MINUTES OF THE MEETING
TAXATION COMMITTEE
MONTANA STATE SENATE

February 15, 1985

The thirty-first meeting of the Senate Taxation Committee was called to order by Chairman Thomas E. Towe at 8:08 am in Room 413-415 of the Capitol Building.

ROLL CALL: Senator Neuman was excused. Senator Severson was absent. All other members of the committee were present. (Senator Severson joined the committee at 9 am).

CONSIDERATION OF HB 140: Representative Tom Asay, House District 94, was recognized as chief sponsor of the bill. He said that he introduced it at the request of the County Treasurers Association. He said the bill would prorate the mobile home tax when moved into a county and add the amount to the following year's tax. This would avoid the problem of making those taxpayers delinquent upon receipt of the tax notice. He said he had no objections to amendments proposed by Representative Bob Bachini.

PROPONENTS

Representative Bob Bachini, House District 14, said that the proration of motor homes was not covered here. He offered an amendment to the committee to correct the perceived flaw (Exhibit 1).

OPPONENTS

None were heard.

Questions from the committee were called for.

Senator Lybeck asked about licensing breaks for motor homes. Representative Bachini said there would be no fiscal impact.

Senator McCallum noted that he had to pay back taxes on a motor home he purchased.

Senator Eck said they get a break by paying such a small amount of tax to begin with.

Senator Towe wanted to clarify that the bill was used in the event of a sale, or a home coming into the state.

Senator Halligan asked if the treasurers' lobbyist, Mr. Charles Gravely, favored the bill. Representative Asay said, yes.

Senator Mazurek asked how these were picked up on the tax rolls. Mr. Gregg Groepper discussed for the committee the taxation law on migratory personal property, mobile homes, motor homes and explained that undiscovered property was handled under a different statute.

Representative Asay closed, thanking the committee.

CONSIDERATION OF HB 176: Representative Francis Bardanouve of House

District 16, was recognized as chief sponsor of the bill. He said that Montana is permitted to borrow money from the federal government when the cash flow is down. At present the law does not allow for paying the costs related to these revenue anticipation notes. Representative Bardanouve detailed the nature of the related costs, and used as example the last issue of $38 million which cost $48,396. The bill would pay that cost by taking money from the issue. The alternative would be to appropriate an imaginary amount, or to continue the present shuffle of funds which may not be legal.

Representative Bardanouve also noted that because of arbitrage the state actually makes money on these issues. The bill, he concluded, would put the Department in good position to do what the Legislature has told them to do.

PROPONENTS

No additional proponents were heard.

OPPONENTS

None were heard.

Questions from the committee were called for.

Senator Hager asked how much the state made on the money. Mr. Marvin Eicholtz of the Department of Administration said the amount was around $1 million annually which is put into the general fund.

Representative Bardanouve closed without comment.

MOTION: Senator Hager moved that HB 176 do pass. The motion carried unanimously. Senator Hager agreed to carry the bill on the Senate floor.

CONSIDERATION OF HB 154: Representative Paul Pistoria, House District 36, was recognized as chief sponsor of the bill which would repeal the Montana Economic Land Development Act (MELDA). He discussed the turbulent legislative history of a complex bill that had been used only once and then had not worked well. He offered to the committee a copy of an article from the Los Angeles Times which discussed problems with the bill (Exhibit 2). He also submitted a letter in support of the repeal (Exhibit 3).

PROPONENTS

Mr. Terry Carmody of the Montana Association of Realtors and Mr. Dennis Burr of the Montana Taxpayers Association rose in support of the bill.

Mr. Greg Groepper of the Department of Revenue said they had no problem with the repeal of the bill as it hadn't been used for years.

OPPONENTS

None were heard.

Questions from the committee were called for.

Senator Hager asked if the bill had any opponents in the House. Representative Pistoria said that there were none in committee and that the bill passed the committee, second and third reading unanimously.

The committee had a nostolgia session about the legislative history of the bill.

MOTION: Senator Goodover moved that HB 154 be concurred in. With Senators Hager and Towe voting no, and all other members present voting yes, the motion carried. Senator Goodover agreed to carry the bill on the floor.

FURTHER CONSIDERATION OF HB 140: The discussion addressed the amendments found in Exhibit 1.

MOTION: Senator Mazurek moved that HB 140 be concurred in.

MOTION: As a substitute motion Senator Hager moved that HB 140 be amended per Exhibit 1. Senator Hager said he didn't want people to feel "taken" by the tax system.

In discussion it was clarified that a mobile home needed a moving declaration which included proof of payment of taxes due and owing before it could be moved.

