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Supremacy Clause vs. Twenty-First Amendment: Low Cost Military Liquor Over State Antidiversion Regulations in United States v. North Dakota

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COMMENTS

SUPREMACY CLAUSE VS. TWENTY-FIRST AMENDMENT: LOW COST MILITARY LIQUOR OVER STATE ANTIDIVERSION REGULATIONS IN *UNITED STATES v. NORTH DAKOTA*

The twenty-first amendment to the United States Constitution repealed national prohibition under the eighteenth amendment.[1] Section 2 of the amendment reserves to the states the authority to regulate intoxicating liquors brought within their borders.[2] Although early United States Supreme Court decisions

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[1] U.S. CONST. amend. XVIII (1919, repealed 1933). Ratified in 1919, the eighteenth amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." *Id.*

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

The language of section 2 of the twenty-first amendment bears remarkable similarity to both the Wilson Act of 1890 and the Webb-Kenyon Act of 1913. The Wilson Act provides in part:

> All . . . intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory . . . .

27 U.S.C. § 121 (1982).

The Webb-Kenyon Act provides that "[t]he shipment or transportation . . . of any . . . intoxicating liquor . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States . . . is prohibited." 27 U.S.C. § 122 (1982).

The close resemblance of the twenty-first amendment to the Wilson and Webb-Kenyon Acts has led some authorities to conclude that the primary object of the amendment was to constitutionalize the purposes behind those Acts. *See* Craig v. Boren, 429 U.S. 190, 205-06

construed section 2 as according plenary powers to the states,[3] and the amendment has consistently been interpreted as granting states considerable regulatory authority over liquor,[4] no longer is this authority deemed to be exclusive or absolute.[5] The Supreme

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(1976). The Wilson and Webb-Kenyon Acts were primarily intended to enable the states to overcome regulatory limitations frequently imposed by operation of the commerce clause. *See id.* The principal effect of the twenty-first amendment is that it creates "an exception to the normal operation of the Commerce Clause." *See id.* at 206; *see also* Battipaglia v. New York State Liquor Auth., 745 F.2d 166, 169 (2d Cir. 1984) (§ 2 grants states authority to regulate liquor without commerce clause limitations), *cert. denied*, 470 U.S. 1027 (1985). For an overview of the history of the twenty-first amendment, see Note, *The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1579-83 (1975).

[3] *See, e.g.*, Joseph F. Finch & Co. v. McKittrick, 305 U.S. 395, 398 (1939) (twenty-first amendment permitted state law to bar importation of liquor from other states); *see also* Mahoney v. Joseph Triner Corp., 304 U.S 401, 404 (1938) (discrimination against imported liquor allowed although not an incident of reasonable regulation).

The Supreme Court first had occasion to interpret section 2 of the amendment in State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936). The Court sustained a California tax on imported liquor. *Id.* at 64. In so doing, it rejected the challengers' argument that the amendment should be construed just as the statutes upon which it was allegedly modeled had been construed. *Id.* at 63-64; *see supra* note 2 (text of statutes). The Court rejected an appeal to construe section 2 narrowly, noting that the broad language of the amendment was unambiguous. *Young's Market*, 299 U.S. at 63-64. By relying solely on the language of the amendment and broadly interpreting the powers granted states under the amendment, the *Young's Market* Court enabled the state tax regulation to withstand both commerce clause and equal protection challenges. *See id.* at 62, 64; *see also* Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939) (twenty-first amendment grants states right to completely restrict transportation of liquor into state).

[4] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-24, at 476-77 (2d ed. 1988). "[C]onsiderable power to control importation is reserved to the states by the twenty-first amendment. The amendment sanctions state action which taxes, regulates, or completely bars the importation of liquor for actual use within the state itself, even where such action would be forbidden as to any other commodity." *Id.*; *see also* City of Newport v. Iacobucci, 479 U.S. 92, 97 (1986) (per curiam) (twenty-first amendment held to defeat first amendment claim); New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 718 (1981) (per curiam) (same); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329 (1964) (if state statute barring passage of liquor through its territory involved any other commodity, it would violate commerce clause); *Young's Market*, 299 U.S. at 62 (state fee to obtain license to import beer valid although would have been invalid as undue burden on interstate commerce prior to enactment of twenty-first amendment).

