mr. Justice Powell

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SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner, v. Midcal Aluminum, Inc., et al. | On Writ of Certiorari to the Court of Appeal of California for the Third Appellate District.

[February —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file with the State fair trade contracts or price schedules.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that

[1] The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers." Cal. Bus. & Prof. Code § 24866 (West 1964).

producer's brands. *Id.*, § 24866 (a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." *Id.*, § 24862 (West Supp. 1979).

The State is divided into three trading areas for administration of the wine pricing program. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. *Id.*, §§ 24862, 24864–24865 (West Supp. 1979). Similiarly, state regulations provide that the wine prices posted by a single wholesaler within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983–984, 153 Cal. Rptr. 757, 762 (1979). A licensee seling below the established prices faces fines, license suspension, or outright license revocation. Cal. Bus. & Prof. Code § 24880.[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

Midcal Aluminum, Inc. is a wholesale distributor of wine in Southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E & J Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then filed a writ of mandate in the California Court of Appeal for the Third Appellate District asking for an injunction against the State's wine pricing system.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U. S. C.

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[2] Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damage suits for unfair competition. *Id.*, § 24752.

§ 1 *et seq.* The court relied entirely on the reasoning in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that case, the court held that because the State played only a passive part in liquor pricing, there was no *Parker* v. *Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P. 2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California system not only permitted vertical control of prices by producers, but also frequently resulted in horizontal pricefixing. Under the program, many comparable brands of liquor were marketed at identical prices.[3] Referring to congressional and state legislative studies, the court observed that resale price main-

[3] The court cited record evidence that in July 1976, five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 454, and nn. 14, 16, 579 P. 2d 476, 491–492, and nn. 14, 16 (1978).

tenance has little positive impact on either temperance or small retail stores. See pp. 14–15, *infra*.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal. App., at 984, 153 Cal. Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from this Court, did not appeal the ruling in this case.[4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.[5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, — U. S. — (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's plan for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 407 (1911), the Court observed that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." See *Albrecht* v. *The Herald Co.*, 390 U. S. 145 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85 (1920). For many years, however, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect

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[4] The State also did not appeal the decision in *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[5] The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.[6] Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); see *Albrecht* v. *The Herald Co., supra; Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *Dr. Miles Medical Co.* v. *Park & Sons Co., supra.* The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U. S., at 408.[7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros.* v. *Calvert Corp., supra; Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

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[6] The congressional reports accompanying the Consumer Goods Pricing Act of 1975, 89 Stat. 801, noted that repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, 94th Cong., 1st Sess., 2 (1975); H. R. Rep. No. 94-341, 94th Cong., 1st Sess., 3, n. 2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.

[7] In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See p. 3, *supra*, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*." *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker* v. *Brown*, 317 U. S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351. In *Parker* v. *Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.*, at 352.

Under the program challenged in *Parker*, the state Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." *Id.*, at 352. In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.*, at 351.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . .

anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as sovereign." *Id.*, at 791. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 362 (1977).

Only last Term, this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978). That program provided that the State would hold a hearing if an automobile franchisee protested the establishment or relocation of a competing dealership. *Id.*, at 103. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.*, at 109.

These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.).[8] The California system for wine pricing satis-

[8] See *Norman's On the Waterfront, Inc.* v. *Wheatley*, 444 F. 2d 1011, 1018 (CA8 1971); *Asheville Tobacco Bd.* v. *FTC*, 263 F. 2d 502, 509–510 (CA4

fies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[9] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U. S., at 351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that Amendment repealed the Eighteenth Amendment's prohibition on the manufacture, sale or transportation of liquor. The second section reserved to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the

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1959); Note, *Parker* v. *Brown* Revisited: The State Action Doctrine After *Goldfarb, Cantor,* and *Bates,* 77 Colum. L. Rev. 898, 916 (1977).

[9] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.,* Va. Code §§ 4-15, 4-28 (Repl. Vol. 1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker* v. *Brown,* 317 U. S. 341 (1943), since the State would "displace unfettered business freedom" with its own power. *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.,* 439 U. S. 96, 109 (1978); see *State Board* v. *Young's Market Co.,* 299 U. S. 59, 63 (1936).

