# STATE IMPOSTS ON INTERSTATE WINE

## HEARING

BEFORE THE

## SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE

OF THE

## COMMITTEE ON FINANCE UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

ON

## H.R. 2096

A BILL TO PROHIBIT THE IMPOSITION BY THE STATES OF DISCRIMINATORY BURDENS UPON INTERSTATE COMMERCE IN WINE, AND FOR OTHER PURPOSES

JANUARY 21, 1974

Printed for the use of the Committee on Finance

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# STATE IMPOSTS ON INTERSTATE WINE

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**MONDAY, JANUARY 21, 1974**

U.S. SENATE,
SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE
COMMERCE OF THE COMMITTEE ON FINANCE,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:05 a.m. in room 2221, Dirksen Senate Office Building, Senator Walter F. Mondale (chairman of the subcommittee) presiding.

Present: Senator Mondale.

Senator MONDALE. The committee will come to order.

On behalf of the members of the Subcommittee on State Taxation of Interstate Commerce, I welcome you to our hearing this morning. H.R. 2096, a bill to prohibit any State from imposing discriminatory burdens upon wines shipped in interstate commerce, passed the House of Representatives on September 11, 1973, and has been referred to the Committee on Finance for consideration. Today we hope to afford both those who support this bill and those who oppose it an ample opportunity to give us a summary of their views. We will also include in our printed record of this hearing any comments by individuals or groups having an interest in this legislation who wish to submit written statements.

This subcommittee has been established to develop information concerning State taxation of businesses engaged in interstate commerce. As part of this responsibility, we are today looking into the particular matter of State taxation of wines shipped in interstate commerce. This specific inquiry has been sought primarily by persons engaged in the manufacture and distribution of wines who strongly feel the second section of the 21st amendment to the United States Constitution repealing Prohibition has been too broadly interpreted by the Supreme Court of the United States. In a series of opinions written by Mr. Justice Brandeis during the period 1936–39 the Supreme Court determined the language of section 2 of the 21st amendment "confers upon the State the power to forbid all importations which do not comply with the conditions it prescribes." As recently as 1972 in *California* v. *LaRue*, 409 U.S. 109, the Supreme Court relied upon section 2 in sustaining State restrictions concerning the apparel of waitresses and entertainers in bars. During this same term, in *Heublein* v. *South Carolina Tax Comm.*, 409 U.S. 275, the Court stated, "Although the relation between the 21st amendment and the force of the commerce clause in the absence of Congressional action has occasionally been explored by this Court, we have never squarely determined how that amendment affects Congress' power under the commerce clause." It is readily apparent that the constitutional issue

raised by this bill is quite controversial and any action taken would, of course, be subject to review by the Supreme Court.

It is in light of this that we begin our hearing this morning. We are anxious to obtain the views of all of you on this difficult constitutional issue.

At this point in the hearing we will include a copy of the bill, H.R. 2096, a copy of the press release announcing these hearings, and copies of the agency reports that have been received by the Committee on Finance pertaining to this bill.

[The material referred to follows:]

DEPARTMENT OF JUSTICE,
*Washington, D.C., January 17, 1974.*

Hon. RUSSELL B. LONG,
*Chairman, Committee on Finance, U.S. Senate,*
*Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 2096, a bill "To prohibit the imposition by the states of discriminatory burdens upon interstate commerce in wine" and on Amendment 509 thereto, relating to the production of wine for private use.

We take no position on the merits of the bill or the amendment and limit comment to the legal issues involved. Existing law is found in the Twenty-first Amendment to the Constitution which repealed the Eighteenth (Prohibition) Amendment. It forbids the transportation or importation of intoxicating liquors into any state for use in the state in violation of state law. In a series of interpretative decisions rendered shortly after ratification of the Amendment, the Supreme Court said that states are thus competent under the Twenty-first Amendment to adopt legislation discriminating against intoxicating liquors imported from other states in favor of those from within the state. The Court has said that such discrimination is not limited by the commerce clause. *E.g., State Bd.* v. *Young's Market Co.*, 299 U.S. 59 (1936).

The bill provides for Congress to make findings that the imposition by states of taxes which discriminate against out-of-state wine obstructs commerce. It would prohibit states which permit the sale of wine within the state from imposing discriminatory measures on wine from without the state. Interested persons would have standing to file suit in Federal district court to enjoin the enforcement of discriminatory state laws.