[5] *See, e.g.*, 324 Liquor Corp. v. Duffy, 479 U.S. 335, 352 (1987) (Sherman Act defeated state's twenty-first amendment defense); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 108 (1980) (state cannot tax imported liquor in violation of import-export clause); South Dakota v. Dole, 791 F.2d 628, 633 (8th Cir. 1986) (in commerce clause area, state power over liquor not exclusive), *aff'd*, 483 U.S. 203 (1987); *see also* Comment, *Pre-Empting State Action Taken Pursuant to the Twenty-First Amendment*, 53 TEMP. L.Q. 590, 603 (1980) (Supreme Court has narrowed state powers under § 2).

In addition, the Supreme Court has articulated certain limitations to the states' broad powers under the twenty-first amendment. For example, the Court has stated that the commerce clause is not completely inapplicable in the area of liquor regulation. *See, e.g.*, *Midcal*

Court, for example, has invalidated state laws regulating liquor sold on federal enclaves over which the federal government exercised exclusive jurisdiction.[6] Recently, in *United States v. North Dakota*,[7] the United States Court of Appeals for the Eighth Circuit further eroded the states' regulatory power by declaring unconstitutional North Dakota's regulation of the sale of liquor to federal military enclaves[8] over which the state and federal governments

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Aluminum, 445 U.S. at 110 (while states have substantial discretion to regulate liquor under § 2, power "subject to federal commerce power in appropriate cases"); William Jameson & Co. v. Morgenthau, 307 U.S. 171, 172-73 (1939) (no substance in argument that twenty-first amendment gives states complete and exclusive control unlimited by commerce clause); *see also* Jatros v. Bowles, 143 F.2d 453, 455 (6th Cir. 1944) (federal government not deprived of all legislative powers regarding intoxicants). The Court has also limited the states' section 2 powers where the import-export clause of the Constitution has been implicated. *See, e.g.*, Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 344 (1964) (twenty-first amendment does not permit what is expressly forbidden by import-export clause of the Constitution). Issues of state power under section 2 have also arisen in the context of equal protection claims under the fourteenth amendment. *See, e.g., Craig*, 429 U.S. at 204-05 (§ 2 of amendment does not prevent invalidation of liquor regulation where there is denial of equal protection under fourteenth amendment).

[6] *See* United States v. State Tax Comm'n, 412 U.S. 363, 368 (1973) [hereinafter *Tax Commission I*]. Known as *Tax Commission I*, this case involved a federal government challenge to a Mississippi law which made the State Tax Commission the sole importer and wholesaler of alcoholic beverages distributed within the state, including any military post. *Id.* at 364. The Commission was required to add a markup to the cost of all alcoholic beverages, *id.* at 364-65, and the federal government challenged the state's authority to enforce the law as to the military posts. *Id.* at 366-67. Of the four military installations involved, the United States exercised exclusive jurisdiction over two, and concurrent jurisdiction over the other two. *Id.* at 367. In rejecting the Commission's contention that the twenty-first amendment allowed the state to impose regulations affecting the bases over which the federal government exercised exclusive jurisdiction, the Court emphasized that they were under the exclusive jurisdiction of the federal government and "constitute[d] federal islands which no longer constitute[d] any part of Mississippi nor function[ed] under its control." *Id.* at 375 (quoting United States v. State Tax Comm'n, 340 F. Supp. 903, 906 (S.D. Miss. 1972)). Consequently, the military posts were not subject to the state's twenty-first amendment power. *Id.* at 376; *see also* Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 538 (1938) (state could not enforce liquor regulations in park after having ceded exclusive jurisdiction to federal government).

[7] 856 F.2d 1107 (8th Cir. 1988).

[8] *See* 32 C.F.R. § 261.3 (1987). Under Department of Defense policy, liquor purchases and sales are made by nonappropriated fund instrumentalities ("NAFI's"). *Id.*; *see United States v. North Dakota*, 856 F.2d at 1108.