Question was called on Senator Hager's motion. With Senators Brown, Goodover, Hager, Halligan and McCallum voting yes; and Senators Eck, Lybeck, Mazurek, Hirsch and Towe voting no, the motion failed.

The question was then called on the motion of Senator Mazurek to concur in HB 140. The motion carried unanimously.

(Senator Severson joined the committee at 9 am; Senator Halligan was excused at the same time.)

FURTHER CONSIDERATION OF HB 172: Senator Towe recognized Mr. Jim Lear of the committee staff who said that a computer search revealed that "leasehold improvement" is not currently used in the statutes outside the definition section, though some bills currently before the Legislature use the words.

MOTION: Senator Eck moved that HB 172 be tabled. The motion carried unanimously.

FURTHER CONSIDERATION OF SJR 14:

MOTION: Senator Brown moved that SJR 14 be amended on line 2, following "that" by striking "an appropriate interim" and inserting "the Revenue Oversight". This amendment would clarify that the study was to be done by Revenue Oversight. The motion carried unanimously.

MOTION: Senator Mazurek moved that SJR 14 do pass as amended.

Both Senators Towe and Mazurek spoke of the absolute mess in current law on this subject. Senator Hirsch asked how this impass had been reached. They responded that it was simply so difficult that any tax sale could be set aside on technical difficulties. It has been further complicated by an attorney general's opinion which says that current taxes cannot be paid until back taxes are paid and no taxes can be paid until all taxes are paid in full.

Senator Eck said she wanted the study to address the problem of large developers leaving local governments holding obligations on SIDs.

Question was called on the motion. The motion carried unanimously.

FURTHER CONSIDERATION OF SB 304:

MOTION: Senator McCallum moved that SB 304 do not pass. He said athletic clubs are areas which include minors and that if we do have a quota system it ought to be somewhat respected. Senator Hager agreed saying that "publically owned" could be construed to mean a university or college campus. Senator Eck pointed out that the application must be made by local government owning or operating the facility and that would keep out the inappropriate applications.

Generally the committee felt the liberalized special permit system and the catering provisions could handle those that needed this kind of service. Senator Mazurek said that the sale would be taken from a local business if this was allowed.

The question was called. With Senator Towe voting no; Senators Halligan and Neuman excused, and all other Senators voting yes, the motion carried.

FURTHER CONSIDERATION OF SB 288: Mr. Lear was recognized to discuss the material sent to the committee from the Department of Revenue (Exhibit 4). Mr. Lear concluded form his own research that current Montana practice is flawed per the U.S. Supreme Court decision. He said the arguments made for Montana law and practice were written into a dissenting opinion, but that it had only three signatures. He concluded by saying, "There is no doubt in my mind that they would declare Montana law unconstitutional."

The committee discussed other parallels, like incentive to gasohol, contracting with Montana businesses etc. The committee also discussed various ways of providing the same help to Alpha Industries and at the same time avoiding a law suit.

Senator Towe instructed Mr. Groepper and Mr. Lear to investigate a size distinction.

FURTHER CONSIDERATION OF SB 203: Senator Towe said that a compromise was being worked out between the Department of Revenue and the bankers. He asked for a motion to table SB 203.

MOTION: Senator Mazurek moved that SB 203 be tabled. With Senator Hager voting no, and all other members present voting yes, the motion carried.

Senator Towe noted that questions from the committee on SB 330 would be entertained in tomorrow's meeting. He adjourned the meeting at 10 am.

Thomas E. Towe
Chairman

ROLL CALL

SENATE TAXATION COMMITTEE

49th Legislative Session -- 1985

Date February 15, 1985 8:08 am

Location -- Room 413-415

Name	Present	Absent	Excused
Senator Brown	✓		
Senator Eck	✓		
Senator Goodover	✓		
Senator Hager	✓		
Senator Halligan	✓		
Senator Hirsch	✓		
Senator Lybeck	✓		
Senator Mazurek	✓		
Senator McCallum	✓		
Senator Neuman			✓
Senator Severson			
Senator Towe	✓		

DATE February 15, 1985

COMMITTEE ON Taxation

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Check One Oppose
Marvin Eicholtz	administration	HB 176	✓	
Jerry Carmody	MT REALTORS	HB 154	✓	
Dennis Burr	MONTAX	HB 154	✓	
Dianne Donnelly	MACo	HB 140 HB 154 HB 176	✓	
~~Linda Hamilton~~	~~Hospital - St. Peter's~~	~~SB 328~~	✓	
		~~SB 328~~	✓	

