MINUTES OF THE MEETING
TAXATION COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

March 18, 1985

The forty-third meeting of the Taxation Committee was called to order in room 312-1 of the state capitol at 8:02 a.m. by Chairman Gerry Devlin.

ROLL CALL: All members were present with the exception of Representatives Asay and Harrington. Also present were Dave Bohyer, Researcher for the Legislative Council, and Alice Omang, Secretary.

CONSIDERATION OF SENATE JOINT RESOLUTION 24: Senator Stephens, District 8, stated that this resolution deals with tax indexing and it basically reaffirms what the legislature has already done in approving the concept of tax indexing. He emphasized that this was a good idea before and it is a good idea now.

PROPONENTS: Keith Anderson, President of the Montana Taxpayers' Association, quoted from a report entitled, "The Inflation Tax" and noted that tax indexing eliminated the real tax increase caused by inflation and prevents the government from receiving a windfall. He said that they wholeheartedly favor this resolution.

There were no further proponents.

OPPONENTS: There were none.

QUESTIONS ON SENATE JOINT RESOLUTION 24: Representative Williams asked Senator Stephens if he felt that the people always make the best judgment on initiatives.

Senator Stephens responded that he would guess that they always do not and that would also parallel the work that the legislature does.

Representative Williams asked if they have to do something to balance the budget, would he (Senator Stephens) favor a surcharge.

Senator Stephens replied that he would not, but he would give serious consideration to any of the proposals.

Representative Ream commented that he recently read where in Minnesota they experienced a phenomena of over-indexing.

Mr. Anderson responded that he supposed this could happen if they proposed an improper formula. He explained that Minnesota is studying their whole tax structure and they also have an extremely high income tax.

Chairman Devlin asked if there was any discussion at all about overriding the governor's veto when there were only fourteen votes in the two houses against this.

Senator Stephens answered that he thought it was vetoed after the legislature had gone home.

There were no further questions, Senator Stephens closed and the hearing on SJR 24 was closed.

CONSIDERATION OF SENATE BILL 261: Senator Lynch, District 34, stated that in 1979 a law was passed, after all property was reclassified and in some cases golf course taxes were tripled, to tax them at one-half of class 4. He said that this bill addresses the seven or eight golf courses that are still being taxed twice as much as "the country club golfers".

PROPONENTS: Roger Tippy, representing the Committee for Favorable Golf Course Taxation, gave testimony in support of this bill. See Exhibit 1. He also submitted some comments made by some commissioners. See Exhibit 2 and 3.

Elmer Link, manager of Pryor Creek Golf Course in Billings, indicated that they lost $66,000.00 in their operation last year and this year they hope to break even and they just want to be taxed equal to other golf courses.

Dennis Flick, manager of the Lake Hills Golf Course in Billings, said that for a private golf course, a subdivision must accompany it for it to be a feasible economic project and they urged passage of this bill.

There were no further proponents.

OPPONENTS: There were none.

QUESTIONS ON SENATE BILL 261: Chairman Devlin asked if the $24,000.00 for taxes was just for the golf course itself or did it include the club house also.

Mr. Link replied that this was the golf course itself and the club house was about $195,000.00 for the building.

Representative Williams asked what the total property tax is for the Lake Hills Golf Course.

Mr. Flick answered that the total property tax including the real estate subdivision is in excess of $50,000.00 annually - the tax on the golf course itself is right at $25,000.00 and the other $25,000.00 is on undeveloped property at this time.

Chairman Devlin noted on the fiscal note that it says that local government will lose about $31,000.00 under this proposal and there already is $49,000.00 from just two golf courses.

Senator Lynch explained that they are not going to get any relief on the club house - this only affects the land - so the total taxes are not going to be cut in half.

There were no further questions.

Senator Lynch indicated that this bill would bring all the golf courses paying the same except for the municipals, which are not on the tax rolls.

The hearing on this bill was closed.

CONSIDERATION OF SENATE BILL 379: Senator Weeding, District 14, stated that this bill proposes to permit the coal board to consider highway projects as one of the things that they will allow under coal board grants. He testified that in Treasure County there is a serious problem because there is a tremendous amount of traffic on their roads because of the mines that are south of them.

PROPONENTS: Gary Wicks, Director of Highways, indicated that they originally had about $60 million worth of road

work that was to be done in these three counties that were impacted by coal development but they ended up with only about $15 million and the federal funds never developed. He indicated that it would probably take another twenty years before there was enough money to complete this road in Treasure County.

There were no further proponents.

OPPONENTS: There were none.

QUESTIONS ON SENATE BILL 379: Representative Gilbert asked which three counties were they referring to.

Mr. Wicks replied Treasure, Rosebud and Big Horn. He explained that this bill would make it available for any county, but the original bill just made it availabe for those three counties.

Representative Gilbert asked if his county would qualify under this bill.

Senator Weeding answered that on page 2, line 10, it reads, "if the deficiency is the direct result of increased traffic accompanying the development of coal resources".

Representative Harp indicated that they were not fully utilizing 8 3/4% impact money for projects and he asked if this money was just setting there.

Terry Johnson from the Governor's office, replied that essentially what has happened since the beginning of the development of the local impact account is that about $6 million is all that has ever reverted back to the education trust account so those funds that are going into the local impact account now are pretty much being utilized almost to a 100% capacity,

There were no further questions.

Senator Weeding said that money would not be taken out of the education trust account, but it would permit

money to be taken out at the coal board's discretion. He suggested that on page 3, line 5, they substitute "coal board" in place of "department of commerce".

The hearing on this bill was closed.

EXECUTIVE SESSION:

DISPOSITION OF SENATE JOINT RESOLUTION 24: Representative Harp moved that this bill BE CONCURRED IN. The motion carried unanimously.

DISPOSITION OF SENATE BILL 261: Representative Zabrocki moved that this bill BE CONCURRED IN. The motion carried unanimously.

CONSIDERATION OF SENATE BILL 288: Senator Eck, District 40, Bozeman, said this bill was requested by the Department of Revenue and that a number of years ago, an incentive was offered allowing 10% below the market value for Alpha Industries here in Helena. She informed the committee that there has been a supreme court decision whereby an incentive that was offered to a similar bottling industry in Hawaii was stricken down. She indicated that they have come up with a concept that they feel will work in this bill.

PROPONENTS: Tim Clavin, Secretary-Treasurer of Alpha Industries, testified that the discount is absolutely vital to the welfare of their company and it does not cost the state anything.

Mike Garrity, representing the Department of Revenue, said that in the case of the Hawaiian statute, it provided a complete exemption from excise tax for products that were distilled from Hawaiian fruits and plants and this discriminated and was in violation of commerce laws. He suggested some amendments to this bill. See Exhibit 4.

There were no further proponents.

OPPONENTS: Don Garrity, representing the Distilled Spirits Council of the United States, distributed copies of the

Supreme Court decision. See Exhibit 5. He stated that this would discriminate against out-of-state products and while the amendment is general in nature, it is specific in effect. He suggested that the committee strip this bill of the amendments passed by the Senate and pass it in its original form.

There were no further opponents.

QUESTIONS ON SENATE BILL 288: Representative Harp asked Senator Eck if she could go along with stripping the amendments off this.

Senator Eck replied that the testimony from Mr. Clavin did indicate that that business would be in jeopardy and it would be her preference that they have some incentive.

Representative Williams asked Mike Garrity if he thought they would still have a possibility of ending up in court with the way it is amended now.

Mr. Garrity replied that in his opinion, it would appear to him that they have a constitutionally sound classification in the amendments as this could be applied indiscriminately on a nationwide basis to all industries that have that volume. He continued that they would also look at the purpose, intent and the effect of the legislation to see if it was to discriminate in favor of a local industry and if it can be determined that that was not the purpose and intent, then this should be constitutionally sound.

