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Midcal Aluminum, Inc. v. California Retail Liquor Dealers Association: Federal Power Under the Twenty-First Amendment

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION v. MIDCAL ALUMINUM, INC.: FEDERAL POWER UNDER THE TWENTY-FIRST AMENDMENT?

The commerce clause, by its terms, grants Congress the power to regulate trade among the several states.[1] Additionally, the clause places inherent restrictions on permissible state commercial regulations.[2] Section 2 of the twenty-first amendment qualifies the commerce clause by vesting the states with the power to control the transportation or importation of alcoholic beverages.[3] Accordingly, the restrictions the com-

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[1] U.S. CONST. art. I, § 8, cl. 3. The commerce clause grants Congress the power to "regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes." *Id.*

[2] Hughes v. Oklahoma, 441 U.S. 322, 326 (1979). If state legislation conflicts with a federal statute the state regulation must give way to the federal law under the supremacy clause. U.S. CONST. art. 6, cl. 2. *See* Pennsylvania v. Nelson, 350 U.S. 497, 499, 510 (1956) (Pennsylvania Sedition Act overturned because directly conflicted with the Smith Act, which prohibits knowing advocacy of overthrow of U.S. government); Castle v. Hayes Freight Lines, Inc., 348 U.S. 61, 63, 65 (1954) (state could not suspend carrier's right to use state's highways in interstate operations when properly licensed by Interstate Commerce Commission under Federal Motor Carrier Act). *See generally* Note, *Pre-Emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

Even when Congress has not enacted legislation, the commerce clause places restrictions on permissible state regulations. 441 U.S. at 326. A state may legislate in an area where Congress has not enacted legislation provided that the state law does not place an undue burden on the free flow of interstate commerce. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 522-23, 530 (1959) (Illinois statute requiring use of certain type of mudguards on trucks and trailers operating on state highways overturned because regulation placed too heavy burden on interstate commerce); Dean Milk Co. v. City of Madison, 340 U.S. 349, 350-51, 356 (1951) (city ordinance making it unlawful to sell any milk unless processed and bottled in approved plant within five mile radius of city held to place discriminatory burden on interstate commerce); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 763, 783-84 (1945) (state law prohibiting operation of any train with more than 14 passenger cars or 70 freight cars overturned because undue burden on interstate commerce). *See generally* Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547 (1947); Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).

[3] U.S. CONST. amend. XXI, § 2. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." *Id.*

The Supreme Court and most commentators treat § 2, of the XXI amendment in terms of an affirmative grant of power to the states. *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980); State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936); *The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1579 (1975) [hereinafter cited as *Authority to Control*]; Note, *Retail Price Maintenance for Liquor: Does the Twenty-First Amendment Preclude a Free Trade Market?*, 5 HASTINGS CONST. L.Q. 507, 510 (1978) [hereinafter cited as *Price Maintenance*]. A minority position asserts that § 2 is a provision simply allowing the states to exercise their police power over alcohol while the commodity is still in interstate commerce. *See* Norman's on the Waterfront, Inc. v.

merce clause places on state regulations affecting interstate trade are modified when the state regulations concern liquor.[4] The Supreme Court, however, has not determined completely the extent of state control over alcohol under the twenty-first amendment and, conversely, the degree of federal authority remaining over alcohol under the commerce clause.[5]

All of the Supreme Court's early decisions concerning section 2 of the twenty-first amendment involved the regulation of importation or transportation of alcoholic beverages coming into a state "for delivery or use therein."[6] The state regulations, therefore, came directly from the language of section 2 of the amendment. Despite the direct burden the state laws placed on interstate commerce, the Supreme Court upheld state legislation that regulated the importation and sale of liquor.[7] The

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Wheatley, 444 F.2d 1011, 1018-19 (3d Cir. 1971); *The Concept of State Power Under the Twenty-First Amendment*, 40 TENN. L. REV. 465, 471-73 (1973) [hereinafter cited as *State Power*].

[4] Two competing theories can be gleaned from the Congressional debates over the effect the XXI amendment was intended to produce on the commerce clause. 76 CONG. REC. 64-4172 (1933); *Authority to Control, supra* note 3, at 1579-81. The "absolutist" position states that Congress intended that § 2 of the XXI amendment give plenary power to the states over alcohol. *Id.* at 1579. The "federalists" assert that Congress intended § 2 to prevent federal restrictions under the commerce clause from unduly interfering with dry states' regulation of imported intoxicants. *Id.* at 1580.

[5] *See Authority to Control, supra* note 3, at 1578-79; *Price Maintenance, supra* note 3, at 509-10. One significant difference between state liquor regulations and other state laws is that when state regulations of alcohol conflict with a federal statute they are not automatically overturned under the supremacy clause. *See* note 2 *supra*. The proposition that state regulations concerning alcohol have the same status as federal statutes because both are supported by constitutional provisions is inherent in Supreme Court decisions concerning the XXI amendment. *See generally* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Craig v. Boren, 429 U.S. 190 (1976); California v. LaRue, 409 U.S. 109 (1972); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).

[6] Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 395-96 (1939) (state "retaliation" statute which barred the importation of alcohol from states which restricted importation from other states sustained); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 392 (1939) (same); Mahoney v. Joseph Triner Corp., 304 U.S. 401 , 402 (1938) (state law restricting types of liquor that could be imported from other states upheld); State Bd. of Equalization v. Young's Mkt. Co., 229 U.S. 59, 60 (1936) (California statute requiring $500 license fee to import beer sustained); *see* note 4 *supra*.