United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

A

In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it. *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936).[10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol.

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[10] The approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional resolution that proposed the Amendment and the state conventions that ratified it. The Senate sponsor of the resolution said the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that § 2 was designed only to ensure that "dry" States could not be force by the Federal Government to permit the sale of liquor. See *id.*, at 4140–4141. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of the Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).

Ziffrin, Inc. v. *Reeves,* 308 U. S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market, supra,* concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401 (1938); two others involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, *Finch & Co.* v. *McKittrick,* 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n,* 305 U. S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market, supra,* 229 U. S., at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, *Seagram & Sons* v. *Hostetter,* 384 U. S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Co.,* 377 U. S. 341 (1964). Nor can they insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren,* 429 U. S. 190, 204–209 (1976), and due process, *Wisconsin* v. *Constantineau,* 400 U. S. 433, 436 (1970).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the

Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977 (1935). And in *Ziffrin, Inc.* v. *Reeves*, *supra*, the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. 308 U. S., at 139.

The contours of Congress' commerce power over liquor were sharpened in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. See *Craig* v. *Boren*, 429 U. S. 190, 206 (1976).[11]

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[11] In *Nippert* v. *City of Richmond*, 327 U. S. 416 (1946), the Court commented in a footnote:

"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . ." *Id.*, at 425, n. 15.

This pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945). In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a program similar in many respects to the California system at issue here. The Court held that because the Louisiana statute violated the Sherman Act, it could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966). The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent the enforcement of the Sherman Act" against an interstate conspiracy to fix liquor prices. *Id.*, at 45–46. See *Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S., at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Assoc.*, 405 U. S. 596, 610 (1972).

See *Northern Pacific Ry.* v. *United States*, 456 U. S. 1, 4 (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435 (1932); see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 398. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761 and in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d, at 451, 579 P. 2d, at 490.[12] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the

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[12] As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See p. 4, *supra*; Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Liquor Dealers Association, a prviate intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinions cited in text.

Twenty-first Amendment. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice* [*supra*]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

In *Rice*, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P. 2d, at 490.[13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 579 P. 2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Program, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." *Ibid.*[14]

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[13] The California Court of Appeal found no additional state interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

[14] See *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.*, at 456, 579 P. 2d, at 493.[15] In gauging this interest, the court adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers. . . ." *Ibid.* The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 per cent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S. Rep. No. 94–466, 94th Cong., 1st Sess., 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see p. 5, *supra*, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P. 2d, at 494. The Court of Appeal came to the same conclusion with respect to the wholesale wine trade. 90 Cal. App. 3d, at 983.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for wine is reasonable, and is supported by the evidence cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State

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[15] The California Supreme Court also stated that orderly market conditions might "reduce excessive competition, thereby encouraging temperance." 21 Cal. 3d, at 456, 579 P. 2d, at 493. The concern for temperance, however, was considered by the court as an independent state interest in resale price maintenance for liquor.

Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.[18] The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

MR. JUSTICE BRENNAN did not take part in the consideration or decision of this case.

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[18] Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U. S. C. § 15.

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R. Stewart 3,7,8,9,13

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

2nd DRAFT

Recirculated: FEB 25 1980

SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner, v. Midcal Aluminum, Inc., et al. | On Writ of Certiorari to the Court of Appeal of California for the Third Appellate District.

[February ~~7~~, 1980]

3

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file with the State fair trade contracts or price schedules.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that

[1] The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers." Cal. Bus. & Prof. Code § 24866 (West 1964).

producer's brands. *Id.*, § 24866 (a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." *Id.*, § 24862 (West Supp. 1979).

The State is divided into three trading areas for administration of the wine pricing program. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. *Id.*, §§ 24862, 24864–24865 (West Supp. 1979). Similiarly, state regulations provide that the wine prices posted by a single wholesaler within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983–984, 153 Cal. Rptr. 757, 762 (1979). A licensee seling below the established prices faces fines, license suspension, or outright license revocation. Cal. Bus. & Prof. Code § 24880.[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

Midcal Aluminum, Inc. is a wholesale distributor of wine in Southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E & J Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then filed a writ of mandate in the California Court of Appeal for the Third Appellate District asking for an injunction against the State's wine pricing system.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U. S. C.