Representative Patterson asked about the fiscal note and Mike Garrity replied that the fiscal note was prepared with the repealer in it and there has not been an amended fiscal note yet. He calculated that with the amendments from the Senate taxation committee, the general fund would lose $23,000.00, the cities and counties would lose $26,000.00 and the Department of Institutions approximately $49,000.00. He advised that on the amendments that he proposed this would allievate that loss to some extent so he thought there would be no general fund loss, but there would still be some loss to the cities and counties and the Department of Institutions.

Representative Patterson asked some questions concerning raising the drinking age in the state and there being a decline in sales.

Representative Gilbert asked Mr. Clavin about transportation costs on his product.

Mr. Clavin replied that they do have transportation costs and Mr. Garrity (Don) represents multi-national corporations with billions of dollars and they do have untold amounts of money to spend and Alpha Industries does not have any unfair advantage in any sense of the word and they cannot buy in volume.

Chairman Devlin asked if there was anything to stop another group coming in and being competitive in this state.

Mr. Garrity replied that it is open for anyone to come into Montana.

There were no further questions.

Senator Eck said that their primary need was to keep the state from any constitutional problem which could have serious effects on the department's income.

The hearing on this bill was closed.

EXECUTIVE SESSION:

DISPOSITION OF SENATE BILL 379: Representative Williams moved that this bill BE CONCURRED IN. Representative Williams moved to amend the bill on page 3, line 5, by striking "department of commerce" and insert "coal board". There was some discussion and Representative Williams withdrew his motion to amend. The motion "TO BE CONCURRED IN" passed unanimously.

DISPOSITION OF SENATE BILL 47: Representative Patterson moved that this bill BE NOT CONCURRED IN.

Representative Ream and Representative Sands indicated that they would like to get more clarification on this.

Representative Sands made a substitute motion that this bill be TABLED. The motion carried unanimously.

DISPOSITION OF HOUSE BILL 869: Representative Keenan moved that this bill DO PASS. Representative Keenan moved to amend on page 2, line 9 by changing $8,000.00 to $10,000.00 and $10,000.00 to $12,000.00. The motion carried unanimously.

Representative Keenan moved to amend the effective date to March 1, 1986.

Mr. Bohyer explained that the people that want this tax reduction have to make an application by March 1, and. therefore, those people couldn't get it for this year. He indicated that the department recommended that for this one year only, they would be able to make that application forty days after the effective date of the act.

Representative Keenan moved to amend it to conform to this. Representative Williams suggested that they forget it as the time is already past and the impact is not too great anyway. Representative Keenan withdrew her motion.

Representative Williams moved to amend on page 4, line 7 by striking "1984" and inserting "1985". The motion carried unanimously.

Representative Keenan moved that this bill DO PASS AS AMENDED. The motion carried unanimously.

ADJOURNMENT: There being no further business, the meeting was adjourned at 10:12 a.m.

Gerry Devlin
GERRY DEVLIN, Chairman

Alice Omang
Alice Omang, Secretary

DAILY ROLL CALL

HOUSE TAXATION COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date March 18, 1985

NAME	PRESENT	ABSENT	EXCUSED
DEVLIN, GERRY, Chrm.	X		
WILLIAMS, MEL, V. Chrm.	X		
ABRAMS, HUGH	X		
ASAY, TOM		X	
COHEN, BEN	X		
ELLISON, ORVAL	X		
GILBERT, BOB	X		
HANSON, MARIAN	X		
HARRINGTON, DAN		X	
HARP, JOHN	X		
IVERSON, DENNIS	X		
KEENAN, NANCY	X		
KOEHNKE, FRANCIS	X		
PATTERSON, JOHN	X		
RANEY, BOB	X		
REAM, BOB	X		
SANDS, JACK	X		
SCHYE, TED	X		
SWITZER, DEAN	X		
ZABROCKI, CARL	X		

STANDING COMMITTEE REPORT

March 18, 19 85

MR. SPEAKER:

We, your committee on TAXATION

having had under consideration SENATE Bill No. 379

third reading copy (blue) color

AN ACT ALLOWING THE COAL BOARD TO MAKE GRANTS FOR CERTAIN HIGHWAY CONSTRUCTION, REPAIR, AND MAINTENANCE;

Respectfully report as follows: That SENATE Bill No. 379

BE CONCURRED IN

DO PASS

GERRY DEVLIN, Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

STANDING COMMITTEE REPORT

March 13, 19 95

MR. SPEAKER:

We, your committee on TAXATION

having had under consideration SENATE Bill No. 261

third reading copy (blue color)

AN ACT TO ELIMINATE THE USE AND OWNERSHIP RESTRICTION FOR GOLF COURSES TO BE TAXED AT ONE-HALF THE RATE OF OTHER CLASS FOUR PROPERTY;

Respectfully report as follows: That SENATE Bill No. 261

BE CONCURRED IN

DO PASS

GERRY DEVLIN, Chairman.

COMMITTEE SECRETARY

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 13, 19 85

MR. SPEAKER:

We, your committee on TAXATION

having had under consideration SENATE JOINT RESOLUTION Bill No. 24

third reading copy (blue)
color

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA PLEDGING THE CONTINUED SUPPORT OF THE LEGISLATURE FOR INCOME TAX INDEXING.

Respectfully report as follows: That SENATE JOINT RESOLUTION Bill No. 24

BE CONCURRED IN

~~DO PASS~~

GERRY DEVLIN, Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

STANDING COMMITTEE REPORT

March 18, 19 85

MR. SPEAKER:

We, your committee on TAXATION

having had under consideration HOUSE Bill No. 869

first reading copy (white color)

AN ACT REVISING THE INCOME SCHEDULE ON WHICH PROPERTY TAX REDUCTIONS ARE BASED FOR WIDOWS AND WIDOWERS AT LEAST 62 YEARS OF AGE, WIDOWS AND WIDOWERS WITH DEPENDENT CHILDREN, AND RECIPIENTS OF RETIREMENT OR DISABILITY BENEFITS;

Respectfully report as follows: That HOUSE Bill No. 869

Be amended as follows:

1. Title, line 8.
Following: "AMENDING"
Strike: "SECTION"
Insert: "SECTIONS"

2. Title, line 9.
Following: "15-6-134"
Insert: "AND 15-6-142"

3. Page 2, line 9.
Following: "than"
Strike: "$8,000"
Insert: "$10,000"
Following: "or"
Strike: "$10,000"
Insert: "$12,000"

DO PASS

Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

March 18, 19 85

4. Page 3.
Following: line 24
Insert: "Section 2. Section 15-6-143, MCA, is amended to read:
"15-6-143. Class twelve property -- description -- taxable percentage. (1) Class twelve property includes:
(a) a trailer or mobile home used as a residence except when:
(i) held by a distributor or dealer of trailers or mobile homes as his stock in trade; or
(ii) specifically included in another class;
(b) the first $35,000 or less of the market value of a trailer or mobile home used as a residence and actually occupied for at least 10 months a year as the primary residential dwelling of:
(i) a widow or widower 62 years of age or older who qualifies under the income limitations of (iii) of this subsection;
(ii) a widow or widower of any age with dependent children who qualifies under the income limitations of (iii) of this subsection; or
(iii) a recipient or recipients of retirement or disability benefits whose total income from all sources including otherwise tax-exempt income of all types is not more than ~~$8,000~~ $10,000 for a single person or ~~$10,000~~ $12,000 for a married couple.
(2) Class twelve property is taxed as follows:
(a) Property described in subsection (1)(a) that is not of the type described in subsection (1)(b) is taxed at 8.55% of its market value.
(b) Property described in subsection (1)(b) is taxed at 8.55% of its market value multiplied by a percentage figure based on income and determined from the table established in subsection (2)(b) of 15-6-134." "
Renumber: subsequent sections