(Please leave prepared statement with Secretary)

Amendments to HB 140

1. Title, line 7.
Following: "TAXES;"
Insert: "PROVIDING FOR PRORATION OF THE FEE IN LIEU OF TAX ON A MOTOR HOME;"
Following: "AMENDING"
Strike: "SECTION"
Insert: "SECTIONS"
Following: "15-24-202,"
Insert: "AND 61-3-522,"

2. Page 2, line 18.
Following: line 17
Insert: "Section 2. Section 61-3-522, MCA, is amended to read:
""61-3-522. Sechedule of fees for motor homes. (1) The owner of a motor home shall pay a fee based on the age of the motor home according to the following schedule:

less than 2 years old	$200
2 years old and less than 3 years old	180
3 years old and less than 4 years old	145
4 years old and less than 5 years old	100
5 years old and less than 6 years old	75
6 years old and less than 7 years old	50
7 years old and less than 8 years old	25
8 years old and older	15

(2) The age of a motor home is determined by subtracting the manufacturer's designated model year from the current calendar year.

<u>(3) A motor home initially registered in Montana, at a time other than that prescribed in 61-3-312, shall have the fee in lieu of tax prorated according to the number of months remaining in the year of initial registration.</u>""

EXHIBIT 1 -- HB 140
February 15, 1985

Los Angeles Times

SUNDAY MORNING, MAY 23, 1976

Commerce MELDA

TESTIMONY FOR H.B. 154 Pistoria

IS IT A GOOD IDEA OR IS IT 'GARBAGE'?

New Land Use Law Baffles Montanans

BY JOHN DREYFUSS
Times Staff Writer

Hal Price, Montana's ordinarily dignified and soft-spoken chief planning administrator, sat in his office flapping his arms.

It would be nice, he said, if he could get to the moon that way.

It would also be nice, Price added, if his state's new land use law would work, but it stood as much chance of working as he stood of flapping his way to the moon.

The year-old Montana Economic Land Development Act (MELDA) is the nation's most radical land use legislation. Unfortunately, it may also be the nation's most confusing land use legislation.

Its goal is clear: Promote good land use by employing tax incentives.

Under the still unimplemented law, if you remodel your home, your taxes drop for five years. Promise to use agricultural land for agriculture, and down zoom taxes as much as 20%. Get governmental approval to build a factory on recreational land, and fork over a penalty of up to double your tax bill.

"Garbage," Hal Price calls it.

"It ought to be repealed," said Democratic Gov. Tom Judge, who signed the bill into law at the eleventh hour.

"Unconstitutional," declared Dennis Burr, head of Montana's property assessment division in the state Department of Revenue.

"The biggest tax break we've had in this state in a long time," said Tom Winsor, lobbyist for the Montana Chamber of Commerce.

"A damn good bill," said State Rep. Harrison Fagg, which was an unsurprising remark.

MELDA is the brainchild of Harrison Fagg, a Billings architect and developer when he's not busy being a Republican legislator.

Fagg is a dynamo; a man who walks fast, talks fast, acts fast and always has goals—usually he's heading for about six of them simultaneously.

MELDA is his statement. Seeing it work is his goal. He wrote its outline on an airplane between Great Falls and Seattle. Then he promoted, shepherded and some say ramrodded his idea into law.

Wins Legislative Approval

The bill waltzed through Montana's House of Representatives to the tune of a 72-1 landslide. The state senate approved it by a healthy 30-19 margin.

"The legislature didn't know what they were voting on," Gov. Judge said less than a year after endorsing the bill.

For starters, legislators voted to put every square inch of Montana into one or more of six categories: agricultural, recreational, residential, commercial, industrial and open space.

So far, just taking that initial step has proved too much for Montana. And beyond that step is a long, steep path full of legal potholes, emotional roadblocks and administrative hairpin turns.

MELDA's problems began, logically enough, at the beginning. The law was badly written. Critics can point to contradictions, ill defined regulations, ambiguous charts, arbitrary tax assessments and, in the words of Dan Obermeyer, president of the Montana Assn. of Planners, "unclear procedures and vague or confusing wording."

All that becomes at least partially understandable when one learns how the law was put together.

Fagg took his outline of the bill—the one he wrote while airborne—and refined it. Then it was assigned to Roger Tippy, an intense, intelligent Yale Law School graduate. Tippy is a staff attorney for Montana's legislative council. He has drafted lots of bills.

