RETAIL PRICE MAINTENANCE FOR LIQUOR: DOES THE TWENTY-FIRST AMENDMENT PRECLUDE A FREE TRADE MARKET?

*By Rosemary Hart**

Introduction

The constitutionality of California's minimum price laws for liquor[1] is currently under review by the state supreme court. The much-criticized program is being challenged by a San Francisco liquor store cited for selling alcoholic beverages at prices below those set by law.[2] The program requires liquor distillers to file monthly retail price schedules for their products; retailers who sell liquor below the listed prices are subject to sanctions imposed at the discretion of the Department of Alcoholic Beverage Control.[3] The main thrust of this most recent challenge is that the price scheme violates the Sherman Antitrust Act[4] and denies equal protection of the law;[5] in *Rice v. Alcoholic Beverage Control Appeals*

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1. CAL. BUS. & PROF. CODE §§ 24749-24756 (West Supp. 1977) (amended 1972).

2. In a disciplinary order, the Department of Alcoholic Beverage Control (ABC) suspended the liquor retailer's license. In proceedings to review the order,the ABC Appeals Board reversed, holding that the retail price maintenance laws violated the state and federal equal protection clauses. *In re* Corsetti, AB No. 4311 (Cal. Dec. 12, 1976) (Alcoholic Beverage Control Appeals Board). On writ of review, the state court of appeal annulled the Appeal Board's order and affirmed the decision of the ABC to suspend the retailer's license in Rice v. Alcoholic Beverage Control Appeals Bd., 137 Cal. Rptr. 213, 221 (hearing granted, May 16, 1977). Once the state supreme court granted a hearing, the text of the appellate court's opinion was withdrawn from the offical reports. *See* CAL. CT. R. 977. Thus, the text of that opinion appears only in the pages of the unofficial report.

3. Violators are subject to sanctions imposed pursuant to CAL. BUS. & PROF. CODE § 24755.1 (West Supp. 1977). Sanctions include monetary penalties, suspension of a liquor license or revocation of a license.

4. 15 U.S.C. §§ 1-7 (1976). The Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* § 1.

5. Liquor is the only item in California that is retailed at set minimum prices. The pricing laws are challenged under both the state and federal constitutions as denying equal protection to liquor consumers, who are the only California consumers who do not derive the price benefits of a free market system. Another argument, and one not made by the petitioner, is that the pricing scheme's classification of liquor retailers as the only retail sellers in the state who must adhere to prices set by manufacturers constitutes a violation of equal protection.

The state constitution provides that "[a]ll laws of a general nature shall have a uniform

Board,[6] the California Supreme Court will examine the extent to which section two of the Twenty-first Amendment[7] shields the regulations from these alleged violations.

The Sherman Act challenge raises a commerce clause issue. If Congress has not enacted legislation in an area within its commerce clause power, a state may ordinarily legislate in that area as long as it does not result in an undue burden on the free flow of interstate commerce.[8] If, however, the state regulation conflicts with federal legislation enacted pursuant to the commerce power, the state statute must bow to the federal law under the supremacy clause.[9] But when, as in *Rice*, the state law is a liquor regulation enacted pursuant to the state's constitutional power under the Twenty-first Amendment, the state law will not automatically be preempted under the supremacy clause because the Twenty-first Amendment provides additional support for the state power to legislate.[10]

The historical defense for California's liquor price laws is that the state legislature could rationally have enacted the program in the belief that the laws promote temperance[11] and offer protection to the many "mom and pop" liquor stores that would otherwise have to engage in open price competition with volume retail outlets.[12] The California Supreme Court has ruled on the constitutionality of the laws three times since 1959 and, on each occasion, has upheld their validity under the state constitution.[13] In all three

operation." CAL. CONST. art. I, § 11. "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." CAL. CONST. art. I, § 21. The Fourteenth Amendment to the United States Constitution provides that no state shall make or enforce any law which shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

6. 137 Cal. Rptr. 213 (hearing granted, May 16, 1977).

7. Section two declares that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

8. *See generally* cases cited notes 220 & 222 *infra*.

9. U.S. CONST. art. VI, cl. 2. *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497 (1956); Castle v. Hayes Freight Lines, 348 U.S. 61 (1954). *See generally* Note, *Pre-Emption As A Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

10. In Part I, sections B and C of this note, the author discusses the United States Supreme Court's interpretation of the extent of the states' power under the Twenty-first Amendment.

11. Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 360-61, 420 P.2d 735, 743, 55 Cal. Rptr. 23, 31 (1966); Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal. 2d 141, 148, 346 P.2d 737, 740 (1959).

12. Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 362, 420 P.2d 735, 744, 55 Cal. Rptr. 23, 32 (1966).

13. Samson Mkt. Co. v. Alcoholic Beverage Control Appeals Bd., 71 Cal. 2d 1215, 459 P.2d 667, 81 Cal. Rptr. 251 (1969); Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966); Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal. 2d 141, 346 P.2d 737 (1959).

cases, however, the court's analysis was limited to the questions of whether the laws constituted a proper exercise of the police power and a proper delegation of legislative authority. In *Rice*, the court will examine federal constitutional issues.

The California Court of Appeal held in *Rice* that because the liquor price laws are part of a state regulatory scheme constituting state action, they are not subject to the Sherman Antitrust Act, which pertains only to actions by private individuals and corporations.[14] The court also stated that Congress did not intend to invalidate any statute affecting the price of liquor as a result of its 1975 repeal of the state fair trade exemption. Even if Congress did so intend, however, the court held that the state has broad powers under section two of the Twenty-first Amendment to regulate liquor traffic within its borders and that these regulations take precedence over conflicting federal legislation, including the Sherman Act.[15] The equal protection argument made by the liquor store owners was discussed only briefly, as the court deferred to the prior decisions of the California Supreme Court that had found the laws to have a rational basis.[16]

The primary purpose of this note is to define a constitutional analysis for determining the scope of state power under the Twenty-first Amendment, with a focus on the Sherman Act and equal protection guarantees as grounds for abolishing California's retail price maintenance laws for liquor. Although the Twenty-first Amendment grants the states wide power to control the importation and transportation of liquor, the United States Supreme Court has established that (1) commerce clause conflicts between federal laws and state liquor regulations are to be resolved by an accommodation, or balancing, test, and (2) state liquor laws are, in any event, subject

14. 137 Cal. Rptr. at 217-218. The Sherman Act applies its restraints to "every person," which includes corporations. 15 U.S.C. § 7, (1976). Parker v. Brown, 317 U.S. 341 (1943), developed a common law exemption to the Sherman Act that is referred to as a "state action" exemption. The *Parker* Court stated that action (1) established under authorization by the state, (2) subject to state approval and (3) enforced with the state's penal sanctions was immune from the Sherman Act's restrictions. *Id.* at 352. The "state action" antitrust exemption for certain state regulatory schemes is not to be confused with the "state action" doctrine in Fourteenth Amendment equal protection analysis, which limits the Fourteenth and Fifteenth Amendments' application to acts of the states and excludes purely private action from the coverage of those amendments. The antitrust "state action" exemption is discussed at notes 154-203 and accompanying text *infra*.

15. 137 Cal. Rptr. at 219. The report of the Senate Judiciary Committee recommending repeal of the fair trade exemptions to the antitrust laws observed that "while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do so in such States which pass price fixing statutes pursuant to the Twenty-first Amendment." S. REP. NO. 466, 94th Cong., 1st Sess. 2 (1975). However, as Congress did not expressly exempt the liquor industry from the 1975 repeals, California liquor price provisions are still subject to the Sherman Act restrictions and would fall under the Act were it not for the grant of state power under the Twenty-first Amendment. *See generally* notes 150-53 and accompanying text *infra*.

16. 137 Cal. Rptr. at 219-20.

to equal protection requirements. The note will show that under the Supreme Court's accommodation test, the California liquor price laws must yield to the Sherman Antitrust Act. The equal protection argument made in *Rice* provides another ground for eliminating the laws; examined under the newer "fair and substantial relationship" standard recently employed by the California Supreme Court, the liquor provisions appear to be an irrational and out-dated method of achieving their stated goals.

After a brief examination of the legislative and judicial history of state power to control liquor prior to enactment of the Twenty-first Amendment, Part I of the note reviews the scope of state power under the Amendment. The note traces the Amendment's scope as construed by the United States Supreme Court, from the Court's initial grant of broad and comprehensive state power over importation of liquor to the current approach, which recognizes various constitutional limitations on state liquor laws. Part II of the note examines the limitations imposed on the scope of state power under the Amendment by the commerce and equal protection clauses. The discussion commences with an examination of the conflict between the state's liquor laws and the Sherman Act's policy against resale price maintenance. After establishing that the common law "state action" exemption should not have been employed by the California Court of Appeal to immunize the liquor laws from Sherman Act restraints, the note defines the criteria for the Twenty-first Amendment accommodation test and applies the test to the California liquor laws. Finally, the note surveys developments in both federal and California equal protection analysis and examines the liquor price laws under the California Supreme Court's most recent standard of review for provisions that no longer seem rational.

I. The Scope of State Power Under the Twenty-first Amendment

The Twenty-first Amendment originated out of a long statutory and constitutional struggle between two conflicting interests: (1) the dry states' interest in preventing the importation of intoxicating liquors[17] and (2) the federal government's authority to promote and protect interstate commerce.[18] Section one of the Amendment simply ended Prohibition, but section two granted the states additional power to regulate alcoholic beverages:

> 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.[19]

17. "Dry state" refers to a state that completely prohibits the manufacture, sale or use of intoxicating liquors or allows such activities only for tightly controlled uses, such as for medicinal or religious purposes.

18. The commerce clause gives Congress the power to "regulate commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.

19. U.S. CONST. amend. XXI, § 2. On December 5, 1933, the Twenty-first Amendment

Questions involving the Twenty-first Amendment have been decided on a case by case basis to date; the Supreme Court has not interpreted the effect of section two on all other parts of the Constitution. Nevertheless, definite trends have emerged in the Court's treatment of the effect of the commerce and equal protection clauses on the Amendment. This part of the note examines the development of state power under section two, focusing on the commerce clause and equal protection limitations. The first section discusses the Amendment's legislative history which, it is suggested, supports the theory that the initial purpose of section two was to establish the dry states'authority to bar the importation of intoxicants.[20]

A. State Regulation of Liquor Prior to the Amendment

Prior to adoption of the Amendment, the Supreme Court had established that a state could completely prohibit the manufacture and use of liquor within its boundaries.[21] The Court also held, however, that the commerce clause restrained the states from prohibiting the sale of liquor if the imported intoxicants arrived in their original, unopened packages.[22] Responding to the Court's decision, Congress enacted the Wilson Act[23] in 1890, proclaiming that imported liquor was subject to a state's police power upon arrival within that state's boundaries. Shortly after the Wilson Act was adopted, the Supreme Court began to establish a loophole to the legislative provision.[24] In successive cases, the Court declared that once an intoxicating liquor arrived within a state's borders, that state could prevent intrastate sale of the liquor.[25] "Arrival" in a state was interpreted to take place, however, upon "delivery to the consignee."[26] Thus, the prohibition on liquor sales

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was declared, in a proclamation by the Secretary of State, to have been ratified by three-fourths of the states in the United States and certified as valid as a part of the Constitution. U.S.C.A., CONSTITUTION, AMENDMENTS 14 TO END 575 (1961) (legislative history note).

20. *See* Note, *The Twenty-first Amendment Versus the Interstate Commerce Clause*, 55 YALE L.J. 815, 818 (1946) [hereinafter cited as 55 YALE L.J.]; 7 GEO. WASH. L. REV. 402 (1939). *But see* Kallenback, *Interstate Commerce in Intoxicating Liquors Under the Twenty-first Amendment*, 14 TEMP. L.Q. 474 (1938).

21. Mugler v. Kansas, 123 U.S. 623 (1887); The License Cases, 46 U.S. (5 How.) 505 (1847).

22. Leisy v. Hardin, 135 U.S. 100 (1890): "[I]nasmuch as interstate commerce . . . is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled." *Id.* at 109-10. *Accord*, Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465 (1888).

23. Ch. 728, 26 Stat. 313 (1890) (currently codified in 27 U.S.C. § 121 (1970)). Generally, it provided that all intoxicating liquors transported into any state and remaining there for use, consumption or sale were subject to regulation through the police powers of that state. Further, intoxicants were subject to state regulation upon arrival in the state even if the alcohol arrived in its original package.

24. *See* Dowling & Hubbard, *Divesting an Article of Its Interstate Character*, 5 MINN. L. REV. 100, 105-06 (1921).

25. *In re* Rahrer, 140 U.S. 545 (1891).

26. Rhodes v. Iowa, 170 U.S. 412, 426 (1898). *Accord*, Vance v. W.A. Vandercook Co. (No. 1), 170 U.S. 438 (1898).

would not take effect until after the alcohol had already been delivered to its purchaser. The practical effect of this judicial interpretation was that mail order businesses dealing in liquor could frustrate state prohibition because neither manufacture nor sale of an alcoholic beverage would technically occur within the state.

Congress recognized the need to protect the dry states from mail order liquor operations. During Congressional debates on a bill to rectify the situation, Senator Kenyon observed that it "is evident that under such circumstances the prohibition law of a State is practically nullified, and intoxicating liquors are imposed upon its people against the will of the majority."[27] To block the judicial loophole, Senators Webb and Kenyon sponsored a bill that Congress adopted in 1913. The Webb-Kenyon Act generally prohibited shipment or transportation of intoxicating liquors into a state for any use "in any manner or by any means whatsoever" in violation of any law of that state.[28] The initial judicial interpretation[29] of the Act held that the law divested intoxicating liquors of their interstate character, thereby withdrawing commerce clause restraints on interstate liquor shipments.[30]

The next major controversy concerning commerce in interstate liquor arose in the early 1930's, when Congress began drafting an amendment to end national prohibition.[31] When Congressional debate began on what was later to become the Twenty-first Amendment, the controversy focused on whether to incorporate the protection granted by the Webb-Kenyon Act. An examination of these debates shows that the purpose of section two of the Amendment was to guarantee the protection of the Webb-Kenyon Act as a matter of federal constitutional law. The general thrust of the debates reflected a concern to "assure the so-called dry States protection against the importation of intoxicating liquor into those states."[32] During the course of his oration, Senator Borah expressed concern that judicial interpretations of the Webb-Kenyon Act could once again render the states "powerless to

27. 49 CONG. REC. 761 (1912) (remarks of Sen. Kenyon).

28. Ch. 90, 37 Stat. 699 (1913) (amended 1935) (current version at 27 U.S.C. § 122 (1970)).

29. Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917).

30. Later cases gave no hint of a blanket power to regulate imported liquor within the state. The cases interpreting the Act concerned situations in which the state had enacted a prohibition against liquor or allowed importation only for specified, restricted purposes. For example, Seaboard Air Line Ry. v. North Carolina, 245 U.S. 298 (1917), construed the Webb-Kenyon Act as extending state power to cover regulations concerning the importation of liquor, which, by state statute, was allowed only for medicinal uses.

31. The procedure necessary to amend the Constitution is described in U.S. CONST. art. V.

Prohibition in the United States resulted from the Eighteenth Amendment, which prohibited the manufacture, sale or transportation of intoxicating liquors. U.S. CONST. amend. XVIII (repealed by U.S. CONST. amend. XXI, § 1 (1933)). The Secretary of State proclaimed the Amendment ratified on January 29, 1919. U.S.C.A., CONSTITUTION, AMENDMENTS 14 TO END 547 (1961) (legislative history note).

32. 76 CONG. REC. 4139-41, 4141 (1933) (remarks of Sen. Blaine).

protect themselves against the importation of liquor . . . .''[33] After noting that the Webb-Kenyon Act was of doubtful validity,[34] he claimed that by not including section two ''we are turning the dry States over for protection to a law . . . which might very well be held unconstitutional upon re-presentation of it.[35] Secondly, we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon Act.''[36]

The debates did not, however, indicate that section two granted unlimited, or even very broad, powers to the states.[37] Importation and transportation of liquor were discussed, but liquor traffic regulations such as taxing, pricing or licensing were not mentioned. Both the Congressional debates[38] and the historical background of the Amendment[39] are indicative of the popular belief of the legislators that section two of the Twenty-first Amendment was added merely to enable the dry states to prohibit, without commerce clause restraints, the importation of liquor.

B. The Twenty-first Amendment: Early Judicial Interpretation

State power over importation was interpreted broadly in *State Board of Equalization v. Young's Market Co.*,[40] the first case to examine the scope of state power under section two of the Amendment. The challenged state regulation in that case imposed a license fee for imported beer, a direct burden on interstate commerce that the Court acknowledged would have been unconstitutional prior to the Amendment.[41] Justice Brandeis, writing for the Court, rejected the argument that section two granted power only to those states that prohibited the manufacture and sale of intoxicants within their borders. He stated that the words of the section granted the power to forbid all importations that did not comply with conditions prescribed by the state. Although the statute reviewed in *Young* was not imposed by a dry state in an attempt to enforce prohibition, the Court construed the Twenty-first Amendment as giving the states power to adopt regulations short of complete prohibition. The plaintiffs pointed out that the Amendment's legislative history supported limiting the Amendment's scope to protection

33. 76 CONG. REC. 4170 (1933). Borah referred to Leisy v. Hardin, 135 U.S. 100 (1890), in which the Court had employed the original package doctrine to limit state power to regulate imported liquor. *See* note 22 and accompanying text *supra*.

34. 76 CONG. REC. 4174 (1933). Senator Borah mentioned that the Webb-Kenyon Act had been passed over a veto by President Taft, who considered the law to be unconstitutional.

35. *Id.* at 4170. Senator Borah's comment may have stemmed from the facts that in Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917), Justice Holmes and Justice Van Devanter had dissented and that later interpretations had also divided the Court.

36. 76 CONG. REC. 4170 (1933).

37. *See* 55 YALE L.J., *supra* note 20, at 816.