The purpose of the bill is apparently to set up a new test case in the courts as to the scope of the Twenty-first Amendment. The sponsors of the bill may feel that there is a better chance of getting the Supreme Court to reverse itself if Congress legislates in this area. We doubt, however, that the findings by Congress based on the commerce clause would be of any particular help in such a test case since this does not seem to be an area where the Constitution confers on Congress the right to define the scope of the Amendment by legislation.

We cannot say, of course, that it is impossible to suppose that the Supreme Court might change its position on this matter. There is some evidence that the original purpose of the Amendment was to permit dry states to protect themselves from importation of liquor rather than to permit liquor producing states from erecting trade barriers against out-of-state products. Generally speaking, there has always been a policy in favor of interpreting the Constitution to prohibit such barriers.

Nevertheless, we feel it appropriate to inform the Committee that if the Congress were to enact H.R. 2096, it would be necessary for the Supreme Court to reverse a well established line of precedents in order for this legislation to be sustained. The Court noted recently that it had never squarely determined how the Amendment affects the power of Congress under the commerce clause. *Heublein* v. *So. Carolina Tax Commission*, 409 U.S. 275, 282 note 9.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

MALCOLM D. HAWK,
*Acting Assistant Attorney General.*

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
*Washington, D.C., January 25, 1974.*

Hon. RUSSELL B. LONG,
*Chairman, Senate Finance Committee,*
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your request for the views of this Department with respect to H.R. 2096, an Act "To prohibit the imposition by the States of discriminatory burdens upon interstate commerce in wine, and for other purposes."

This Act would prohibit any State from imposing a tax, regulation, prohibition, or requirement that discriminates against importation or sale of wine produced outside the State. The Act would also prohibit any State, which permits the transportation or importation of wine therein, from imposing any prohibition or requirement unreasonably impairing the free flow of commerce in wine among the several States. State actions could be challenged in Federal district courts.

The Department of Commerce favors the objective of H.R. 2096, but defers to the Department of Justice because of a constitutional issue raised by the Act.

Eight States impose discriminatory taxes on wines produced in other States. Wines (except for expensive European imports) are very price-competitive, so the tax differentials, which range from 15¢ to $1.50 per gallon, discourage or prevent out-of-state producers from entering the market in those eight States. This protects home state wineries but provides customers with fewer choices at higher prices.

The taxes in those eight States also discriminate against wines imported into the United States from foreign countries.

As to the constitutional question, Section 2 of the 21st Amendment may constitute a grant to the States of exclusive authority over alcoholic beverage control (and therefore an exception to the Interstate Commerce Clause of the Constitution).

We have been advised by the Office of Management and Budget that there would be no objection to the submission of our report to the Congress from the standpoint of the Administration's program.

Sincerely,

KARL E. BAKKE,
*General Counsel.*

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EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
*Washington, D.C., January 11, 1974.*

Hon. RUSSELL B. LONG,
*Chairman, Committee on Finance, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your request for the views of the Office of Management and Budget on H.R. 2096, a bill "To prohibit the imposition by the States of discriminatory burdens upon interstate commerce in wine, and for other purposes."

This bill would declare that the intent of Congress, in its exercise of the power to regulate interstate commerce, is to eliminate discriminatory and unreasonable burdens upon the free flow of commerce in wines among the States.

The Office of Management and Budget favors the objectives of H.R. 2096, in that we believe that commerce between the States should be free of discriminatory and unreasonable obstructions. We recommend that, in its deliberation on this bill, the Committee give careful consideration to the views expressed in the report of the Department of Justice.

Sincerely,

WILFRED H. ROMMEL,
*Assistant Director for Legislative Reference.*

THE GENERAL COUNSEL OF THE TREASURY,
*Washington, D.C., January 11, 1974.*

Hon. RUSSELL B. LONG,
*Chairman, Committee on Finance, U.S. Senate,*
*Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Treasury Department on H.R. 2096, 93d Congress, 1st Session, entitled, "An Act To prohibit the imposition by the States of discriminatory burdens upon interstate commerce in wine, and for other purposes."

H.R. 2096 is directed solely to State taxes and regulations relating to wine. It would not affect the laws relating to alcoholic beverages administered by the Treasury Department. We, therefore, have no comments to offer with respect to the proposed legislation.