The NAFI's are operated in accordance with Department of Defense Directive 1015.1 (Aug. 19, 1981), but do not receive federal funding. *See* 32 C.F.R. § 261.3. One important function of the NAFI's is to resell the liquor purchased and use the profits generated to support morale, welfare, and recreational programs for the benefit of military personnel. *See id.* Another related Department of Defense regulation provides:

> The Department of Defense shall cooperate with local, state, and federal officials . . . . However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other [Department of Defense] installation . . . shall be in

exercise concurrent jurisdiction.[9]

In *United States v. North Dakota*, the state had enacted regulations in an effort to prevent the unlawful diversion of liquor into its domestic commerce.[10] One regulation required out-of-state suppliers of alcoholic beverages to affix a label to each bottle destined for a federal military installation indicating that the liquor was exclusively for consumption within the military enclave.[11] After learning the regulations would increase the cost of liquor to the military,[12] the United States brought suit seeking a declaration that the regulations were unconstitutional and an injunction against their enforcement.[13] The state's regulations were invalid under the supremacy clause,[14] the United States asserted, because they conflicted with a federal regulation requiring military procurement of alcohol at the "most advantageous" price.[15] In re-

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such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors. These other factors shall not be construed as meaning any submission to state control, nor shall cooperation be construed . . . as an admission of any legal obligation to submit to state control, [or] pay state or local taxes . . . .

32 C.F.R. § 261.4 (1987) (quoting Armed Services Military Club Package Store Regulations, Department of Defense 1015.3-R, ch. 4, § C).

The Secretary of Defense promulgates these regulations under a statute authorizing the Secretary to "make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in . . . intoxicating liquors to or by members of the Armed Forces." 50 U.S.C. app. § 473 (Supp. IV 1986).

[9] *United States v. North Dakota*, 856 F.2d at 1112.

[10] *See id.* at 1108.

[11] *See* N.D. ADMIN. CODE § 84-02-01-05(7) (1986). This regulation provides in part: "All liquor destined for delivery to a federal enclave in North Dakota . . . shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively." *Id.*

The other North Dakota regulation required suppliers to file a monthly report disclosing the amount of liquor shipped into the state or returned. *See* N.D. ADMIN. CODE § 84-02-01-05(1) (1978).

[12] *United States v. North Dakota*, 856 F.2d at 1109. The military estimated that its liquor bill would increase by $200,000 to $250,000 since the suppliers would pass on the costs of complying with the regulations. *Id.* The court maintained that because this increase in costs prevented the military from maximizing profits, the regulations conflicted with federal policy. *Id.* at 1113.

[13] *Id.* at 1108.

[14] *Id.*; *see* U.S. CONST. art. VI. The supremacy clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

[15] *United States v. North Dakota*, 856 F.2d at 1108; *see* 32 C.F.R. § 261.4 (1987).

sponse, the State of North Dakota maintained it had acted properly to prevent the unlawful diversion of liquor into its domestic commerce under the powers granted states by the twenty-first amendment.[16]

On cross motions for summary judgment, the district court denied the United States' motion and granted summary judgment in favor of North Dakota.[17] The court found no conflict between the state and federal regulations, noting that although the lowest cost rose, the state's regulation still permitted purchases at the lowest available cost.[18] The district court also found that even if a conflict between the regulations existed, the state's interest in preventing diversion would prevail over the federal interest in purchasing liquor at the lowest price.[19] On appeal, the Eighth Circuit reversed, holding that the state had no power under the twenty-first amendment to regulate the military's procurement of liquor.[20] The court also concluded that even if the state had jurisdiction over the subject matter by virtue of the twenty-first amendment, its regulations would be preempted by federal law.[21]

Writing for the court, Judge Henley noted that the principles underlying the supremacy clause mandate the general dominance of federal over state law.[22] Relying primarily on the Supreme

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[16] *United States v. North Dakota*, 856 F.2d at 1108.

[17] United States v. North Dakota, 675 F. Supp. 555, 559 (D.N.D. 1987), *rev'd*, 856 F.2d 1107 (8th Cir. 1988). Although the district court granted summary judgment based on its finding that there were "no genuine issues of material fact," *id.* at 555, at least one liquor supplier had contended that the label required by the regulation was actually a "tax stamp." *Id.* at 556. This claim was disputed by the state and apparently was not seriously advanced by the United States. *See id.* at 556 n.2

[18] *Id.* at 557.

[19] *Id.* at 559. The district court concluded that the state's interest in preventing diversion of liquor into its stream of commerce was much more significant than the federal interest in keeping costs down. *Id.* In making this determination, the court relied in part upon the Supreme Court's decision in Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), wherein the Court employed a similar balancing test between competing state and federal interests. *Id.* at 714-16; *see United States v. North Dakota*, 675 F. Supp. at 558-59. In *Crisp*, however, the Court determined that the balance tipped in favor of the federal interests, and thus enforcement of the state law was barred. *See* 467 U.S. at 716.

[20] *United States v. North Dakota*, 856 F.2d at 1112.