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[2] Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damage suits for unfair competition. *Id.*, § 24752.

§ 1 *et seq.* The court relied entirely on the reasoning in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that case, the court held that because the State played only a passive part in liquor pricing, there was no *Parker* v. *Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P. 2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California system not only permitted vertical control of prices by producers, but also frequently resulted in horizontal price fixing. Under the program, many comparable brands of liquor were marketed at identical prices.[3] Referring to congressional and state legislative studies, the court observed that resale price main-

[3] The court cited record evidence that in July 1976, five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 454, and nn. 14, 16, 579 P. 2d 476, 491–492, and nn. 14, 16 (1978).

tenance has little positive impact on either temperance or small retail stores. See pp. 14–15, *infra*.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal. App., at 984, 153 Cal. Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from this Court, did not appeal the ruling in this case.[4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.[5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, — U. S. — (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's plan for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 407 (1911), the Court observed that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." See *Albrecht* v. *The Herald Co.*, 390 U. S. 145 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85 (1920). For many years, however, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect

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[4] The State also did not appeal the decision in *Copiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[5] The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.[6] Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); see *Albrecht* v. *The Herald Co., supra; Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *Dr. Miles Medical Co.* v. *Park & Sons Co., supra.* The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U. S., at 408.[7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros.* v. *Calvert Corp., supra; Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

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[6] The congressional reports accompanying the Consumer Goods Pricing Act of 1975, 89 Stat. 801, noted that repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, 94th Cong., 1st Sess., 2 (1975); H. R. Rep. No. 94-341, 94th Cong., 1st Sess., 3, n. 2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.

[7] In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See p. 3, *supra*, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*." *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker* v. *Brown*, 317 U. S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351. In *Parker* v. *Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.*, at 352.

Under the program challenged in *Parker*, the state Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." *Id.*, at 352. In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.*, at 351.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . .

anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as sovereign." *Id.*, at 791. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 362 (1977).

Only last Term, this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978). That program provided that the State would hold a hearing if an automobile franchisee protested the establishment or relocation of a competing dealership. *Id.*, at 103. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.*, at 109.

These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.).[8] The California system for wine pricing satis-

[8] See *Norman's On the Waterfront, Inc.* v. *Wheatley*, 444 F. 2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd.* v. *FTC*, 263 F. 2d 502, 509–510 (CA4

fies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[8] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U. S., at 351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that Amendment repealed the Eighteenth Amendment's prohibition on the manufacture, sale or transportation of liquor. The second section reserved to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the

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1959); Note, *Parker* v. *Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum. L. Rev. 898, 916 (1977).

[8] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4–15, 4–28 (Repl. Vol. 1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker* v. *Brown*, 317 U. S. 341 (1943), since the State would "displace unfettered business freedom" with its own power. *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); see *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63 (1936).

United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

A

In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it. *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936).[10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol.

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[10] The approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional ~~resolution that proposed~~ the Amendment and the state conventions ~~that ratified it~~. The Senate sponsor of the resolution said the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that § 2 was designed only to ensure that "dry" States could not be force by the Federal Government to permit the sale of liquor. See *id.*, at 4140–4141. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of the Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment, 72 Harv. L. Rev, 1145, 1147 (1959).

Ziffrin, Inc. v. *Reeves*, 308 U. S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market, supra*, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); two others involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States. *Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market, supra*, 229 U. S., at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341 (1964). Nor can they insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren*, 429 U. S. 190, 204–209 (1976), and due process, *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1970).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the

Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977 (1935). And in *Ziffrin, Inc.* v. *Reeves, supra*, the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. 308 U. S., at 139.

The contours of Congress' commerce power over liquor were sharpened in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. See *Craig* v. *Boren*, 429 U. S. 190, 206 (1976).[11]

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[11] In *Nippert* v. *City of Richmond*, 327 U. S. 416 (1946), the Court commented in a footnote:

"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . ." *Id.*, at 425, n. 15.

This pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945). In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a program similar in many respects to the California system at issue here. The Court held that because the Louisiana statute violated the Sherman Act, it could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966). The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent the enforcement of the Sherman Act" against an interstate conspiracy to fix liquor prices. *Id.*, at 45–46. See *Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S., at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Assoc.*, 405 U. S. 596, 610 (1972).

See *Northern Pacific Ry.* v. *United States*, 456 U. S. 1, 4 (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435 (1932); see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 398. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761 and in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d, at 451, 579 P. 2d, at 490.[12] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the

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[12] As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See p. 4, *supra*; Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinions cited in text.

Twenty-first Amendment. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice* [*supra*]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

In *Rice*, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P. 2d, at 490.[13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 579 P. 2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Program, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." *Ibid.*[14]

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[13] The California Court of Appeal found no additional state interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

[14] See *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.*, at 456, 579 P. 2d, at 493.[15] In gauging this interest, the court adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers. . . ." *Ibid.* The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 per cent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S. Rep. No. 94–466, 94th Cong., 1st Sess., 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see p. 5, *supra*, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P. 2d, at 494. The Court of Appeal came to the same conclusion with respect to the wholesale wine trade. 90 Cal. App. 3d, at 983.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for wine is reasonable, and is supported by the evidence cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State

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[15] The California Supreme Court also stated that orderly market conditions might "reduce excessive competition, thereby encouraging temperance." 21 Cal. 3d, at 456, 579 P. 2d, at 493. The concern for temperance, however, was considered by the court as an independent state interest in resale price maintenance for liquor.

Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.[16] The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

MR. JUSTICE BRENNAN did not take part in the consideration or decision of this case.

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[16] Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U. S. C. § 15.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

Stylistic Changes 9

From: Mr. Justice Powell

2-29-80

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner, v. Midcal Aluminum, Inc., et al. | On Writ of Certiorari to the Court of Appeal of California for the Third Appellate District.

[March —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file with the State fair trade contracts or price schedules.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that

[1] The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers." Cal. Bus. & Prof. Code § 24866 (West 1964).

producer's brands. *Id.*, § 24866 (a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." *Id.*, § 24862 (West Supp. 1979).

The State is divided into three trading areas for administration of the wine pricing program. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. *Id.*, §§ 24862, 24864–24865 (West Supp. 1979). Similiarly, state regulations provide that the wine prices posted by a single wholesaler within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983–984, 153 Cal. Rptr. 757, 762 (1979). A licensee seling below the established prices faces fines, license suspension, or outright license revocation. Cal. Bus. & Prof. Code § 24880.[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

Midcal Aluminum, Inc. is a wholesale distributor of wine in Southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E & J Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then filed a writ of mandate in the California Court of Appeal for the Third Appellate District asking for an injunction against the State's wine pricing system.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U. S. C.

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[2] Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damage suits for unfair competition. *Id.*, § 24752.

§ 1 *et seq.* The court relied entirely on the reasoning in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that case, the court held that because the State played only a passive part in liquor pricing, there was no *Parker* v. *Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P. 2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California system not only permitted vertical control of prices by producers, but also frequently resulted in horizontal price fixing. Under the program, many comparable brands of liquor were marketed at identical prices.[3] Referring to congressional and state legislative studies, the court observed that resale price main-

[3] The court cited record evidence that in July 1976, five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 454, and nn. 14, 16, 579 P. 2d 476, 491–492, and nn. 14, 16 (1978).

tenance has little positive impact on either temperance or small retail stores. See pp. 14–15, *infra*.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal. App., at 984, 153 Cal. Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from this Court, did not appeal the ruling in this case.[4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.[5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, — U. S. — (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's plan for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 407 (1911), the Court observed that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." See *Albrecht* v. *The Herald Co.*, 390 U. S. 145 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85 (1920). For many years, however, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect

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[4] The State also did not appeal the decision in *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[5] The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.[6] Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); see *Albrecht* v. *The Herald Co., supra; Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *Dr. Miles Medical Co.* v. *Park & Sons Co., supra.* The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U. S., at 408.[7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros.* v. *Calvert Corp., supra; Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

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[6] The congressional reports accompanying the Consumer Goods Pricing Act of 1975, 89 Stat. 801, noted that repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, 94th Cong., 1st Sess., 2 (1975); H. R. Rep. No. 94-341, 94th Cong., 1st Sess., 3, n. 2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.