'IT OUGHT TO BE REPEALED'—Gov. Tom Judge opposed bill, but signed it.
Times photo

The year-old act is the nation's most radical land use legislation

EXHIBIT 2 -- HB 154
February 15, 1985

Los Angeles Times PART VII

Real Estate

HOMES and INDUSTRY

★ SUNDAY, MAY 23, 1976

The law's goal is to promote good land use by employing tax incentives

The lawyer spent two frustrating weeks struggling to produce a rough draft of the bill from Fagg's notes. He gave up half way through the job. It couldn't be done right in time for submission to the 1975 legislature, Tippy said.

He tried to convince Fagg to delay the bill. But the legislator's nature is not to delay. He took Tippy's work and his own version of the bill's second half to Tom Keegan, another legislative council staff attorney.

It was a hectic time around the capitol. Bill drafters were swamped with work. Keegan was no exception. So for the most part he just finished Tippy's work by adapting Fagg's words to bill-writing style where necessary, Keegan said.

"I would characterize my participation more as that of a mechanic than a draftsman," said the attorney, who is a friend and admirer of Fagg.

The prospective legislation then went to Mike Matroff, a proofreader employed by the legislature.

"It came down in such an incoherent state that I was assigned to try to get more coherent language in it, but later I was told that was not my job," Matroff said. "We proofed the final version and it didn't make much sense at all."

Approval Came on Final Day

It passed a bleary house of representatives—the next to last bill approved in a meeting which ran from about 9 a.m. to the following 2 a.m. Approval came on the final day of the legislative session that the house could transmit a bill to the senate.

"Many house members assumed the senate would defeat the bill," Tippy said.

Many house members were dead wrong.

After the usual committee reviews and revisions (including a highly unusual number of amendments—about 200, including 148 mostly minor ones by one senator), the bill got senate approval and landed on the governor's desk.

Less than an hour before time was to run out for signing the bill, Judge put his name on MELDA, thereby giving Montana a law peppered with problems.

"If I had it to do over again, I would have vetoed it," he said recently.

Judge indicated he signed the bill because he did not fully understand it ("We have too many bills and not enough staff to analyze all of them"), because it had broad public support, and because it had been so successful in the legislature.

AUTHOR OF BILL—Rep. Harrison Fagg on roof of his Billings office building.

Times photo

Montana's legislators wrote so many problems into the books by passing MELDA for at least four reasons:

1—They didn't know what they were doing.

2—Harrison Fagg is a relentlessly determined man.

3—The law's goals had something for everyone.

4—MELDA had support from a king-sized bed full of strange bedfellows.

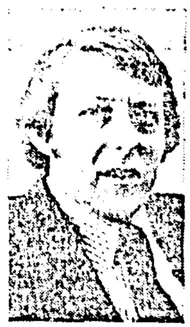
It is widely conceded that many legislators never read the complicated MELDA before voting on it, and even more of them failed to understand it.

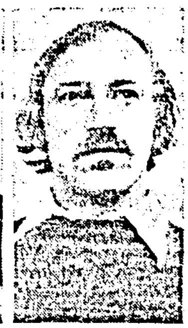
"That bill was one of those that went through without anybody knowing what it was really about," said Herb Huennekans, Democratic senator and retired meteorologist from Billings.

"I'm not sure anyone understands it," said Bob Brown, Republican senator and a rancher from Whitefish.

Please Turn to Page 18, Col. 1


Dennis Burr


Tom Winsor


Roger Tippy


Torian Donohoe


Hal Price

Times photos

MONTANA'S NEW LAND USE LAW

Continued from First Page

And Gov. Judge, who had said the legislature passed the bill without understanding it, added that "nobody really knew what it was going to do."

Voting a mystery into law becomes partially understandable when one realizes the Montana legislature schedules only 90 meeting days every other year. The last session took 86 days and lawmakers voted on 1,238 bills. "Legislators," said Gov. Judge, "are overworked."

A second reason MELDA is law is that Harrison Fagg is some kind of 20th century Don Quixote, except that occasionally he beats the windmill.

To knock over opponents of MELDA, Fagg employed a tactic he excels at: salesmanship.

He put together a convincing slide show about his bill and flew his green and yellow Beechcraft Bonanza all over Montana flashing pictures on screens for anyone who would watch.

"I think it did more to get the bill past the legislature than anything else," Fagg said. And he is probably right.

The show emphasized the positive and ignored the negative. "There was just no relationship between the bill and the slide show," said Al Thelan, city manager of Helena.

Thelan overstated the case. There was clear relationship. But the show left out a lot.

Fagg narrated his slides with conviction and vigor. He built enormous support for MELDA.