[21] *See id.* at 1112-13. The court weighed three considerations in concluding that federal law preempted the state regulations: (1) the pervasiveness of the federal program; (2) the need for uniformity; and (3) the danger of conflict between the state law and the federal program. *See id.* In its analysis, the court placed considerable emphasis on the third of these considerations, the danger of state and federal conflict. *See id.* at 1113.

[22] *Id.* at 1112. The *United States v. North Dakota* court stated that these principles included the need for the uniformity of federal law, as well as the need " 'to avoid a break-

Court's decisions in *Tax Commission I*[23] and *Tax Commission II*,[24] Judge Henley acknowledged a state's nearly unlimited authority when exercising its "core power" under the twenty-first amendment,[25] but found that such power ceases when the state exercises it over an instrumentality of the federal government.[26] Moreover, the court continued, even if the twenty-first amendment conferred jurisdiction, the state's regulations would nonetheless be preempted by federal law[27] because of the strong federal interest in procuring alcoholic beverages at the most profitable price.[28]

Dissenting, Chief Judge Lay asserted that the *Tax Commission* cases were inapplicable since North Dakota's regulations constituted neither a tax on the federal government nor an attempt to regulate liquor consumption on a federal enclave.[29] The Chief Judge also contended that the regulations did not conflict with

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down of administration through possible conflicts arising from inconsistent requirements.' " *Id.* at 1111 (quoting Mayo v. United States, 319 U.S. 441, 445 (1943)). The court also found that " '*[a] corollary to this principle is that the activities of the Federal Government are free from regulation by any state.*' " *Id.* (quoting Mayo v. United States, 319 U.S. 441, 445 (1943)).

[23] 412 U.S. 363 (1973). For the relevant facts and holding of this case, see *supra* note 6.

[24] United States v. Tax Comm'n, 421 U.S. 599 (1975) [hereinafter *Tax Commission II*]. This case arose from an appeal of the *Tax Commission I* case after it had been remanded to the district court. *Id.* at 603. One issue raised on appeal in *Tax Commission II* concerned the constitutionality of a state regulation requiring that liquor suppliers collect and remit to the Mississippi Tax Commission a tax from two military installations over which the state exercised concurrent jurisdiction. *Id.* at 600-01. The Supreme Court concluded that although the liquor suppliers were responsible for the payment of the tax, the legal impact of the tax fell upon the United States. *Id.* at 610. The Court thus held the imposition of the tax unconstitutional. *See id.* at 614.

[25] *United States v. North Dakota*, 856 F.2d at 1111.

[26] *Id.*

[27] *Id.* at 1112. For a discussion of the preemption doctrine, see *supra* note 21 and *infra* note 44.

[28] *United States v. North Dakota*, 856 F.2d at 1113-14. According to the court, this strong federal interest arose from the long-standing federal policy of purchasing liquor for the military at a price which remains competitive after the military's markup, and using the profits for the welfare and morale of military personnel and their families. *See id*; *see also supra* note 8 (discussing regulatory framework and policy).

[29] *United States v. North Dakota*, 856 F.2d at 1115 (Lay, C.J., dissenting). The Chief Judge underscored the fact that the sole purpose behind North Dakota's regulations was to prevent unlawful diversion—an objective quite different from the scheme to indirectly tax the federal government in *Tax Commission I*. *See id.* (Lay, C.J., dissenting). Chief Judge Lay, noting the Supreme Court's statement in *Tax Commission I* acknowledging a state's right to regulate liquor destined for federal enclaves to prevent diversion, argued that the effect of the majority's holding was to "slight" the import of the Supreme Court's analysis of the problem. *Id.* (Lay, C.J., dissenting).

federal law or policy,[30] and argued that the majority's holding would render section 2 of the twenty-first amendment meaningless.[31]

It is submitted that the court's holding unjustifiably elevates the federal policy of obtaining inexpensive liquor for military enclaves over the states' strong interest in liquor regulation implicit in the enactment of section 2 of the twenty-first amendment. This Comment will examine the extent of a state's twenty-first amendment authority to regulate liquor destined for federal enclaves. In addition, this Comment will suggest that application of traditional preemption analysis is inappropriate in the context of a state exercising its regulatory powers under the twenty-first amendment.