In *Young's Mkt.*, the Court refused to inquire into the XXI amendment's legislative history stating that "the language of the Amendment is clear." 299 U.S. at 63-64.

[7] State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936). The Court in *Young's Mkt.* upheld a California statute requiring a $500 license fee to import beer into the state. *Id.* The Court stated clearly that California's beer importation statute placed an undue burden on the free flow of commerce and that prior to adoption of the XXI amendment the $500 fee would have been impermissible. *Id.*

Petitioners in *Young's Mkt.* also claimed that the statute discriminated against wholesalers who imported beer from other states in violation of the XIV amendment equal protection clause. *Id.* at 64; *see* U.S. CONST. amend. XIV, § 1. The Court summarily dismissed this claim stating that "[a] classification recognized by the Twenty-First amendment cannot be deemed forbidden by the Fourteenth." 299 U.S. at 64; *accord*, Mahoney v. Joseph Triner Corp., 304 U.S. 401, 403-04 (1938).

Court stated that the broad nature of state authority over alcoholic beverages logically entailed considerable regulatory power not limited strictly to importation or sale.[8] The Court rejected the contention, however, that section 2 of the amendment released the states from all restrictions inherent in the commerce clause and other provisions of the Constitution.[9] When confronted with state regulations over alcohol which did not come directly from the language of section 2, the Court began to limit state authority over intoxicating beverages.[10] The limitations the Court placed on state authority over alcohol were in areas of exclusive federal concern, such as federally owned installations,[11] regulation of commerce with foreign nations,[12] and taxation of imports from

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[8] Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939). The Court upheld Kentucky's complex system for licensing liquor haulers only after concluding that the laws were a reasonable exercise of the state's authority over alcoholic beverages. *Id.* Since a state could absolutely prohibit the manufacture, sale, transportation or possession of liquor, the Court reasoned that a state could adopt measures "reasonably appropriate to effectuate these inhibitions." *Id.*

[9] State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 64 (1936); *see* note 6 *supra*. In *Young's Mkt.*, petitoners contended that to sustain California's beer importation statute would require an interpretation that the XXI amendment freed the states from all restrictions placed on their power over alcohol found in the Constitution. *Id.* The Court stated that such a generalization was not required. *Id.*; *e.g.* Burke v. Ford, 389 U.S. 320 (1967) (*per curiam*); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Frankfort Distilleries, 324 U.S. 293 (1945).

The effect of the XXI amendment on other constitutional provisions is increasingly doubtful. Craig v. Boren, 429 U.S. 190, 206 (1976). When the exercise of state's power over alcohol contravened the XIV amendment's due process and equal protection rights, the Supreme Court limited that power. *See id.* (statutory scheme prohibiting sale of 3.2% beer to males under 21 years and females under 18 years overturned because constituted discrimination in violation of equal protection clause of XIV amendment); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 165 (1973) (state liquor licensing program violated XIV amendment to extent it operated to allow Moose Lodge to practice racial discrimination); Wisconsin v. Constantineau, 400 U.S. 433, 434 & 439 (1971) (state law authorizing posting of the names in retail liquor stores of persons to whom liquor was not to be sold invalidated because contravened XIV amendment due process requirements). *But see* California v. LaRue, 409 U.S. 109, 110 & 119 (1972) (California's law prohibiting explicit sexual live entertainment and films in bars and other establishments licensed to sell liquor by the drink sustained against I and XIV amendment challenges); note 7 *supra*. *See generally Authority to Control*, *supra* note 3, at 1595-1610; *Price Maintenance*, *supra* note 3, at 521-25; *see also* note 13 *infra*.

[10] *See* text accompanying notes 11-13 *infra*. *See generally Authority to Control*, *supra* note 3, at 1582-95; *Price Maintenance*, *supra* note 3, at 515-20.

[11] *See* United States v. State Tax Comm'n, 412 U.S. 363, 368 (1973) (XXI amendment did not give states power to control or tax importation of liquor into federal military bases under exclusive jurisdiction of United States); Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 538-39 (1938) (XXI amendment did not give states power to regulate importation of liquor going exclusively into national park under jurisdiction of United States).

[12] Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 334 (1964); *accord*, Department of Alcoholic Beverage Control for Cal. v. Ammex Warehouse Co., 378 U.S. 124, 124 (1964) (*per curiam*). In *Idlewild*, the Court concluded that the XXI amendment did not grant the states power over foreign commerce in alcohol, reasoning that foreign liquor

foreign countries.[13]

Recent cases have sharpened the contours of state and federal regulatory authority over alcohol.[14] *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[15] represents the Supreme Court's most recent attempt to define the relationship between states' power under the twenty-first amendment and federal power under the commerce clause. *Midcal* reaffirmed that the federal government still retains an interest in the control of alcoholic beverages in interstate commerce.[16] Furthermore, the Court established that when a conflict arises between a state alcohol regulation and a valid exercise of the federal commerce power that the respective interests must be closely evaluated and balanced to properly resolve the conflict.[17]

The controversy in *Midcal* arose from the petitioner's violation of California's wine pricing laws enacted pursuant to the State's power under section 2 of the twenty-first amendment.[18] California's wholesale wine pricing laws required that all wine producers, wholesalers and rectifiers file fair trade contracts or price schedules with the state.[19] The contracts or price schedules set the terms for all wholesale transactions in a particular brand of wine within a given trading area.[20] In July 1978, the California Department of Alcoholic Beverage Control charged Midcal Aluminum, Inc., a wholesale distributor of wine in Southern California, with the sale of twenty-seven cases of wine below the price set by the effective price schedule of the E&J Gallo Winery.[21]

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shipments did not constitute importation or transportation within the meaning of section 2. 377 U.S. at 325-26; *see* note 11 *supra*.