Supplementing his words with photos of Montana's magnificent landscape, charts, graphs and models made from Monopoly sets and cork, Fagg told Montanans that MELDA would use tax incentives to:

—Stop urban sprawl.
—Foster redevelopment in cities.
—Promote use of non-productive land.
—Save agricultural land from development.
—Encourage home remodeling.
—Increase local control of property.
—And more . . . much more.

Among MELDA's innovative, controversial regulations:

—Homeowners get tax reductions for remodeling their homes because remodeling improves neighborhoods. Traditionally, remodeling brings a tax increase on grounds that it raises a home's value.

—Farmers and ranchers who promise to use their land for agriculture—thereby guaranteeing it will not contribute to urban sprawl—get a tax cut.

—The same ranchers can further reduce their taxes by permitting the public to use their land.

—Homeowners who use their land for nonresidential purposes can be required to pay whopping tax penalties.

—Owners of commercial property pay progressively higher taxes if they fail to remodel structures that are more than 10 years old.

"You've got something that sounds like God, country, mother and flag," said Gov. Judge. "You've got a whole lot of organizations that support it."

An unlikely coalition of organizations stood behind the bill: a coalition whose members are often at odds on other issues.

Among active supporters, businessmen were (the Montana Chamber of Commerce), environmentalists (the citizens' Environmental Information Center), farmers (the Montana Farm Bureau Federation) and ranchers (the Montana Stockgrowers Assn.)

Legislators and the governor were under pressure from those and other groups. MELDA became law.

Since then, farm bureau and stockgrowers association support has cooled a lot. Strong opposition has developed from the Montana Assn. of Counties, and the state's departments of revenue and planning. The Montana Assn. of Realtors does not like the law, and the president of the Montana Assessors Assn. labeled it "a screwy deal."

MELDA's strongest supporting organization is the Montana Chamber of Commerce, followed by the Environmental Information Center. Other groups have adopted a wait-and-see posture.

Almost everyone seems to think massive work must be done on MELDA if it is to be saved. Many oppose salvation.

Of five independent experts in the field of land use, taxation, or both, four found more wrong than right with the law.

Bill Press, California's planning director: "I can't believe it. I've never read a worse piece of legislation."

Don Hagman, UCLA law school professor and one of the nation's leading experts on the relationship between taxation and land use: "It's going to be an administrative nightmare."

Michael Mitchell, head of planning for Daniel, Mann, Johnson & Mendenhall, an international planning, architecture and engineering firm, saw more good than bad in MELDA: "It has flaws, but if it goes down the drain there's something basically wrong with our attitudes."

Don McAllister, environmental planning professor at UCLA: "Overall, I don't like the law because we can't estimate in advance the land use patterns that will result from it."

Carlyle Hall, staff attorney for the Los Angeles-based Center for Law in the Public Interest, and an expert in land use litigation: "I felt I didn't really have the complete law. I couldn't figure out how it works."

Hall has lots of company. Almost no one claims to know how the law would work as it is written.

MELDA's supporters think that to give the legislation a fair chance, it should be amended.

"The concept is workable," said Torian Donohoe, staff member of the Environmental Information Center, "but the law must be substantially amended. There are contradictions, but I don't think the law is totally unworkable because of them."

MELDA's opponents think the law should be scrapped.

"People involved with administering this law are holding back and praying to God that it will be repealed," said Bob Hoffman, president of the Montana Assessors Assn.

So from either point of view—that of supporter or that of opponent—MELDA cannot work as it now stands. The question Montana's legislators must face when they meet next year is whether to save it or to scuttle it.

'TERRIBLY, TERRIBLY COMPLICATED'

Countless Problems Plague New Law

For zoned cities, Montana's Economic Land Development Act (MELDA) was supposed to take effect the first day of this year. Or was it?

The year-old land use law—the nation's most radical—gives cities two years from last New Year's Day to divide their land into six categories: residential, industrial, commercial, open space, recreational and agricultural.

But there is a proviso.

Cities have until 1978 to classify land "unless the existing classification system conforms to the provisions of this act."

Apparently that means the two-year grace period does not apply if city zoning classifications can be flopped over into MELDA's six categories.

But MELDA doesn't say who is to decide if existing city zoning areas conform to the new law's designated land use areas.

And if somehow a city decides it has established such conformity, there is no way it can tell from MELDA when to begin implementing the new law.

If conformity cannot be established, the city council is required to make "a complete inventory of the land and its usage . . . including land types based on federal standards."