38. *See generally* 76 CONG. REC. 4138 (1933) (United States Senate) and 76 CONG. REC. 4508 (1933) (House of Representatives).

39. *See generally* notes 17-26 and accompanying text *supra*, which describe the struggle of the dry states to enforce prohibition within their borders.

40. 299 U.S. 59 (1936).

41. *Id.* at 62.

only of the dry states. The Court, however, would not discuss the Congressional debate over section two and refused to consider prior decisions concerning the Wilson and Webb-Kenyon Acts, stating that "[a]s we think the language of the Amendment is clear, we do not discuss these matters."[42]

The Court limited its holding to the question of commerce clause restraints on import regulations, summarily dismissing an equal protection argument[43] by declaring that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[44] The Court acknowledged that the Amendment enabled the states to regulate imported liquor in the same manner as domestic liquor, but it did not render an opinion as to the effect of the Amendment on other constitutional restrictions on the police power.[45]

Much of the academic criticism levelled at the *Young* Court's interpretation of state power under the Amendment was aimed at its refusal to examine the Amendment's legislative history.[46] The next few cases, however, reiterated *Young*'s grant of broad state rights in the area of importation, regardless of whether the state was "wet" or "dry."[47] In doing so, these early cases expanded the scope of state power beyond that originally conceived by the drafters of the Amendment, who sought only to protect the so-called "dry" states.[48] Since *Young* had established precedent for examining the Amendment only on its face,[49] the interpretation of the Amendment as reflected in its legislative history was all but forgotten. Instead, the first cases to follow *Young* adhered to a literal reading of section two, establishing a solid recognition of wide state power to control the importation of liquor into any state, free from both commerce clause

42. *Id.* at 63-64.

43. The plaintiffs argued that the classification of imported beer as opposed to the unlicensed, untaxed domestic beer constituted a denial of equal protection. *Id.* at 64.

44. *Id.*

45. *Id.* The Court declared that the "question for decision requires no such generalization." *Id.*

46. *See generally* 55 YALE L.J., *supra* note 20; 7 GEO. WASH. L. REV. 402 (1939); 85 U. PENN. L. REV. 322 (1937).

47. *See, e.g.*, Mahoney v. Triner Corp., 304 U.S. 401 (1938), construing *Young* as allowing a state to discriminate against imported liquors even if the discrimination "is not an incident of reasonable regulation of the liquor traffic . . . ." *Id.* at 403. *See also* Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939), in which the Court invoked the Twenty-first Amendment to sanction a "retaliatory" statute prohibiting importation of intoxicants into Indiana only from those states that taxed or licensed Indiana liquor. *But see* Collins v. Yosemite Park Co., 304 U.S. 518 (1937), one early case that defined a limit to the Amendment's scope. The case was a suit to enjoin enforcement of California's Alcoholic Beverage Control Act within the limits of Yosemite National Park. The Court held that in geographic areas in which the federal government had exclusive jurisdiction, the Twenty-first Amendment was inapplicable; thus, the states are without power to regulate alcoholic beverages in federal enclaves.

48. *See generally* notes 31-39 and accompanying text *supra*.

49. Justice Brandeis reiterated this point in Finch & Co. v. McKittrick, 305 U.S. 395 (1938).

restraints and the guarantees of the equal protection clause. The Court in the future was left with the task of defining and setting limits on state power under the Amendment as problems arose in different contexts.

C. Later Cases: Narrowing the Amendment's Scope

A few years after deciding the *Young* case, the Court indicated that the Twenty-first Amendment did not confer unrestricted power on the states to control liquor traffic within their borders. Although language in the opinions still remained absolute in regard to state power to regulate the importation of liquor, the Court began to recognize that outside the area of importation the state laws were still subject to some constitutional restraints.

One of the first cases to suggest that the states' power was not unlimited under the Amendment was *Ziffrin, Inc. v. Reeves*,[50] which indicated that there were both commerce clause and equal protection limitations on the Amendment's scope. The state law at issue in *Ziffrin* required transporters or carriers to obtain licenses before they could legally export any alcoholic beverages. In upholding the provisions, the Court did not rely on the Twenty-first Amendment to protect the state law, noting that the Amendment merely sanctions the right of a state to legislate unrestricted by the commerce clause with respect to liquor "brought from without."[51] The Court also addressed the issue of the extent of state power to regulate liquor outside the area of importation, the question upon which the *Young* Court had declined comment. The *Ziffrin* Court considered the state's power to regulate the manufacture, sale, transportation or possession of intoxicants to be based upon the police power, under which the state may adopt "measures reasonably appropriate to effectuate [the restrictions] . . . ."[52] Therefore, in areas outside of importation, state laws were subject to a reasonableness requirement.

In its treatment of the equal protection challenge, the Court indicated that aside from those laws that regulated the importation of alcoholic beverages, state liquor laws must still conform to the demands of the equal protection clause.[53] Although the Court stated that it could not find any discrimination in the state provisions, it did not say, as it previously had done, that a Fourteenth Amendment argument could not be entertained.

In *United States v. Frankfort Distilleries, Inc.*,[54] the Court's holding implied that even the commerce clause limited the protection to be given state liquor regulations under section two of the Twenty-first Amendment. *Frankfort* considered an antitrust prosecution of wholesalers, producers and retailers of alcoholic beverages charged with coercive price-fixing activities

50. 308 U.S. 132 (1939).
51. *Id.* at 138.
52. *Id.*
53. *Id.* at 140.
54. 324 U.S. 293 (1945).

in violation of the Sherman Act. The indictment alleged that the parties agreed to fix and maintain a single course of conduct in making contracts of sale and to boycott all others who would not adopt the same course. The indicted parties argued, in part, that the Twenty-first Amendment gave the states exclusive power to control liquor traffic, thereby rendering the Sherman Act inapplicable, but the Court affirmed that the Amendment had not granted states plenary and exclusive power to control interstate liquor trade.[55]

Justice Black, writing for the majority, recognized that under the Amendment the states had broad regulatory power over liquor traffic within their boundaries.[56] He noted, however, that it did not follow that the United States had absolutely no power to regulate the in-state conduct of persons engaged in interstate liquor trade.[57] Thus, the Court intimated that even with regard to liquor traffic, the federal government had power to control conduct covered by the Sherman Act.[58]

In 1964, the Supreme Court formulated a new approach for defining the extent to which the scope of state power under the Amendment was limited by the commerce clause. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*[59] concerned a retail liquor business located at John F. Kennedy Airport in New York City. The retailer purchased the liquor outside of New York state under the supervision of the Federal Bureau of Customs, and transported it into the state to the airport, where it was sold to departing

55. *Id.* at 299.

56. *Id.*

57. *Id.*

58. It must be noted, however, that the suggestion in *Frankfort* that federal authority is not always subordinate to the Twenty-first Amendment was merely dictum. The Sherman Act was not applied to defeat the policy of the state because state law did not authorize the defendants' activities; therefore, the case did not involve a conflict between federal and state authority. As a result, the Court did not decide whether state or federal authority prevailed in governing conduct which affected interstate liquor traffic in violation of the Sherman Act. *See* 55 YALE L.J., *supra* note 20, at 816-17, which suggests that the Court may have been showing preference for a new standard for determining the scope of the Amendment; *see also* Comment, *Concept of State Power Under the Twenty-first Amendment*, 40 TENN. L. REV. 465, 479 (1973) [hereinafter cited as 40 TENN. L. REV. 465]. *But see* Justice Frankfurter's concurring opinion in *Frankfort*, in which he discusses the issue upon which Black reserved comment. Frankfurter viewed the Sherman Act as subordinate to the Twenty-first Amendment and, as such, violated only when the conduct in question is not sanctioned by state law. 324 U.S. at 300-02 (Frankfurter, J. concurring).

Nevertheless, the cases that followed *Frankfort* supported and expanded Justice Black's acknowledgement of limits to the scope of the Twenty-first Amendment. Although the Court did not always hold the state liquor statutes invalid, most decisions revealed a closer examination of the nature and effect of the regulations. For example, in Groesaert v. Cleary, 335 U.S. 464 (1948), the Court employed the Twenty-first Amendment to uphold a Michigan statute restricting employment of female bartenders. The Court found a reasonable legislative basis and held the state law to be valid. *Id.* at 467. *See also* Nippert v. City of Richmond, 327 U.S. 416, 425 n.15 (1946).

59. 377 U.S. 324 (1964).

international passengers. The New York State Liquor Authority attempted to terminate Idlewild's commercial operations, claiming that the business violated a state law requiring retail liquor outlets to have a street level entrance on a public throughfare.[60] The Court acknowledged that if the commodity in question was not liquor, the commerce clause would deprive New York of the power to terminate the operation. Thus, the Court faced the issue it had declined to address in the past—how the Court should analyze a conflict between section two of the Twenty-first Amendment and other provisions of the Constitution, "particularly the Commerce Clause."[61]

Justice Stewart, writing for the majority, briefly reviewed the early Twenty-first Amendment cases and concluded that the states were "totally unconfined by traditional Commerce Clause limitations when [they restrict] the importation of intoxicants destined for use, distribution, or consumption within its borders."[62] He warned, however, that

> [t]o draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.[63]

Following this strong statement, the Court departed from its prior Twenty-first Amendment analysis by describing the accommodation analysis that it would use to examine conflicts between federal law and state regulations for the control of liquor traffic. Justice Stewart declared that since both the Twenty-first Amendment and the commerce clause were parts of the same Constitution, each must be "considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."[64] Distinguishing *Idlewild* from earlier decisions in which the state law had prevailed, Justice Stewart observed that the immediate case did not involve a state regulation aimed at preventing unlawful diversion or use of alcoholic beverages within the state. Rather, the state was attempting to terminate transactions conducted in accordance with a law passed by Congress under an explicit constitutional power.[65] The Court concluded that New York had no constitutional right to do so.[66]

60. N.Y. ALCO. BEV. CONT. LAW § 105(2) (McKinney 1970).

61. 377 U.S. at 325.

62. *Id.* at 330.

63. *Id.* at 331-32.

64. *Id.* at 332.

65. U.S. CONST. art. I, § 8, cl. 3. The commerce clause gives Congress the power to regulate commerce with foreign nations. *See* note 18 *supra*.

66. Justice Black wrote a strong dissent criticizing the majority for establishing such inroads on state power. He focused on the older cases such as *Young*, voicing approval of the broad and comprehensive power that those decisions had granted the states for control of liquor traffic. Justice Black also interpreted the legislative history of the Amendment as giving the

The immediate effect of *Idlewild* on future decisions was unclear because the Court's mode of analysis had been broadly stated. Justice Stewart had admitted that the states could regulate liquor unconfined by the "traditional" limitations of the commerce clause, but he did not define what those "traditional" restraints were. He had also formulated an accommodation, or balancing, test without outlining the situations in which the test should be employed. For example, in his discussion of prior cases, he focused on the fact that they involved importation of liquor for use within the state. He did not, however, state that the test should be implemented when the regulations being questioned do not entail importation for use within the state's borders; nor did he explain the weight given to the Constitution's express reservation of power over foreign trade to the federal government.

Because *Idlewild* failed to address these issues, interpretations of the case have varied.[67] The decision can be construed narrowly, reserving application of the test only to cases in which the federal regulation is enacted pursuant to explicit constitutional authority and the ultimate use of the liquor is not within the borders of the state in question.[68] One could also construe the opinion as establishing a new standard of review for Twenty-first Amendment cases.[69] Whatever the interpretation, the case illustrated that the Court could and would impose commerce clause limitations on state power under the Amendment.[70]

The next case to examine the Amendment, *Joseph E. Seagram & Sons, Inc. v. Hostetter*,[71] demonstrated a new approach for dealing with equal protection arguments in Twenty-first Amendment cases and reiterated that

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states absolute power over activity within its borders. He neglected, however, to address any distinction between the grant of power to "dry" as opposed to "wet" states; nor did he acknowledge that the Congressional debates emphasized that the states should be given control of importation of liquor and not an absolute power over all types of liquor regulations. 377 U.S. at 334-40 (Black, J., dissenting).

67. *See generally* Note, *The Evolving Scope of State Power Under the Twenty-first Amendment: The 1964 Liquor Cases*, 19 RUTGERS L. REV. 759 (1965), which describes some of the interpretations of *Idlewild*.

68. *See generally* Note, *The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1594 (1975).

69. For a favorable reaction to the decision, *see* 38 TEMP. L. Q. 227 (1965), in which the author makes reference to the legislative history and purpose of the Twenty-first Amendment.

70. *See also* Department of Revenue v. James Beam Co., 377 U.S. 341 (1964), which supported the view of *Idlewild* and *Young* that the Amendment's protection extended only to commerce clause restrictions. The *Beam* Court considered the relationship between the Amendment and the export-import clause of the Constitution, U.S. CONST. art. I, § 10, cl. 2. The case involved a Kentucky import tax on liquor imported from outside of the United States to a bonded warehouse in Kentucky and later distributed in various states across the country. In the majority opinion, Justice Stewart rejected the contention that the Twenty-first Amendment invalidated the clause, pointing out that the Court had "never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import clause precisely and expressly forbids." *Id.* at 344.

71. 384 U.S. 35 (1966).

state liquor regulations were subject to commerce clause restraints. The challenged statutes in that case were New York's "affirmation" laws for liquor. The provisions required brand owners of liquor, or their agents, to file monthly price schedules for sales to wholesalers and retailers. The laws further required that the price schedules be accompanied by an affirmation that the price of the liquor was no higher than the lowest price at which sales were made anywhere else in the United States during the preceding month. A group of distillers, wholesalers and importers of distilled spirits sought to enjoin enforcement of the law claiming, in part, that it violated both the commerce clause and the equal protection clause of the Fourteenth Amendment.

The majority opinion acknowledged the holding in *Idlewild* that section two had not repealed the commerce clause, but did not determine whether the affirmation laws were an unreasonable restraint of interstate trade.[72] The Court upheld the regulations, declaring that any harmful effect on interstate commerce would be largely conjectural[73] since the laws had not yet gone into effect.[74] It is significant to note, however, that the Court was only concerned with the constitutionality of the laws on their face. Significantly, the opinion hinted that as relevant data became available, the Court might be able to decide whether that method of state liquor regulation constituted so grave an interference with business elsewhere as to make the regulation invalid under the commerce clause.[75] The Court thus inferred that the Amendment did not protect state laws from all commerce clause challenges.[76]

The Court's treatment of the equal protection contentions[77] shows a definite departure from the earlier analysis of statutes enacted pursuant to the Twenty-first Amendment. The opinion contains none of the sweeping language of *Young* and the other early cases that flatly refused to entertain Fourteenth Amendment arguments. Rather, the Court applied traditional equal protection analysis without discussion as to whether the Amendment

72. The appellants contended that the provisions placed an illegal burden on interstate commerce, conflicted with federal antitrust legislation, and thus should yield to the federal interests by virtue of the supremacy clause. *See* notes 8-10 and accompanying text *supra* for a brief discussion of the effect of the supremacy clause on state liquor laws enacted pursuant to the Twenty-first Amendment.

73. *Id.* at 43.

74. *Id.* at 41. Justice Stewart explained that as a result of a series of stays throughout the litigation, the affirmation laws had not gone into effect at the time the opinion was written. *Id.* The Court's examination was thus limited to the face of the provisions. *Id.*

75. *Id.* at 42-43.

76. Thus, *Seagram*'s treatment of the commerce clause question supports the view in *Idlewild* that the Twenty-first Amendment has not barred all federal power under the commerce clause.

77. The plaintiffs claimed that the provisions arbitrarily discriminated against various segments of the liquor industry. For example, the laws excepted consumer sales and private label brands of liquor from the category of products that had to adhere to the affirmation procedure. *Id.* at 50.

would preclude or temper such consideration.[78] The Court declined to invalidate the provisions on equal protection grounds, declaring that (1) it could find no invidious discrimination and (2) the legislature appeared to have had a reasonable basis for imposing the affirmation requirement on sales by retailers to consumers.[79]

There is contradiction within the *Seagram* opinion,[80] however. In one respect, *Seagram* appears to be tightening the new latitude set by *Idlewild* by limiting that holding to its facts.[81] The Court's action, however, belies this interpretation of its language. The Court recognized the existence of both equal protection and commerce clause limitations on the Amendment's scope. For example, as mentioned above, the Twenty-first Amendment was not invoked to preclude or modify application of the current constitutional analysis for equal protection challenges as had been done before *Idlewild*. As to the commerce clause, *Seagram* can be viewed as utilizing an even more accommodating analysis than that employed in *Idlewild*. The opinion indicates that even as to intrastate use of alcoholic beverages, it would be possible to prove a sufficient interference with interstate commerce so as to render the affirmation laws invalid under the commerce clause.[82]

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78. Justice Stewart declined comment on the due process contention that the affirmation laws imposed an "unreasonable, arbitrary, and capricious" burden upon liquor distillers, wholesalers and retailers. He stated that it was a legislative, not judicial, role to decide the wisdom and utility of legislation. 384 U.S. at 46-47.

79. *Id.* at 50-52.

80. *See generally* Comment, *State Power to Regulate Liquor: Section Two of the Twenty-first Amendment, Reconsidered*, 24 SYRACUSE L. REV. 1131 (1973), which interprets *Seagram* as stating both that (1) states have wide section two powers; and (2) under *Idlewild*, the states do not have wide section two powers. *Id.* at 1138-39. The author stated that these two conclusions cannot be reconciled. The *Seagram* Court distinguished the two concepts, however, by stating that a state has wide section two powers when the importation is for local use, consumption or distribution, but that when ultimate delivery is in a foreign country, as was the case in *Idlewild*, the state's power might be subordinate to that of the federal government. 384 U.S. at 42.

81. As mentioned above, Justice Stewart distinguished *Seagram* from *Idlewild*. See text accompanying notes 64-65 *supra*.