[13] Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 346 (1964) (XXI amendment does not give states power to tax alcohol imported from abroad in violation of export-import clause. U.S. CONST. art. I, § 10, cl. 2); William Jameson & Co. v. Morgenthau, 307 U.S. 171, 172-73 (1939) (*per curiam*) (states lack exclusive power to regulate imported alcohol under XXI amendment).

[14] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204-08 (1976); California v. LaRue, 409 U.S. 109, 114-15 & 118 (1972); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329-33 (1964); *see* notes 9 & 12 *supra*.

[15] 445 U.S. 97 (1980).

[16] *Id.* at 110.

[17] *Id.* at 109-10.

[18] *Id.* at 100.

[19] CAL. BUS. & PROF. CODE § 24866 (West 1964). Under the California law, if no fair trade contract were entered into, then a schedule of selling prices of wine was posted. *Id.*

[20] 445 U.S. at 99. The State was divided into three trading areas for administration of the wine pricing program. A single fair trade contract or schedule for each brand established the terms for all wholesale transactions in that brand within a given trading area. CAL. BUS. & PROF. CODE §§ 24862, 24864-24865 (West Supp. 1980). Similarly, state regulations provided that a single wholesaler posted wine prices within a trading area which bound all wholesalers in that area. Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d 979, 983-84, 153 Cal. Rptr. 747, 762 (1979). The State, however, had no direct control over the wine prices, and did not review the reasonableness of the prices set by wine dealers. 445 U.S. at 100.

[21] 445 U.S. at 100. The Department alleged that Midcal sold wine for which no fair trade contract or schedule had been filed. *Id.* No state-licensed wine merchant could sell

Midcal stipulated that the allegations were true and filed a writ of mandate in the California Court of Appeals, requesting an injunction against the state's wine pricing system.[22] Midcal asserted that California's wine pricing system illegally restrained trade in violation of the Sherman Antitrust Act (the Act).[23] The Department contended, however, that the twenty-first amendment precluded application of the Act.[24] Relying exclusively on the reasoning utilized in an earlier California Supreme Court decision, the California Court of Appeals ruled in favor of Midcal, holding that the wine pricing system violated the Sherman Act.[25]

On appeal, the United States Supreme Court affirmed the California Court of Appeals' decision.[26] Having determined that California's wine

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wine to a retailer at a price lower than the state set upon penalty of fine, license suspension, or license revocation. CAL. BUS. & PROF. CODE §§ 24862 & 24880 (West Supp. 1979). Licensees that sold wine below the prices specified in fair trade contracts or schedules could have been subject to private damage suits for unfair competition. *Id.* § 24752.

[22] 445 U.S. at 100; Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d 979, 981, 153 Cal. Rptr. 757, 759 (1979). Mandate is an appropriate writ for court review of a constitutionally authorized statewide agency's exercise of quasi-judicial power. *Id.* at 981, 153 Cal. Rptr. at 759.

[23] *Id.* at 980-81, 153 Cal. Rptr. at 758-59. The Sherman Act, 15 U.S.C. §§ 1-7 (1976), provides that the restraint of interstate trade or commerce is illegal. *Id.* § 1(a). *See generally Price Maintenance*, *supra* note 3, at 528-29; W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 54-70 (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY (1954); *see also* text accompanying note 30 *infra*.

[24] Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

The Department argued that the state laws were immune from anti-trust prosecution under the Sherman Act. *Id.* at 982-83, 153 Cal. Rptr. at 759-60; *see* text accompanying note 28 *infra*.

[25] 90 Cal. App. 3d 979, 153 Cal. Rptr. 757. The court in *Midcal* relied on the California Supreme Court case of Rice v. Alcoholic Beverage Control Bd., 21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978). The California Supreme Court in *Rice* employed a balancing test in determining that the policies underlying the Sherman Act clearly outweighed those behind California's liquor price maintenance system. *Id.* at 451-58, 579 P.2d at 490-94, 146 Cal. Rptr. at 599-603. In *Rice* the California Supreme Court invalidated California's liquor minimum pricing scheme as a violation of the Sherman Act. *Id.* at 459, 579 P.2d at 494-95, 146 Cal. Rptr. at 603-04. The court rejected the argument that the liquor pricing scheme was protected from anti-trust prosecution by either the "state action" doctrine or the XXI amendment. *Id.* The California Court of Appeals in *Midcal* held that the challenged wine price maintenance laws were not significantly different from the statutes found to be invalid in *Rice*. 90 Cal. App. 3d at 983, 153 Cal. Rptr. at 760.

[26] 445 U.S. at 102. The California Department of Alcoholic Beverage Control did not appeal the Court of Appeals decision, rather an intervenor, California Retail Liquor Dealers Association, brought the appeal. *Id.* at 101-02. Although the California Supreme Court denied a hearing of the case, the United States Supreme Court granted a writ of certiorari. *Id.*; 444 U.S. 824 (1979).