The Office of Management and Budget has advised the Treasury Department that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely yours,

EDWARD C. SCHMULTS,
*General Counsel.*

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DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
*Washington, D.C., February 7, 1974.*

Hon. RUSSELL B. LONG,
*Chairman, Committee on Finance,*
*U.S. Senate,*
*Washington, D.C.*

DEAR MR. CHAIRMAN: Your letter of January 17, 1974, requested the views of this Department on H.R. 2096, a bill "To prohibit the imposition by the States of discriminatory burdens upon interstate commerce in wine, and for other purposes."

This bill provides that any State which permits the sale of wine within the State shall permit the transportation or importation of wine of like kind produced in other States, or from materials originating in other States, into said State for sale therein upon terms and conditions equally applicable to all wine of like kind sold in the State. It further provides that whenever the law of any State permits the transportation or importation of wine into that State, such State may not impose with respect to such wine any prohibition or requirement which unreasonably impairs the free flow of commerce in such wine among the several States.

The Department has no objection to the enactment of H.R. 2096, but defers to the Department of Justice as to its constitutionality. The Department has consistently opposed trade barriers among the States, especially in the flow of agricultural products. We believe that commerce between the States should be free and unencumbered; that farmers from all areas should have equal access to the marketplace.

The enactment of H.R 2096 would have no measurable impact upon the environment.

Enactment of this proposed legislation will not involve any funds of this Department.

The Office of Management and Budget advises that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

RICHARD A. ASHWORTH,
*Deputy Under Secretary.*

## PRESS RELEASE

FOR IMMEDIATE RELEASE
January 3, 1974

FINANCE SUBCOMMITTEE O[illegible] 'TATE TAXATION OF INTERSTATE COMMERCE
UNITED STATES SENATE
2227 Dirksen Senate Office Bldg.

**FINANCE SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE ANNOUNCES HEARINGS ON H.R. 2096, A BILL TO PROHIBIT THE IMPOSITION BY THE STATES OF DISCRIMINATORY BURDENS UPON INTERSTATE COMMERCE IN WINE, AND FOR OTHER PURPOSES.**

Senator Walter F. Mondale (D., Minn.) has announced he will chair Senate hearings on H.R. 2096. The bill is intended to prohibit any State from imposing any tax, regulation, prohibition, or requirement on wine produced out of the State that is not imposed on wine produced in the State.

The hearings before this Subcommittee of the Senate Finance Committee will commence at 10:00 A.M. on January 21, 1974, in Room 2221, Dirksen Senate Office Building.

These hearings will consider H.R. 2096, which was passed by the House of Representatives on September 11, 1973, and Senate Amendment Number 509 to the bill introduced by Senator Robert Packwood (R., Ore.) on September 19, 1973. Additional amendments to the bill introduced prior to the date of this hearing will also be considered.

Request to Testify. -- Senator Mondale has advised that witnesses desiring to testify during this hearing must make their request to testify to Michael Stern, Staff Director, Committee on Finance, 2227 Dirksen Senate Office Building, Washington, D. C., not later than Monday, January 14, 1974. Witnesses will be notified as soon as possible after this cutoff date as to whether they are scheduled to appear. If for some reason the witness is unable to appear on the date scheduled, he may file a written statement for the record of the hearing in lieu of a personal appearance.

Consolidated Testimony. -- Senator Mondale has stated that the Subcommittee urges all witnesses who have a common position or the same general interest to consolidate their testimony and designate a single spokesman to present their common viewpoint orally to the Subcommittee. This procedure will enable the Subcommittee to receive a wider expression of views on the total bill than it might otherwise obtain. He urged very strongly that all witnesses exert a maximum effort, taking into account the limited advance notice, to consolidate and coordinate their statements.

Legislative Reorganization Act. In this respect, he observed that the Legislative Reorganization Act of 1946, as amended, requires all witnesses appearing before the Committees of Congress "to file in advance written statements of their proposed testimony, and to limit their oral presentations to brief summaries of their argument."

Senator Mondale stated that in light of this statute and in view of the large number of witnesses who desire to appear before the Subcommittee in the limited time available for the hearing, all witnesses who are scheduled to testify must comply with the following rules:

(1) All statements must be filed in advance of the day on which the witness is to appear. Witnesses scheduled to testify on Monday, January 21, 1974 must file their written statements by Friday, January 18, 1974.