82. *See also* 40 TENN. L. REV. 465, *supra* note 58, at 482-83, which observes that in *Seagram* "the idea of 'accommodating' opposing state and federal interests seems to be present throughout the opinion, especially in the section dealing with the Sherman Act." *Id.* at 483.

This trend of accommodation between state and federal interests in the control of liquor traffic continued through the next few years. The cases dealt primarily with conflicts between state laws and the Fourteenth Amendment. For example, in Wisconsin v. Constantineau, 400 U.S. 433 (1972), the Court noted that the police power of the states over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment. The Court held, however, that state liquor regulations must still meet the requirements of procedural due process. The Wisconsin statute in question forbade the sale or gift of liquor to anyone who, by excessive drinking, produced described conditions or exhibited specific traits such as exposing himself or his family to poverty, or becoming dangerous to the peace of the community. At issue was the statute's requirement that the names of such designated persons be posted with liquor stores without hearing or notice to those persons.

For an example of the Court's attitude toward equal protection and state liquor laws, see Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1971). Irvis, a black guest of a member of a private

A temporary break in the use of "accommodation" analysis came in 1972 when the Supreme Court, in *California v. LaRue*,[83] held that the protection given by the First and Fourteenth Amendments to freedom of expression must yield to state power under the Twenty-first Amendment. *LaRue* concerned a series of rules promulgated by the California Department of Alcoholic Beverage Control that denied liquor licenses to premises hosting entertainment involving certain degrees of nudity and specified sexually suggestive acts.[84] The district court found the regulations to be unconstitutional as violative of the First, Fifth and Fourteenth Amendments.[85] Judge Ferguson, for a three-judge court, observed that since the Supreme Court had established that the interest of a state in regulating the liquor business cannot override the due process clause of the Fourteenth Amendment,[86] it certainly could not override the First Amendment.[87] Judge Ferguson further stressed that other clauses in the Constitution may not be used to determine and restrict obscenity without complying with the obscenity standard established by the Supreme Court.[88]

The United States Supreme Court reversed.[89] Justice Rehnquist, deliv-

club, was refused service at the club's dining room and bar because of his race. He contended that the racial discrimination was state action because the state liquor authority had issued a liquor license to the club. The Court held that the state liquor authority violated equal protection when it applied licensing sanctions resulting in the enforcement of racial discrimination. Thus, the Court implicitly denied the power of the Twenty-first Amendment to shield state liquor regulations from scrutiny under the equal protection clause. *Id.* at 175-79.

83. 409 U.S. 109 (1972).

84. The following kinds of performances were prohibited by the California Department of Alcoholic Beverage Control rules in question:

(a) The performance of acts, or simulated acts, of "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law";

(b) The actual or simulated "touching, caressing or fondling on the breast, buttocks, anus or genitals";

(c) The actual or simulated "displaying of the pubic hair, anus, vulva or genitals";

(d) The permitting by a licensee of "any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus";

and, by a companion section,

(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above. Rules 143.3 and 143.4.

Id. at 111-12 (citing 4 CAL. ADMIN. CODE §§ 143.3-.4).

85. 326 F. Supp. 348 (1971).

86. *Id.* at 357. Judge Ferguson was referring to Wisconsin v. Constantineau, 400 U.S. 433 (1971). *See* note 82 *supra* for a discussion of the facts in *Constantineau*.

87. 326 F. Supp. at 357.

88. *Id.* The court warned that to allow a state agency to "issue, renew or revoke liquor licenses for the purpose of censoring whatever it believes to be undesirable entertainment" would be to "allow states to circumvent the protection provided by the First Amendment and do indirectly that which they cannot do directly." *Id.*

89. 409 U.S. at 119. 28 U.S.C. § 1253 (1970) provides for direct appeal to the United States Supreme Court from a three-judge United States district court decision.

ering the majority opinion for a divided Court,[90] commented on the content of the restricted entertainment, but did not base the Court's decision on obscenity grounds. Noting that the challenged regulations came to the Court not in the context of censoring a dramatic performance but rather in the context of licensing bars and nightclubs to sell liquor by the drink,[91] Justice Rehnquist based his holding on a broad interpretation of state power under section two of the Twenty-first Amendment. Justice Rehnquist viewed the Amendment as conferring "something more than the normal state authority" over public health, welfare and morals.[92] He recognized that no decisions had gone so far as to hold that the Amendment superseded all other provisions of the Constitution, but he intimated that the type of entertainment in question was not protected by the First and Fourteenth Amendments to the same extent that more classical modes of entertainment were protected.[93] Declaring that the performances consisted "more of gross sexuality than of communication,"[94] the Court thus held that the provisions were constitutional, given the "added presumption in favor of the validity . . . that the Twenty-first Amendment requires [in this area] . . . ."[95]

The *LaRue* decision was the subject of much criticism[96] and is of questionable value as precedent for the expansion of state power under section two.[97] There are several grounds on which the Court's reasoning can

90. *LaRue* was a 6-3 decision. Dissenting opinions were filed by Douglas, J., 409 U.S. at 120, Brennan, J., *id.*, at 123, and Marshall, J., *id.*

91. 409 U.S. at 114.

92. *Id.*

93. *Id.* at 118. Justice Rehnquist referred to the restricted entertainment as "bacchanalian revelries" that are not the "constitutional equivalent of a scantily clad ballet troupe in a theater." *Id.*

94. *Id.*

95. *Id.* at 118-19.

96. *See generally* Kamenshine, *California v. LaRue: The Twenty-First Amendment as a Preferred Power*, 26 VAND. L. REV. 1035 (1973). *See also* Note, *The First Amendment Onstage*, 53 B.U. L. REV. 1121 (1973); Note, *California v. LaRue: The Demise of the "Bottomless" Bar*, 1 PEPPERDINE L. REV. 129 (1973); Comment, *State Power to Regulate Liquor: Section Two of the Twenty-first Amendment, Reconsidered*, 24 SYRACUSE L. REV. 1131 (1973); Note, *The Expansion of State Power Through the Twenty-first Amendment*, 27 U. MIAMI L. REV. 509 (1973); Comment, *Demon Rum and the Dirty Dance: Reconsidering Government Regulation of Live Sex Entertainment After California v. LaRue*, 1975 WIS. L. REV. 161; 61 GEO. L.J. 1577 (1973); 19 VILL. L. REV. 177 (1973). *Cf.* Note, *California v. LaRue: The Supreme Court's View of Wine, Women, and the First Amendment*, 68 NW. U.L. REV. 130 (1973) (author states that *LaRue* seemingly did not expand scope of Twenty-first Amendment, *id.* at 133; majority opinion in *LaRue* said to clarify First Amendment doctrine, *id.* at 160).

97. The *LaRue* decision, however, appears to be good law at least on its facts. Recently, the United States Supreme Court denied review of a federal district court's refusal to enjoin the California Department of Alcoholic Beverage Control for suspending a bar owner's license for violation of the provisions challenged in *LaRue*. The Court decided that in view of its determination in *LaRue* that the nude entertainment regulations are facially constitutional, the trial court had properly refused to convene a three-judge court to review the bar owner's constitutional challenge. Richter v. Department of Alcoholic Beverage Control, 559 F.2d 1168 (9th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3467 (U.S. Jan. 24, 1978).

be questioned. First, Justice Rehnquist appears to have made an inadequate study of legislative action prior to the adoption of the Twenty-first Amendment. Such a study would have demonstrated that his expansion of state power went far beyond the original purpose of the Amendment, which, as mentioned above,[98] was to ensure that states desiring prohibition would be able to control the importation and transportation of alcoholic beverages in accordance with state laws.[99]

Even if the purpose of the Amendment was not so strictly construed, however, another criticism of *LaRue* is that the Court failed to distinguish the immediate case from the Court's prior decisions interpreting the Amendment. For example, Justice Rehnquist cited *Seagram* and *Idlewild* as a basis for the opinion's recognition of a broad sweep of state power under the Amendment,[100] even though the commerce clause had been a primary ground for the challenges in both of those cases. *LaRue*, in contrast, concerned activities that allegedly were entitled to First Amendment protection. Yet Justice Rehnquist made no comparisons with the Court's analysis in other cases involving individual rights, such as *Wisconsin v. Constantineau*,[101] in which the Court employed an analysis more accommodating to individual interests than that used in *LaRue* to determine state power under the Amendment. Even in Twenty-first Amendment cases that had dealt directly with the economic control of liquor, the Court had made a closer examination of the challenged provisions[102] than it did in *LaRue*, despite the fact that *LaRue* involved the First Amendment.

Another area of uncertainty in the Court's analysis is its treatment of the accommodation approach used in *Idlewild*. The Court quotes *Idlewild*'s accommodation language,[103] but sheds no further light on the questions of when and how the test is to be employed. Although the Court recognized that state regulation in "the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment,"[104] the extent of this "strengthening" was not delineated; nor did the Court discuss whether the California statutes were "in the area covered by" the Amendment.

Due to these uncertainties and incongruities in the majority opinion, the

98. *See* notes 31-39 and accompanying text *supra*.

99. Compare the analysis in the dissent by Justice Marshall, in which he stated:

> But the Amendment by its terms speaks only to state control of the *importation* of alcohol and its legislative history makes it clear that it was intended only to permit 'dry' States to control flow of liquor across their boundaires depite potential Commerice Clause objections. . . . There is not a word in that history which indicates that Congress meant to tamper in any way with First Amendment rights.

409 U.S. at 134 (original emphasis).

100. *Id.* at 115-16.

101. 400 U.S. 433 (1971). *See* note 82 *supra*.

102. *See, e.g.*, Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Department of Revenue v. James Beam Co., 377 U.S. 341 (1964).

103. 409 U.S. at 115 (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964)).

104. *Id.*

holding in *LaRue* should carry little weight in defining the scope of the Twenty-first Amendment. In light of the constitutional protection accorded First Amendment rights at the time of the decision,[105] the *LaRue* Court expanded the scope of section two to an extent unsupported by the legislative history and judicial interpretation of the Amendment.[106] As noted in one of the three dissenting opinions: "Nothing in the language or history of the Twenty-first Amendment authorizes the States to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression."[107]

The latest Supreme Court case to interpret the Twenty-first Amendment, *Craig v. Boren*,[108] clarified Twenty-first Amendment analysis in two respects: (1) the opinion establishes that statutes enacted pursuant to the Amendment are not free from judicial scrutiny under the equal protection clause of the Fourteenth Amendment[109] and (2) dictum in the decision indicates that *LaRue* is to be limited to its facts.[110] The issue in *Boren* was whether a state statutory scheme prohibiting the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18 constituted discrimination that denied to males 18-20 years of age equal protection of the law. Justice Brennan, delivering the opinion of the Court, concluded that the operation of the Twenty-first Amendment did not alter the application of equal protection standards.[111]

In reaching that conclusion, the Court made a distinction between state liquor laws affecting the normal operation of the commerce clause and those

105. *But see* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), decided four years later, in which the Court narrowed the extent of First Amendment protection in a manner similar to that used by Justice Rehnquist in *LaRue*. In *Young*, the Court examined the constitutionality of a local ordinance that required "adult theatres" to be licensed and subjected to zoning ordinances. "Adult theatre" was defined as one which presented material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas." *Id.* at 53. In a 5-4 decision, the Court stated that "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . . Even though the First Amendment protects . . . [communication such as "Specified Sexual Activities"] . . . from total suppression, we hold that the state may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Id.* at 70-71. *See generally* Note, *Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech*, 4 HASTINGS CONST. L.Q. 321 (1977).

106. *See generally* notes 31-39 and accompanying text *supra* (legislative history); notes 40-49 and accompanying text *supra* (early judicial interpretation).

107. 409 U.S. at 123 (Brennan, J., dissenting). See also Justice Marshall's dissent, 409 U.S. at 123-39, in which he states that the Twenty-first Amendment analysis is "relevant only to the extent that California has in fact encroached upon First Amendment rights." *Id.* at 136.

108. 429 U.S. 190 (1976).

109. *Id.* at 204-05.

110. *Id.* at 207.

111. *Id.* at 209-10.

that allegedly resulted in violation of equal protection guarantees.[112] Justice Brennan intimated that the accommodation test is limited to cases in which the state regulations conflict with the commerce clause.[113] He also noted that since the adoption of the Amendment, the Court's decisions have confirmed that the Amendment "primarily created an exception to the normal operation of the Commerce Clause"[114] but that even in commerce clause conflicts, the Twenty-first Amendment required that the state and federal provisions be viewed in light of the respective interests at stake.[115] He further noted that the Court had in the past upheld state regulations that pertained to the importation of alcoholic beverages,[116] indicating that provisions touching on this area "where the State's authority under the Twenty-first Amendment is transparently clear"[117] would be more likely to prevail in a state-federal balancing analysis of a commerce clause conflict.

With reference to the equal protection claim, the Court first noted that the relevance of the Twenty-first Amendment to constitutional provisions other than the commerce clause was "increasingly doubtful."[118] The Court then distinguished the early Twenty-first Amendment cases, which had generally involved importation of intoxicants, from *Boren*, which concerned individual rights.[119] The Court construed *LaRue* narrowly by observing that in that case the activities for which First and Fourteenth Amendment protection was sought consisted of performances that " 'partake more of gross sexuality than of communication' . . . ."[120] The Court then declared that it had "never recognized sufficient 'strength' in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause."[121] Justice Brennan applied the current equal protection standard for review of classifications based on gender and concluded that the classifications were invalid,[122] thus demonstrating the narrow application that the Court had given to *LaRue*'s interpretation of the relationship between the equal protection clause and the Twenty-first

112. *Id.* at 206-07.
113. *Id.* at 206.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 207.
118. *Id.* at 206. Justice Brennan quoted P. BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING, CASES AND MATERIALS 258 (1975), in which the author remarked that " '[n]either the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.' " 429 U.S. at 206.
119. 429 U.S. at 206-07.
120. *Id.* at 207 (quoting California v. LaRue, 409 U.S. 109, 118 (1973)) (citation omitted).
121. *Id.* Justice Brennan cited Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), as establishing that state liquor regulatory schemes cannot work invidious discrimination violative of equal protection. 429 U.S. at 208.
122. *Id.* at 197-204. The Court required that the gender-based classification be substantially related to achievement of the statutory objective. *Id.* at 197.

Amendment. In so doing, the Court also affirmed its approach in *Seagram*, in which the Twenty-first Amendment had not hindered the operation of the equal protection clause.[123]

. The California Supreme Court has accepted the concept that the scope of the Amendment does not offer state liquor laws protection from equal protection analysis and, in dictum, has voiced approval of the accommodation test as the means by which to resolve commerce clause issues. In *Sail'er Inn, Inc. v. Kirby*,[124] an unanimous court held unconstitutional a state statute that prohibited women from tending bar except in specified circumstances.[125] Justice Peters for the court rejected the argument that the Twenty-first Amendment protected the state law from constitutional attack.[126] In response to the equal protection claim, Justice Peters declared that the power of the state to regulate alcoholic beverages is "necessarily subject" to the demands of the equal protection clause.[127] The court then ascertained and applied the proper equal protection standard to be used in scrutinizing gender-based classifications.[128]

Dictum in the opinion also recognized commerce clause restraints on the Amendment's scope. Justice Peters acknowledged that although the "early cases painted state powers under section 2 of the Twenty-first Amendment with a broad brush, later decisions have taken a position more in keeping with the original intent of the amendment."[129] After emphasizing that the Amendment gave the states the right to regulate or prohibit the importation of alcoholic beverages,[130] the court noted the accommodation language of *Idlewild*, concluding "it is apparent that the Twenty-first Amendment *not only does not reach all alcoholic beverage cases which would otherwise fall within Congress' commerce clause powers*, but even in those situations covered by the express language of the amendment, some balancing and accommodation must take place."[131] Thus, the California court, like the Court in *Boren*, considered an accommodation analysis to be the appropriate way to resolve conflicts between state liquor laws and the commerce clause.

In deciding the conflict between California's price maintenance laws for liquor and the Sherman Antitrust Act, the California Court of Appeal in *Rice v. Alcoholic Beverage Control Appeals Board*[132] should not have upheld the state laws under the Twenty-first Amendment without an exami-

123. *See* note 78 and accompanying text *supra*.
124. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).
125. CAL. BUS. & PROF. CODE § 25656 (West 1964) (amended 1967; repealed 1971).
126. 5 Cal. 3d at 11-13, 485 P.2d at 535-36, 95 Cal. Rptr. at 335-36.
127. *Id.* at 16, 485 P.2d at 538, 95 Cal. Rptr. at 338.
128. *Id.* at 16-22, 485 P.2d at 538-43, 95 Cal. Rptr. at 338-43.
129. *Id.* at 12, 485 P.2d at 535, 95 Cal. Rptr. at 335.
130. *Id.*
131. *Id.* at 12, 485 P.2d at 536, 95 Cal. Rptr. at 336 (emphasis added).
132. 137 Cal. Rptr. 213 (1977).

nation of the competing state and federal interests. The early cases interpreting commerce clause limits on state power under the Amendment granted wide power in the areas of importation and transportation, thereby adhering to a literal reading of section two.[133] Outside of those areas, however, the Court's analysis of conflicts between the commerce clause and state liquor laws has developed into an "accommodation" approach that weighs the state and federal concerns involved. Through the *Sail'er Inn* decision, the California Supreme Court demonstrated its approval of this accommodation test for resolving conflicts between state liquor regulations and the commerce clause. The court stated that even in a situation expressly covered by the Amendment, some balancing must take place.[134] Because California's minimum retail price maintenance laws for liquor are neither the type that the Amendment was enacted to protect nor within the literal confines of the Amendment's language, the accommodation test is the proper mode of constitutional analysis for resolving the commerce clause issue in *Rice*. Part II of this note will therefore examine both the commerce clause and then the equal protection limitations on the scope of state power under the Twenty-first Amendment, focusing on the effect that these limitations have on the *Rice* case.