[7] In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See p. 3, *supra*, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*." *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker* v. *Brown*, 317 U. S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351. In *Parker* v. *Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.*, at 352.

Under the program challenged in *Parker*, the state Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." *Id.*, at 352. In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.*, at 351.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . .

anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as sovereign." *Id.*, at 791. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 362 (1977).

Only last Term, this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978). That program provided that the State would hold a hearing if an automobile franchisee protested the establishment or relocation of a competing dealership. *Id.*, at 103. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.*, at 109.

These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.).[8] The California system for wine pricing satis-

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[8] See *Norman's On the Waterfront, Inc.* v. *Wheatley*, 444 F. 2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd.* v. *FTC*, 263 F. 2d 502, 509–510 (CA4

fies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[9] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U. S., at 351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that Amendment repealed the Eighteenth Amendment's prohibition on the manufacture, sale or transportation of liquor. The second section reserved to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the

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1959); Note, *Parker* v. *Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum. L. Rev. 898, 916 (1977).

[9] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4–15, 4–28 (Repl. Vol. 1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker* v. *Brown*, 317 U. S. 341 (1943), since the State would "displace unfettered business freedom" with its own power. *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); see *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63 (1936).

United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

A

In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it. *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936).[10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol.

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[10] The approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional proposal of the Amendment and its ratification in the state conventions. The Senate sponsor of the Amendment resolution said the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that § 2 was designed only to ensure that "dry" States could not be force by the Federal Government to permit the sale of liquor. See *id.*, at 4140–4141. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of the Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).

Ziffrin, Inc. v. *Reeves*, 308 U. S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market, supra*, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); two others involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, *Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market, supra*, 229 U. S., at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341 (1964). Nor can they insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren*, 429 U. S. 190, 204–209 (1976), and due process, *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1970).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the

Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977 (1935). And in *Ziffrin, Inc.* v. *Reeves*, *supra*, the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. 308 U. S., at 139.

The contours of Congress' commerce power over liquor were sharpened in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. See *Craig* v. *Boren*, 429 U. S. 190, 206 (1976).[11]

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[11] In *Nippert* v. *City of Richmond*, 327 U. S. 416 (1946), the Court commented in a footnote:

"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . ." *Id.*, at 425, n. 15.

This pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945). In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a program similar in many respects to the California system at issue here. The Court held that because the Louisiana statute violated the Sherman Act, it could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966). The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent the enforcement of the Sherman Act" against an interstate conspiracy to fix liquor prices. *Id.*, at 45–46. See *Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. 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. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S., at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Assoc.*, 405 U. S. 596, 610 (1972).

See *Northern Pacific Ry.* v. *United States*, 456 U. S. 1, 4 (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435 (1932); see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 398. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761 and in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d, at 451, 579 P. 2d, at 490.[12] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the

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[12] As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See p. 4, *supra;* Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Retail Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinions cited in text.

Twenty-first Amendment. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances." *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice* [*supra*]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 761. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

In *Rice*, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P. 2d, at 490.[13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 579 P. 2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Program, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." *Ibid.*[14]

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[13] The California Court of Appeal found no additional state interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

[14] See *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.*, at 456, 579 P. 2d, at 493.[15] In gauging this interest, the court adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers. . . ." *Ibid.* The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 per cent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S. Rep. No. 94-466, 94th Cong., 1st Sess., 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see p. 5, *supra*, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P. 2d, at 494. The Court of Appeal came to the same conclusion with respect to the wholesale wine trade. 90 Cal. App. 3d, at 983.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for wine is reasonable, and is supported by the evidence cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State

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[15] The California Supreme Court also stated that orderly market conditions might "reduce excessive competition, thereby encouraging temperance." 21 Cal. 3d, at 456, 579 P. 2d, at 493. The concern for temperance, however, was considered by the court as an independent state interest in resale price maintenance for liquor.

Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.[16] The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

MR. JUSTICE BRENNAN did not take part in the consideration or decision of this case.

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[16] Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U. S. C. § 15.