5. Page 4, line 7.
Strike: "1984"
Insert: "1985"

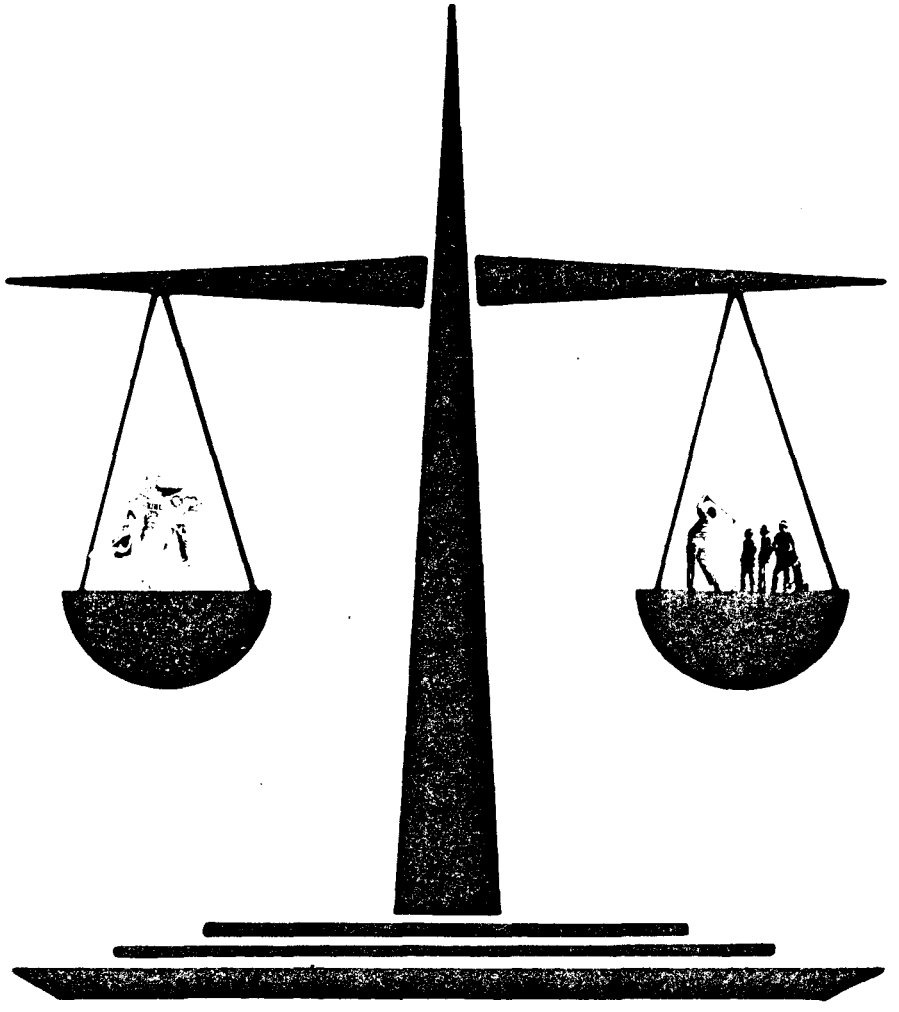
AND AS AMENDED,
DO PASS

GERRY DEVLIN, Chairman.

#4

STATE PUB. CO.
Helena, Mont.

Senate Bill 261



Means Fair Golf Course Taxation

Exhibit 1
SB 261
3/18/85
Rose Tippy

EXHIBIT 2
SB 261
3/18/85
R. TIPPY

Golf Courses Are Not Taxed Equally

Under present Montana law, the taxable value of **most** golf courses is 4.275% of their appraised value. A **few** golf courses are taxable at **twice** this level, or 8.55% of appraised value.

Treated Differently for No Clear Reason

The **handful** of golf courses -- seven or eight -- paying the **higher rate** of property tax do so because they were built **after 1979** or because their ownership is some business form other than a nonprofit corporation. The **great majority** of golf courses, being in existence prior to 1979 and set up as nonprofit corporations, qualify for the lower rate. There is no rationale in the law for drawing these distinctions.

Tax Equity Would Not Cost Much

SB261 has a fiscal note indicating minor fiscal impact to the state from having the taxable valuation of the seven or eight existing golf courses now paying the higher rate. No unit of local government would be significantly impacted either.

Passage of SB261 Averts Legal Challenge

The lack of a rational basis for taxing golf courses two different ways leaves the classification open to a lawsuit charging it violates **equal protection** guaranteed in the Montana and U.S. Constitution. Enactment of SB261 would put **all** golf courses on the **same** footing again.

Courses Affected by SB261 Need Relief

The seven or eight golf courses subject to the higher property tax rate have on the average operated **at or below break-even** levels recently. The relief which SB261 would bring would dilute the red ink for some of them.

Please Comment Here:
Golf course taxation should be equalized - We don't know about it -
Also see SB 48 - the reclassification bill - Don E

COMMITTEE FOR FAIR GOLF COURSE TAXATION
Pryor Creek Golf Club, Huntley—Highlands Golf Club, Missoula
Black Butte Country Club, Havre—Lake Hills Golf Club, Billings—
Eagle Bend Golf Club, Bigfork—Briarwood Country Club, Billings—
Meadow Lake Country Club, Columbia Falls
Roger Tippy, Lobbyist

Exhibit 3
SB 261
3/18/85
R. Tippy

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The seven or eight golf courses subject to the higher property tax rate have on the average operated **at or below** break-**even** levels recently. The relief which SB261 would bring would dilute the red ink for some of them.

Please Comment Here:

Have no problem in Support of this bill - this tax equity needs to be addressed

COMMITTEE FOR FAIR GOLF COURSE TAXATION
Pryor Creek Golf Club, Huntley—Highlands Golf Club, Missoula
Black Butte Country Club, Havre—Lake Hills Golf Club, Billings—
Eagle Bend Golf Club, Bigfork—Briarwood Country Club, Billings—
Meadow Lake Country Club, Columbia Falls

Roger Tippy, Lobbyist

Exhibit 4
SB 288
3/18/85
Mike Gahn

49th Legislature SB 0288/02

AMENDMENTS TO THIRD READING COPY SENATE BILL NO. 288

BY REQUEST OF THE DEPARTMENT OF REVNEUE

1. Page 2, line 14.
Following: "than"
Strike: "250,000"
Insert: "200,000"

2. Page 2, line 17.
Following: "(b)"
Strike: "12%"
Insert: "13.8"

3. Page 2, line 20.
Following "more"
Strike: "that 250,000 "
Insert: "than 200,000"

4. Page 3, Line 13.
Following: "than"
Strike: "250,000"
Insert: "200,000"

5. Page 3, line 16.
Following: "(b)"
Strike: "7.5%"
Insert: "8.6%"

6. Page 3, line 19.
Following: "than"
Strike: "250,000"
Insert: "200,000"

Exhibit 5
SB 288
3/18/85
Don Garrity

EXTRA EDITION NO. 4

The United States
LAW WEEK

Supreme Court
Opinions

June 26, 1984 • THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C. • Volume 52, No. 50

OPINIONS ANNOUNCED JUNE 29, 1984

The Supreme Court decided:

CONSTITUTIONAL LAW—Freedom of Speech

National Park Service regulations prohibiting "camping," defined to include overnight sleeping and cooking, in certain Washington, D.C., parks do not, as applied to demonstrators who seek to sleep in such parks to call attention to plight of homeless persons, violate First Amendment. (Clark v. Community for Creative Non-Violence, No. 82-1998) ..... Page 4986

CRIMINAL LAW AND PROCEDURE—Double Jeopardy

Criminal defendant who, after his trial ended in mistrial caused by hung jury, claimed that evidence was legally insufficient to establish guilt and that retrial would violate Double Jeopardy Clause, has raised colorable double jeopardy claim that is appealable under 28 USC 1291 even though consideration of that claim would require appellate court to canvass sufficiency of evidence at first trial; mistrial that results from jury's failure to reach verdict does not terminate original jeopardy to which defendant was subjected, and thus retrial is not barred by Double Jeopardy Clause. (Richardson v. U.S., No. 82-2113) ..... Page 4993

TAXATION—State Taxes

Liquor wholesalers have standing to challenge, as discriminatory, Hawaii tax on sales of liquor at wholesale even though wholesalers may pass burden of tax onto customers; sales tax exemption for locally produced fruit wine and brandy distilled from indigenous Hawaiian shrub violates Commerce Clause because it has both purpose and effect of discriminating in favor of local products; exemption from tax, which was not designed to promote temperance or to carry out any other purpose served by Twenty-First Amendment but to promote local industry, is not saved by that amendment. (Bacchus Imports, Ltd. v. Dias, No. 82-1565) ..... Page 4979