The Department did not seek certiorari from the Supreme Court following the *Rice* decision, nor did they appeal the decision in Capiscean Corp. v. Alcoholic Beverage Control Appeals Bd., 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979). In *Capiscean Corp.*, the California Court of Appeals employed the analysis used in *Rice* to invalidate California's resale

pricing system violated the Sherman Act,[27] the Court addressed the Department's contention that section 2 of the twenty-first amendment precluded application of the Act.[28] The Court stated that a careful examination of the interests underlying the Sherman Act and California's regulations was essential to the resolution of the conflict between the two laws.[29] Congress enacted the antitrust laws to enforce the firmly es-

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price maintenance scheme for retail wine sales to consumers. 445 U.S. at 102 n.4.

The Court in *Midcal* made note of the unusual posture of the *Midcal* case and the Department's failure to appeal the prior cases. *Id.* at 111 n.12. The Court stated that the State of California had shown "less than an enthusiastic interest" in its wine pricing system. *Id.*

[27] 445 U.S. at 103. The Court found that California's wholesale wine pricing system constituted resale price maintenance, reasoning that wine producers held the power to prevent price competition by dictating the prices charged by wholesalers. *Id.* Prior cases have held consistently that resale price maintenance illegally restrains trade. *See* Albrecht v. Herald Co., 390 U.S. 145, 151-53 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 45-47 (1960). Moreover, the Sherman Act applies to fair trade contracts. 445 U.S. at 102-03.

Relying on Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) and Burke v. Ford, 389 U.S. 320 (1967) (*per curiam*), the Court rejected the argument that California's program was simply intrastate regulation beyond the reach of the Sherman Act. 445 U.S. at 103; *see* note 54 *infra*.

[28] 445 U.S. at 106. The Court in *Midcal* rejected the Department's argument that California's wine pricing system was a protected "state action." *Id.* at 105-06. In Parker v. Brown, 317 U.S. 341 (1943), the Court found that the Sherman Act was not enacted to nullify state powers. *Id.* at 352. The *Parker v. Brown* "state action" exemption provides that a state is exempt from prosecution when it acts through its legitimate state agencies or officers pursuant to legislative authority. *Id.* at 351-52. *See generally Price Maintenance*, *supra* note 3, at 530-33; Note, *State Action Exemption from the Antitrust Laws*, 50 B.U.L. REV. 393, 400-05 (1971). Several recent decisions have applied *Parker's* analysis. *See, e.g.*, New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (Brennan, J., concurring). The Court in *Midcal* concluded that the recent decisions applying the *Parker* analysis established two standards for antitrust immunity. 445 U.S. at 105. First, the activity in question must be "'one clearly articulated and affirmatively expressed as state policy'" and second, the state must actively supervise the policy. *Id. See also* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 410 (Brennan, J., concurring).

The Court in *Midcal* found that California's wine price maintenance system satisfied the first requirement of the *Parker* analysis. 445 U.S. at 105. The Court found, however, that the California regulations did not fulfill the second requirement under the *Parker* test. *Id.* California simply authorized the price-setting and enforced the prices established by private parties. *Id.* The State was not involved in any other aspect of the program. *Id.* The Court reasoned that the result of California's regulations was to permit private price fixing arrangements and therefore the regulations were not immune from Sherman Act prosecution. *Id.* at 106. *See generally* Note, Rice v. Alcoholic Beverage Control Appeals Board: *The Demise of Fair Trade in California*, 3 GLENDALE L. REV. 105 (1978-79) [hereinafter cited as *Demise of Fair Trade*].

In Sound, Inc. v. American Tel. and Tel. Co., No. 80-1047 (8th Cir. Aug. 25, 1980), the Eighth Circuit referred to the *Midcal* enunciation of the *Parker* "state action doctrine" as a "recent articulation." *Id.* slip op. at 15. The Tenth Circuit, however, apparently considered the test enunciated in *Midcal* as a modification of that set forth in prior *Parker* type cases. Community Communications Co. v. City of Boulder, 630 F.2d 704, 708 (10th Cir. 1980).

[29] 445 U.S. at 110. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) was the first case in which the Court articulated the need to balance the commerce clause

tablished national policy in favor of competition and free enterprise.[30] The Court identified the state's interests attributed to California's wine pricing system as the promotion of temperance and orderly market conditions.[31] Neither state interest enjoyed much support. A California state government study indicated that the wine pricing laws did not promote temperance.[32] Congressional studies revealed that price maintenance laws did not aid orderly market conditions and that the laws were not necessary for the survival of small retail businesses.[33] In conclusion, the

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and the XXI amendment. *Id.* at 332. In *Idlewild*, the Court emphasized that both provisions were part of the same Constitution and therefore "each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.* at 331-32; *see Price Maintenance*, *supra* note 3, at 516-18. *See generally* Note, *The Evolving Scope of State Power Under the Twenty-First Amendment: The 1964 Liquor Cases*, 19 RUTGERS L. REV. 759 (1965). In Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), the Court indicated that a balancing approach should be employed to resolve conflicting federal and state interests over alcoholic beverages. *Id.* at 42-44; *see Price Maintenance*, *supra* note 3, at 520; *State Power*, *supra* note 3, at 482-83. The Court later intimated that the balancing analysis should be limited to cases involving a conflict between the commerce clause and state liquor regulations. Craig v. Boren, 429 U.S. 190, 206 (1976). *See also* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945).