II. Limitations on State Power Under the Twenty-first Amendment: *Rice v. Alcoholic Beverage Control Appeals Board*

A. Commerce Clause Limitations: An Accommodation Test

This section of the note will discuss the commerce clause limitations on California's power to enact retail price maintenance laws for liquor pursuant to the Twenty-first Amendment. The note first outlines the purposes of the Sherman Antitrust Act, moving from the general goals of the Act and the development of a federal policy against price fixing to a discussion of the Act's treatment of resale price maintenance. A brief discussion of fair trade laws begins with a description of Congress' exemptions to the Sherman Act for state-established fair trade laws and their subsequent repeals. Having thus established the conflict between the Sherman Act and California's liquor price program, the note proceeds to examine the question of whether the California program, being a state regulation, warrants a common law "state action" exemption[135] to the Sherman Act. After determining that the state laws are not eligible for such an immunity, the note defines the criteria for the Supreme Court's Twenty-first Amendment accommodation test. Finally, this criteria is applied to California's liquor pricing laws.

133. *See* notes 47-49 and accompanying text *supra*.

134. 5 Cal. 3d at 12, 485 P.2d at 536, 95 Cal. Rptr. at 336; *see* text accompanying note 131 *supra*.

135. *See* note 14 *supra* for an explanation of the distinction between the term "state action" as familiarly used in antitrust law and the "state action" doctrine which pertains to the Fourteenth Amendment.

1. The Sherman Antitrust Act

The Sherman Act was enacted in 1890 in response to both a growing public concern about monopolies in American business and a general distrust of corporations.[136] The law was not aimed at maintaining a perfectly competitive economy, however, for Congress and the economists alike realized that unlimited competition was not desirable and that there were situations in which a monopoly could be beneficial to the public interest.[137] Thus, the Act was aimed at only unreasonable restraints of trade "tested by the rules of common law and human experience."[138] The general policy behind the Sherman Act was succinctly stated by the Court in *Northern Pacific Railway Co. v. United States*:[139]

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States."[140]

Early Sherman Act cases established that it was an unlawful restraint of trade for manufacturers to require distributors, by agreement, to adhere to the manufacturer's prescribed retail prices; resale price maintenance (RPM) was considered to be destructive of competition, injurious to the public interest, and therefore illegal per se.[141] By the early 1930's, however, movements to enact legislation that would legalize RPM began to achieve some success on the state level. In 1931, California passed the first so-called "fair trade" law to legalize RPM contracts.[142] Two years later, in response to manufacturers' complaints as to the burden of establishing separate contracts with each retailer, California's Fair Trade Act was amended by the addition of a "non-signer" provision.[143] This clause provided that as long as

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136. W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 54-70 (1965) [hereinafter cited as LETWIN]. This book provides an historical treatment of the Sherman Act. *See also* H. THORELLI, THE FEDERAL ANTITRUST POLICY (1955).

137. LETWIN, *supra* note 136, at 95-99.

138. 21 CONG. REC. 2457 (1890) (remarks of Senator Sherman).

139. 356 U.S. 1 (1958).

140. *Id.* at 4-5.

141. Albrecht v. The Herald Co., 390 U.S. 145 (1968) (maximum resale price maintenance illegal per se); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (minimum resale price maintenance is a per se violation of § 1 of the Sherman Act).

142. CAL. BUS. & PROF. CODE § 16902 (West 1964) (repealed 1975).

143. *Id.* § 16904 (West 1964) (repealed 1975).

a manufacturer had entered into an RPM contract with one of his retailers, it was illegal for any other retailer knowingly to sell below the price that that contract stipulated.

In 1936, the Court upheld state fair trade laws in the face of challenges based on the United States Constitution.[144] Congress passed the Miller-Tydings Act[145] in 1937 to exempt from the Sherman Act any minimum resale price agreements that were sanctioned by state law and that involved interstate commerce. Several years later, the Court held that the Miller-Tydings Act did not legalize non-signer provisions;[146] subsequently, Congress passed the McGuire Act,[147] which provided that under state laws, manufacturers could set resale prices—not necessarily minimum prices—and that the price restrictions could be imposed against non-signers.[148]

Even after the passage of the McGuire Act, fair trade continued to be a controversial issue in Congress. In 1975, after a series of Congressional debates, Congress repealed both the Miller-Tydings and McGuire Acts, thereby rendering unlawful those RPM arrangements within the reach of the Sherman Act.[149] This most recent legislative action, the Consumer Goods Pricing Act of 1975, appeared to affect fair trade laws for all consumer goods. There is, however, a statement in the legislative history of the Act that appears to remove liquor from its reach. The Senate Report declares that "while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the Twenty-First Amendment."[150] In *Rice v. Alcoholic Beverage Control Appeals Board*,[151] the court seemed to treat this language in the Senate Report as exempting the California liquor laws from fair trade repeals.[152] The Supreme Court, however, has established that it will strictly construe any exemptions to the antitrust laws, requiring specific and clear indication of Congress' intent.[153]

144. Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).

145. Act of August 17, 1937, ch. 690, 50 Stat. 693, (repealed by Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975)).

146. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

147. Act of July 14, 1952, ch. 745, 66 Stat. 631, (1970) (repealed by Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975)).

148. The McGuire Act was upheld by the Court in Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964).

149. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975). Justifications for the Act as stated in its legislative history included a belief that the laws result in higher consumer prices and that they permit retailers to have identical prices, thus eliminating price competition. *See* S. REP. NO. 466, 94th Cong., 1st Sess. 1 (1975). Repeal of the fair trade laws had been called for by President Ford, consumer groups, the Justice Department, the Federal Trade Commission, the Council on Wage and Price Control, discount stores and smaller business associations. *Id.* at 3.

150. *Id.* at 2.

151. 137 Cal. Rptr. 213 (1977).

152. *Id.* at 218.

153. In United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), the Court was asked

The Senate Report, therefore, did not constitute an exemption to the Sherman Act, as it did not clearly establish that state liquor laws were immune; it merely noted that repeal of the Miller-Tydings and McGuire Acts would not affect the RPM laws for liquor in the same way that other products would be affected. The mention of the Twenty-first Amendment indicates recognition that state RPM laws for liquor are to be treated differently from those for other products due to the constitutional support afforded by section two of the Amendment; that is, a conflict between the Sherman Act and a state liquor law enacted pursuant to the Twenty-first Amendment will not result in the Sherman Act automatically prevailing under the supremacy clause. Rather, the constitutionality of RPM laws for alcoholic beverages should be analyzed by means of the accommodation test that the Court has developed for examining the competing state and federal interests involved. Before discussing the accommodation test, however, it must be determined whether the California liquor laws are immune from the Sherman Act due to a common law exemption that applies to certain types of state regulatory schemes. The next subsection of the note addresses this additional Sherman Act issue.

2. *The "State Action" Antitrust Law Exemption*

The threshold question in the *Rice* court's discussion of the California liquor pricing program and its conflict with the Sherman Act was whether the program, being part of a state regulatory scheme, was at all subject to the federal antitrust laws. The court of appeal held that due to the program's state regulatory function, the laws fell within a common law exemption and were therefore not subject to the Sherman Act.[154]

This so-called "state action" doctrine was first suggested in *Olsen v. Smith*[155] and later developed in the landmark case of *Parker v. Brown*,[156]

to determine whether bank mergers were exempt from § 7 of the Clayton Act. *Id.* at 335-55. Stating that "[i]t is settled law that '[i]mmunity from the antitrust laws is not lightly implied,' " the Court emphasized that this "canon of construction" reflected "the felt indispensible [*sic*] role of antitrust policy in the maintenance of a free economy . . . ." 374 U.S. at 348 (citations omitted). The Court intimated that if Congress wanted to exempt an industry from a law, the legislative history must contain evidence that Congress wished to confer a special dispensation upon that industry. *Id.* In Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), the Court refused to read into the Miller-Tydings Act an antitrust exemption for non-signer provisions. Justice Douglas, writing for the majority, stressed that the words of the statute must contain an express exemption before the Court would allow an immunity, "The omission of the nonsignor provision from the Federal law is fatal to respondents' position unless we are to perform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it." *Id.* at 388. *See* Justice Jackson's concurring opinion, in which he submits that "it does not appear that there is either necessity or propriety in going back of [the Act] into legislative history . . ." as resort to legislative history is only justified "where the face of the Act is inescapably ambiguous . . . ." *Id.* at 395.

154. 137 Cal. Rptr. at 218.

155. 195 U.S. 332 (1904).

156. 317 U.S. 341 (1943).

upon which the *Rice* court based its decision on the issue. The *Parker* case involved the California Agricultural Prorate Act, which authorized through the action of state officials the establishment of programs for the marketing of California raisins so as to restrict competition among growers. A program committee composed of ten raisin producers was required to formulate a marketing program that in turn had to be approved by the California Agricultural Prorate Advisory Commission, which also had authority to modify the program. After approval, the marketing program would be administered by the producers, subject to approval by the State Director of Agriculture.

A producer and packer of raisins challenged the marketing program adopted for the 1940 raisin crop as being in violation of the Sherman Antitrust Act. After assuming that the prorate program would indeed violate the Sherman Act, the United States Supreme Court held that the Act did not render the program unlawful since, in view of the Sherman Act's words and history, it must be taken to be a prohibition of individual and not state action.[157] In holding that "state actions" were immune from the antitrust laws, the *Parker* Court based its reasoning on the fact that the challenged program was part of state-created "machinery," which required adoption and enforcement by the state and which had to be approved by a state commission.[158] The Court's analysis also mentioned that the state program had been adopted in accordance with an express federal policy.[159] The Court did not, however, indicate what weight this was in fact given in this case.[160]

Subsequent to *Parker*, some courts established that when a state regulatory program involves private conduct, those actions require sufficient supervision and accountability to the state before the conduct is excused

157. *Id.* at 352.

158. *Id.*

159. *Id.* at 368. The Court declared that "whatever effect the operation of the California program may have on interstate commerce, it is one which it has been the policy of Congress to aid and encourage through federal agencies . . . ." *Id.*

160. The Court later established that merely because a state enforced a pricing program, it did not necessarily follow that the program was exempt from the Sherman Act. In Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), the Court invalidated a state law allowing non-signer provisions. Noting that private manufacturers were enforcing fixed prices against retailers with whom they had made no contractual agreements, the Court held that the price fixing activity did not fall within the exemption that the Miller-Tydings Act had established for RPM contracts. Without an express exemption from Congress, state compulsion of private price fixing was not exempt from federal antitrust laws; the Court observed that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Id.* at 389. *Accord*, Wainwright v. National Dairy Prods. Corp., 304 F. Supp. 567, 574-75 (N.D. Ga. 1969). One commentator distinguished *Schwegmann* from *Parker* by noting that in *Parker*, the statute in question was not inconsistent with federal policy, as the state program had been adopted with the aid and approval of the federal government. The author concluded that when the state policy truly conflicts with federal law and policy, the Court may be more willing to hold the state-compelled conduct illegal as it did in *Schwegmann*. Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulaton*, 39 A.B.A. ANTITRUST L.J. 950, 960-61 (1970).

from antitrust law restraints under the "state action" exemption.[161] For example, in *Asheville Tobacco Board of Trade v. FTC*,[162] the state's involvement consisted of authorizing local tobacco boards of trade to make reasonable regulations for the marketing of tobacco. The boards were made up entirely of private tobacco businesspersons who were not accountable to the state for the rules and regulations they designed. The Court of Appeals for the Fourth Circuit held that the state authorization of the board's activity did not exempt the board's actions from being held subject to the Federal Trade Commission's provisions forbidding unreasonable and undue restraints on trade.[163] The court declared that the state may for public policy reasons regulate an industry to eliminate competition and may even permit persons subject to such controls to participate in the regulations, provided their activities are "adequately supervised by independent state officials."[164] Noting that the officers and members of the tobacco board were not accountable to the state and were not supervised in any manner by state officials, the court held that the regulations and activities of the board did not warrant a state action exemption to the FTC prohibitions.[165]

In examining state action that encompasses private conduct, the courts have continued to emphasize the state's role as a supervisor by requiring an independent administrative review and approval of prices before granting an exemption to the antitrust laws. For example, the court in *Allstate Insurance Co. v. Lanier*[166] applied the exemption to insurance companies that set uniform minimum rates for their industry. In holding the state action exemption applicable, the court focused on the state's dominant and independent role in the rate program; before the set rates could be charged to the public, they had to be reviewed and approved by the State Insurance Commissioner, who was also authorized to approve upward deviations from the prescribed rates.[167]

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161. *See generally* Note, *State Action Exemption from the Antitrust Laws*, 50 B.U. L. REV. 393, 400-05 (1970).

162. 263 F.2d 502 (4th Cir. 1959).

163. *Id.* at 510. Federal Trade Commission Act, § 5, 15 U.S.C. § 45 (Supp. 1975).

164. 263 F.2d at 509. *Accord*, Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

165. 263 F.2d at 510.

166. 361 F.2d 870 (4th Cir. 1966).

167. *Id.* at 872. *See also* Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062, *rehearing denied*, 405 U.S. 969 (1972) (exemption applied when utility rates were subjected to meaningful regulation and supervision by the state); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971) (exemption applied where state regulatory body investigated and reviewed conduct of utility company with respect to rates, tolls and charges); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970) (*Parker* exemption did not apply merely because private contractor's specifications were adopted by public school board); Macom Prods. Corp. v. A.T. & T., 359 F. Supp. 973, 976-77 (C.D. Cal. 1973) (state supervision must be more than general to invoke *Parker* immunity; challenged conduct must be the result of the considered judgment of a state regulatory authority).

A later case, *Norman's on the Waterfront, Inc. v. Wheatley*,[168] involved a challenge by an independent liquor retailer that the Virgin Islands' resale price maintenance program violated the Sherman Act. This pricing law required producers, importers or wholesalers to file the wholesale price of their liquor, and brand owners or their licensees to file minimum retail prices for their products. The Fourth Circuit decided that the program violated the Sherman Act[169] and rejected the argument that the mandatory price provisions were immune from the antitrust laws under the state action doctrine of *Parker*.[170] The court construed *Parker* as having emphasized the extensive government involvement; in *Parker*, government officials rather than private individuals determined at what price the raisins would be sold. The court went on to declare that the exemption did not apply in the instant case since under Virgin Islands law, the territory's board had "no power to approve, disapprove, or modify the prices fixed by private persons."[171] In so holding, the court distinguished "genuine governmental action controlling the anticompetitive practice, and an attempt by government officials to 'authorize individuals to perform acts which violate the antitrust laws.' "[172]

The holding in *Norman's* is especially relevant to *Rice v. Alcoholic Beverage Control Appeals Board*[173] in that both of the cases involved minimum retail price maintenance programs. Judged against the criteria set out by the *Norman's* court, the California liquor scheme should not be granted a state action exemption. Under the California system, the liquor distillers are the parties setting the resale price levels. The state's role is that of an enforcer as opposed to a supervisor or reviewer. The state does not approve or modify the prices set by the private parties, nor does it offer guidelines for the distillers to follow in establishing such prices. This complete lack of administrative review would, under the holding in *Norman's*, have rendered the California pricing program subject to the federal antitrust laws.

In its decision that the common law exemption applied in *Rice*, however, the California Court of Appeal relied on the 1975 Supreme Court decision in *Goldfarb v. Virginia State Bar*.[174] That case concerned an attack on a minimum fee schedule for common legal services published by the county bar association, a state agency. The schedule was enforced by the Virginia State Bar, through which the Virginia Supreme Court regulates the practice of law in that state; a state bar opinion stated that evidence that an attorney habitually charged less than the suggested fees raised a presumption

168. 444 F.2d 1011 (3rd Cir. 1971).

169. *Id.* at 1016.

170. *Id.* at 1018.

171. *Id.*

172. *Id.* (quoting Asheville Tobacco Bd. of Trade v. FTC, 263 F.2d 502, 509 (4th Cir. 1959)).

173. 137 Cal. Rptr. 213 (1977).

174. 421 U.S. 773 (1975).

of professional misconduct.[175] Chief Justice Burger, writing for the Court, stated that the "threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."[176] The Court declared that it did not need to inquire further into the state action question because the state did not compel the anticompetitive activities. Justice Burger emphasized that Virginia had not enacted a statute referring to attorney fees, nor did the state supreme court's ethical codes direct the bar associations to supply fee schedules or to require any type of price floor.[177] Chief Justice Burger also noted the absence of any evidence that the Virginia Supreme Court had ever approved the state bar opinions urging adherence to the schedules.[178] Such "prompting" of anticompetitive activity by the state bar, Burger held, was not enough to warrant application of the common law exemption.[179]

The *Goldfarb* opinion treated as a threshold inquiry the question of whether the state actually compelled the challenged conduct. Since the conduct in question was not compelled by the state, the Court expressly withheld judgment as to further requirements for the state action exemption.[180] The California Court of Appeal in *Rice* interpreted *Goldfarb* as stating that this threshold question is dispositive of the issue of the exemption's applicability; therefore, if the activity was compelled by the state, the "state action" inquiry comes to an end.[181] The Court's lengthy review of the *Parker* doctrine in the 1976 case of *Cantor v. Detroit Edison Co.*,[182] however, casts doubt upon the *Rice* court's interpretation of *Goldfarb*. In *Cantor*, the owner of a drugstore selling electric lightbulbs brought an antitrust action against an electric private utility company, alleging that the utility company had restrained competition and damaged his business by distributing free lightbulbs to residential subscribers in exchange for their burned-out bulbs. The electrical utility could not abandon the program without the approval of the Michigan Public Service Commission and therefore claimed that the state's participation rendered the utility immune to the antitrust laws. The Supreme Court held in a plurality opinion that the public utility's participation in the program was sufficiently significant to require that its conduct be subject to the Sherman Act.