NOTICE: These opinions are subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

Full Text of Opinions

No. 82-1565

BACCHUS IMPORTS, LTD. ET AL. *v.* HERBERT H. DIAS, DIRECTOR OF TAXATION OF THE STATE OF HAWAII

ON APPEAL FROM THE SUPREME COURT OF HAWAII

Syllabus

No. 82-1565. Argued January 11, 1984—Decided June 29, 1984

Hawaii imposes a 20% excise tax on sales of liquor at wholesale. But to encourage the development of the Hawaiian liquor industry, okolehao, a brandy distilled from the root of an indigenous shrub of Hawaii, and fruit wine manufactured in the State are exempted from the tax. Appellant liquor wholesalers, who sell to retailers at the wholesale price plus the tax, brought an action in the Hawaii Tax Appeal Court seeking a refund of taxes paid under protest and alleging that the tax is unconstitutional because it violates, *inter alia*, the Commerce Clause. The court rejected this constitutional claim, and the Hawaii Supreme Court affirmed, holding that the tax did not illegally discriminate against interstate commerce because the incidence of the tax is on the wholesalers and the ultimate burden is borne by consumers in Hawaii.

Held:

1. Appellants have standing to challenge the tax in this Court. Although they may pass the tax on to their customers, they are liable for it and must return it to the State whether or not their customers pay their bills. Moreover, even if the tax is passed on, it increases the price as compared to the exempted beverages, and appellants are entitled to litigate whether the tax has had an adverse competitive impact on their business.

2. The tax exemption for okolehao and fruit wine violates the Commerce Clause, because it has both the purpose and effect of discriminating in favor of local products.

(a) Neither the fact that sales of the exempted beverages constitute only a small part of the total liquor sales in Hawaii nor the fact that the exempted beverages do not present a "competitive threat" to other liquors is dispositive of the question whether competition exists between the exempt beverages and foreign beverages but only goes to the extent of such competition. On the facts, it cannot be said that no competition exists.

(b) As long as there is some competition between the exempt beverages and nonexempt products from outside the State, there is a discriminatory effect. The Commerce Clause limits the manner in which a State may legitimately compete for interstate trade, for in the process of competition no State may discriminatorily tax products manufactured in any other State. Here, it cannot properly be concluded that there was no improper discrimination against interstate commerce merely because the burden of the tax was borne by consumers in Hawaii. Nor does the propriety of economic protectionism hinge upon characterizing the industry in question as "thriving" or "struggling." And it is irrelevant to the Commerce Clause inquiry that the legislature's motivation was the desire to aid the makers of the locally produced beverages rather than to harm out-of-state producers.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released * * * at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

3. The tax exemption is not saved by the Twenty-first Amendment. The exemption violates a central tenet of the Commerce Clause but is not supported by any clear concern of that Amendment in combating the evils of an unrestricted traffic in liquor. The central purpose of the Amendment was not to empower States to favor local liquor industry by erecting barriers to competition.

4. This Court will not address the issues of whether, despite the unconstitutionality of the tax, appellants are entitled to tax refunds because the economic burden of the tax was passed on to their customers. These issues were not addressed by the state courts, federal constitutional issues may be intertwined with issues of state law, and resolution of the issues may necessitate more of a record than so far has been made.

65 Haw. ——, 656 P. 2d 724, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined. BRENNAN, J., took no part in the consideration or decision of the case.

JUSTICE WHITE delivered the opinion of the Court.

Appellants challenge the constitutionality of the Hawaii Liquor Tax, which is a 20% excise tax imposed on sales of liquor at wholesale. Specifically at issue are exemptions from the tax for certain locally produced alcoholic beverages. The Supreme Court of Hawaii upheld the tax against challenges based upon the Equal Protection Clause, the Import-Export Clause, and the Commerce Clause. *In re Bacchus Imports, Ltd.*, 65 Hawaii ——, 656 P. 2d 724 (1982). We noted probable jurisdiction, —— U. S. —— (1983), and now reverse.

I

The Hawaii Liquor Tax was originally enacted in 1939 to defray the costs of police and other governmental services that the Hawaii legislature concluded had been increased due to the consumption of liquor. At its inception the statute contained no exemptions. However, because the legislature sought to encourage development of the Hawaiian liquor industry, it enacted an exemption for *okolehao* from May 17, 1971, until June 20, 1981, and an exemption for fruit wine from May 17, 1976, until June 30, 1981.[1] Haw. Rev. Stat. §244-4(6), (7). Okolehao is a brandy distilled from the root of the *ti* plant, an indigenous shrub of Hawaii. *In re Bacchus Imports, Ltd.*, *supra*, at ——, n. 7, 656 P. 2d, at 727, n. 7. The only fruit wine manufactured in Hawaii during the relevant time was pineapple wine. *Id.*, at ——, n. 8, 656 P. 2d, at 727, n. 8. Locally produced *sake* and fruit liqueurs are not exempted from the tax.

Appellants—Bacchus Imports, Ltd., and Eagle Distributors, Inc.—are liquor wholesalers who sell to licensed retailers.[2] They sell the liquor at their wholesale price plus the 20% excise tax imposed by §244-4, plus a one-half percent tax imposed by Hawaii Rev. Stat. §237-13. Pursuant to Hawaii Rev. Stat. §40-35, which authorizes a taxpayer to pay taxes under protest and to commence an action in the Tax Appeal Court for the recovery of disputed sums, the wholesalers initiated protest proceedings and sought refunds of all taxes paid.[3] Their complaint alleged that the Hawaii liquor tax was unconstitutional because it violates both the Import-Export Clause[4] and the Commerce Clause[5] of the United States Constitution. The wholesalers sought a refund of approximately $45 million, representing all of the liquor tax paid by them for the years in question.[6]

The Tax Appeal Court rejected both constitutional claims. On appeal, the Supreme Court of Hawaii affirmed the decision of the Tax Appeal Court and rejected an equal protection challenge as well. It held that the exemption was rationally related to the State's legitimate interest in promoting domestic industry and therefore did not violate the Equal Protection Clause. 65 Hawaii, at ——, 656 P. 2d, at 730. It further held that there was no violation of the Import-Export Clause because the tax was imposed on all local sales and uses of liquor, whether the liquor was produced abroad, in sister states, or in Hawaii itself. *Id.*, at ——, 656 P. 2d, at 732–733. Moreover, it found no evidence that the tax was applied selectively to discourage imports in a manner inconsistent with federal foreign policy or that it had any substantial indirect effect on the demand for imported liquor. *Id.*, 656 P. 2d, at 732–733. Turning to the Commerce Clause challenge, the Hawaii court held that the tax did not illegally discriminate against interstate commerce because "incidence of the . . . tax is on wholesalers of liquor in Hawaii and the ultimate burden is borne by consumers in Hawaii." *Id.*, at ——, 656 P. 2d, at 734.

II

The State presents a claim not made below that the wholesalers have no standing to challenge the tax because they have shown no economic injury from the claimed discriminatory tax. The wholesalers are, however, liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills. Furthermore, even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business. The wholesalers plainly have standing to challenge the tax in this Court.[7]

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[1] An exemption for okolehao that had been enacted in 1960 expired in 1965. 1960 Haw. Sess. Laws, c. 26, §1. During the pendency of this litigation, the Hawaii legislature enacted a similar exemption for rum manufactured in the State for the period May 17, 1981, to June 30, 1986.

[2] Two other taxpayers—Foremost-McKesson, Inc., and Paradise Beverages, Inc.—were appellants in the consolidated suit in the Hawaii Supreme Court. They did not appeal to this Court and thus are appellees here pursuant to our Rule 10.4. For the sake of clarity, both appellants and appellee wholesalers will be referred to collectively as "wholesalers."