(2) All witnesses must include with their written statement a summary of the principal points included in the statements.

(3) The written statements must be typed on letter-size paper (not legal size) and at least 50 copies must be submitted.

(4) Witnesses are not to read their written statements to the Subcommittee, but are to confine their ten-minute oral presentations to a summary of the points included in the statement.

(5) Not more than ten minutes will be allowed for the oral summary. Witnesses who fail to comply with these rules will forfeit their privilege to testify.

Written Statements. -- Witnesses who are not scheduled for oral presentation, and others who desire to present their views to the Subcommittee, are urged to prepare a written statement outlining their position for submission and inclusion in the printed record of the hearings. These written statements should be submitted to Michael Stern, Staff Director, Committee on Finance, Room 2227, Dirksen Senate Office Building not later than Friday, February 1, 1974.

93D CONGRESS
1ST SESSION

# H. R. 2096

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 12, 1973

Read twice and referred to the Committee on Finance

# AN ACT

To prohibit the imposition by the States of discriminatory burdens upon interstate commerce in wine, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 SECTION 1. (a) Congress finds that the imposition by
4 one State of State taxes, regulations, prohibitions, and re-
5 quirements which discriminate against wine produced outside
6 the State, and the imposition of unreasonable requirements as
7 conditions for shipment into and sale or distribution of wine
8 in a State, materially restrain, impair, and obstruct com-
9 merce among the several States.
10 (b) Congress declares that, in the exercise of the power

II

1 to regulate commerce among the several States granted to it
2 by article I, section 8, clause 3 of the United States Constitu-
3 tion, its purpose and intent in enacting this Act is to eliminate
4 the obstructions to the free flow of commerce in wine among
5 the several States resulting from acts of the States which
6 impose discriminatory and unreasonable burdens upon such
7 commerce.

8 SEC. 2. (a) Wherever the law of any State permits the
9 transportation or importation of wine into that State, such
10 State may not impose with respect to any wine produced out-
11 side the State, or from materials originating outside the State,
12 any tax, regulation, prohibition, or requirement which is not
13 equally applicable with respect to wine of the same class
14 (established under section 5041 (b) of the Internal Revenue
15 Code of 1954) (1) produced in, or from materials originating
16 in, the State imposing such tax, regulation, prohibition, or
17 requirement, or (2) produced outside the State, or produced
18 from products produced outside the State.

19 (b) A State which permits the sale of wine within the
20 State shall permit the transportation or importation of wine
21 of the same class (established under section 5041 (b) of the
22 Internal Revenue Code of 1954) produced outside the State,
23 or from materials originating outside the State, into such
24 State for sale therein upon terms and conditions equally
25 applicable to all wine of the same class (established under

1 section 5041 (b) of the Internal Revenue Code of 1954)
2 sold in the State.
3 SEC. 3. (a) Notwithstanding the provisions of section 2
4 of this Act, each State retains the right—
5 (1) to engage in the purchase, sale, or distribution
6 of wine; and
7 (2) to exercise discretion in the selection and list-
8 ing of wine to be purchased or sold by each such State.
9 (b) No State which exercises the rights set forth in
10 subsection (a) may impose with respect to wine of any class
11 (established under section 5041 (b) of the Internal Revenue
12 Code of 1954) any tax, regulation, license fee, prohibition
13 or markup, which discriminates against wine of such class
14 produced outside such State.
15 SEC. 4. Whenever any interested person has reason to
16 believe that any State has violated any of the provisions of
17 section 2 or 3 (b) of this Act, such person may file in a
18 district court of the United States of competent jurisdiction,
19 a civil action to enjoin the enforcement thereof. Such court
20 shall have jurisdiction to hear and determine such action,
21 and to enter therein such preliminary and permanent orders,
22 decrees, and judgments as it shall determine to be required
23 to prevent any violation of section 2 or 3 (b).
24 SEC. 5. As used in this Act—
25 (1) the term "State" means any State of the United

Senator MONDALE. Our first witness this morning on this measure is the Honorable John L. McClellan, Senator from Arkansas.

I understand that Senator Fulbright also had hoped to appear this morning, but is attending a meeting at the White House. His statement will appear later.