As to the "threshold" language in *Goldfarb*, the *Cantor* Court empha-

175. *Id.* at 777-78.
176. *Id.* at 790.
177. *Id.*
178. *Id.* at 791.
179. *Id.*
180. *Id.* at 790.
181. 137 Cal. Rptr. 213, 217-18 (1977).
182. 428 U.S. 579 (1976). Justice Stevens delivered the opinion of the Court, in which Justices Brennan, White and Marshall joined. Chief Justice Burger joined in the opinion with the exception of Parts II and IV (holding that *Parker v. Brown* did not control since the defendant was a private utility company). Justices Stewart, Powell, and Rehnquist dissented.

sized that "[c]ertainly that careful use of language could not have been read as a guarantee that compliance with any state requirement would automatically confer federal antitrust immunity."[183] Satisfaction of the inquiry concerning state compulsion is thus not sufficient to sustain an ultimate determination that the exemption applies. When there is conjunctive state and private involvement, the nature and extent of each party's role must be examined before the state action question is finally resolved.[184]

In the most recent Supreme Court case to discuss the *Parker* doctrine, *Bates v. State Bar of Arizona*,[185] the Court reaffirmed the concept that examination of the nature of the private parties' and state's roles in the challenged activity is the focal point of state action antitrust analysis. In *Bates*, attorney members of a legal clinic challenged an Arizona Supreme Court rule prohibiting attorneys from advertising, arguing in part that the disciplinary rule violated sections one and two of the Sherman Act because of the rule's tendency to limit competition.[186] Writing for the majority, Justice Blackmun barred the Sherman Act claim after stating that the *Parker* exemption applied.[187] In his explanation of the exemption's applicability, he contrasted *Bates* with *Goldfarb* and *Cantor*, both cases in which the Court had refused to grant an exemption. Justice Blackmun first distinguished

183. *Id.* at 600.

184. A puzzling aspect of the *Cantor* opinion is the Court's focus on the question of whether the "state action" doctrine applies to private parties who have allegedly violated the Sherman Act. The opinion distinguished *Cantor* from *Parker* by noting that in the former, suit had been brought against a private party; in the latter, the state officials overseeing the program had been the parties sued. *Id.* at 589-92. The Court determined that the *Parker* doctrine did not control in *Cantor* because the instant case did not "call into question the legality of any act of the State of Michigan or any of its officials or agents . . . ." *Id.* at 591-92. However, despite its holding that *Parker* did not apply, when the Court outlined the criteria for determining if a private party's activities should be afforded Sherman Act immunity, it considered factors that varied little from the approach used in the *Parker* line of cases—a focus on which party played the more dominant role in the alledged state action and whether the regulatory scheme conflicted with federal antitrust policy. *Id.* at 593-96. Thus, in light of the Court's actual approach in determining applicability of an exemption, the significance of the Court's distinction between *Cantor* and *Parker* is not clear.

The possible difference in the treatment to be afforded private and state defendants has also puzzled the commentators, who have recognized that *Cantor*, in particular, is susceptible to varied interpretations. *See generally* Dorman, *State Action Immunity: A Problem Under Cantor v. Detroit Edison*, 27 CASE W. RES. L. REV. 503-41 (1977), in which the author views *Cantor* as defining criteria for determining whether a private defendant who allegedly acted under immunity of the state warrants an antitrust immunity. Another commentator sees the Court as using two different tests for determining state action: in one, the identity of the party is determinative and the exemption applies to acts of the state and its officials; in the other, adopted by *Parker*, the activity is the focus of attention, regardless of the actor's identity. 5 HOFSTRA L. REV. 673-97 (1977); *See* 60 MARQ. L. REV. 952 (1977); 62 CORNELL L. REV. 628 (1977).

185. 97 S. Ct. 2691 (1977).

186. *Id.* at 2695. The other charge made by the legal clinic attorneys was that the advertising rule infringed upon their First Amendment rights. *Id.*

187. *Id.* at 2698.

Goldfarb, noting that in *Goldfarb* the anticompetitive conduct was not required by the state of Virginia. In *Bates*, however, the advertising prohibition was " 'compelled by direction of the State acting as a sovereign.' "[188] Therefore, the advertising restraint satisfied *Goldfarb*'s "threshold inquiry." The *Bates* Court, however, did not end its inquiry there, confirming that compulsion by the state is not a dispositive finding for ascertaining whether the state action exemption applies.

The Court continued its examination by contrasting *Bates* with issues raised in *Cantor*. Justice Blackmun declared that *Cantor* would have been an entirely different case if the claim had been filed against a public official or agency rather than against a private party.[189] He viewed *Cantor* as an attempt merely to delineate prerequisites for exemptions in actions against private parties.[190] The criteria employed by the *Cantor* Court, however, was similar to some of the criteria that the *Bates* Court seemed to limit to antitrust actions against states and their agents—a focus on the extent of the participation of the parties involved in the state regulated action and the nature of the state's interest in enforcing the program. Thus, as a matter of practical application, it is not clear whether a distinction between different defendants would alter the result of the Court's state action determination.[191] After this somewhat confusing discussion of private and state parties, Justice Blackmun compared the fact situations in *Bates* and *Cantor*, explaining why the activity in *Bates* warranted a state action immunity from the Sherman Act while the conduct by the utility company in *Cantor* did not. Justice Blackmun first noted that the *Cantor* Court had emphasized that the state did not have an independent regulatory interest in the lightbulb market; in *Bates*, on the other hand, the state had clearly expressed its policy with regard to professional behavior.[192] He also noted that the lightbulb program had operated with only the acquiesence of the state regulatory commission.[193] In contrast, the anti-advertising rules in *Bates* were subject to "pointed re-examination" by the Arizona Supreme Court.[194]

The *Bates* decision affirms that the Court considers more than the "compulsion" factor when determining whether the state action exemption applies. Before granting the exemption, the *Bates* Court emphasized that the case involved (1) action compelled by the state as sovereign, (2) an express state interest in the regulated activity, and (3) continued supervision or review by the state. The last criterion is in accord with prior state action cases that examined conjunctive action between the state and private parties

188. *Id.* at 2697 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975)).
189. *Id.*
190. *Id.* at 2697-98.
191. *See generally* note 184 *supra*.
192. *Id.*
193. *Id.* at 2698.
194. *Id.*

regulating business activities. As mentioned above,[195] in such situations the courts have required an independent administrative review before granting immunity from the Sherman Act. It is not dispositive of the exemption's applicability that a state compels the activity;[196] nor is it enough that a state enforces such a program.[197] Additionally, the courts consider whether the state action is in accordance with any express federal policy, as was the case in *Parker*.[198]

Application of these concepts to the facts in *Rice v. Alcoholic Beverage Control Appeals Board*[199] results in a finding that California's minimum retail price maintenance laws for liquor do not warrant a state action exemption. The structure of California's program satisfies only two of the *Bates* criteria; the state does compel the anticompetitive conduct and the California legislature has expressly articulated its interests in maintaining the liquor pricing program.[200] But the third part of the *Bates* analysis is not met in *Rice* because there is no independent state review of the liquor prices set by the distillers each month. Although the State of California or its agencies have established the retail price maintenance laws, the prices are set by private individuals—the liquor distillers who stand to gain much profit from fixing price levels. There is no review by the state, nor are there any suggested standards or guidelines for setting the prices.[201]

Apart from the *Bates* criteria, there is an additional reason for concluding that the common law exemption does not apply in *Rice*—there is an articulated federal policy against resale price maintenance. As mentioned above, the Supreme Court has determined RPM to be a per se violation of the Sherman Act.[202] This federal policy consideration is reinforced by the fact that Congress had once granted an antitrust exemption to state fair trade laws but repealed it in 1975, stating a federal concern about such "legalized price-fixing."[203] This clear federal interest casts even more doubt on the state's grounds for being granted a state action immunity. In light of the express federal policy against RPM and the fact that the California liquor distillers set mandatory minimum prices without state review, the state's pricing program is not entitled to the common law state action exemption to the Sherman Act.

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195. *See* notes 182-86 and accompanying text *supra*.

196. Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3rd Cir. 1971). *See* notes 181-88 and accompanying text *supra*.

197. Asheville Tobacco Bd. of Trade v. FTC, 263 F.2d 502 (4th Cir. 1959). *See* note 160 *supra*. *See also* notes 162-65 and accompanying text *supra*.

198. *See* note 160 and accompanying text *supra*.

199. 137 Cal. Rptr. 213 (1977).

200. *See* note 201 and accompanying text *infra*. CAL. BUS. & PROF. CODE § 24749 (West 1964) expressly declares that it is a state policy to regulate and control sales of alcoholic beverages in order to promote temperance and the orderly sale and distribution of liquor.

201. For a discussion of the harm from this complete lack of standards, see Comment, *Fair Trade of Liquor in California: Is Bartering for Booze Bad?* 6 CAL. W. L. REV. 282 (1970).

202. *See* note 141 and accompanying text *supra*.

203. S. REP. NO. 466, 94th Cong., 1st Sess. 1 (1975).

As the California minimum retail price laws for liquor are not immune from the antitrust laws, the Court of Appeal in *Rice* should have analyzed the laws by means of the Supreme Court's accommodation test for Twenty-first Amendment cases. The next subsection of this note examines the accommodation test, which the Court has as yet described only in broad terms, and attempts to further define and clarify the criteria that constitute the test.

3. Defining Criteria for the Accommodation Test

The United States and California Supreme Courts have not developed definite criteria or guidelines for the accommodation test. Moreover, there has not been one clear method of application; the test has been applied or described somewhat differently in each case that has cited it. An analysis of those decisions, however, suggests some considerations for weighing the interests at issue.

In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,[204] the first case to enunciate the test, the Court used broad language in describing the balancing approach, simply stating that the constitutional provisions must be considered in light of each other in the context of the issues and interests at stake.[205] The federal interest in that case was supervising the transportation of liquor through New York State for sale to international passengers departing from John F. Kennedy Airport. Acting through a constitutional power to regulate commerce with foreign nations,[206] Congress had delegated to the Federal Bureau of Customs the authority to supervise the transactions in question. The state's interest was enforcement of the New York Alcoholic Beverage Control Law, which dictated certain requirements concerning the structure of facilities selling intoxicating liquors.[207] In concluding that the federal interest prevailed, the Court focused on two facts: (1) the state regulation was not within the literal language of the Twenty-first Amendment because the regulation did not restrict the importation or transportation of intoxicants destined for use, distribution or consumption within the state's borders, and (2) Congress had exercised an explicit constitutional power under the commerce clause in authorizing the Federal Bureau of Customs to control foreign commerce.[208] Aside from those observations, the Court did not define or discuss what it considered to be the "interests at stake"; nor did it discuss the relative importance of the criteria upon which it based its decision.

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204. 377 U.S. 324 (1964).

205. *Id.* at 332. *See generally* notes 59-70 and accompanying text *supra*.

206. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have Power . . . To regulate Commerce with foreign Nations . . . ."

207. N.Y. ALCO. BEV. CONT. LAW § 105(2) (McKinney 1970).

208. 377 U.S. at 333-34.

Craig v. Boren,[209] the latest Supreme Court case to mention the accommodation test, did so only in dictum. Since the state law had been challenged on equal protection grounds, an area that the Twenty-first Amendment has no power to invade,[210] the Court merely discussed the accommodation test as it reviewed the Amendment's judicial and legislative history. Within that discussion, however, the Court shed some light on what factors the Court considers in its balancing approach. In his survey of the Amendment's history, Justice Brennan observed that two states had successfully relied upon the Twenty-first Amendment in response to commerce clause challenges of state authority to regulate the importation and manufacture of alcoholic beverages.[211] In explaining the results in those cases, Justice Brennan noted that the states' authority under the Twenty-first Amendment to regulate transportation and importation of liquor is "transparently clear."[212] The Court thereby reaffirmed the view that a state law has a greater chance of being upheld when it falls within the literal language of section two of the Amendment.

The California Supreme Court, in *Sail'er Inn, Inc. v. Kirby*,[213] emphasized that an important consideration in the accommodation analysis was the question of whether the state statute was of the type expressly protected by section two. In the process of ruling on the constitutionality of a state law restricting the employment of women as bartenders, the court briefly surveyed the legislative and judicial development of the Twenty-first Amendment.[214] Noting the link between section two and the wording of the Webb-Kenyon Act, Justice Peters' majority opinion stated that the Amendment applied only to prohibition of importation and transportation of liquor into the state,[215] but that "even in those situations covered by the express language of [section two], some balancing and accommodation must take place."[216] This discussion of the test in *Sail'er Inn* varied little from the *Boren* and *Idlewild* analyses. Although the decision added no new criteria for balancing the federal and state interests, it did reemphasize the importance of narrowing the Amendment's protection to those statutes within the core of the Amendment's express grant of power.

Even though these Twenty-first Amendment cases leave few distinct guidelines for application of the accommodation test, it must be reiterated that the *Idlewild* Court used broad language to describe the test, thereby leaving room for future interpretation and development in the context of

209. 429 U.S. 190 (1976).

210. *See* discussion at notes 118-23 and accompanying text *supra*.

211. 429 U.S. at 206-07. The Court cited Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938), and State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59 (1936).

212. 429 U.S. at 207.

213. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

214. *Id.* at 11-13, 485 P.2d at 535-36, 95 Cal. Rptr. at 335-36.

215. *Id.* at 12-13, 485 P.2d at 536, 95 Cal. Rptr. at 336.

216. *Id.* at 12, 485 P.2d at 536, 95 Cal. Rptr. at 336.

varied fact situations. It should also be noted that in *Boren* and *Sail'er Inn*, the state provisions had not been challenged on commerce clause grounds; therefore, the accommodation test was only discussed generally and in dicta. In both cases, the state laws had been attacked as denying equal protection of the law. Because there was judicial precedent for holding that the power of a state to regulate alcoholic beverages is necessarily subject to the demands of the equal protection clause,[217] the respective courts did not have to engage in the accommodation test's balancing analysis between conflicting state and federal laws.

The courts are still in the process of defining the accommodation approach; moreover, the criteria and methods of application employed or discussed thus far are not exclusive due to the flexible nature of the test. Hence, in ascertaining the appropriate method of accommodation to apply in the *Rice* case, it is helpful to examine situations in which the Court has balanced federal commerce clause interests against state regulations not based on the Twenty-first Amendment. As mentioned above,[218] the Twenty-first Amendment cases involve a unique situation in that the state regulations that conflict with federal laws do not automatically fall under supremacy clause analysis; the closest analogy to the state liquor law and Sherman Act conflict would then be those cases that involve state regulations that burden interstate commerce within an area in which Congress has either remained silent or enacted federal regulations that do not preempt the state provision. Again, the state-federal balancing processes employed by the Court in those situations must be examined with the awareness that the Twenty-first Amendment adds weight to the state laws if these laws deal with transportation or importation.[219]

Generally, the Supreme Court has focused more closely on the state rather than the federal interests when examining state regulations in light of the federal commerce clause power.[220] The nature of the state laws and the

217. The *Sail'er Inn* court cited as precedent Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 50 (1966), and Parks v. Allen, 426 F.2d 610, 613 (5th Cir. 1970). The *Boren* Court cited Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972).

218. *See* notes 8-10 and accompanying text *supra*.

219. *Cf.* California v. LaRue, 409 U.S. 109 (1972) (*rehearing denied*, 410 U.S. 948 (1973)) (Court stated that Twenty-first Amendment added strength to state's power to control liquor, but did not limit this added strength to regulations involving transportation and importation).

220. *See generally* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (Illinois statute required use of certain type of mudguard on trucks and trailers operated on the highways of that state; held: heavy burden of state law on interstate movement of trucks and trailers passed the permissible limits even for safety regulations); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (city ordinance made it unlawful to sell any milk as pasteurized unless it had been processed and bottled at an approved plant within a radius of five miles from the city; held: local provision placed a discriminatory burden on interstate commerce; provision not essential for the protection of local health interests); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, (1945) (state law prohibited operation within the state of any train with more than 14 passenger cars or 70 freight cars; held: state safety interest outweighed by national interest in adequate, economical and efficient interstate railway transportation service).

extent of their burden on interstate commerce affect the weight to be accorded to these laws in the balancing analysis. For example, when the sole purpose of the state regulations is to further local economic interests, the state provisions have ordinarily been struck down with little, if any, consideration of a balancing analysis.[221] When, however, health and safety or moral purposes lie behind the enactment of the state provisions, the Court will employ a balancing test, scrutinizing the practical effects of the state regulations to ascertain whether there are less restrictive alternatives for achieving the same end.[222]

This latter mode of analysis is the logical way in which to employ the accommodation test in the Twenty-first Amendment cases because the controlling legislative intent behind most liquor laws, including those challenged in *Rice*, is that of protecting the health and morals of the population from the alleged evils of alcohol.[223] The balancing approach used by the Supreme Court in cases involving health and safety purposes includes an assessment of the extent to which the laws have achieved their stated objectives[224] and a determination of whether the regulation is essential for the protection of the local interests.[225] Even when the rationality of the state's law is found to be tenuous, however, the reviewing court must

221. *See, e.g.*, H.P. Hood & Sons. v. DuMond, 336 U.S. 525, 530-39 (1949). The Court indicated in that case that if the state objectives are purely economic, the federal interest would prevail.

222. In Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), the Supreme Court outlined criteria for balancing local interests and federal commerce clause interests. The case concerned a municipal ordinance that placed restrictions on the sale of milk within the city of Madison, Wisconsin. In its investigation of the ordinance's constitutionality, the Court indicated that it is not enough that the local regulation have a permissible purpose. Rather, the practical effects of the law must be examined to see whether the discrimination inherent in the statute "can be justified in view of the character of the local interests and the available methods of protecting them." *Id.* at 354. Furthermore, no discrimination should be tolerated if "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." *Id. See also* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371-72 (1976). *Cf.* Breard v. City of Alexandria, 341 U.S. 622 (1951) (Court upheld ordinance prohibiting door-to-door solicitation of orders to sell goods unless requested to by the occupants. "When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign [state] power . . . ." *Id.* at 640). Note, however, Chief Justice Vinson's dissent, joined by Justice Douglas, which urged that the *Dean Milk* "practical effects" criteria should have been applied. *Id.* at 647.