[3] Bacchus Imports, Ltd., was the first of the wholesalers to protest the assessment. It sent a letter dated May 30, 1979, protesting the payment of taxes for the period December 1977 through May 1979. Appellee Paradise Beverages Inc., protested on July 30, 1979, for the period June 1977 through July 1979; appellant Eagle Distributors, Inc., protested on August 31, 1979, taxes paid from August 1974 through July 1979; and, on September 6, 1979, appellee Foremost-McKesson, Inc., protested taxes paid from August 1974 through August 1979. *In re Bacchus Imports, Ltd.*, 65 Hawaii ——, ——, n. 11, 656 P. 2d 724, 728, n. 11 (1982).

[4] Article I, §10, clause 2, of the Constitution provides in part:

"No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports. . . ."

[5] Article I, §8, clause 3, of the Constitution provides in part:

"The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States. . . ."

[6] Eagle Distributors sought refund of $10,744,047, App. 7; Bacchus sought $75,060.22, App. 13; Foremost-McKesson sought over $26 million, App. 19; and Paradise sought $8,716,727.23, Stip. of Facts 26.

[7] Appellees also would have us avoid the merits by holding that the exemptions are severable and should not invalidate the entire tax. The argument was not presented to the Supreme Court of Hawaii and that court did not proceed on any such basis. Furthermore, the challenged exemptions have now expired and "severance" would not relieve the harm inflicted during the time the wholesalers' imported products were taxed but

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III

A cardinal rule of Commerce Clause jurisprudence is that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange* v. *State Tax Commission*, 429 U. S. 318, 329 (1977) (quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 457 (1959). Despite the fact that the tax exemption here at issue seems clearly to discriminate on its face against interstate commerce by bestowing a commercial advantage on okolehao and pineapple wine, the State argues—and the Hawaii Supreme Court held—that there is no improper discrimination.

A

Much of the State's argument centers on its contention that okolehao and pineapple wine do not compete with the other products sold by the wholesalers.[8] The State relies in part on statistics showing that for the years in question sales of okolehao and pineapple wine constituted well under one percent of the total liquor sales in Hawaii.[9] It also relies on the statement by the Hawaii Supreme Court that "[w]e believe we can safely assume these products pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii," *In re Bacchus Imports, Ltd.*, 65 Hawaii, at ——, n. 21, 656 P. 2d, at 735, n. 21, as well as the court's comment that it had "good reason to believe neither okolehao nor pineapple wine is produced elsewhere." *Id.*, at n. 20, 656 P. 2d, at 735, n. 20. However, neither the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present "competitive threat" to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages;[10] instead, they go only to the extent of such competition. It is well settled that "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland* v. *Louisiana*, 451 U. S. 725, 760 (1981).

The State's position that there is no competition is belied by its purported justification of the exemption in the first place. The legislature originally exempted the locally produced beverages in order to foster the local industries by encouraging increased consumption of their product. Surely one way that the tax exemption might produce that result is that drinkers of other alcoholic beverages might give up or consume less of their customary drinks in favor of the exempted products because of the price differential that the exemption will permit. Similarly, nondrinkers, such as the maturing young, might be attracted by the low prices of okolehao and pineapple wine. On the stipulated facts in this case, we are unwilling to conclude that no competition exists between the exempted and the nonexempted liquors.

B

The State contends that a more flexible approach, taking into account the practical effect and relative burden on commerce, must be employed in this case because (1) legitimate State objectives are credibly advanced, (2) there is no patent discrimination against interstate trade, and (3) the effect on interstate commerce is incidental. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). On the other hand, it acknowledges that where simple economic protectionism is effected by state legislation, a stricter rule of invalidity has been erected. *Ibid.* See also *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471 (1981); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980).

A finding that state legislation constitutes "economic protectionism" may be made on the basis of either discriminatory purpose, see *Hunt* v. *Washington Apple Advertising Commission*, 432 U. S. 333, at 352–53, or discriminatory effect, see *Philadelphia* v. *New Jersey*, *supra*. See also *Minnesota* v. *Clover Leaf Creamery Co.*, *supra*, at 471, n. 15. Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce. See *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). The Hawaii Supreme Court described the legislature's motivation in enacting the exemptions as follows:

> "The legislature's reason for exempting 'ti root okolehao' from the 'alcohol tax' was to 'encourage and promote the establishment of a new industry,' S. L. H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of 'fruit wine manufactured in the State from products grown in the State' was intended 'to help' in stimulating 'the local fruit wine industry.' S. L. H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76, in 1976 Senate Journal, at 1056." *In re Bacchus Imports, Ltd.*, 65 Hawaii, at ——, 656 P. 2d, at 730.

Thus, we need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry. Likewise, the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products. Consequently, as long as there is some competition between the locally produced exempt products and nonexempt products from outside the State, there is a discriminatory effect.

No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal. One of the fundamental purposes of the Clause "was to insure . . . against discriminating State legislation." *Welton* v. *Missouri*, 91 U. S. 275, 280 (1876). In *Welton*, the Court struck down a Missouri statute that "discriminat[ed] in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product, or manufacture of other states or countries. . . ." *Id.*, at 277. Similarly, in *Walling* v. *Michigan*, 116 U. S. 446, 455 (1886), the Court struck down a law imposing a tax on the sale of alcoholic beverages produced outside the State, declaring:

> "A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States.

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locally produced products were not.

[8] The State does not seriously defend the Hawaii Supreme Court's conclusion that because there was no discrimination between in-state and out-of-state *taxpayers* there was no Commerce Clause violation. Our cases make clear that discrimination between in-state and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state taxpayers. Compare *J. M. Darnell & Son Co.* v. *City of Memphis*, 208 U. S. 113 (1908), with *Maryland* v. *Louisiana*, 451 U. S. 725 (1981).

[9] The percentage of exempted liquor sales steadily increased from .2221% of total liquor sales in 1976 to .7739% in 1981. App. to Brief for Appellee Dias A-1.

[10] The Hawaii Supreme Court's assumption that okolehao and pineapple wine do not pose "a competitive threat" does not constitute a finding that there is no competition whatsoever between locally produced products and out-of-state products, nor do we understand the State to so argue.

and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

See also *I. M. Darnell & Son Co.* v. *Memphis*, 208 U. S. 113 (1908).

More recently, in *Boston Stock Exchange* v. *State Tax Commission*, 429 U. S. 318 (1977), the Court struck down a New York law that imposed a higher tax on transfers of stock occurring outside the State than on transfers involving a sale within the State. We observed that competition among the States for a share of interstate commerce is a central element of our free-trade policy but held that a State may not tax interstate transactions in order to favor local businesses over out-of-state businesses. Thus, the Commerce Clause limits the manner in which States may legitimately compete for interstate trade, for "in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." 429 U. S., at 337. It is therefore apparent that the Hawaii Supreme Court erred in concluding that there was no improper discrimination against interstate commerce merely because the burden of the tax was borne by consumers in Hawaii.

The State attempts to put aside this Court's cases that have invalidated discriminatory State statutes enacted for protectionist purposes. See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471 (1981); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980). The State would distinguish these cases because they all involved attempts "to enhance thriving and substantial business enterprises at the expense of any foreign competitors." Brief for Appellee Dias 30. Hawaii's attempt, on the other hand, was "to subsidize nonexistent (pineapple wine) and financially troubled (okolehao) liquor industries peculiar to Hawaii." *Id.*, at 33. However, we perceive no principle of Commerce Clause jurisprudence supporting a distinction between thriving and struggling enterprises under these circumstances, and the State cites no authority for its proposed distinction. In either event, the legislation constitutes "economic protectionism" in every sense of the phrase. It has long been the law that States may not "build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy* v. *Baltimore*, 100 U. S. 434, 443 (1880). Were it otherwise, "the trade and business of the country [would be] at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States." *Id.*, at 442. It was to prohibit such a "multiplication of preferential trade areas" that the Commerce Clause was adopted. *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 356 (1951). Consequently, the propriety of economic protectionism may not be allowed to hinge upon the State's—or this Court's—characterization of the industry as either "thriving" or "struggling."