We are very pleased to have the distinguished senior Senator from Arkansas with us.

## STATEMENT OF HON. JOHN L. McCLELLAN, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator McCLELLAN. Thank you very much, Mr. Chairman.

I, too, was invited to the White House this morning for this meeting, but I didn't find out about that until later, and I did not know you were going to hold a session this afternoon or I would have gone. I understood you wanted to conclude it this morning.

Senator MONDALE. Well, I would hope we could conclude it this morning.

Senator McCLELLAN. So I am here to look after my State and my constituents, and I will learn about what happened in Egypt and Israel a little later.

Senator MONDALE. We are very pleased to have you.

Senator McCLELLAN. Mr. Chairman, I appear before this subcommittee today in opposition to H.R. 2096, a bill, the alleged purpose of which is to prohibit the imposition by States of discriminatory burdens on the interstate commerce in wines.

Mr. Chairman, there are limits, prescribed by the Constitution, to the powers which the Congress can exercise. This bill would seek to nullify powers clearly granted to the States by the 21st amendment to the Constitution.

Section 2 of the 21st amendment provides as follows:

> 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.

That is the highest power and authority than can be conferred or established under our system of government, the Constitution itself.

I do not think this language is susceptible of any other interpretation than what it says, and the Supreme Court has consistently held that the language of this amendment leaves the States free to control the importation of and traffic in liquors within their boundaries. In a series of interpretative decisions rendered shortly after ratification of that amendment the Court said that States have the authority and right under the 21st amendment to adopt legislation discriminating against intoxicating liquors imported from other States in favor of those from the home State. The Court has also said that such discrimination is not limited by the commerce clause.

In the case of *State Board of Equalization of California* v. *Young's Market Co.*, it was argued that it would be a violation of the commerce clause and of the equal protection clause for a State to require a fee of persons importing beer from outside the State. In this case, the State was upheld. Noting that such discrimination would have violated the commerce clause before adoption of the 21st amendment, the Court, speaking through Justice Brandeis, held that since

the adoption of that amendment a State was no longer required to "let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the amendment, but a rewriting of it." That is the language of the highest court in the land.

Mr. Chairman, to adopt this bill would be to attempt to do indirectly what could only be done directly by rewriting the 21st amendment to the Constitution, and by having it adopted as rewritten. The wording of the amendment is clear and the Supreme Court's interpretation substantiates the fact that the States have the power, under the Constitution, to impose the taxes in question here.

Apparently, the Department of Justice agrees with this view. In commenting on this legislation, the Department has stated that "if the Congress were to enact H.R. 2096, it would be necessary for the Supreme Court to reverse a well-established line of precedents in order for this legislation to be sustained." So, Mr. Chairman, it appears to me that the enactment of this legislation would be tantamount to asking the Supreme Court to reverse a long line of decisions and precedents that had been established.

The wording of the amendment is clear, and the Supreme Court's interpretation substantiates the fact that the States have the power under the Constitution to impose these taxes.

Mr. Chairman, the State of Arkansas has chosen to exercise its powers under the Constitution to protect its own wine industry. The impact of Arkansas wines on the national market is minimal. The production of Arkansas wineries accounts for less than one-half of 1 percent of total national production. In other words, out of every 200 bottles of wine that is produced in the United States, Arkansas' contribution to that is less than one bottle.

The low production figures indicate that Arkansas producers are not able to take advantage of the many cost-saving measures that are available through mass production in the larger wine-producing States. Other factors further increase the costs of producing wine in Arkansas. State law requires that the wineries use Arkansas-grown grapes, berries, and fruits to produce their wines. This factor inflates the price of fruits from the limited domestic market. Because of the situation produced by this law and the availability of less-expensive grapes and fruits to out-of-State producers, Arkansas enacted a tax of 75 cents on wines brought into the State and 5 cents on Arkansas-produced wines. The obvious purpose, Mr. Chairman, if this tax was to protect Arkansas budding wine industry and give it an opportunity to compete in the Arkansas market with wines produced at lower cost in other States. Arkansas has a valid interest in fostering this growing industry. The pending bill would prevent the States from taking such action under the pretext of removing discriminatory burdens on interstate commerce.