[30] 445 U.S. at 110-11. Relying on United States v. Topco Assoc., Inc., 405 U.S. 596 (1972) and Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), the Court stated that the Sherman Act was the "Magna Carta of free enterprise." 445 U.S. at 110-11. The Court further analogized the importance of the Sherman Act to "the preservation of economic freedom and our free-enterprise system," to the importance of the Bill of Rights as the protectorate of fundamental personal freedoms. *Id.* The Court also emphasized the fact that Congress utilized all the power it possessed under the commerce clause to enact the Sherman Act. *Id.* at 111.

[31] 445 U.S. at 111-13. The Court adopted the state's interest in California's laws as identified by the California Court of Appeals and the California Supreme Court. *Id.*; *see* Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d at 983, 153 Cal. Rptr. at 76; note 25 *supra*. The Supreme Court also adopted the California courts' interpretation and evaluation of the State's interests behind the wine pricing regulations. 445 U.S. at 112-14. The Court stated that there was no basis to disagree with the California courts' evaluation of the asserted state interests. *Id.* at 113.

[32] 445 U.S. at 112. To support the proposition that the price-fixing system did not promote temperance, the California courts relied on a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, years during which resale price maintenance was in effect. *Id.*; *see* California Dept. of Finance, Alcohol and State: A Reappraisal of California's Alcohol Control Program, xi, 15 (1974). The California court stated that the study, at the very least, raised a doubt whether the laws could be justified as promoting temperance. 445 U.S. at 112. *See also* Joseph E. Seagram & Sons, Inc. 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).

[33] 445 U.S. at 113. A Congressional study showed that states with fair trade laws had at 55% higher rate of firm failure than free trade states. Additionally, the rate of growth of small retail stores in free trade states betwen 1956 and 1972 was 32% higher than in states with fair trade laws. S. REP. NO. 94-466, 94th Cong., 1st Sess. 13 (1975), *reprinted in* [1975] U.S. CODE CONG. & ADMIN. NEWS, 1569, 1571. The California courts also looked to congressional abandonment of fair trade in 1975 with the Consumer Goods Pricing Act as indicative of the lack of justification for continuing fair trade practices with respect to wholesale wine trade. 445 U.S. at 113.

Supreme Court determined that the state's interests underlying the California wine pricing laws were "not of the same stature" as those of the Sherman Act.[34] Consequently, the twenty-first amendment did not preclude the application of the Sherman Act to California's regulations.[35] The Court held that the state laws were invalid because they violated the Act.[36]

The Supreme Court in *Midcal* reaffirmed that the federal government retains an interest in the regulation of alcoholic beverages through its commerce power.[37] Although the Court did not explicitly define the parameters of the remaining federal interest, the Court did provide some guidance for lower courts. In *Midcal*, the Court drew a distinction between state regulations that involve importation, sale or distribution of liquor and regulations that govern peripheral aspects of liquor control.[38] According to the Court in *Midcal*, the commerce clause permits the federal government to regulate peripheral aspects of liquor control in appropriate situations.[39]

A corollary to the Court's holding that the federal government possesses an interest in the peripheral aspects of liquor regulation is that no commerce clause authority exists over the importation, sale or distribution of alcohol.[40] The Court, however, qualified state authority in

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[34] 445 U.S. at 114.

[35] *Id.*

[36] *Id.* The Court in *Midcal* reaffirmed the Court's earlier refusal to inquire into the legislative history of the XXI amendment when interpreting the effect of the Amendment. 445 U.S. at 106-07; *see* note 6 *supra*. The Court emphasized the Amendment's ambiguous legislative history and the states' indecisiveness in the ratification conventions in determining the effect of § 2. 445 U.S. at 107 n.10. *See generally* E. BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION (1938).

[37] 445 U.S. at 110.

[38] *Id.* The distinction between state regulation of importation, sale or distributing of liquor and peripheral liquor regulations was indicated first in Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939). The Court distinguished between regulations concerning "manufacture, transportation, sale or possession" and other regulations adopted to effectuate limitations on alcohol traffic. *Id.* at 138. In Hostetter v. Idlewild Bon Voyage Liquor Corp., 337 U.S. 324 (1964) the Court specifically included distribution of liquor in the same category with importation or sale. *Id.* at 330. This distinction follows logically from the language of § 2 of the XXI amendment. The Amendment's terms refer to "transportation or importation" into a state "for delivery or use therein." *See* note 3 *supra*. The decision whether to allow the importation of alcoholic beverages into a state, necessarily involves the decision whether to allow the sale of intoxicants in the state. Similarly, an affirmative conclusion to allow the importation and sale of alcohol in a state logically involves decisions concerning the manner of distribution. *See* Norman Williams Co. v. Rice, 108 Cal. App. 3d 348, ____, 166 Cal. Rptr. 563, 571 (1980).

[39] 445 U.S. at 110.