Nowhere does MELDA define "federal standards," and there are lots of them that pertain to land types, according to Dan Obermeyer, president of the Montana Assn. of Planners.

Obermeyer also oberved that "the single word 'value' is apparently used in the law to mean taxable value, assessed value, appraised value and market value. In some places the word refers to value of land only, and in others to value of both land and improvements."

How carelessly MELDA is written becomes apparent on its first page, where Montana's economic problems are cited as causing "cutbacks in our state's growth and currently lack to proper development."

That nonsense—which is now law—appeared in the bill's introductory draft and remained uncorrected through five rewrites.

Don Hagman, UCLA law professor and an expert in the relationship between land use and taxation, called the law "untidy," "fascinating from an academic point of view," and "terribly, terribly complicated."

One of several "bugs" Hagman cited was that the law's definition of "construction period" did not limit the length of that period.

The fact is important because of sections in the law like the one requiring that "the construction cost and land cost

Please Turn to Page 20, Col. 1

LAW'S ENIGMA

Continued from 18th Page

of any commercial development within a classified commercial or residential area shall not be taxed for its construction period."

A builder could theoretically continue the tax free construction period of a development forever, even while simultaneously using it to make money.

Those are just a few examples of almost countless problems plaguing the law that supporters and critics alike cite as the nation's most imaginative and far-reaching legal effort to achieve good land use through tax incentives.

MELDA'S supporters focus on the law's potential for doing well by doing good.

"It won't be repealed, not when the word gets out," said Barbara Kennedy, planner for two counties, a city and a town in Montana.

"It gives a person the opportunity to do what he wants to do and it improves the town. It will lead to much more orderly development," she said.

Local control—giving a person the opportunity to do what he wants to do—is one of MELDA's intents.

But there is a great deal of state government regulation written into the law.

Ironically, that is part of its problem. Bureaucrats in state government are fiercely critical of MELDA because they fear problems written into the law, they think it will cut tax revenue in rural counties and they worry about whether their county assessors have what it takes to make MELDA work.

Assessors in Montana are elected, but they work for the state's Department of Revenue. One administrator in that department evaluated assessors' qualifications in a sentence: "The people who work for us in the counties are not very damn sharp."

"As the law sits right now, planners don't like it," said planning association President Obermeyer. "Given a choice between what's on the books and nothing, they'll take nothing."

Rec'd - Mon. Jan. 14, 1985

Rep. Paul Pistoria
% Mont. House of Representatives
Capitol Station
Helena, Mont. 59620

Testimony for
H.B. 154

January 13, 1985

Dear Sir:

Congratulations and thank you for your realization and foresight concerning your bill HB 154 - to repeal the Montana Economic Land Development Act.

Your bill is one of the greatest to come forth in years.

This dastardly Act has been a costly usurpation of citizens rights. This and other similar infringements should all be repealed.

We should take back our State's rights. It may bring great difficulties at first, but better now than later, when it may become impossible.

Vera Cahoon and Julie Hacker, of Potomac, will be there lobbying for some of our causes. I have called Mrs. Cahoon and left a message concerning you and HB154.

I am also writing to Sen. Bill Norman and Mike Kadas asking them to give you support.

In great appreciation,

Mrs. Martha Powell
Mrs. Mary Bollinger
Luther D. Powell
Emil Ricker
Pauline Ricker

P.O. Box 3867
Missoula, Mont. 59806

EXHIBIT 3 -- HB 154
February 15, 1985

DEPARTMENT OF REVENUE

TED SCHWINDEN, GOVERNOR

MITCHELL BUILDING

STATE OF MONTANA

HELENA, MONTANA 59620

MEMORANDUM

TO: Jim H. Lear, Staff Attorney
Legislative Council

FROM: MGG Michael G. Garrity, Tax Counsel
Legal Bureau

DATE: February 13, 1985

SUBJECT: Senate Bill #288

A BILL FOR AN ACT ENTITLED: "AN ACT REMOVING THE REQUIREMENT THAT THE STATE MARKUP ON LIQUOR MANUFACTURED, DISTILLED, RECTIFIED, BOTTLED, OR PROCESSED IN MONTANA BE 10% LESS THAN THE MARKUP ON THE PRODUCTS OF OUT-OF-STATE MANUFACTURERS, DISTILLERS, RECTIFIERS, AND PROCESSORS; REPEALING SECTION 16-2-202, MCA; AND PROVIDING AN EFFECTIVE DATE."