It was acknowledged, Mr. Chairman, that it is a discriminatory action, and it is premised upon the plain language of the amendment to the Constitution which authorized States to take such action, even though it be discriminatory and notwithstanding the commerce clause of the Constitution.

Mr. Chairman, according to information supplied by the Arkansas Department of Finance and Administration, covering fiscal year 1972, 31.7 percent more wine was imported into Arkansas from other States

and foreign countries than in the year before. So they are still importing it in there, Mr. Chairman, and I assume at a pretty good profit, or at least it is profitable to do so because the importation of wine, notwithstanding this tax, increased in Arkansas by 37 percent in fiscal 1972. During this same period, sales of Arkansas wines declined by 6 percent. These figures indicate no adverse effect by the Arkansas laws upon interstate commerce.

Mr. Chairman, the pending bill raises serious constitutional questions, as I have indicated. It would vitiate the plain words of the 21st amendment to the Constitution and the Supreme Court cases which have interpreted that amendment. The passage of this measure would impair Arkansas ability, and that of other States, to protect their native wine industries. Such protection will, in the final analysis, strengthen the capability of this industry to compete in the national marketplace and thereby stimulate competition and commerce.

For these reasons, Mr. Chairman, I strongly oppose H.R. 2096.

And I really believe—I know the Supreme Court recently reversed itself, set aside law and precedents, and established a new law by reason of overriding strong precedents—but I really believe that that is what the effect of this legislation suggested should be done.

We would not want to pass a bill that we anticipated the Court was going to say was unconstitutional, and I do not know how it can say that it is constitutional in view of this amendment to the Constitution—that 21st amendment could have no further meaning if the Court upheld this bill.

Now I do not think there is any great injustice being done, as I pointed out, as far as Arkansas is concerned. Any time that the importation of wine increases 37 percent in 1 year's time, it seems to me like you are making pretty good progress, and it further indicates, of course, even though we do have this tax which is discriminatory, it certainly is not adequate. It is not prohibitive. They are still able to compete at a profit.

I would hope the committee would take these truths, as I see them, into consideration when it weighs the prospect of reporting out this legislation.

Mr. Chairman, I thank you very much. I hope I have not taken too much time. Mr. Wiederkehr, from my State, Mr. Al Wiederkehr, is present and would like to testify, but I would like to be excused. I do have other work to do, and I do not know when you would like to hear him, but he will be able to answer other factual questions that maybe I would not have the answers to.

Senator MONDALE. He is scheduled to testify later on this morning. We are looking forward to hearing from him. I think your statement is a very strong presentation of what I believe is the fundamental problem this committee has to face; namely, does the 21st amendment prohibit any further Federal action and does the 21st amendment, in effect, give the States power to exclusively make their own laws with respect to alcoholic beverages.

That is the central question I think we have to face. You make the case very strongly and we look forward to hearing what the arguments might be on it.

Senator MCCLELLAN. Well, my source of authority is the Supreme Court of the United States. Thank you very much.

28-456 O—74——2

Senator MONDALE. The original amendment for prohibition was the Volsted amendment, Volsted being a Congressman from Minnesota.

Senator MCCLELLAN. Well, we repealed that; not by a Court decision, but by the due processes of amending the Constitution. Maybe this should be repealed.

Senator MONDALE. Thereby bringing relief to millions of parched Americans.

Senator MCCLELLAN. Making it possible for them to produce wine in Arkansas and other places too.

Senator MONDALE. I thank you, Senator McClellan.

Senator MCCLELLAN. Thank you very much, Mr. Chairman.

[The prepared statements of Senator McClellan and Senator Fulbright with material referred to follow:]

PREPARED TESTIMONY OF HON. JOHN L. MCCLELLAN, A U.S. SENATOR FROM THE STATE OF ARKANSAS

I appear before this Subcommittee today in opposition to H.R. 2096, a bill the alleged purpose of which is to prohibit the imposition by States of discriminatory burdens on the interstate commerce in wines.

Mr. Chairman, there are limits, prescribed by the *Constitution*, to the powers which the Congress can exercise. This bill would seek to nullify powers clearly granted to the States by the 21st Amendment to the *Constitution*.

Section 2 of the 21st Amendment provides as follows:

"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."