[40] The California Court of Appeals case of Norman Williams Co. v. Rice, 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980), decided since *Midcal*, supports the proposition that the federal government does not retain commerce clause authority over the importation, sale or distribution of alcohol. *Id.* at ____, 166 Cal. Rptr. at 571. In holding a state liquor regulation invalid as a violation of the Sherman Act, the California court relied on the analysis employed in *Midcal* and Rice v. Alcoholic Control Appeals Bd., 21 Cal. 3d 431, 146, Cal. Rptr. 585, 579 P.2d 476 (1978). 108 Cal. App. 3d at ____, 166 Cal. Rptr. at 570-73. One of the con-

the importation, sale or distribution of alcohol. The Court stated that the twenty-first amendment grants "*virtually* complete control" to the states over importation, sale or distribution of liquor, as opposed to *complete* control over this aspect.[41] Although the Supreme Court could have meant that the federal government retains some commerce clause authority over importation, sale or distribution of alcoholic beverages, Supreme Court precedent does not support this interpretation.[42] Prior Court treatment of the twenty-first amendment power supports the proposition that by employing the word "virtually," the Court was referring to limitations of constitutional provisions other than the commerce clause.[43] Prior case law also supports the view that the Court in *Midcal* was referring to the limitations placed on state authority in areas of exclusive federal concern.[44]

If the federal government does not retain commerce clause authority over the importation, sale or distribution of alcoholic beverages, a conflict between federal power and a state regulation restricted to the importation, sale or distribution of liquor could never arise.[45] If the exercise of the federal commerce power over a peripheral aspect of liquor regulation conflicts with a state statute, however, *Midcal* established that courts should use a balancing process to resolve the conflict.[46] Courts

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tentions the court addressed was whether the regulation in question concerned the importation, sale or distribution of alcohol. *Id.* at ____, 166 Cal. Rptr. at 571. The court determined that the statute in question did not relate to importation, sale or distribution. *Id.* The court stated that these regulations were precisely the type "which must be reconciled with the federal interests in interstate commerce." *Id.*; *see* note 5 *supra*.

[41] 445 U.S. at 110.

[42] *See* Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 398 (1939). The Supreme Court held that the states' right to prohibit or regulate importation of alcoholic beverages was not limited by the commerce clause. Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. at 394; Joseph S. Finch & Co. v. McKittrick, 305 U.S. at 398; *see* text accompanying notes 6 & 7 *supra*. In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), the Court reiterated their prior position that granted absolute control to the states over importation of liquor. *Id.* at 330. The Court also stated that states' power to restrict, regulate or prevent the traffic and distribution of intoxicants within its borders had remained unquestioned. *Id.*

[43] *See* text accompanying notes 8 & 13 *supra*.

[44] *See* text accompanying notes 11-13 *supra*. The Court in *Midcal* briefly reviewed the case history of the XXI amendment. 445 U.S. at 107-10; *see* text accompanying note 45 *infra*. Nowhere in the opinion did the Court indicate that these prior cases were modified by the *Midcal* opinion. The Court has not hesitated to modify the holding of a prior XXI amendment case when it determined that the case was no longer a correct interpretation of states' authority under the Amendment. *See* Craig v. Boren, 429 U.S. 190, 210 n.23 (1976).

[45] *See* text accompanying notes 43-44 *supra* & 46-48 *infra*.

[46] 445 U.S. at 110; *accord*, Norman Williams Co. v. Rice, 108 Cal. App. 3d 348, ____, 166 Cal. Rptr. 563, 571 (1980); Goldstein v. Miller, 488 F. Supp. 156, 174 (D. Md. 1980); *see* note 29 *supra*. Although the Court in Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964) indicated that a balancing process should be used to resolve a conflict between the commerce clause and the XXI amendment, at least one commentator suggested that the balancing approach was particular to the facts of *Idlewild*. *Authority to Control*, *supra* note 3, at 1594.

should examine the state liquor regulations closely to identify state policies serves by the statute in question and to determine whether the regulations vindicate the state policies.[47] The Court in *Midcal* also stated that courts should evaluate the federal policy underlying the conflicting federal power and determine the importance of the policy.[48] After defining the degree of interference the state regulation imposes on interstate commerce, a court should weigh the state's interest against the federal interest.[49]

The *Midcal* decision raises an important question for lower courts of how to determine whether a regulation concerns the importation, sale or distribution of liquor or a peripheral aspect of liquor control. A statute requiring a licensing fee for the right to bring liquor into a state is directly related to importation.[50] Conversely, state regulation of liquor

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[47] 445 U.S. 111-14; Norman Williams Co. v. Rice, 108 Cal. App. 3d 348, ____, 166 Cal. Rptr. 563, 571 (1980). If state regulations related to importation, sale or distribution are subject to commerce clause authority, then an important factor in the balancing process is whether the state regulation in question concerns these aspects of liquor regulation. *See* text accompanying notes 43-46 *supra* & 48 *infra*. State regulations falling within the wording of § 2 of the XXI amendment would carry a greater presumption of validity than peripheral regulations. *See* Craig v. Boren, 429 U.S. 190, 206 (1976); *Price Maintenance, supra* note 3, at 525.

Courts may encounter the practical problem of attempting to determine state interests behind liquor regulations. Many states have little or no legislative history for their laws. The difficulty in determining state interests may explain in part the *Midcal* Court's complete acceptance of the California court's evaluation of the state interest behind the wine price maintenance scheme. *See* note 36 *supra*.

In *Norman Williams*, the California court stated that a factor relevant to whether the regulation in question vindicates the state policies it reflects, is whether the state interest can be fulfilled by an alternative means which would not conflict with federal interests. 108 Cal. App. 3d at ____, 166 Cal. Rptr. at 571.

[48] 445 U.S. at 110-11.

[49] *Id.*; Norman Williams Co. v. Rice, 108 Cal. App. 3d 348, ____, 166 Cal. Rptr. 536, 571 (1980).