THE TWENTY-FIRST AMENDMENT AND FEDERAL ENCLAVES

When the propriety of a state's attempt to regulate liquor destined for a federal enclave is challenged, the court must first look to the jurisdictional status of the territory involved.[32] It is well established that an enclave under exclusive federal jurisdiction represents a "distinct sovereignty" that, notwithstanding the twenty-first amendment, is not subject to direct state regulation.[33] But an

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[30] *Id.* (Lay, C.J., dissenting). The Chief Judge said the suggestion that the military should generally be exempt from state regulation in its procurement of liquor is "ridiculous in light of the myriad of state regulations applied to distillers and suppliers of liquor." *Id.* at 1116 (Lay, C.J., dissenting). He also noted that compliance with regulations already in effect, such as those impacting upon bottling and the treatment of employees, also necessarily increased the cost of liquor. *Id.* (Lay, C.J., dissenting). The Chief Judge argued that the federal policy calling for purchases at the lowest cost contemplated the presence of such necessary expenses. *Id.* (Lay, C.J., dissenting).

[31] *See id.* at 1115-16 (Lay, C.J., dissenting).

[32] *See, e.g., Tax Commission I*, 412 U.S. 363, 378, 380 (1973) (while enclave under exclusive jurisdiction is "foreign land" to state, enclave under concurrent jurisdiction deemed within state's territory).

[33] *See id.* at 374 (quoting Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 538 (1938)). The idea that a state's twenty-first amendment powers could not extend to federal enclaves over which the national government had exclusive jurisdiction was one of the first exceptions the Supreme Court carved out under the amendment. *See* Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938). In *Collins*, the State of California had ceded jurisdiction over a national park to the United States. *Id.* at 523-26. Although California had reserved some rights under the jurisdictional grant, such as the right to tax persons and property on the land, the right to regulate liquor was not reserved. *Id.* at 525-26. California sought to enforce its Alcoholic Beverage Control Act against a lessee of the park engaged in the business of selling liquor. *Id.* at 521-22. The regulatory provisions of the statute beyond the scope of the rights reserved were held to be unenforceable against the lessee. *Id.* at 539. The Court noted that the twenty-first amendment was inapplicable since "[t]he delivery and use is in the Park, and under a distinct sovereignty," and therefore, "[t]here was no

enclave over which a state exercises concurrent jurisdiction is not a distinct sovereignty, and thus may be subject to state regulations enacted pursuant to the twenty-first amendment.[34]

The *United States v. North Dakota* court correctly noted that for federal instrumentalities certain types of state liquor regulation, such as taxation,[35] may be precluded by the Constitution whether or not jurisdiction over the instrumentality is exclusively within the province of the federal government.[36] It is submitted, however, that the court erroneously extended the absolute restriction on a state's section 2 regulatory authority over federal enclaves—an attribute of exclusive federal jurisdiction—to the military bases in North Dakota which were under concurrent state jurisdiction.[37] Although the court relied heavily on the *Tax Commission* cases, the Supreme Court's decisions in *Tax Commission I* and *Tax Commission II* do not rest on any principle which would automatically foreclose North Dakota's right to exercise its regulatory powers regarding a base over which it has concurrent jurisdiction. Instead, the *Tax Commission* cases merely bar direct regulation of enclaves under exclusive federal jurisdiction,[38] and prohibit state *taxes* against federal instrumentalities whether under concur-

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transportation into California 'for delivery or use therein.' " *Id.* at 538 (quoting U.S. CONST. amend. XXI, § 2); *see also Tax Commission I*, 412 U.S. at 375 (state's § 2 power did not apply to sale of liquor earmarked for military bases since use on bases was not within the meaning of "for delivery or use" within the state); Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 386 (1944) (state not justified in seizing liquor destined for military reservation over which jurisdiction vested exclusively in federal government).

[34] *See* United States v. State Tax Comm'n, 340 F. Supp. 903, 907 (S.D. Miss. 1972), *vacated*, 412 U.S. 363 (1973). The district court observed that "as to the concurrent jurisdiction bases, the liquor sales transactions occurred within the jurisdiction of the State of Mississippi, even where the consumption or other use of the liquor was consummated within the territorial confines of the base." *Id.* When this case was presented to the Supreme Court on appeal in *Tax Commission I*, the Court cited the above observation of the district judge with approval. *See Tax Commission I*, 412 U.S. at 380.

[35] *United States v. North Dakota*, 856 F.2d at 1110; *see Tax Commission II*, 421 U.S. 599, 614 (1975); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 430 (1819). In *McCulloch*, Chief Justice Marshall noted that "the power to tax involves the power to destroy," *id.* at 431, and that a state could therefore not tax the means used by the federal government when acting pursuant to the Constitution. *See id.* at 430.