The Supreme Court has consistently held that the language of this amendment leaves the States free to control the importation of and traffic in liquors within their boundaries. In a series of interpretative decisions rendered shortly after ratification of that amendment, the Court said that States have the authority and right under the 21st Amendment to adopt legislation discriminating against intoxicating liquors imported from other States in favor of those from the home State. The Court has also said that such discrimination is not limited by the Commerce Clause.

In the case of *State Board of Equalization of California* v. *Young's Market Company*, 299 U.S. 59) 1936), it was argued that it would be a violation of the commerce clause and of the equal protection clause for a State to require a fee of persons importing beer from outside the State. In this case the State was upheld. Noting that such discrimination would have violated the commerce clause before adoption of the 21st Amendment, the Court, speaking through Justice Brandeis, held that since the adoption of that amendment a State was no longer required to—

"Let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it."

Mr. Chairman, to adopt this bill would be to attempt to do indirectly what could only be done directly by rewriting the 21st Amendment to the *Constitution*. The wording of the amendment is clear and the Supreme Court's interpretation substantiates the fact that the States have the power, under the *Constitution*, to impose the taxes in question here.

Apparently, the Department of Justice agrees with this view. In commenting on this legislation, the Department has stated that—

"If the Congress were to enact H.R. 2096, it would be necessary for the Supreme Court to reverse a well established line of precedents in order for this legislation to be sustained."

Mr. Chairman, the State of Arkansas has chosen to exercise its power under the *Constitution* to protect its own wine industry. The impact of Arkansas wines on the national market is minimal. The production of Arkansas wineries accounts for less than one-half of one percent of total national production. The low production figures indicate that Arkansas producers are not able to take advantage of the many cost-saving measures that are available through mass production in the larger wine producing States. Other factors further increase the costs of producing wine in Arkansas. State law requires that the wineries use Arkansas-grown grapes, berries and fruits to produce their wines. This

factor inflates the price of fruits from the limited domestic market. Because of the situation produced by this law and the availability of less expensive grapes and fruits to out-of-state producers, Arkansas enacted a tax of 75¢ on wines brought into the State and 5¢ on Arkansas-produced wine. The obvious purpose, Mr. Chairman, of this tax was to protect Arkansas' budding wine industry and give it an opportunity to compete in the Arkansas market with wines produced at lower cost in other States. Arkansas has a valid interest in fostering this growing industry. The pending bill would prevent the States from taking such action under the pretext of removing discriminatory burdens on interstate commerce.

Mr. Chairman, according to information supplied by the Arkansas Department of Finance and Administration, covering FY 1972, 31.7 percent more wine was imported into Arkansas from other States and foreign countries than in the year before. During this same period sales of Arkansas wines declined by 6 percent. These figures indicate no adverse effect by the Arkansas laws upon interstate commerce.

Mr. Chairman, the pending bill raises serious constitutional questions. It would vitiate the plain words of the 21st Amendment to the *Constitution* and the Supreme Court cases which have interpreted that amendment. The passage of this measure would impair Arkansas' ability, and that of other States, to protect their native wine industries. Such protection will, in the final analysis, strengthen the capability of this industry to compete in the national market place and hereby stimulate competition and commerce. For these reasons, Mr. Chairman, I strongly oppose H.R. 2096.

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## Statement of Hon. J. W. Fulbright, a U.S. Senator From the State of Arkansas

Mr. Chairman: I am pleased to have this opportunity to appear before the Subcommittee today. As the Chairman knows, my distinguished colleague, Senator McClellan and I requested these hearings in a joint letter to Senator Fong which was written shortly after H.R. 2096, the so-called Wine Bill, was referred to the Finance Committee. In that letter we stated that we shared "very strong objections to this measure which are based upon its economic and constitutional ramifications". Today I would like to put that statement into perspective by examining the difficulties in each of these areas.

Most people associate winemaking in this country with the wine industries of California and New York. In many cases, they are quite surprised to learn that Arkansas has vineyards and wineries, much less that it produces premium varieties of wine. Yet Arkansas and many states other than California and New York do have small wine industries which, although minuscule in comparison with the vineyards and facilities of the largest producers, make important contributions to the local economies of their respective states.

In Arkansas interest in vineyards and winemaking stems from the immigrants of Austria, Switzerland, Italy, and Germany who settled in the mountainous northwest region of the state in the early 1800's. These people found the area conducive to grape growing and made wines in order to satisfy their native tastes and customs and to celebrate various religious and festive holidays.