In accordance with the request of Senator Towe, Chairman of the Senate Taxation Committee, attached please find:

1. A copy of the United States Supreme Court Opinion in **Bacchus Imports, Ltd. v. Herbert H. Diaz, Director of Taxation of State of Hawaii,** Docket No. 82-1565; and

2. A copy of the memorandum prepared for the Department by William David Dexter, Special Assistant Attorney General for the State of Hawaii, who was retained by the Department as a Consultant regarding the constitutionality of § 16-2-202, MCA.

MGG/ilb
Attachments

EXHIBIT 4 -- SB 288
February 15, 1985

MEMORANDUM

From: William David Dexter
To: Ellen Feaver, Director, Montana Department of Revenue
Michael G. Garrity, Counsel, Montana Department of Revenue

IN Re: Constitutiional Considerations Involved in a State's Promotion of Local Industry.

At least four interrelated constitutional considerations (absent Congresional action) are involved when a State wishes to design a plan to promote local business:

1. The first is the ability of the States to classify for the purpose of regulation or taxation. In the context of the power of a legislature to classify for the purpose of taxation, the Supreme court has repeatedly held that this power can be exercised if any concievable fact can remove the classification from being simply capricious and arbitrary. See, for example, Bell's Gap Railroad v. Pennsylvania, 134 U.S. 232 (1890) where the Supreme Court upheld the power of the state to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity (Id. at 528). Cf. Madden v Kentucky, 309 U.S. 83 (1940); Allied Storage of Ohio v. Bowers, 358 U.S. 522 (1959). In Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 419-424 (1837) the Supreme Court further held, in upholding a graduated chain store tax based on the total number of stores everywhere (instate and out-of-state), that it was constitutional for the states to discriminate between classes to equalize economic advantages, vis a vis their tax structure.

2. The second constitutional consideration, tangent to the

classification question, is that the states are free to grant subsidies to promote local industry. Parker v. Brown, 317 U.S. 341 (1943).

3. The third consideration is the ability of the states to become market participants with a freedom of action analogous to anyone in a private business. Hughes v. alexandria Scrap Corp. , 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); White v. Massachusetts Counsel of Constr. Employers, __U.S.__, 103 S.Ct. 1042 (1983).

4. The fourth constitutional consideration is the principle that a state cannot discriminate against interstate or foreign commerce. The Supreme Court has struck down many regulatory or taxing structures on the basis that they prevented the free flow of commerce which was intended to be free from interference by the states. Boston Stock Exchange v. State Tax comm'n, 429 U.S. 318 (1977) and cases cited therein.

The foregoing constitutional considerations are in conflict. In order to resolve this fact, the Supreme Court has talked repeatedly about balancing the legimate interests of the states in promoting local industry and the effect of any such promotion on interstate commmerce. They have futher indicated that these conflicting considerations must be reconciled on a case by case basis, although in some discrimination cases, they have applied what has been referred to by the Court as the *per se* rule.

Based on the foregoing, it is difficult to determine exactly what the Supreme Court would do with any case which has the effect of discriminating against those engaged in interstate commmerce as compared to those engaged in a local business.

Nevertheless there are certain guiding prinicples that are of assistance:

1. The states have a legimate constitutional right to promote local industry. Thus, the mere fact that a tax or regulatory measure is specifically designed to promote local business provides no constitutional basis for its invalidity.

2. A reasonable classification based on the size of the business has been recognized as constitutional. See <u>great Atlantic</u>, supra.

3. States are permitted to grant subsidies to promote local business.

4. If a state enters the market place and carries on a propietary function, the normal Commerce Clause restrictions do not apply.

5. In application of the foregoing principles, any direct reference to or direct impact on interstate commerce should be avoided.

Bearing in mind the fact that a question of discrimination against interstate commerce is pragmatic and depends soley what comparatives are employed, it is essential that any proposal be directed to serve some other purpose, if possible, than simple to promote a local business. For, viewed in a broad prospective, any incentive to promote a local business, has the potential of discriminating against interstate or out-of-state competing activies.

Thank you both very much for your kindness. If you desire, I would be pleased to expand on the foregoing and give my opinion as to the validity of any specific proposals.

November 19, 1984

Respectfully Submitted

William David Dexter

SUPREME COURT OF THE UNITED STATES

Syllabus

BACCHUS IMPORTS, LTD., ET AL. *v.* DIAS, DIRECTOR OF TAXATION OF HAWAII

APPEAL FROM THE SUPREME COURT OF HAWAII

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. Pp. 3-4.

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. Pp. 4-10.

(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

Syllabus

of such competition. On the facts, it cannot be said that no competition exists. Pp. 4–6.