[36] *See Tax Commission II*, 421 U.S. at 614. In *Tax Commission II*, the Supreme Court stated that "it is a 'patently bizarre' and 'extraordinary conclusion' to suggest that the Twenty-first Amendment abolished federal immunity as respects taxes on sales to the bases where the United States and Mississippi exercise concurrent jurisdiction." *Id.* (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964)).

[37] *See supra* notes 33-34 and accompanying text.

[38] *See Tax Commission II*, 421 U.S. at 613; *Tax Commission I*, 412 U.S. at 368.

rent or exclusive jurisdiction.[39]

As Chief Judge Lay observed in his dissent, the North Dakota regulations did not amount to a tax on a federal instrumentality, nor were they an attempt by North Dakota to regulate liquor consumption on the military bases.[40] As for the state's interest in preventing diversion, the Supreme Court in *Tax Commission I* recognized that interest as substantial enough that a state could even prevent the diversion of liquor destined for federal enclaves by regulation independent of its twenty-first amendment powers.[41] It is therefore submitted that when a state is acting pursuant to the express terms and intendment of the twenty-first amendment, the degree of recognition accorded its power and interests should be substantially heightened.

An Alternative to Preemption

The supremacy clause provides that acts of the national government, enacted "in pursuance" of the Constitution[42] are superior to acts of a state.[43] The preemption doctrine[44] is grounded in this

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[39] *See Tax Commission II*, 421 U.S. at 612-13.

[40] *United States v. North Dakota*, 856 F.2d at 1115 (Lay, C.J., dissenting).

[41] *See Tax Commission I*, 412 U.S. at 377. In the absence of conflicting regulation, Justice Marshall suggested that the State of Mississippi, under its police powers, could regulate shipments to military enclaves under exclusive federal jurisdiction during their passage through the state in order to prevent the unlawful diversion of liquor into its internal commerce. *Id.*; *see* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 333 (1964); Duckworth v. Arkansas, 314 U.S. 390, 396 (1941).

[42] *See supra* note 14 (text of supremacy clause).

[43] *See* Note, *The Burger Court and Preemption Doctrine: Federalism in the Balance*, 60 Notre Dame L. Rev. 1233, 1254 (1985). "The Court generally will not permit state laws to stand if they conflict with the federal law because they inhibit the legitimate exercise of federal power." *Id.*

[44] Preemption is a "[d]octrine adopted by U.S. Supreme Court holding that certain matters are of such a national, as opposed to local, character that federal laws pre-empt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law." Black's Law Dictionary 1060 (5th ed. 1979).

In Arons v. New Jersey State Board of Education, 842 F.2d 58 (3d Cir. 1988), the court explained the practical application of the doctrine as follows:

> The standard governing federal preemption of state statutes and regulations most often is based on a clear or unambiguous expression of congressional intent. If Congress demonstrates an intent to occupy a given field, any state law falling within that field is preempted. If Congress, however, does not entirely displace state regulation over the matter, state law is still preempted to the extent it actually conflicts with the federal law or stands as an obstacle to achieving the full purposes and objectives of Congress.

Id. at 61; see Hillsborough County v. Automated Laboratories, 471 U.S. 707, 713 (1985); Silkwood V. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Jones v. Rath Packing Co., 430

clause,[45] and the Supreme Court's traditional preemption analysis strongly favors federal law.[46] Nevertheless, when a state acts under the affirmative grant of power from the twenty-first amendment, it too is acting pursuant to the Constitution, and thus its acts, at a minimum, should be accorded equal deference.[47] In *United States v. North Dakota*, the court held that even if section 2 of the twenty-first amendment empowered the state to regulate the military's suppliers, conflict between federal and state regulations led to the preemption of the state law.[48] It is submitted that while the use of traditional preemption analysis might generally be appropri-

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U.S. 519, 525 (1977).

[45] U.S. CONST. art. VI. For the text of the supremacy clause, see *supra* note 14.

[46] *See* Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984) (preemption of state law can occur expressly, implicitly, or by occupation of field by federal legislation). *See generally* Note, *supra* note 43, at 1234-37 (discussing development of preemption doctrine).