The balancing approach utilized by the Court in *Midcal* resembles closely that which the Court has employed in "negative commerce clause" cases. Negative commerce clause cases are cases involving state regulations which burden interstate commerce within an area in which Congress has not acted or has enacted federal regulations which do not preempt state regulations. *See* text accompanying note 2 *supra*. In such cases, the Court has considered whether the laws in question achieve their stated objective and whether the regulation in question is essential for the protection of the state interest. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-56 (1951); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 779 (1945). The Court also considered whether there was an alternative means to achieve the state interests in negative commerce clause cases. *See* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 373 (1976); Dean Milk Co., 340 U.S. at 354. The XXI amendment, however, gives additional weight to the validity of state liquor regulations. *See* California v. LaRue, 409 U.S. 109, 118 (1972).

[50] *See* State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 60 (1936) (California statute requiring $500 license fee to import beer sustained). *See also* text accompanying note 6 *supra*. *But see* Norman Williams Co. v. Rice, 168 Cal. App. 3d 348, ____, 166 Cal. Rptr. 563, 566 (1980) (Sherman Act held applicable to state regulation concerning designation of authorized importers by distilled spirits brand owners or agents).

advertisements does not *directly* relate to importation, sale or distribution.[51] Yet arguably advertising does *indirectly* relate to the sale of liquor, as the very purpose of alcohol advertising is to influence people to purchase liquor. Conceivably there are liquor regulations which courts will find very difficult to place in one category or another. As *Midcal* indicates, the Supreme Court apparently considers the pricing of alcoholic beverages peripheral to the importation, sale or distribution of liquor.[52] Regulations concerning the pricing of alcoholic beverages are not related to a state's decision of whether to permit the importation or sale of liquor.[53] Price setting does not directly affect the structure of the liquor distribution system of a state.[54] The pricing of alcoholic beverages, however, does effect the sale of liquor indirectly, because it determines the consumer cost for alcohol. Arguably, the Supreme Court requires a state regulation to *directly* relate to importation, sale or distribution of liquor in order that the regulation fall within this category.

After *Midcal*, lower courts may also be confronted with the question of whether *any* state interest in the peripheral control of alcoholic beverages can withstand a valid exercise of the federal commerce power. Regulations not directly related to the importation, sale or distribution of alcohol appear to be more susceptible to overriding federal interest now than before *Midcal*.[55] The Court did not have the opportunity

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[51] *See* PA. STAT. ANN. tit. 47, § 4-493 (Purdon Supp. 1979).

[52] See 445 U.S. at 99-100. The Court in *Midcal* never explicitly stated that pricing regulations were peripheral aspects of liquor control. The fact that the Court never discussed the California pricing schemes' relationship to the importation, sale or distribution of alcoholic beverages indicates that the Court did not consider pricing of alcohol to be directly related to these enumerated areas. In contrast, the California court in Norman Williams Co. v. Rice, 168 Cal. App. 3d 348, ____, 166 Cal. Rptr. 563, 571 (1980) considered the question of whether a challenged liquor regulation was directly related to importation, sale or distribution, vital to their analysis. *See* note 40 *supra*.

[53] Norman Williams Co. v. Rice, 108 Cal. App. 3d 348, ____, 166 Cal. Rptr. 563, 571 (1980).

[54] *Id.*

[55] *See* Castlewood Int'l Corp. v. Simon, 48 U.S.L.W. 3746, 3746 (1980); Colby Distrib. Co. v. Lennen, 227 Kan. 2d 179, ____, 606 P.2d 102, 110 (1980); William J. Mezzetti Assocs. v. State Liquor Auth., 51 N.Y.2d 761, 761, 411 N.E.2d 791, 791, 432 N.Y.S.2d 372, 372 (1980) (*per curiam*).

The change in attitude of lower courts toward peripheral regulations since *Midcal* supports the proposition that *Midcal* lessens the presumption of validity that state liquor regulations enjoyed previously from the XXI amendment. For example, prior to *Midcal*, the Kansas Supreme Court in *Colby Distrib. Co.* rejected a challenge, based on the California decisions in *Rice* and *Midcal*, against their price maintenance system. 227 Kan. 2d at ____, 606 P.2d at 110. In February 1980 the New York Court of Appeals upheld their state's liquor pricing system. William J. Mezzetti Assocs. v. State Liquor Auth., 49 N.Y.2d 758, 758, 403 N.E.2d 184, 184, 426 N.Y.S.2d 479, 479 (1980) (*per curiam*). Following the Supreme Court's decision in *Midcal*, however, the New York court reversed its previous ruling and held their liquor pricing system invalid because it violated the Sherman Act. William J. Mezzetti Assocs. v. State Liquor Auth., 51 N.Y.2d 761, 761, 411 N.E.2d 791, 791, 432 N.Y.S.2d 372, 372, *rev'g per curiam*, 49 N.Y.2d 758, 403 N.E.2d 184, 426 N.Y.S.2d 479 (1980) (*per curiam*).

to balance legitimate state interests against federal interests in interstate commerce, because the state regulations in *Midcal* were totally unsupported.[56] *Midcal* should not be interpreted, however, as overturning *any* peripheral state regulation of alcoholic beverages which conflicts with a federal interest. The Court stated that only in "appropriate situations" would a federal interest override a conflicting state interest in alcohol regulation. The Court advanced the balancing process as a means to determine when an appropriate situation exists.[57] If a price-maintenance scheme for the sale of alcoholic beverages structured similarly to California's is challenged under the Sherman Act, the courts will probably overturn the statute unless a state can prove a viable interest which supports the regulation.[58] It remains to be seen, however,

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The Supreme Court reversed and remanded a Fifth Circuit case decided before *Midcal* for consideration in light of *Midcal*. Castlewood Int'l Corp. v. Simon, 48 U.S.L.W. 3746, 3746 (1980).