(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. Pp. 6–10.

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. Pp. 10–12.

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. Pp. 13–14.

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.

SUPREME COURT OF THE UNITED STATES

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

[June 29, 1984]

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 29, 1981, and an exemption for fruit wine from May 17, 1976, until June 30, 1981.[1] Haw. Rev. Stat.

[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.

§ 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]

[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 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

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

[6] Eagle Distributors sought refund of $10,744,017, 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.

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]

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 ex-

[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 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 *I. 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.

empted 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, 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 legis-

[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)

lative 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 Constitution [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.

---

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

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

SUPREME COURT OF THE UNITED STATES

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

[June 29, 1984]

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

[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.

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]

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

[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 Impost-Expost clause claim is wholly lacking in merit, see, *e. g.*, *Department of Revenue* v. *Beam Distilling Co.*, 377 U. S. 341 (1964).

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

[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)).

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.*, *Captial 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 Liqour 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

[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*, *supra*.

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

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 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.*, *surpa*. 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.

[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 delivery and use is not in New York, but in a foreign country. The State 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 New York cannot constitutionally do." 377 U. S., at 333–334.

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, *Capital 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 Amendment 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.

---

[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.

STANDING COMMITTEE REPORT

February 15, 1985

MR. PRESIDENT

We, your committee on Taxation

having had under consideration Senate Bill No. 304

first reading copy (white)
color

BEER AND WINE LICENSE FOR PUBLICLY OWNED ATHLETIC FACILITY

Respectfully report as follows: That Senate Bill No. 304

~~DO PASS~~

DO NOT PASS

Senator Thomas E. Towe, Chairman.

STANDING COMMITTEE REPORT

February 15, 1985

MR. PRESIDENT

We, your committee on Taxation

having had under consideration Senate Joint Resolution No. 14

first reading copy (white)
color

JOINT RESOLUTION FOR REVIEW OF TAX SALE PROCEDURES

Respectfully report as follows: That Senate Joint Resolution No. 14

be amended as follows:

1. Title, lines 5 and 6.
Following: "MONTANA" on line 5
Strike: "REQUESTING AN INTERIM STUDY"
Insert: "ASSIGNING THE REVENUE OVERSIGHT COMMITTEE"

2. Page 2, line 1.
Following: "that"
Strike: "an appropriate interim"
Insert: "the revenue oversight"

AND AS AMENDED

DO PASS

~~DO NOT PASS~~

Senator Thomas E. Towe, Chairman.

STANDING COMMITTEE REPORT

February 15, 1985

MR. PRESIDENT

We, your committee on Taxation

having had under consideration House Bill No. 140

third reading copy (blue)
color

PRORATION OF TAXES ON MOBILE HOMES ASSESSED AFTER SECOND PAYMENT DATE.

Respectfully report as follows: That House Bill No. 140

BE CONCURRED IN

~~DO PASS~~

~~DO NOT PASS~~

.... Chairman.

Senator Thomas E. Towe,

ROLL CALL VOTE

SENATE TAXATION COMMITTEE
49 th Legislative Session -- 1985

Time 8:55am Date February 15, 85 Room 413-415

Motion: amends by Sen Hager to HB140

Name	Yes	No	Excused
Senator Brown	✓		
Senator Eck		✓	
Senator Goodover	✓		
Senator Hager	✓		
Senator Halligan	✓		
Senator Hirsch		✓	
Senator Lybeck		✓	
Senator Mazurek		✓	
Senator McCallum	✓		
Senator Neuman			✓
Senator Severson			✓
Senator Towe		✓	

STANDING COMMITTEE REPORT

February 15, 19 85

MR. PRESIDENT

We, your committee on Taxation

having had under consideration House Bill No. 154

third reading copy (blue)
color

(Senator Goodover)

REPEAL OF THE MONTANA ECONOMIC LAND DEVELOPMENT ACT.

Respectfully report as follows: That House Bill No. 154

BE CONCURRED IN

~~DO PASS~~

~~DO NOT PASS~~

Thomas E. Towe, Chairman.

STANDING COMMITTEE REPORT

February 15, 19 85

MR. PRESIDENT

We, your committee on Taxation

having had under consideration House Bill No. 176

third reading copy (blue)
color

(Senator Hager)

AUTHORIZE PAYMENT OF COSTS RELATED TO TAX ANTICIPATION NOTES.

Respectfully report as follows: That House Bill No. 176

BE CONCURRED IN

~~DO PASS~~

~~DO NOT PASS~~

Senator Thomas E. Towe, Chairman.