We also find unpersuasive the State's contention that there was no discriminatory intent on the part of the legislature because "the exemptions in question were not enacted to discriminate against foreign products, but rather, to promote a local industry." Brief for Appellee Dias 40. If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory. Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other. Consequently, it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers.

We therefore conclude that the Hawaii Liquor Tax exemption for okolehao and pineapple wine violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products.[11]

IV

The State argues in this Court that even if the tax exemption violates ordinary Commerce Clause principles, it is saved by the Twenty-first Amendment to the Constitution.[12] Section 2 of that Amendment provides: "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."

Despite broad language in some of the opinions of this Court written shortly after enactment of the Amendment,[13] more recently we have recognized the obscurity of the legislative history of § 2. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 107 n. 10 (1980). No clear consensus concerning the meaning of the provision is apparent. Indeed, Senator Blaine, the Senate sponsor of the Amendment resolution, appears to have espoused varying interpretations. In reporting the view of the Senate Judiciary Committee, he said that the purpose of § 2 was "to restore to the States . . . absolute control over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933). On the other hand, he also expressed a narrower view: "So to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line." *Id.*, at 4141.

It is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause. For example, in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 331–332 (1964), the Court stated:

> "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."

We also there observed that "[b]oth the Twenty-first Amendment and the Commerce Clause are part of the same Con-

[11] Because of our disposition of the Commerce Clause issue, we need not address the wholesalers' arguments based upon the Equal Protection Clause and the Import-Export Clause.

[12] We note that the State expressly disclaimed any reliance upon the Twenty-first Amendment in the court below and did not cite it in its Motion to Dismiss or Affirm. Apparently it was not until it prepared its brief on the merits in this Court that it became "clear" to the State that the Amendment saves the challenged tax. See Brief for Appellee Freitas 36.

[13] For example, in *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 62 (1936), the Court stated:

"The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it."

The Court went on to observe, however, that a high license fee for importation may "serve as an aid in policing the liquor traffic." *Id.*, at 63.

See also *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401, 403 (1938) ("since the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor"). Cf. *Craig* v. *Boren*, 429 U. S. 190 (1976).

stitution [and] 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 332. Similarly, in *Midcal Aluminum*, *supra*, at 109, the Court, noting that recent Twenty-first Amendment cases have emphasized federal interests to a greater degree than had earlier cases, described the mode of analysis to be employed as a "pragmatic effort to harmonize state and federal powers." The question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended. Or as we recently asked in a slightly different way, "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Capital Cities Cable, Inc.* v. *Crisp*, —— U. S. ——, —— (1984).

Approaching the case in this light, we are convinced that Hawaii's discriminatory tax cannot stand. Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. *South-Central Timber Development, Inc.* v. *Wunnicke*, —— U. S. —— (1984); *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935). State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was "to promote a local industry." Brief for Appellee Dias 40. Consequently, because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State's belated claim based on the Amendment.

V

Appellees further contend that even if the challenged tax is adjudged to have been unconstitutionally discriminatory and should not have been collected from appellants as long as the exemptions for local products were in force, appellants are not entitled to refunds since they did not bear the economic incidence of the tax but passed it on as a separate addition to the price that their customers were legally obligated to pay within a certain time. Relying on *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386 (1934), a case involving interpretation of a federal tax-refund statute, they assert that only the parties bearing the economic incidence of the tax are constitutionally entitled to a refund of an illegal tax. They further assert that appellants, at least arguably, do not even bear the legal obligation for the tax and that appellants have shown no competitive injury from the alleged discrimination. Appellants assert, on the other hand, that they were liable to pay the tax whether or not their customers paid their bills on time and that if the tax was illegally discriminatory the Commerce Clause requires that the taxes collected be refunded to them. Their position is also that the discrimination has worked a competitive injury on their business that entitles them to a refund.

These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the Federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law.[14] Also, resolution of those issues, if required at all, may necessitate more of a record than so far has been made in this case. We are reluctant, therefore, to address them in the first instance. Accordingly, we reverse the judgment of the Supreme Court of Hawaii and remand for further proceedings not inconsistent with this opinion.

So ordered.

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

JUSTICE STEVENS, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

Four wholesalers of alcoholic beverages filed separate complaints challenging the constitutionality of the Hawaii liquor tax because pursuant to an exception, since expired, the tax was not imposed on okolehao or pineapple wine in certain tax years.[1] Although only one of them actually sells okolehao and pineapple wine,[2] apparently all four of them are entitled to engage in the wholesale sale of these beverages as well as the various other alcoholic beverages that they do sell. The tax which they challenge is an excise tax amounting to 20 percent of the wholesale price; presumably the economic burden of the tax is passed on to the wholesalers' customers.

Today the Court holds that these wholesalers are "entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business." *Ante*, at 4. I am skeptical about the ability of the wholesalers to prove that the exemption for okolehao and pineapple wine has harmed their businesses at all, partly because their customers have reimbursed them for the excise tax and partly because they are free to take advantage of the benefit of the exemption by selling the exempted products themselves. Even if some minimal harm can be proved, I am even more skeptical about the possibility that it will result in the multi-million dollar refund that the wholesalers are claiming. My skepticism concerning the economics of the wholesalers' position is not, however, the basis for my dissent. I would affirm the judgment of the Supreme Court of Hawaii because the wholesalers' Commerce Clause claim is squarely foreclosed by the Twenty-first Amendment to the United States Constitution.[3]

[14] It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law.

[1] Two of the wholesalers Bacchus Imports, Ltd., and Eagle Distributors, Inc., are appellants in this Court; the other two, Paradise Beverages, Inc. and Foremost-McKesson, Inc., are nominally appellees under our rules, see *ante*, at 2 n. 2, but have filed briefs supporting reversal. All four were parties to the case in the Hawaiian Supreme Court.

[2] As the Supreme Court of Hawaii noted:

"Paradise acknowledges that it is a 'beneficiary' of the exemptions from taxation provided by HRS in Hawaii. It nevertheless maintains the statute is unconstitutional probably because the volume of sales of the exempted products is relatively insubstantial." App. to Juris. Statement A-34, n. 9.

[3] As the Court recognizes, the issue whether the Twenty-first Amendment insulates the exemption from invalidation under Commerce Clause is properly before us, even though it was not argued below. I should add that appellants' specific Equal Protection Clause claim is plainly foreclosed under the Twenty-first Amendment as well, see, *e. g.*, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); and their Import-Export clause claim is wholly lacking in merit, see, *e. g.*, *Department of Revenue* v. *Beam Distilling Co.*, 377 U. S. 341 (1964).

I

At the outset, it is of critical importance to a proper understanding of the significance of the Twenty-first Amendment in this litigation to note the issues this case does not raise. First, there is no claim that the Hawaii tax is inconsistent with any exercise of the power that Article I, sec. 8, cl. 3 of the Constitution confers upon the Congress "To regulate Commerce among . . . the several States." The extent to which the Twenty-first Amendment may or may not have placed limits on the ability of Congress to regulate commerce in alcoholic beverages is simply not at issue in this case. Hence, there is no issue concerning the continuing applicability of previously enacted federal statutes affecting the liquor industry.[4] For purposes of analysis, we may assume *arguendo* that the Twenty-first Amendment left the power of *Congress* entirely unimpaired.[5]

Moreover, there is no claim that the Hawaii tax has impaired interstate commerce that merely passes through the State,[6] or that is destined to terminate at a federal enclave within the State.[7] Nor is there a claim of a due process violation,[8] nor a claim of discrimination among persons, as opposed to goods,[9] nor a claim of an effect on liquor prices outside the State.[10]

The tax is applied to the sale of liquor in the local market that presumably will be consumed in Hawaii. It thus falls squarely within the protection given to Hawaii by the second section of the Twenty-first Amendment, which expressly mentions "delivery or use therein."[11]

II

Prior to the adoption of constitutional amendments concerning intoxicating liquors, there was a long history of special state and federal legislation respecting intoxicating liquors and resulting litigation challenging that legislation under the Commerce Clause.[12] The Commerce Clause effectively prevented States from unilaterally banning the local sale of intoxicating liquors from out-of-state, *Leisy* v. *Hardin*, 135 U. S. 100 (1890), but Congress, acting pursuant to its plenary power under the Commerce Clause, essentially conferred that authority on them, and this Court upheld that exercise of congressional power. *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311 (1917). The Eighteenth Amendment, ratified in 1919, prohibited the manufacture, sale, and transportation of intoxicating liquors for beverage purposes, and expressly conferred concurrent power to enforce the prohibition on Congress and the several States.[13] Section 1 of the Twenty-first Amendment, ratified in 1933, repealed the Eighteenth Amendment. However, the constitutional authority of the States to regulate commerce in intoxicating liquors did not revert to its status prior to the adoption of these constitutional amendments; section 2 of the Twenty-first Amendment expressly provides:

> "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."