223. The general provisions of California's Alcoholic Beverage Control Act specifically express an intent to protect the health and morals allegedly resulting from the consumption of alcohol. CAL. BUS. & PROF. CODE § 23001 (West 1964).

224. *See, e.g.*, Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

225. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-56 (1951). *See also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), in which the Court intimates that there must be a direct link between the economic regulation and the attainment of a safety and health purpose. "[T]he evils springing from uncared for cattle must be remedied by measures of repression more direct and certain than the creation of a parity of prices between New York and other states." *Id.* at 524.

determine whether there are alternative ways to achieve the same purpose before such a law may be struck down.[226] An examination of the practical effects of the state laws is not at odds with Supreme Court case law concerning the Twenty-first Amendment. Cases interpreting section two have recognized that the Amendment cannot be employed to protect regulations that are an unreasonable burden on interstate commerce;[227] therefore, a determination of a state law's reasonableness as part of the accommodation test would be in accord with prior decisions.

Taking into consideration both the accommodation test guidelines as developed thus far by the courts and the Supreme Court's approach to state-federal balancing in commerce clause cases, it is suggested that the approach for balancing the state and federal interests involved in *Rice* may be stated as follows: after a determination of the purpose of the state and federal provisions, the primary focus is on the state regulations. As emphasized in the Twenty-first Amendment cases, weight is given to the state interest if it is determined that the state law is within the express language of section two of the Amendment. The practical effects of the state provisions are then examined to determine whether they provide a reasonable means of achieving their stated objectives. This part of the analysis includes an assessment of the state law's success in achieving its expressed objectives as well as a determination of whether the provisions are essential for the protection of the local health or safety interests at stake. The next step is to determine the availability of other reasonable means of achieving the declared local objectives. All of these factors are then taken into consideration in ascertaining whether, given the strength of the federal interest and the weight provided to the state law by the Twenty-first Amendment, the state or federal law prevails.

4. Application of the Test

The first step in balancing the state and federal interests is to identify the purposes behind the two statutes involved. The objectives of both the Sherman Act and California's retail price maintenance laws for liquor are easily ascertained, as they have been expressed in both judicial opinions and the statutes themselves. The purpose of California's retail price maintenance program for alcoholic beverages is stated in California Business and Professions Code section 24749, which provides:

226. *See* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 373 (1976); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

227. For example, the Court, in Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939), noted that states may adopt measures "reasonably appropriate" to effectuate prohibition and exercise full police authority in respect to them. *Id.* at 138. *See also* Justice Stewart's concurring opinion in California v. LaRue, 409 U.S. 109 (1972), which notes that the Amendment does not empower a state to act "with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders." *Id.* at 120.

> It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination.[228]

The pricing scheme's purpose, then, is twofold: (1) to encourage temperance in the consumption of liquor and (2) to promote the orderly distribution and sale of alcoholic beverages, thereby encouraging adherence to other alcoholic beverage regulations.[229] The expressed aim of the Sherman Antitrust Act, as noted above,[230] is to promote open and unrestrained competition as the general rule of trade. The Court has declared resale price maintenance to be an unlawful restraint on interstate commerce in violation of the Sherman Act.[231]

After the local and national interests are indentified, the focus turns to the state laws. The first inquiry is whether the state regulation is within the literal proscription of section two. As mentioned above,[232] California's liquor price laws do not fall within the express language of the Amendment as they are not related to either the importation or transportation of liquor. Also, price regulation in a "wet" state has not been recognized as a concern of the Amendment's framers either by legislative historians or the Supreme Court. Because California's laws are not of the type that the Amendment was intended to protect, section two adds little if any weight to the state's interest in the course of the accommodation process.[233]

Examination of the practical effects of the state laws is the next phase in the recommended accommodation analysis. The California Supreme

228. CAL. BUS. & PROF. CODE § 24749 (West 1964).

229. The California Supreme Court in Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966), explained this legislative purpose by noting that retail price wars may encourage retailers, struggling to withstand the pressure of ruinous competition, to sell liquor below cost in violation of the state's Fair Trade Act or to transgress other regulations of retail liquor distribution, notably CAL. BUS. & PROF. CODE §§ 25600-25667 (West 1964). Examples of the types of regulations in those sections include limitations on the hours of sale and delivery of liquor, inspection controls, rules governing the practice of substituting advertised brands of liquor and regulations specifying areas in which alcoholic beverages may be sold. The *Wilke* court stated that to the extent that the price laws eliminate retail price wars, they discourage violations of those regulatory provisions. 65 Cal. 2d at 362, 420 P.2d at 744, 55 Cal. Rptr. at 32.

230. *See* note 140 and accompanying text *supra*.

231. *See* cases cited note 141 and accompanying text *supra*.

232. *See* note 134 and accompanying text *supra*.

233. *See* notes 211-16 and accompanying text *supra*.

Court has never determined the extent to which the liquor price laws actually succeed in attaining their stated goals of promoting temperance and discouraging disruptive sale and distribution practices. In two previous cases that have looked at the laws' purposes, *Allied Properties v. Department of Alcoholic Beverage Control*[234] and *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control*,[235] the court upheld the validity of the laws on the assumption that the elimination of price cutting, bargain sales, and advertising of low prices at the retail level tends to reduce both excessive purchases of alcoholic beverages[236] and disorderly marketing practices.[237] Statistical data shows these underlying assumptions to be untenable.

A scrutiny of California's liquor price maintenance laws indicates that the program is not a practical method of promoting temperance through a reduction in consumption. Statistics as to the per capita consumption of alcohol in California are one indication that the price maintenance laws are an ineffective way of furthering temperance. According to a California budget report for 1973-74, per capita consumption of alcoholic beverages has steadily increased since 1950,[238] giving California one of the highest levels of per capita consumption in the country.[239] There has been an increase in the per capita consumption of four out of five categories of alcoholic beverages, including a 42% increase in the per capita consumption of distilled spirits, a 30% increase for beer and a 356% increase for dry wines.[240]

This data on per capita consumption of liquor in California indicates that the success of the provisions in promoting temperance is, at best, quite doubtful.[241] As pointed out in a comprehensive report on California's alcohol control policies, "[t]here is little compelling evidence to suggest that fair trade promotes temperance or contributes in any significant way to the minimization of the current problem of alcohol abuse."[242] It must be

234. 53 Cal. 2d 141, 346 P.2d 737 (1959).

235. 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966).

236. *Id.* at 360-61, 420 P.2d at 743, 55 Cal. Rptr. at 31; 53 Cal. 2d at 148, 346 P.2d at 741.

237. *Id.* at 362, 420 P.2d at 744, 55 Cal. Rptr. at 32; 53 Cal. 2d at 149, 346 P.2d at 741.

238. Clark & Owsley, Alcohol and the State: A Reappraisal of California's Alcohol Control Policies 15 (1974) (unpublished report requested by the California Director of Finance as a review of the state's role in regulating the alcoholic beverage industry) (information reprinted from California Governor's Budget, 1973-1974) [hereinafter cited as Reappraisal]. The only category to show a decrease in per capita consumption was that of sparkling wines, sales of which underwent a 45% decrease in the years 1950-1972.

239. *See Temperance, Fair Trade and the ABC*, CAL. J., Jan., 1971, at 13, which states that California is tenth in per capita consumption.

240. Reappraisal, *supra* note 238, at 15.

241. *See generally* Dunsford, *State Monopoly and Price-Fixing in Retail Liquor Distribution*, 1962 WIS. L. REV. 454, 484, in which the author concludes, in part, that anticompetitive policies sometimes tend to work in opposition to what might seem to be temperance goals.

242. Reappraisal, *supra* note 238, at 19. *See also* Bunce, Alcoholic Beverage Consumption, Prices and Income in California 1952-1975 (June 1976) (unpublished report prepared for the Office of Alcoholism, State of California) [hereinafter cited as Bunce]. It should be noted, however, that this latter report was not presented to the Court of Appeal in *Rice*.

noted, however, that the above statistical evidence is not conclusive proof of the liquor program's ineffectiveness. Although the data shows that the laws do not promote temperance, no study has yet determined what California's liquor consumption trends would be were the retail price maintenance laws not in existence. Without such an analysis of the differential impact, it cannot be determined whether, in the absence of the pricing program, per capita consumption would have been even higher.[243]

There is also evidence that the retail price maintenance laws are an ineffective means of achieving their second stated purpose, promotion of orderly distribution and sale of alcoholic beverages, which prevents undue pressure on retailers to violate other police power regulations on liquor traffic. The California Supreme Court has noted that when the economic existence of small retailers is threatened, they may take illegal shortcuts to maintain their solvency, to the detriment of both the industry and the public.[244] To the extent that the retail price maintenance provisions eliminated retail price wars in the liquor industry, the court believed that they also discouraged disruptive practices by retailers struggling to withstand the pressures of "ruinous competition."[245]

Recent research demonstrates that the California court was incorrect in assuming that without minimum retail price maintenance, small independent retailers would be unable to compete in price wars against larger retail outlets.[246] Before Congress repealed the state fair trade exemptions in 1975, it conducted considerable research on the general effects of price cutting on small retailers. The Congressional research resulted in a finding that an absence of fair trade laws did *not* result in economic harm to small businesses;[247] to the contrary, the growth of small businesses was substantially

243. *But see* 3 THE ALCOHOLIC BEVERAGE INDUSTRY, REPORT TO THE LEGISLATURE 69 (1973). At public hearings before the Senate Select Committee on Laws Relating to Alcoholic Beverages, testimony described the experience that New Mexico had in 1967 after the state repealed laws for liquor. During the first year following repeal, per capita consumpsion increased at a moderate rate. But in 1969, it declined again, and by 1971 per capita consumption in that state was actually less than it had been in 1967, which was the last year in which retail prices had been posted.

See Bunce, *supra* note 242, at 1-2, in which the author discusses variables other than price that contribute to alcohol consumption levels, including the amount of a person's leisure time and changes in the beliefs about the effects of alcohol and its causal significance for a person's behavior.

244. Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 362 n.9, 420 P.2d 735, 744 n.9, 55 Cal. Rptr. 23, 32 n.9 (1966) (citing Grand Union Co. v. Sills, 81 N.J. Super. 65, 194 A.2d 591 (1963)).

245. *Id.* at 362, 420 P.2d at 744, 55 Cal. Rptr. at 32.

246. *Id.*

247. "Using Dun and Bradstreet data, the Library of Congress found the 1972 firm failure in 'fair trade' states which have the nonsigner provision was 35.9 failures per 10,000 firms, in 'fair trade' States without the nonsigner provisions the rate was 32.2 failures per 10,000 firms, while the failure rate in free trade States averaged 23.3 failures per 10,000 firms . . ." S. REP. No. 466, 94th Cong., 1st Sess. 3 (1975).

higher in "free trade" states than in those states that had fair trade laws.[248] Although this study did not look at liquor retailers specifically, the absence of resale price maintenance laws apparently would not raise the specter of undue economic pressures, forcing small businesses to shortcut illegally the existing regulations for orderly liquor distribution.[249]

The final step in the recommended application of the accommodation test is to determine the availability of other reasonable means of achieving the stated local objectives. This note has demonstrated that the court in *Rice v. Alcoholic Beverage Control Appeals Board*[250] could determine that California's price program is not an effective method of promoting temperance and preventing disruptive conduct by small retailers threatened by ruinous competitive practices. Before the state regulations are forced to give way to the federal interests, however, it must be determined whether there are alternative means of achieving the stated purposes of the provisions, that is, of preventing undue consumption and promoting orderly marketing conditions.

In 1967, the California legislature enacted a provision that furnishes an alternative means of promoting both goals of the retail price maintenance laws for liquor. Section 24755(g) of the Business and Professions Code generally provides that no liquor retailer shall sell any distilled spirits below cost.[251] Below cost selling is considered the extreme method of waging a price war. Elimination of below cost selling, then, would arguably eliminate

248. *Id.* "Finally, the traditional argument that fair trade protects the 'mom and pop' store from unfair competition is not borne out by statistics. Between 1956 and 1972 the rate of growth of small retail stores in free trade States (including states which repealed 'fair trade' during this period) is 32 percent higher than the rate in 'fair trade' States." *Id.*

249. There are additional grounds for attacking the overall reasonableness of these laws, although such arguments do not go to the statutes' failure to achieve their stated objectives. For example, evidence before the *Rice* court demonstrates that the laws provide a great temptation to effect parallel pricing. Data shows that during the past decade, there has been a steady decrease in price differentials among competing brands of distilled spirits, sometimes to the point of no price differences at all. Consider, for example, the pricing activity for Scotch whiskey. A comparison of the posted prices for fifths of the leading brands of Scotch at five-year intervals starting in 1961 shows that the price differential from the least expensive brand to the most expensive was 70 cents, or more than 10 percent. After fifteen years of liquor fair trade, the price differential had decreased to a penny, or slightly more than one tenth of one percent. Petition for Hearing and Application for Temporary Stay Order for Real Parties in Interest at 16, Rice v. Alcoholic Beverage Control Appeals Board, 137 Cal. Rptr. 213 (1977).

The possibility of such a result had been recognized in the course of debate on the congressional repeal of the fair trade exemptions. *See generally Proposed Repeals of the Miller-Tydings Act and McGuire Act: Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 175 (1975).

It is also significant to note that the laws do not provide any safeguards against excessive pricing. As has already been discussed above, there is no standard of review or guidelines as to the level at which the prices are set. *See* note 201 and accompanying text *supra. See generally* Comment, *Fair Trade of Liquor in California: Is Bartering for Booze Bad?*, 6 CAL. W. L. REV. 282 (1970).

250. 137 Cal. Rptr. 213 (1977).

251. CAL. BUS. & PROF. CODE § 24755(g) (West Supp. 1977).

the danger of "*undue* stimulation" of consumption, which the legislature intended to prevent in enacting the retail price maintenance scheme for liquor. Section 24755(g) would also serve as a reasonable alternative for ensuring an orderly liquor trade in which retailers adhere to the other liquor regulations set out in the Alcoholic Beverage Control Act. Because of the protection provided by section 24755(g), the small retailers would not have to fear anticompetitive pricing activity on the part of large retail outlets. As long as there is no below cost selling, the volume dealers cannot impose *undue* economic pressure on the small retailers to engage in illegal acts that might result in disorderly distribution of liquor and, consequently, harm to public health and safety.

Another indication of the reasonableness of section 24755(g) as an alternative to the state liquor pricing scheme is that the requirement of proof for a violation of this section is satisfied merely upon a showing of a below cost sale. In the past, the California Supreme Court has indicated concern with the difficulties in enforcing prohibitions against below cost sales and has upheld the liquor price program on the grounds that the liquor laws offer a more facile means of preventing below cost selling than does the state's Unfair Business Practices Act.[252] The court has stated that requirements of proof for the Act, which include proof of an intent to injure competition, are so stringent that the legislature might easily have concluded that the Act offered little practical aid to independent retailers.[253] Section 24755(g) satisfies the court's concern with the standard of proof of below cost sales because the section does not have any requirement of intent; only proof of the sale is required. Thus, it appears that elimination of the pricing system would not leave the independent retailers without a reasonable means of protection from anticompetitive, below cost pricing.

After all of the above factors are weighed, it appears that the state laws must give way to the Sherman Antitrust Act. Although the laws may be accorded some support by the Twenty-first Amendment, the cases interpreting the accommodation test have indicated that in the course of the balancing process, less weight is given to the state laws if they are not within the literal language of section two. The California liquor laws are not expressly covered by section two of the Twenty-first Amendment because they do not regulate the importation and transportation of liquor. Thus, the Amendment adds little weight to the state's interest in *Rice*. Another factor that weighs against upholding the state interests is that the court could find the laws to be an ineffective means of decreasing consumption and preventing economic pressures on small retailers. Statistics reveal that the assumptions upon which the California Supreme Court has upheld the retail price maintenance laws are no longer tenable. Additionally, there is an alternative means for

252. Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 363, 420 P.2d 735, 744-45, 55 Cal. Rptr. 23, 32-33 (1966). The Unfair Business Practices Act is found in CAL. BUS. & PROF. CODE §§ 17000-17101 (West 1964 & Supp. 1977).

253. 65 Cal. 2d at 363, 420 P.2d at 744-45, 55 Cal. Rptr. at 32-33.

controlling economic activity in the liquor market, thereby providing for the health, safety and moral interests involved in the enactment of the state liquor laws. When the weakly supported state interests are weighed against the strongly articulated federal policy in favor of promoting competition and against resale price maintenance, the federal interests should prevail.

Assuming, for the sake of argument, that the *Rice* court was correct in upholding the liquor price laws on the basis of state power under the Twenty-first Amendment, such a conclusion should have been reached only after the state and federal interests were properly balanced; the accommodation test is the appropriate constitutional analysis for the court to have employed in resolving the commerce clause issue. The court should have examined the nature and effectiveness of the state laws and balanced the interests involved rather than rely as it did on such a broad interpretation of the Twenty-first Amendment.

B. Equal Protection Limitations on the Twenty-first Amendment

In *Rice*, the retail price maintenance laws for liquor were also challenged as violating the equal protection clauses[254] of both the state and federal constitutions.[255] The earliest judicial interpretations of the Twenty-first Amendment granted the states such broad and comprehensive powers over importation of alcoholic beverages that the Supreme Court did not even entertain Fourteenth Amendment arguments against state liquor regulations in those cases.[256] As subsequent interpretation of the Twenty-first Amendment's scope imposed more limits on the states' power, however, the Court has established that section two of the Amendment does not alter the applicability of equal protection standards to state liquor laws.[257]

The California Supreme Court has never fully addressed the issue of whether the state's retail liquor pricing program constituted a denial of equal protection. It has, however, considered the question of whether the provi-

254. "All laws of a general nature shall have a uniform operation." CAL. CONST. art I, § 11. "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." CAL. CONST. art I, § 21. The Fourteenth Amendment to the United States Constitution provides that no state shall make or enforce any law which shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

255. 137 Cal. Rptr. 213, 219-21 (1977).