[47] *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 713 (1984). In *Crisp*, Oklahoma law permitted the sale of alcohol but prohibited television stations from broadcasting liquor commercials. *Id.* at 694-95. However, Federal Communications Commission ("FCC") regulations forbade the stations from altering the broadcasting signals they received, some of which carried liquor advertisements. *Id.* at 696. Although compliance with state law would require violation of the FCC regulations, the state threatened the plaintiffs, who were cable television station operators, with criminal prosecution if they persisted in carrying liquor advertisements. *Id.* The station operators brought suit seeking declaratory and injunctive relief. *Id.* The Supreme Court held that the Oklahoma law was preempted by the FCC regulation and that the twenty-first amendment did not prevent preemption of the state law. *Id.* at 716. The Court, in rejecting the state's twenty-first amendment claim, stated that "when a State has not attempted directly to regulate the sale or use of liquor within its borders—the core § 2 power—a conflicting exercise of federal authority may prevail." *Id.* at 713. It is suggested that the *Crisp* Court recognized the propriety of conventional preemption theory only outside the context of a state's valid exercise of "the core § 2 power" granted by the twenty-first amendment. Furthermore, it is submitted that this core power—which the court defines as the authority to "directly . . . regulate the sale or use of liquor within its borders"—plainly incorporates a state's regulatory attempts to prevent the unlawful diversion of liquor into its domestic commerce. *See id.* at 713; *see also* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980) (under twenty-first amendment, states have "virtually complete control over whether to permit importation or sale of liquor"); Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363, 364 (1978) (state laws which protect "vital [state] interests" are generally not preempted).

[48] *See United States v. North Dakota*, 856 F.2d at 1112. The *United States v. North Dakota* court found several elements of the preemption balancing formula to be relevant. *See id.* at 1112-13. It found that the Defense Department's regulation disapproving of the military's subjection to the control of local authorities in this area evinced an intention to "completely occupy the field." *See id.* at 1113. The court noted the need for uniformity, particularly in view of the national characteristics of the military. *See id.* Finally, the court declared the last relevant element—actual conflict with federal policy—the "most decisive," since the state's regulations undermined the federal policy of maximizing profits to be used for the support of military personnel. *Id.*

ate when federal and state laws clash, its application is unwarranted when a state exercises its "core power" under section 2 of the twenty-first amendment.[49] This "core power" has been defined by the Court as a state's right to attempt "directly to regulate the sale or use of liquor within its borders."[50] It is suggested that North Dakota's attempt to prevent the unlawful diversion of liquor destined for federal enclaves, over which the state had concurrent jurisdiction, unmistakably falls within the ambit of this definition.

The Supreme Court has recognized that resolution of questions of state power under the twenty-first amendment demands something more than the traditional preemption analysis that is generally employed in the absence of such a constitutional recognition of state authority.[51] The Court articulated a balancing approach in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,[52] declar-

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[49] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 207 (1976). The *Craig* Court recognized that state regulation may overcome challenges under other constitutional provisions if the regulation touches an area in which state section 2 authority is "transparently clear." *Id.* Where there are two conflicting constitutional provisions, "each provision [should] 'be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.' " *Id.* at 206 (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964)).

[50] *Crisp*, 467 U.S. at 713. In *Crisp*, the Court also referred to the "core" or "central" section 2 power of the states as the power to "regulat[e] the times, places, and manner under which liquor may be imported and sold," *id.* at 716, as well as "exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.' " *Id.* at 715 (quoting *Midcal Aluminum*, 445 U.S. at 110); *see also* Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939) ("State may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put").

[51] *See Crisp*, 467 U.S. at 714 (when state liquor regulation conflicts with federal law, state law may prevail if closely related to core § 2 powers); *see also Midcal Aluminum*, 445 U.S. at 110 (competing federal and state interests to be reconciled after "careful scrutiny"). In California v. LaRue, 409 U.S. 109, 114 (1972), Justice Rehnquist hinted that certain state actions under the twenty-first amendment should not be subject to the same traditional preemption analysis as would other state acts:

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.

Id.