This Court immediately recognized that this broad constitutional language confers power upon the States to regulate commerce in intoxicating liquors unconfined by ordinary limitations imposed on state regulation of interstate goods by the Commerce Clause and other constitutional provisions, *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939); *Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Brewing Co.* v. *Liquor Comm.*, 305 U. S. 391 (1939); *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936), and we have consistently reaffirmed that understanding of the Amendment, repeatedly acknowledging the broad nature of State authority to regulate commerce in intoxicating liquors, see, *e. g.*, *Capital Cities Cable, Inc.* v. *Crisp*, —— U. S. ——, —— - —— (1984); *Craig* v. *Boren*, 429 U. S. 190, 206–207 (1976); *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U. S. 275, 283–284 (1972); *California* v. *LaRue*, 409 U. S. 109, 114–115 (1972); *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, 42 (1966); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 330 (1964); *Nippert* v. *Richmond*, 327 U. S. 416, 425 (1946); *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 299 (1945).

III

Today the Court, in essence, holds that the Hawaii tax is unconstitutional because it places a burden on intoxicating liquors that have been imported into Hawaii for use therein that is not imposed on liquors that are produced locally. As I read the text of the Amendment, it expressly authorizes this sort of burden. Moreover, as I read Justice Brandeis' opinion for the Court in the seminal case of *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936), the Court has squarely so decided.

In *Young's Market*, the Court upheld a California statute that imposed a license fee on the privilege of importing beer to any place in California. After noting that the statute would have been obviously unconstitutional prior to the Twenty-first Amendment, the Court explained that the Amendment enables a State to establish a local monopoly and to prevent or discourage competition from imported liquors. Because the Court's reasoning clearly covers this case, it merits quotation at some length:

> "The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The

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[4] See generally, *Capital Cities Cable, Inc.* v. *Crisp*, —— U. S. —— (1984); *California Retail Liquor Dealers Association* v. *Mid Cal Aluminum, Inc.*, 445 U. S. 97 (1980); see also, *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U. S. 275, 282 n. 9 (1972).

[5] The Commerce Clause operates both as a grant of power to the Congress and a limitation on the power of the States concerning interstate commerce. Congress's power under the clause, however, is broader than the limitation inherently imposed on the States, and hence we have always recognized that some State regulation of interstate commerce is permissible which would be impermissible if Congress acted. *Cooley* v. *Board of Wardens*, 12 How. 299 (1852). Given the dual character of the clause, it is not at all incongruous to assume that the power delegated to Congress by the Commerce Clause is unimpaired while holding the inherent limitation imposed by the Commerce Clause on the States is removed with respect to intoxicating liquors by the Twenty-first Amendment.

[6] See generally, *Department of Revenue* v. *Beam Distilling Co.*, 377 U. S. 341 (1964); *Carter* v. *Virginia*, 321 U. S. 131 (1944).

[7] See generally, *United States* v. *Mississippi Tax Comm.*, 412 U. S. 363 (1973); *Collins* v. *Yosemite Park Co.*, 304 U. S. 518 (1938).

[8] See generally, *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971).

[9] See generally, *Craig* v. *Boren*, 429 U. S. 190 (1976).

[10] See generally, *Seagram & Sons* v. *Hostetter*, 384 U. S. 35 (1966), compare *United States Brewers Association, Inc.* v. *Rodriquez*, —— U. S. —— (1984) (summarily aff'g —— N. M. ——) with *Healy* v. *United States Brewers Association, Inc.*, —— U. S. —— (1983) (summarily aff'g 692 F. 2d 275 (CA2 1982)).

[11] See *infra*, at ——.

[12] See, *e. g.*, *United States* v. *Hill*, 248 U. S. 420 (1919); *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311 (1917); *In re Rahrer*, 140 U. S. 545 (1891); *Leisy* v. *Hardin*, 135 U. S. 100 (1890); *Bowman* v. *C. & N. W. R. Co.*, 125 U. S. 465 (1888); *Walling* v. *Michigan*, 116 U. S. 446 (1886); *License Cases*, 5 How. 504 (1847), overruled, *Leisy* v. *Hardin*,

[13] See generally, *The National Prohibition Cases*, 253 U. S. 350 (1920).

words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

"The plaintiffs argue that, despite the Amendment, a State may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer's license fee was not imposed to that end. Surely the State may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee? Compare *Slaughter-House Cases*, 16 Wall. 36; *Vance* v. *W. A. Vandercook Co. (No. 1)*, 170 U. S. 438, 447. There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting hard liquors absolutely. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee?" 299 U. S., at 62-63.

Today the Court implies that Justice Brandeis' reasoning in the *Young's Market* case has been qualified by our more recent decision in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324 (1964). However, in the passage quoted by the Court, *ante*, at 11, Justice Stewart merely rejected the broad proposition that the Twenty-first Amendment had entirely divested Congress of all regulatory power over interstate or foreign commerce in intoxicating liquors. As I have already noted, this case involves no question concerning the power of Congress, see *supra*, at —— and n. ——, and Justice Brandeis of course in no way implied that Congress had been totally divested of authority to regulate commerce in intoxicating liquors—a proposition which Justice Stewart characterized as "patently bizzare." 377 U. S., at 11.

Moreover, the actual decision in *Hostetter* was predicated squarely on the principle reflected in the Court's earlier decision in *Collins* v. *Yosemite Park Co.*, *supra*. Referring to *Collins*, the Court explained:

> "There it was held that the Twenty-first Amendment did not give California power to prevent the shipment into and through her territory of liquor destined for distribution and consumption in a national park. The Court said that this traffic did not involve 'transportation into California "for delivery or use therein"' within the meaning of the Amendment. 'The delivery and use is in the Park, and under a distinct sovereignty.' *Id.*, at 538. This ruling was later characterized by the Court as holding 'that shipment through a state is not transportation or importation into the state within the meaning of the Amendment.' *Carter* v. *Virginia*, 321 U. S. 131, 137." *Hostetter* v. *Idlewild Liquor Corp.*, *supra*, at 332.[14]

On the same day that it decided *Hostetter*, the Court also held that a Kentucky tax violated the Export-Import Clause of the Constitution. *Department of Revenue* v. *James Beam Co.*, *supra*. The holding of that case is not relevant to the Commerce Clause issue decided today, but the final paragraph of the Court's opinion in the *James Beam Co.* case surely confirms my understanding that the Court did not then think that it was repudiating the central rationale of Justice Brandeis' opinion in *Young's Market*. It wrote:

> "We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. All we decide today is that, because of the explicit and precise words of the Export-Import Clause of the Constitution, Kentucky may not lay this impost on these imports from abroad." 377 U. S., at 346.

Indeed, only a fortnight ago, we stated that a direct regulation "on the sale or use of liquor" within a State's borders is the "core §2 power" conferred upon a State, *Captial Cities Cable, Inc.* v. *Crisp*, *supra*, at ——, observing that

> "'[t]his Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.' . . . §2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Id.*, at —— - —— (citation omitted).