256. *See, e.g.*, State Board of Equalization v. Young's Mkt. Co., 299 U.S. 59 (1936). *See generally* notes 40-49 and accompanying text *supra*.

257. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197-204 (1976); Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 50 (1966); Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); *Cf.* California v. LaRue, 409 U.S. 109 (1972) (Court unclear as to effect of equal protection clause on state liquor regulations enacted purusant to Twenty-first Amendment; indication that Amendment offers some protection from Fourteenth Amendment guarantees, *id.* at 114-18, but no clarification as to what types of laws warrant such protection).

sions are a constitutional exercise of the police power, in both *Allied Properties v. Department of Alcoholic Beverage Control*[258] and *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control*.[259] In upholding the constitutionality of the provisions both times, the court found that they bore a reasonable relationship to the stated purposes of promoting temperance and bringing about orderly marketing conditions.[260] Three years after it decided *Wilke*, the California Supreme Court was again asked to rule on the validity of the price program. This time, in *Samson Market Co. v. Alcoholic Beverage Control Appeals Board*,[261] the court stated that "[it did] not feel compelled to essay a third review of the issue,"[262] because *Wilke* and *Allied Properties* had thoroughly examined the question.

The court of appeal in *Rice* interpreted California's equal protection standard as requiring only that the distinction drawn by the statute "bear some rational relationship to a conceivable legitimate state purpose."[263] Observing that "our Supreme Court has already concluded that the challenged law has a legitimate purpose, and that the means chosen by the Legislature bear a rational relationship to that purpose,"[264] the court of appeal concluded that it had no alternative but to accept the prior holdings of the California Supreme Court on the issue of the constitutionality of the provisions. The court's reasoning in reaching that conclusion did not, however, take into consideration the changes that the California equal protection standard has undergone since *Samson Market* was decided; nor did the court take notice of the data currently available that could aid in a determination of the liquor price maintenance program's rationality. This last section of the note discusses recent developments in the state's equal protection standard, first taking note of the trends of federal authority in equal protection analysis upon which the California criterion is, in part, based. The note will close with a brief examination of the liquor provisions in light of the new state standard.

1. Federal Equal Protection Standards

Federal equal protection analysis has undergone significant development in the past few years; it is thus difficult to predict what standard the Supreme Court will employ in reviewing a given type of statute.[265] Tradi-

258. 53 Cal. 2d 141, 346 P.2d 737 (1959).

259. 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966).

260. *Id.* at 360-65, 420 P.2d at 742-46, 55 Cal. Rptr. at 30-34; 53 Cal. 2d at 146-49, 346 P.2d at 739-41.

261. 71 Cal. 2d 1215, 459 P.2d 667, 81 Cal. Rptr. 251 (1969).

262. *Id.* at 1219, 459 P.2d at 669, 81 Cal. Rptr. at 253.

263. 137 Cal. Rptr. at 219.

264. *Id.* at 220.

265. *See generally* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as *A Newer Equal Protection*]. *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

tionally, the Court had applied minimum scrutiny, thereby treating state regulations with deference.[266] Because the Court only looked for some rational basis for the legislation, most statutes passed the test. By the 1960's, the Court had departed from this mode of analysis by evolving what was eventually referred to as the two-tiered test.[267] Under that test, those classifications that were deemed by the Court to be "suspect"[268] or to involve a "fundamental interest"[269] were subjected to strict scrutiny—a difficult test to pass. Other classifications, including economic and social welfare regulations, were usually given minimal scrutiny.[270] In the 1970's, the Court continued to employ the two-tiered test.[271] Some justices of the Court, however, began to voice dissatisfaction with the dual approach. Justices Marshall, Powell, White and Stevens suggested a break from the rigidity of that standard because a single test was not in fact being consistently applied.

Justice Marshall's opinions demonstrated early dissatisfaction with the dual distinction. In a dissenting opinion in *Dandridge v. Williams*,[272] Justice Marshall pointed out the need for a middle ground between the two degrees of scrutiny that the Court had been employing. The *Dandridge* case questioned the constitutionality of a $250 per month ceiling on all grants under the Aid for Families with Dependent Children program, regardless of

266. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (regulation of optician profession; Court declared that the prohibition of the equal protection clause "goes no further than the invidious discrimination." *Id.* at 489); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (state regulation of advertising on motor vehicles upheld; Court stated that if the classification has relation to its purpose, it is immaterial that statute does not completely eradicate traffic problem at which law is aimed).

267. *A Newer Equal Protection, supra* note 265, at 8-10.

268. The Court now acknowledges the following classifications as being "suspect": race, Loving v. Virginia, 388 U.S. 1 (1967) (racial classification valid only if necessary to achieve some overriding state purpose); national origin, Korematsu v. United States, 323 U.S. 214 (1944) (statute in question affected only a single ethnic-racial group); alienage, Nyquist v. Mauclet, 432 U.S. 1 (1977) (state law denied state financial assistance for higher education to resident aliens unless they affirmed intent to apply for citizenship when eligible); Examining Bd. of Eg'rs v. Flores De Otero, 426 U.S. 572 (1976) (Puerto Rico law barring aliens from engaging in private practice of engineering violates equal protection).

269. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (residency requirement impinges on right to travel interstate); Dunn v. Blumstein, 405 U.S. 330 (1972) (state residency requirement held invalid; discussion of both right to vote and right to travel interstate).

270. This is often referred to as the "rational basis" test. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961). For a more recent discussion of how the Court continues to treat economic and social legislation, see Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

271. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973) (classifications based on alienage subject to close judicial scrutiny); Lindsey v. Normet, 405 U.S. 56 (1972) (rationality test is proper standard for examining a wrongful detainer statute; need for decent shelter and the right to retain peaceful possession of one's home held not to be fundamental interests).

272. 397 U.S. 471, 508 (1970) (Marshall, J., dissenting); *accord*, *id.* at 490 (Douglas, J., dissenting).

the size of the family and its actual need. The majority held that in the area of social welfare, the Court need only find a reasonable basis for the classification in order to uphold it.[273] In his dissent, Justice Marshall stated that the case "simply defies easy characterization in terms of one or the other of these 'tests.' "[274] The approach he proposed placed more emphasis on a balancing of the various interests at stake. He observed that the mere rationality test has generally been used in cases challenging business regulations.[275] Justice Marshall declared that in the instant case "concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[276]

Justice Marshall has also argued that no one standard has been applied by the Court. His dissent in *San Antonio Independent School District v. Rodriguez*[277] acknowledged that "[a] principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause."[278] Justice Marshall viewed the variations as depending upon the constitutional and societal importance of the adversely affected interest.[279] He also viewed as an important consideration the invidiousness of the basis upon which the specific classification was designed.[280]

In *Weber v. Aetna Casualty & Surety Co.*,[281] Justice Powell supported a test that does not make such rigid distinctions as does the two-tiered test. In his examination of a workman's compensation benefit program that discriminated against illegitimate children, Justice Powell observed that different tests had been used by the Court in the past.[282] He pointed out, however, that in all previous cases, there had been the same essential inquiry: "What legitimate state interest does the classification promote [and] what fundamental personal rights might the classification endanger?"[283]

In a concurring opinion in *Vlandis v. Kline*,[284] Justice White expressed

273. *Id.* at 485.

274. *Id.* at 520 (Marshall, J., dissenting).

275. *Id.*

276. *Id.* at 520-21.

277. 411 U.S. 1, 70 (1973) (public school financing program based on property taxes in individual school districts upheld by majority).

278. *Id.* at 98-99.

279. *Id.* at 99.

280. *Id.*

281. 406 U.S. 164 (1972).

282. *Id.* at 172.

283. *Id.* at 173.

284. 412 U.S. 441, 456 (1973) (White, J., concurring in the judgment) (constitutional challenge of one year durational residency requirement to qualify for lower tuition and fees at state university rejected).

agreement with Justice Marshall's dissent in *San Antonio* that had described the equal protection test as involving a "spectrum of standards."[285] Justice White voiced the criticism that although the Court at times employed the different degrees of scrutiny of the two-tiered analysis, sometimes the Court would merely say that a claim was "invidious" and let the matter rest there.[286] He also stated:

> I am uncomfortable with the dichotomy [of the two-tiered test], for it must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.[287]

Justice Stevens stated in a concurring opinion in *Craig v. Boren*[288] that he was inclined to believe that the two-tiered analysis does not describe a completely logical method of deciding equal protection claims; rather, it is a "method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."[289] Justice Stevens further stated that this single standard could be identified more easily by a careful examination of the reasons motivating particular decisions than by an attempt to use any all-encompassing terms.[290] Stevens decided that the statute in *Boren* was unjustified; he seemed to place the gender-based classification in a category apart from the usual distinctions of the two tiers, declaring that the statute was "not as obnoxious as some the Court had condemned, nor as inoffensive as some the Court has accepted."[291]

It is not clear in which direction the Court is moving—whether it will continue with the rigidity of the two-tiered test or whether it will adopt a middle test that would use a "sliding scale" approach that bases the degree of scrutiny on the invidiousness of the classification and the importance of the individual right involved.[292] Some cases decided by the Court make no mention of the two-tiered test in the course of their equal protection analysis,[293] while other opinions have adhered to the dual distinction.[294] In all

285. *Id.* at 458.

286. *Id.*

287. *Id.* at 458-59.

288. 429 U.S. 190 (1976).

289. *Id.* at 212 (Stevens, J., concurring).

290. *Id.*

291. *Id.* (footnotes omitted).

292. *See generally Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975). It must be noted that the Court has used a "middle test" largely when examining classifications based on gender. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

293. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971), which examined a classification based on gender. Chief Justice Burger framed the test as follows: "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .'" *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

294. A recent case employing a two-tiered approach is Hughes v. Alexandria Scrap Corp.,

instances, it is important to look closely at the Court's application of the standard it espouses; while the Court may state that it is using a traditional test, it may in fact examine the means employed by the statute in a manner that reflects a closer scrutiny than the traditional method the Court has employed.[295] Moreover, there appears to be an increasing support for a standard of review that more closely examines the means employed by the state to attain its objectives.[296]

2. *A New California Standard for Out-dated Laws*

The California Supreme Court also applies more than one standard of review in its equal protection analysis. Traditionally, state economic and social welfare legislation have been reviewed with judicial restraint; the challenged legislation is presumed constitutional and the court only requires that the statutory classifications bear "some rational relationship to a conceivable legitimate state purpose."[297] When reviewing cases involving "suspect classifications" or those that touch on "fundamental interests," the court applies a more stringent test.[298] In such cases, the state bears the burden of showing that the distinctions drawn are necessary for the furtherance of a compelling government interest.[299] Thus, in many cases, the California court appears to have adopted the two-tiered analysis.

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426 U.S. 794 (1976), which examined a statute involving licensing requirements for scrap processors. Note, however, that although minimal scrutiny was employed, the case involved an economic regulation, which generally still warrants use of the traditional rationality test by the United States Supreme Court. Here, the Court merely looked to see if the underlying assumptions of the regulation were rational. *Id.* at 813-14.

295. For example, in United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), after stating that the traditional equal protection standard applied, the Court applied a closer scrutiny. The case examined a challenge to a section of the Food Stamp Act of 1964, 7 U.S.C. §§ 2001-2026 (1976) (amended 1977), that generally excluded from participation in the food stamp program any household containing an individual unrelated to any other household member. In its equal protection analysis, the Court looked beyond the program's means, which the Government maintained were rationally related to the legitimate governmental interest of minimizing fraud in the administration of the food stamp program. Instead of accepting that basis as rational, the Court focused on the practical effects of the classification. Noting ways in which people could commit welfare fraud despite the statute, the Court declared the provisions invalid, stating that the classification "simply does not operate so as rationally to further the prevention of fraud." *Id.* at 537.

296. *See A Newer Equal Protection, supra* note 265, at 43-46 for arguments in support of a means scrutiny analysis that would give the Court a more active role in reviewing legislation.

297. Westbrook v. Mihaly, 2 Cal. 3d 765, 784, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852 (1970). *Accord*, Steed v. Imperial Airlines, 12 Cal. 3d 115, 123, 524 P.2d 801, 806, 115 Cal. Rptr. 329, 334 (1974) (quoting Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rtpr. 601, 609 (1971)); Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973).

298. *See, e.g.*, Arp v. Workers' Compensation Appeals Board, 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977); People v. Olivas, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976); Westbrook v. Mihaly, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970).

299. *See, e.g.*, D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 17, 520 P.2d 10, 22, 112 Cal. Rptr. 786, 798 (1974).

The California court has also developed a middle test for reviewing equal protection cases. This test is embodied in the 1973 decision of *Brown v. Merlo*.[300] In that case, the California Supreme Court opted for an approach that set a course away from minimum rationality and, instead, gave closer scrutiny to the relationship between the means and ends of the statute in question. *Brown* involved a constitutional attack on the state's automobile guest statute.[301] The statute distinguished between the rights of paying and non-paying riders in tort actions. On the one hand, an injured automobile guest, a passenger who had not paid the driver for the ride, was denied recovery for the careless driving of the host unless the injury resulted from the driver's willful misconduct or intoxication. A paying rider, on the other hand, was only required to prove that the driver was negligent. After a detailed analysis, Justice Tobriner, writing for an unanimous court, concluded that the traditional rationales for the statute's classification did not provide a rational basis for the distinction between paying and non-paying automobile guests.

At the beginning of his equal protection discussion, Justice Tobriner seemed to acknowledge an equal protection test with a dual distinction. He pointed out that strict scrutiny should be utilized only in those cases involving "suspect" classifications or touching on "fundamental interests."[302] After deciding that the guest statute did not fit into either of those categories, the court proceeded to depart from the traditional approach of viewing statutes with minimal scrutiny. The court embraced a new test that required a more in-depth examination than that customarily applied in determining a statute's rationality.[303] Justice Tobriner stated that the appropriate standard required that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[304] The requirement, then, was for a "fair and substantial" relationship, not merely "some" relation.

Justice Tobriner's application of this test emphasized that the statute must be examined in light of present day information and circumstances.

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300. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

301. CAL. VEH. CODE § 17158 (West 1971) (amended 1973).

302. 8 Cal. 3d at 862 n.2, 506 P.2d at 216 n.2, 106 Cal. Rptr. at 392 n.2 (citing Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971)).

303. For a discussion of the similarity between the *Brown* test and the equal protection model designed by Gunther in *A Newer Equal Protection, supra* note 265, *see* Note, *The California Supreme Court—Torts*, 62 CALIF. L. REV. 648 (1974): "[I]t appears that the result reached by the court in *Brown* can be explained only on the ground of a modified 'rational basis' test. . . . [T]he standard finally enunciated in *Brown* is very similar to the synthesis worked out in the Gunther model: an old 'rational basis' test given new 'strict scrutiny' teeth by the requirement that the relation between the statute's classifications and purposes must be 'substantial' as well as 'rational.' " *Id.* at 657-58.

304. 8 Cal. 3d at 861, 506 P.2d at 216, 106 Cal. Rptr. at 392 (quoting Reed v. Reed, 404 U.S. 71, 75-76 (1971) (emphasis omitted)).

This included a survey of the state's objectives as recognized by traditional justifications advanced in both judicial precedent and academic commentaries.[305] One of these justifications, that of encouraging hospitality, was deemed by the court to be irrational when viewed in light of the current state of liability insurance coverage.[306] Justice Tobriner pointed out that "a classification which once was rational because of a given set of circumstances may lose its rationality if the relevant factual premise is totally altered."[307]

The *Brown v. Merlo*[308] decision marks a trend away from the court's traditionally restrained role as a check on the legislative power in the areas of economic and social welfare. Contrary to the manner in which courts viewed such legislation in the past, the *Brown* court decided that those classifications that are not suspect and do not involve a fundamental right will not carry a presumption of constitutionality. Rather, the court takes a closer look at the reasonableness of the means used to further the state interest. The *Brown* test, in summary, looks for a fair and substantial relationship between the classification and the objects of the legislation.[309] In so doing, it views the means and practical effects of the statute in terms of present day conditions rather than upon the assumptions and circumstances existing at the time of the statute's adoption.

The state supreme court's record after *Brown v. Merlo*[310] has been mixed. Subsequent to *Brown*, most of the cases reviewing social welfare statutes or economic regulations showed a restraint that prevented such a close examination of the means used, preferring to focus on whether the statutes bear some rational relationship to California's purpose in enacting the provisions.[311] In most of these decisions, however, two or three justices filed strong dissents, criticizing the majority for failing to employ a closer scrutiny.[312] An example of the court's adherence to the traditional approach

305. *Id.* at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.

306. *Id.* at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397.

307. *Id.* at 869, 506 P.2d at 222, 106 Cal. Rptr. at 398. The court cited CAL. CIV. CODE § 3510 (West 1964): "[w]hen the reason of a rule ceases, so should the rule itself." 8 Cal. 3d at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397. This emphasis on present day conditions is significant to *Rice* since the liquor store owner argued that the liquor price laws can no longer be considered reasonable.

308. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

309. Apart from the assertion that the purpose of the statute was determined from rationales traditionally advanced on both academic commentary and judicial precedent, the *Brown* court did not explain how it had determined the guest statute's objectives. For an in-depth look at the various ways in which legislative purpose may be ascertained, see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

310. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

311. *See generally* Adams v. Superior Court, 12 Cal. 3d 55, 524 P.2d 375, 115 Cal. Rptr. 247 (1974); Swoap v. Superior Court, 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973); Crownover v. Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973).