[52] 377 U.S. 324 (1964). The *Hostetter* Court held that in-state sales of intoxicating liquor intended to be consumed only in foreign countries could be placed under Federal Bureau of Customs supervision. *Id.* at 333-34. The conflicting state regulation was not aimed at preventing unlawful use of alcoholic beverages within the state, but had been enacted "totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations." *Id.* at 334.

ing that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution" and "each must be considered in the light of the other, and in the context of the issues and interests at stake."[53] Similarly, the Court has balanced the federal interest inherent in the Sherman Act with the state interest in promoting temperance in a "pragmatic effort to harmonize state and federal powers."[54]

More recently, in *Capital Cities Cable, Inc. v. Crisp*,[55] the Supreme Court appeared to go even further, implying that a federal law could prevail over a conflicting state liquor regulation only if the state regulation did not directly stem from an exercise of "the core § 2 power."[56] The *Crisp* Court, faced with a direct conflict between a federal regulation and a state law,[57] noted that the "central question presented" was "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[58] It is evident that this approach to resolving questions of state power under section 2 is far removed from traditional preemption analysis under which a direct conflict would invariably be resolved in favor of federal law.[59] Under the *Crisp* approach, it appears that so long as the state's authority is squarely within the realm of a state's "core power," the state regulation

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[53] *Id.* at 332; *see supra* notes 49-51 and accompanying text.

[54] *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 109-10 (1980). The *Midcal Aluminum* Court held that a violation of the Sherman Act caused by the state's wine pricing program was not superseded by the twenty-first amendment because the state's interest in promoting temperance was not substantial and was outweighed by the federal objectives underlying the Sherman Act. *See id.* at 113-14.

[55] 467 U.S. 691 (1984); *see supra* note 47 (discussing facts in *Crisp*). Although the *Crisp* Court concluded that the state statute was preempted, this determination was made only after the Court had weighed the respective federal and state interests. *See* 467 U.S. at 714-16. The decision was based on the Court's finding that the state regulation, which prohibited certain liquor advertisements, "engage[d] only indirectly the central power reserved by § 2 of the Twenty-first Amendment." *See id.* at 715.

[56] *See Crisp*, 467 U.S. at 713.

[57] *Id.* at 696-97.

[58] *Id.* at 714. The *Crisp* Court recognized the broad power of the states to "regulate the importation and use of intoxicating liquor within their borders." *Id.* at 712. Section 2 permits states "to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Id. See generally* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1206-94 (1985) (tracing rulings and Supreme Court trends with respect to dormant commerce clause and attempted state protectionism).

[59] *See supra* notes 45-46 and accompanying text.

should prevail.[60] Even if the *Crisp* Court did not intend to imply such, however, it is submitted the Court's language does at least infer the Eighth Circuit's application of traditional preemption analysis improperly disregarded the unique authority accorded states by the twenty-first amendment.

Thus, a court's analysis should begin with an inquiry as to the degree to which a state liquor regulation derives from the state's "core § 2 power."[61] As suggested, the *United States v. North Dakota* court erred because it failed to address this issue as a preliminary matter, and instead applied traditional preemption analysis. Moreover, it is submitted that since traditional preemption analysis should not apply, a court must look to the purposes of the competing regulations and competing constitutional provisions, and determine, on a case by case basis, which regulations represent the more compelling interests in light of the goals of the United States Constitution. Only after such a determination is made, it is suggested, may a court legitimately find a state regulation under section 2 preempted by federal law.

CONCLUSION

Although the Supreme Court has significantly narrowed its earlier interpretations regarding the reach of a state's regulatory power under the twenty-first amendment, it has nevertheless continued to recognize substantial state authority where state liquor regulations satisfy the express provisions of the amendment. In holding state regulations directly implicating the "core § 2" power invalid, the Eighth Circuit's decision represents a departure from this approach and serves to frustrate the policies underlying the twenty-first amendment.[62] In order to satisfactorily resolve conflicts that arise between state liquor regulations and federal law, a court must recognize that state liquor regulations derive their authority from the federal constitution. Preemption of a state law

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[60] *See Crisp*, 467 U.S. at 713-14.

[61] *See* Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 41 (1966). The *Seagram* Court stated that "[c]onsideration of any state law regulating intoxicating beverages must begin with the Twenty-first amendment." *Id.*; *see* Olitsky v. O'Malley, 597 F.2d 295, 299 (1st Cir. 1979); *see also* California v. LaRue, 409 U.S. 109, 118-19 (1972) (state regulation under § 2 entitled to "added presumption" of validity).

[62] *See* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 352-60 (1987) (O'Connor, J., dissenting). Justice O'Connor has noted that the legislative history of the twenty-first amendment reveals a "clear legislative intent to free state regulation from federal interference." *Id.* at 358 (O'Connor, J., dissenting).

should only occur where the federal interest is greater. This approach is more in accord with the language and spirit of the Constitution than the traditional preemption analysis utilized by the *United States v. North Dakota* court, under which federal law will almost invariably prevail.

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