As a matter of pure constitutional power, Hawaii may surely prohibit the importation of all intoxicating liquors. It seems clear to me that it may do so without prohibiting the local sale of liquors that are produced within the State. In other words, even though it seems unlikely that the okolehao lobby could persuade it to do so, the Hawaii Legislature surely has the power to create a local monopoly by prohibiting the sale of any other alcoholic beverage. If the State has the constitutional power to create a total local monopoly—thereby imposing the most severe form of discrimination on competing products originating elsewhere—I believe it may also engage in a less extreme form of discrimination that merely provides a special benefit, perhaps in the form of a subsidy or a tax exemption, for locally produced alcoholic beverages.

The Court's contrary conclusion is based on the "obscurity of the legislative history" of §2. *Ante*, at 11. What the Court ignores is that it was argued in *Young's Market* that a "limitation of the broad language" of §2 was "sanctioned by its history," but the Court, observing that the language of the Amendment was "clear," determined that it was unnecessary to consider the history, 299 U. S., at 63-64—the history which the Court today considers unclear. But now, according to the Court, the force of the Twenty-first Amend-

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[14] The Court added:

"A like accommodation of the Twenty-first Amendment with the Commerce Clause leads to a like conclusion in the present case. Here, ultimate

has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. As the District Court emphasized, this case does not involve 'measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York.' 212 F. Supp., at 386. Rather, the State has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations. This

ment contention in this case is diminished because the "central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Ante*, at 12. It follows, according to the Court, that "state laws that constitute mere economic protectionism are not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Ibid.* This is a totally novel approach to the Twenty-first Amendment.[15] The question is not one of "deference," nor one of "central purposes;"[16] the question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution. It plainly is.

Accordingly, I respectfully dissent.

FRANK H. EASTERBROOK, Chicago, Ill. (W. REECE BADER, ROBERT E. FREITAS, JAMES A. HUGHES, ORRICK, HERRINGTON & SUTCLIFFE, and ALLAN S. HALEY, with him on the brief) for appellants; WILLIAM DAVID DEXTER, Special Assistant Attorney General of Hawaii, Renton, Wash. (TANY S. HONG, Atty. Gen., T. BRUCE HONDA, Dpty. Atty. Gen., and KEVIN T. WAKAYAMA, Spec. Asst. Atty. Gen., with him on the brief) for appellees.

No. 82-1998

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS *v.* COMMUNITY FOR CREATIVE NON-VIOLENCE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

No. 82-1998. Argued March 21, 1984—Decided June 29, 1984

In 1982, the National Park Service issued a permit to respondent Community for Creative Non-Violence (CCNV) to conduct a demonstration in Lafayette Park and the Mall, which are National Parks in the heart of Washington, D. C. The purpose of the demonstration was to call attention to the plight of the homeless, and the permit authorized the erection of two symbolic tent cities. However, the Park Service, relying on its regulations—particularly one that permits "camping" (defined as including sleeping activities) only in designated campgrounds, no campgrounds having ever been designated in Lafayette Park or the Mall—denied CCNV's request that demonstrators be permitted to sleep in the symbolic tents. CCNV and the individual respondents then filed an action in Federal District Court, alleging, *inter alia*, that application of the regulations to prevent sleeping in the tents violated the First Amendment. The District Court granted summary judgment for the Park Service, but the Court of Appeals reversed.

Held: The challenged application of the Park Service regulations does not violate the First Amendment.

(a) Assuming that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment, the regulation forbidding sleeping meets the requirements for a reasonable time, place, and manner restriction of expression, whether oral, written, or symbolized by conduct. The regulation is neutral with regard to the message presented, and leaves open ample alternative methods of communicating the intended message concerning the plight of the homeless. Moreover, the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of the Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence. To permit camping would be totally inimical to these purposes. The validity of the regulation need not be judged solely by reference to the demonstration at hand, and none of its provisions are unrelated to the ends that it was designed to serve.

(b) Similarly, the challenged regulation is also sustainable as meeting the standards for a valid regulation of expressive conduct. Aside from its impact on speech, a rule against camping or overnight sleeping in public parks is not beyond the constitutional power of the Government to enforce. And as noted above, there is a substantial Government interest, unrelated to suppression of expression, in conserving park property that is served by the proscription of sleeping.

—— U. S. App. D. C. ——, 703 F. 2d 586, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined.

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether a National Park Service regulation prohibiting camping in certain parks violates the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in connection with a demonstration intended to call attention to the plight of the homeless. We hold that it does not and reverse the contrary judgment of the Court of Appeals.

I

The Interior Department, through the National Park Service, is charged with responsibility for the management and maintenance of the National Parks and is authorized to promulgate rules and regulations for the use of the parks in accordance with the purposes for which they were established. 16 U. S. C. §§ 1, 1a–1, 3.[1] The network of National Parks includes the National Memorial-core parks, Lafayette Park and the Mall, which are set in the heart of Washington, D. C., and which are unique resources that the Federal Government holds in trust for the American people. Lafayette Park is a roughly seven-acre square located across Pennsylvania Avenue from the White House. Although originally part of the White House grounds, President Jefferson set it aside as a park for the use of residents and visitors. It "functions as a formal garden park of meticulous landscaping with flowers, trees, fountains, walks and benches." National Park Service, U. S. Department of the Interior, *Resource Management Plan for President's Park* 4.3 (1983). The Mall is a stretch of land running westward from the Capitol to the Lincoln Memorial some two miles away. It includes the Washington Monument, a series of reflecting pools, trees, lawns, and other greenery. It is bordered by, *inter alia*, the Smithsonian Institution and the National Gallery of Art. Both the Park and the Mall were included in

[15] It is an approach explicitly rejected in *Young's Market*, 299 U. S., at 63 (rejecting argument that the "State may not regulate importations except for the purpose of protecting the public health, safety or morals. . . ."), and in subsequent cases as well, see, *e. g.*, *Seagram & Sons* v. *Hostetter*, *supra*, 384 U. S., at 47 ("[N]othing in the Twenty-first Amendment . . . requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance."). Because it makes the constitutionality of state legislation depend on a judicial evaluation of the motivation of the legislators, I regard it as an unsound approach to the adjudication of federal constitutional issues. Indeed, it is reminiscent of a long since repudiated era in which this Court struck down assertions of Congress's power to regulate commerce on the ground that the objective of Congress was not to regulate commerce, but rather to remedy some local problem. See generally, *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936); *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935). In any event, the Court's analysis must fall of its own weight, for we do not know what the ultimate result of a regulation such as this may be. The immediate objective may be to encourage the growth of domestic distilleries, but the ultimate result—or indeed, objective—may be entirely to prohibit imported liquors for domestic consumption when the domestic industry has matured.

[16] I would suggest, however, that if vague balancing of "central purposes" is to govern the ultimate disposition of this litigation, a careful and thorough analysis of the actual economic effect of the tax exemption on the business of the taxpayers should be made before any serious consideration is given to their multi-million dollar refund claim.

[1] The Secretary is admonished to promote and regulate the use of the parks by such means as conform to the fundamental purpose of the parks, which is "to conserve the scenery and the natural and historic objects and the wild life therein . . . in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U. S. C. § 1.

VISITORS' REGISTER

TAXATION COMMITTEE

BILL NO. SB 288 DATE March 18, 1985

SPONSOR SENATOR ECK

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Michael G. Garrity	MT Dept. of Revenue	X	
Connie Ruetten	"	"	

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TAXATION COMMITTEE

BILL NO. SB 261 DATE March 18, 1985

SPONSOR SENATOR LYNCH

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Roger Tippy	Helena	X	
Dennis M Flick	Billings	X	
Vincent F. Smith	"	X	

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TAXATION COMMITTEE

BILL NO. SB 379 DATE March 18, 1985

SPONSOR SENATOR WEEDING

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Harriett Meloy	League of Women Voters Helena		

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TAXATION COMMITTEE

BILL NO. SJR 24 DATE March 18, 1985

SPONSOR SENATOR STEPHENS

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
S. Keith Anderson	Helena Mont Tax	✓	
Riley Johnson	Helena - NFIB	✓	

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