Recent lower court cases indicate other areas in which the federal government may retain an interest in the control of alcohol. *See* Castlewood Int'l Corp., 596 F.2d 638, 640 (5th Cir. 1979); Goldstein v. Miller, 488 F. Supp. 156, 158 (D. Md. 1980); Norman Williams Co. v. Rice, 108 Cal. App. 3d 348, ____, 166 Cal. Rptr. 563, 566 (1980). *See also* William Jameson & Co. v. Morgenthau, 307 U.S. 171, 172 (1939) (*per curiam*). The Sherman Act was held applicable to a state statute concerning the designation of authorized importers by distilled spirits brand owners or agents. Norman Williams Co. v. Rice, 108 Cal. App. 3d at ____, 166 Cal. Rptr. at 566. In addition to the Sherman Act, the Federal Alcohol Administration Act (FAA Act) and regulations of the Bureau of Alcohol, Tobacco and Firearms (ATF) enacted pursuant to the FAA Act reflect federal interest in the control of alcohol. 27 U.S.C. §§ 201-212 (1976 & Supp. III 1979); *see* Castlewood Int'l Corp., 596 F.2d at 640; Goldstein v. Miller, 488 F. Supp. at 158. *See also* William Jameson & Co. v. Morgenthau, 307 U.S. at 172. The FAA Act deals primarily with the licensing of wholesalers and manufacturers of distilled spirits and the prevention of unfair competition and unlawful practices in the liquor industry. 27 U.S.C. §§ 203-205 (1976 & Supp. III 1979). In promulgating the FAA Act, Congress relied partially on its commerce clause power, but much of the FAA Act is supported by Congress' taxing power. Goldstein v. Miller, 488 F. Supp. at 162. The FAA Act was held not unconstitutional against a challenge that the XXI amendment transferred complete and exclusive control over alcohol to the States. Arrow Distillers, Inc. v. Alexander, 109 F.2d 397, 400-01 (7th Cir.), *cert. denied* 310 U.S. 646 (1940).

[56] *See* text accompanying notes 31-33 *supra*. California's wine pricing system did not vindicate the state interests the legislature extended to protect by enactment of the system. 445 U.S. at 111-14. Conversely, the federal interests expressed by the Sherman Act are well supported and established. *Id.* at 110-11; *see* text accompanying notes 30-34 *supra*. The Court in *Midcal* did not discuss the burden which California's wine price maintenance system placed on interstate commerce. Instead, the Court relied on the burden which fair trade contracts in general place on commerce. 445 U.S. at 103.

[57] 445 U.S. at 110. The Court did not attempt to define what an "appropriate situation" was for the application of the federal commerce power to peripheral regulations of alcohol. Rather, the Court provided the balancing process to determine from the circumstances of a particular case when an appropriate situation existed. *See* text accompanying notes 46-49 *supra*.

[58] At the time *Midcal* was decided 13 states had price maintenance schemes for liquor in effect which were similar to California's. Petitioner's Brief for Certiorari, App. F. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). New Jersey previously revised their price-maintenance laws based on the earlier California courts' deci-

whether under the *Midcal* balancing approach other peripheral regulations of alcoholic beverages, supported by viable state concerns, can withstand a challenge based on a conflict with a federal statute.

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sions in *Rice* and *Midcal*. Heir v. Degnan, 82 N.J. 109, ____, 411 A.2d 194, 198 (1980). The New York Court of Appeals, relying on *Midcal*, recently held the New York liquor price maintenance system invalid. William J. Mezzetti Assocs. v. State Liquor Auth., 51 N.Y.2d 761, 761, 411 N.E.2d 791, 791, 432 N.Y.S.2d 372, 372 *rev'g per curiam*, 49 N.Y.2d 758, 403 N.E.2d 184, 426 N.Y.S.2d 479 (1980) (*per curiam*).

A price maintenance system for liquor that provides for active state supervision and control, is exempt from the Sherman Act under Parker v. Brown, 317 U.S. 341, 351-52 (1943). *See* note 28 *supra*; *Demise of Fair Trade*, *supra* note 28, at 118. The Kentucky Alcoholic Beverage Control Board recently concluded that their state's liquor fair trade laws were not invalidated by the Supreme Court decision in *Midcal*. *In re* Taylor Drug Stores, Inc., [1981] 995 ANTITRUST & TRADE REG. REP. (BNA) D-1 (Ky. ABC Bd., Dec. 18, 1980). The Board found the price maintenance system exempt from Sherman Act prosecution under the *Parker* "state action" doctrine. *Id.* The Court in *Midcal* pointed out that state liquor monopolies would be immune from Sherman Act prosecution under *Parker v. Brown*. 445 U.S. at 106 n.9, *citing* VA. CODE §§ 4-15, 4-28 (Repl. Vol. 1979). In dictum, the Court in *Young's Mkt.* stated that a state could establish a monopoly over manufacture and sale of alcohol under their XXI amendment powers. State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936). California is presently considering a bill which provides that liquor cannot be sold for a price less than the wholesale cost plus a 6% markup. The State will set the minimum prices. Assembly Bill 935; *Demise of Fair Trade*, *supra* note 28, at 118.