312. In Justice Mosk's dissent in Adams v. Superior Court, 12 Cal. 3d 55, 63, 524 P.2d 375, 380, 115 Cal. Rptr. 247, 252 (1974) (joined by Tobriner, J., and Sullivan, J.), he calls for a

is *Schwalbe v. Jones*,[313] in which the court examined the validity of that part of the state's guest statute dealing with injury to, or death of, an owner riding as a passenger in his own vehicle.[314] After applying the old rationality test, the court concluded that the statute bore a rational relationship to a "conceivable legitimate state purpose."[315] In the course of the 5-2 decision authored by Justice Sullivan, the court admitted that the language in *Brown* could be interpreted as departing from the traditional equal protection standard and as lightening "the burden borne by the assailant under the traditional test."[316] The court warned, however, that to dilute the traditional standard would result in the substitution of judicial policy determination for established constitutional principle.[317]

Only a few other cases decided after *Brown* have supported application of a closer study of classifications that do not involve a "suspect" class or a "fundamental right." *Cossack v. City of Los Angeles*,[318] decided the year following *Brown*, adopted the *Brown* court's view that a statute's rationality should be measured in terms of current conditions rather than those in existence or assumed to be in existence at the time the provision was enacted. The court in *Cossack* ruled on the validity of a 1939 municipal ordinance that prohibited pinball machines and other games of chance in public places or on business premises. The court observed that at the time of the ordinance's adoption, pinball was a game of chance and therefore regulated by the ordinance.[319] Then, noting that technology had changed pinball into a game of skill, the court concluded that the provisions constituted a denial of equal protection since there was an arbitrary classification concerning which games constituted games of chance and thereby fell within the terms of the statute.[320]

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stricter scrutiny. *See also* Justice Tobriner's dissent in Crownover v. Musick, 9 Cal. 3d 405, 431, 509 P.2d 497, 514, 107 Cal. Rptr. 681, 698 (1973) and Justice Burke's dissent in Steed v. Imperial Airlines, 12 Cal. 3d 115, 126, 524 P.2d 801, 808, 115 Cal. Rptr. 329, 336 (1974) (joined by Justices Mosk and Tobriner).

313. 16 Cal. 3d 514, 546 P.2d 1033, 128 Cal. Rptr. 321 (1976).

314. CAL. VEH. CODE § 17158 (West 1971). In Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973), the California Supreme Court had held that the guest statute violated equal protection insofar as it precluded recovery by a "non-owner guest" against the driver for injury or death caused by that driver. *Schwalbe* involved another part of that same statute.

315. 16 Cal. 3d at 517-23, 546 P.2d at 1035-39, 128 Cal. Rptr. at 323-27.

316. *Id.* at 518 n.2, 546 P.2d at 1035 n.2, 128 Cal. Rptr. at 323 n.2.

317. *Id.* Justice Tobriner filed a dissent, in which Justice Mosk concurred. Tobriner defended his position in *Brown*, claiming that "[t]he determination of whether a particular classification is 'arbitrary' or 'reasonable' cannot, of course, be made in the abstract . . . ." *Id.* at 528, 546 P.2d at 1042, 128 Cal. Rptr. at 330 (Tobriner, J., dissenting). After a detailed examination of the law's rationality, he found the provision to be violative of state and federal equal protection guarantees. *Id.* at 537, 546 P.2d at 1049, 128 Cal. Rptr. at 337.

318. 11 Cal. 3d 726, 523 P.2d 260, 114 Cal. Rptr. 460 (1974).

319. *Id.* at 730, 523 P.2d at 263, 114 Cal. Rptr. at 463.

320. *Id.* at 735, 523 P.2d at 266, 114 Cal. Rptr. at 466.

A more recent example of a case supporting *Brown*'s equal protection analysis is *Borer v. American Airlines, Inc.*[321] *Borer* examined the distinction between (1) the award of damages under California's wrongful death statute[322] for a child's loss of parental consortium resulting from the tortious killing of the parent and (2) the denial of such damages to a child whose parent has been merely disabled by tortious injury. Justice Tobriner, writing for the majority, applied *Brown*'s "fair and substantial relationship" standard without discussing whether the challenged statute created a suspect classification or impinged upon a a fundamental interest.[323] He found the statute to be rational, but only after a look at the history[324] and practical effects of both the wrongful death and loss of consortium actions.[325] The examination of the practical effects of the two laws included an inquiry into the availability of alternative methods by which a family unit can recover compensation for the loss of parental care and services in the case of the parent's wrongful death.[326]

In *Brown* and the few cases that have employed its equal protection approach, the California court, like the United States Supreme Court, developed a middle test that studies the practical effects of statutes in the context of present day issues and interests. But it is not yet clear to what extent and in what circumstances the court will use this new standard that manifests a change in the balance of power between the legislature and the judiciary.

The cases using the *Brown* test, however, can be distinguished from the cases decided subsequent to *Brown* in which the traditional test has been employed. Thus far, the cases that used the *Brown* criteria to strike down statutes have involved laws deemed outdated because of changed circumstances; the economic and social situations and the assumptions in existence at the time of the statutes' enactment had changed considerably by the time the provisions were constitutionally challenged. In *Brown*, the court based its holding not on the type of interest involved, but on evidence that showed that the underlying assumptions of the legislature in enacting the provision were no longer tenable. In *Cossack v. City of Los Angeles*,[327] the court emphasized that changes in technology had altered the rationality of the municipal business provision under challenge. The latest case to use the *Brown* test, *Borer v. American Airlines, Inc.*,[328] also utilized a scrutiny that involved a review of the legislative history of the provisions and an examination of the state laws in the context of present day conditions and

321. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).
322. CAL. CODE CIV. PRO. § 377 (West Supp. 1977).
323. 19 Cal. 3d at 451, 563 P.2d at 865, 138 Cal. Rptr. at 309.
324. *Id.* at 451-52, 563 P.2d at 865, 138 Cal. Rptr. at 309.
325. *Id.* at 446-49, 563 P.2d at 862-63, 138 Cal. Rptr. at 306-07.
326. *Id.* at 452, 563 P.2d at 866, 138 Cal. Rptr. at 310.
327. 11 Cal. 3d 726, 523 P.2d 260, 114 Cal. Rptr. 460 (1974).
328. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

alternatives. Even though the statutes in *Borer* were upheld, the court's analysis included a determination of whether they were rational after being in existence, in some statutory form, for over one hundred years.

A case purporting to apply the traditional rationality test has also used the *Brown* approach of reviewing current data. In *D'Amico v. Board of Medical Examiners*,[329] decided subsequent to *Brown*, the court examined vocational licensing provisions in terms of present day conditions. The case concerned an equal protection challenge of the Osteopathic Act of 1962[330] together with the 1962 Amendment to the Medical Practice Act,[331] which prevented consideration of osteopaths for licenses to practice as physicians and surgeons in California. The California Supreme Court stated that the appropriate standard of review was the conventional rational relationship test traditionally applied in cases involving occupational licensing;[332] such laws are presumed constitutional unless the party assailing the provisions demonstrates the irrationality of the classification.[333]

The court first noted the existence of a conceivable state interest in maintaining the laws—that of protecting the public "from harm suffered at the hands of poorly trained or incompetent medical practitioners."[334] Instead of ending the equal protection inquiry there, however, the court proceeded to determine whether that interest was indeed served by the laws in question. The court reviewed evidence presented by the plaintiffs that showed osteopathy to be a complete school of medicine and surgery whose practitioners successfully engaged in the full range of activities commonly considered to constitute medical science. Deciding that there was no longer any reason to question the intrinsic ability or inability of osteopathic training to produce competent and qualified physicians, the court held the laws invalid to the extent that they forbade the licensure of graduates of osteopathic colleges as physicians and surgeons regardless of individual qualifications. Thus, although the court had presumed constitutionality, it gave a full review to the evidence offered by the plaintiffs to prove that the underlying assumptions to the laws could not be maintained.

D'Amico and all three of the cases using the *Brown* test employed a close examination despite the fact that they considered the type of provision that had historically warranted minimum scrutiny. Judging from the statutes struck down in *Brown, Cossack* and *D'Amico*, it appears that despite the absence of a suspect classification or fundamental interest, the court can apply a strict test and invalidate a statute that is outdated. The next step in this discussion is to determine whether this stricter standard should be applied in *Rice v. Alcoholic Beverage Control Appeals Board*.[335]

329. 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974).
330. CAL. BUS. & PROF. CODE §§ 3600 to 3600-5 (West 1974) (§ 3600-5 repealed 1977).
331. *Id.* § 2310 (West 1974).
332. 11 Cal. 3d at 17, 520 P.2d at 22, 112 Cal. Rptr. at 798.
333. *Id.* at 16-17, 520 P.2d at 21-22, 112 Cal. Rptr. at 797-98.
334. *Id.* at 22, 520 P.2d at 26, 112 Cal. Rptr. at 802.
335. 137 Cal. Rptr. 213 (1977).

As discussed above,[336] the assumptions upon which the liquor price maintenance laws were based over forty years ago, in the post-prohibition era, have now been challenged by statistical research. The California Supreme Court could find that a closer examination of the state liquor laws is warranted due to (1) the altered horizontal price activity in California's liquor market, (2) a new alternative means for eliminating below-cost selling and (3) the increased availability of studies on temperance and the state's liquor market. Considering the amount of data indicating that the provisions are now irrational and contrary to the public interest, *Rice* seems to be an appropriate situation in which to use *Brown*'s closer equal protection scrutiny. Therefore, the final subsection of this note will briefly review California's liquor pricing program in terms of the *Brown* requirement of a fair and substantial relationship to the statutes' objectives.

3. *A Closer Scrutiny: California Retail Price Maintenance Laws for Liquor*

In applying the *Brown* test, the California Supreme Court must determine whether the state's retail price maintenance program for liquor bears a "fair and substantial relationship" to its objectives when examined in light of current market conditions. The court of appeal in *Rice* intimated that a demonstration of "changed economic circumstances" could result in a showing that the provisions were invalid, but concluded that no such change had been established.[337] In so holding, the court relied on the state supreme court's prior holdings in *Allied Properties* and *Wilke*, and seemed to ignore available data on current conditions in the California liquor market that would have demonstrated such changed circumstances. If, however, the court had applied the type of scrutiny outlined in *Brown*, and had carefully surveyed this data, it would have seen that in the context of the current economic environment, the provisions are not a rational means of achieving the state's purposes.[338]

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336. *See generally* notes 234-49 and accompanying text *supra*.

337. 137 Cal. Rptr. at 220. The court of appeal pointed out that "[w]hile the Board speaks of a change in economic circumstances since 1939, when the price maintenance laws took effect, it cites no change since 1969, when the Supreme Court, in *Samson Market*, last upheld the statutes." *Id.* As has already been demonstrated in this note, at the time of *Samson Market*, the comprehensive reports on the California liquor industry that exist now were in large part unavailable.

338. Writer Rupert Wilkinson observed in his book, *The Prevention of Drinking Problems:*

> [T]he great bulk of the [economic] controls reflect present circumstances much less than they do those of the past: the evils of the old-time saloon; the fervor of Prohibitionism; and the anxieties of Repeal, when men sought simple checks against a return of the old abuses.
>
> Since those times the changes have been great. Excessive drinking is still with us, but its styles and environment have altered greatly. . . . Whatever their original merits, the vast multitude of rules governing liquor sales do very little today to promote temperance. In some respects they may well promote the opposite.

R. WILKINSON, THE PREVENTION OF DRINKING PROBLEMS 52-53 (1970).

This note has already observed that the courts in *Allied Properties v. Department of Alcoholic Beverage Control*[339] and *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control*[340] made assumptions concerning the pricing program's success in promoting temperance that now appear unfounded.[341] The state supreme court has upheld the validity of the laws partly on the assumption that the elimination of price cutting, bargain sales and advertising of low prices at the retail level tends to reduce consumption of liquor.[342] The court, however, did not establish a concrete basis for this assumption.[343] Today, statistical data demonstrates that in the past twenty-five years, the per capita consumption of alcoholic beverages has generally risen instead of decreased.[344] Thus, it appears doubtful that the pricing program has had any significant effect on the encouragement of temperance.

The note has also established that the retail price maintenance laws are an ineffective means of achieving the other stated objective for the laws—that of promoting the orderly distribution of liquor in order to prevent undue pressure on retailers to violate other state laws for the marketing of liquor.[345] As already mentioned above, recent investigation by the United States Congress has resulted in the finding that the absence of fair trade laws did not cause economic harm to small, independent businesses;[346] rather, the growth of small retailers was significantly higher in those states with free market systems than in those states that had enacted fair trade regulations.[347] In light of these findings by Congress, the fear of undue economic pressure on small liquor businesses no longer appears to be a valid justification for maintaining the state's liquor pricing program.

Another indication of a statute's irrationality, as pointed out in *Brown v. Merlo*,[348] is the existence of alternative means for offering the protection

339. 5 Cal. 2d 141, 346 P.2d 737 (1959).

340. 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966).

341. *See generally* notes 234-43 and accompanying text *supra*.

342. Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 360, 420 P.2d 735, 743, 55 Cal. Rptr. 23, 31 (1966); Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal. 2d 141, 148, 347 P.2d 737, 741 (1959).

343. The court based its assumption partly on a New Jersey case in which the New Jersey Supreme Court held that in formulating its policy for a retail liquor restriction, "the Legislature could properly accept 'widely held views as to sound liquor control,' including the 'beliefs that the consumption of liquor is elastic rather than inelastic, and that price cuttings and their advertisement, along with comparable practices, are undesirable in the liquor field as tending to stimulate consumption . . . .'" Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 361, 420 P.2d 735, 743, 55 Cal. Rptr. 23, 31 (quoting Grand Union Co. v. Sills, 43 N.J. 390, 204 A.2d 853 (1964)).

344. *See* notes 238-40 *supra*.

345. *See* notes 246-49 and accompanying text *supra*.

346. *See* note 247 and accompanying text *supra*.

347. *See* note 248 and accompanying text *supra*; *see also* text accompanying note 249 *supra*.

348. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

allegedly provided by the statute in question.[349] As discussed above, California Business and Professions Code section 24755(g)[350] prohibits below cost sales and thereby provides protection for small liquor businesses that might otherwise be subjected to anticompetitive price-cutting activities by volume liquor retailers.[351] The provision can be enforced more easily than the Unfair Business Practices Act,[352] as it does not require proof of an intent to injure. Additionally, enforcement of section 24755(g) would not involve a prohibitive cost to the smaller sellers, since enforcement is effectuated by the Department of Alcoholic Beverage Control rather than by private actions.

When judged under the "fair and substantial relationship" standard of equal protection, California's minimum retail price laws for alcoholic beverages should be found invalid. The means employed by the state can no longer be deemed to have a substantial relationship to the statute's objectives of promoting both temperance and orderly marketing conditions for liquor. The practical effect of the laws is to provide liquor distillers with an unchecked opportunity to set retail prices for their products—the only industry to have such an economic advantage. As a result of the liquor price laws, California liquor consumers are subjected to anticompetitive marketing conditions that differ from marketing conditions for any other product in the state. Thus, the state's liquor consumers have been denied equal protection under the law. As the laws promote neither of their stated purposes and afford no economic protection that is unique from other state provisions, they no longer appear to be a rational method of controlling the state liquor industry. Therefore, the California Supreme Court should invalidate the state's minimum retail price maintenance laws for liquor.

Conclusion

California's pricing scheme for liquor may have been reasonable in the post-prohibition era when the states were experimenting with various methods of encouraging temperance and were attempting to keep a close watch on the liquor industry. Today, however, the pricing program appears to benefit liquor distillers more than it protects California consumers. While the distillers have complete control over setting retail price levels, the liquor consumers must pay prices set according to a system violative of the Sherman Antitrust Act. In *Rice v. Alcoholic Beverage Control Appeals Board*,[353] the California Supreme Court should abolish the program under either of two constitutional theories.

349. *See* note 249 *supra* for a discussion of some other indications that the laws are irrational and harmful to consumers.

350. CAL. BUS. & PROF. CODE § 24755(g) (West Supp. 1977).

351. *See* notes 251-53 and accompanying text *supra*.

352. CAL. BUS. & PROF. CODE §§ 17000-17101 (West 1964 & Supp. 1977). *See* note 252 and accompanying text *supra*.

353. 137 Cal. Rptr. 213 (1977).

The court could find that the state liquor program is not protected from the Sherman Act by section two of the Twenty-first Amendment. When the states moved to repeal prohibition through the Twenty-first Amendment, section two was added to insure protection to those dry states that wanted to bar importation of liquor. In early cases, the Amendment was construed by the Court as granting the states wide power to regulate varied aspects of their liquor industries. In subsequent delineation and limitations on the Amendment's scope, however, the Court has established that a determination of commerce clause limitations on state liquor regulations now involves an accommodation between the state and federal interests at stake. As the California laws do not warrant a common law "state action" exemption to the Sherman Act, the California court should apply this accommodation test to weigh the competing state and federal interests involved in the Sherman Act challenge in *Rice*. Current data and research show the laws to be an unnecessary and ineffective means of promoting their stated goals. Because the state pricing laws are not the type of regulation that the Twenty-first Amendment was established to protect, and in light of a strongly articulated federal policy against resale price maintenance, application of the accommodation test results in the determination that the federal law prevails.

The United States Supreme Court has also established that section two of the Amendment does not affect the application of the equal protection clause; a state equal protection standard that examines the practical effect of a state's regulations provides another avenue by which the California court could abolish the liquor laws. Thus far, the court has used this closer scrutiny to invalidate laws which, though once deemed rational, are no longer reasonable due to changed social or economic circumstances. The new test seems to be the appropriate one to apply in *Rice* because, as already mentioned, changed conditions have out-dated California's liquor price laws. After reviewing the data demonstrating the ineffectiveness of the price scheme, the court should find that the laws do not bear a substantial relationship to their objectives.

It is difficult to justify these ineffective laws in the face of a strong federal concern in promoting and maintaining a free market system. Whichever mode of review it employs, the California Supreme Court should invalidate the state liquor industry's outmoded and anticompetitive price laws. *Rice v. Alcoholic Beverage Control Appeals Board*[354] provides the court with an opportunity to do so.

354. *Id.*