About 90% of the wine produced in the state still comes from this area. However, the activity has much more than cultural significance today. It now represents an important source for economic development in areas of Arkansas which have yet to realize their full economic potential. The small winemakers of northwest Arkansas are developing a growth industry which is becoming increasingly important to agricultural interests, to business and commercial firms, as an employer of labor, and as an increasing source of local and state tax revenue.

I will not take the Committee's time this morning to recite all the various statistics which illustrate these points. The President of the Arkansas Wine Producers, Al Wiederkehr, is here with representatives of the small wine industries of several other states, and will give you testimony on this later. I would, however, ask to have included as an appendix to my remarks a study completed in 1971 and revised on an interim basis for these hearings through 1973, as well as several tables which the Committee has furnished me. The study is entitled, "The Arkansas Wine Industry: History, Economic Impact, Future", and the tables show national statistics for wine production by states in 1972.

These materials are significant in terms of assessing the economic consequences in my state of the legislation under consideration today. They demonstrate that the potential for Arkansas' small industry rests upon a continuation of the state tax and other laws which H.R. 2096 seeks to eliminate.

The Committee information shows that the American wine market is presently monopolized by California and New York products with California alone accounting for approximately 82.6% of all wines produced in the United States in 1972. Arkansas production, on the other hand, represented less than one half of 1% of the total national volume in the same period accounting to this data. Contrasted with this, the Arkansas study assesses the economic impact of this nationally-infinitesimal industry in the state in this manner:

"The development of a growth industry providing payroll opportunities, an expanding tax base, a market for agricultural products, and opportunities for industrial expansion appears to present a challenging potential for the state which should be actively encouraged."

According to the study, this potential is based in large part upon the continuation of economic incentives provided through the very kind of tax structure which H.R. 2096 would prohibit.

These tax laws, similar to those in effect in several other fruit-producing states, were enacted in Arkansas in the late 30's under authority delegated to the states by the second section of the 21st Amendment. According to the history provided in the Arkansas study, the State Legislature felt that such laws were necessary at the time in order to prevent an influx of cheaply produced west coast wines from ruining what was then truly an infant industry in Arkansas. As the production tables indicate, the situation has hardly changed today. Without the benefit of these laws, Arkansas wineries would still face the impossible economic task of using local grapes and other fruits costing three to four times as much per ton as the bulk materials used by the west coast wineries.

As far as Arkansas is concerned, such state laws continue to foster the development of the small wineries, thus providing incentives for further diversification of agriculture in not only the mountainous northwest, but the northcentral and northeast regions of the state as well. Thus, the laws encourage industrialization in the state in a manner which is compatible with the interests and resources of the predominantly rural areas.

Moreover, under this arrangement the success of native wines has been instrumental in introducing Arkansans to other varieties, thus opening up the additional markets for the products of other states. Although taxed more heavily under the present system, these out-of-state products accounted for 670,305 wine gallons sold in the state in 1972 as opposed to 614,703 wine gallons of locally produced wines. These figures represented a 31.7% increase for the imports over 1971 as compared with a decline of 6% for the Arkansas products in that same period.

Thus, the principal economic arguments advanced by the proponents of this measure—that the present laws result in discrimination and the "balkanization" of interstate commerce in wine—are in the case of my state's experience completely without foundation. From the standpoint of Arkansas' wine economy the data conclusively demonstrates just the reverse of their arguments—that the state laws which this legislation would prohibit have, in effect, been the leading factor keeping the market competitive.

But, even if the economic inequities of this bill could be overcome, there is a more fundamental objection to the measure in terms of the constitutional question it presents:

The language of Section 2 of the 21st Amendment reads:

"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."

The Supreme Court has consistently held that this language delegates to the states absolute control over the importation of and traffic in liquors (which

by definition includes wines) within their boundaries, and that this authority is not limited by the Commerce Clause.

Since H.R. 2096 is based upon a Congressional declaration of power under the Commerce Clause to eliminate state laws enacted pursuant to Section 2 of the 21st Amendment, a constitutional question emerges in terms of whether Congress can legitimately legislate in this fashion.

The Committee is already in possession of an extensive memorandum submitted by the American Law Division of the Library of Congress on the question, a copy of which was furnished to me in response to my own request for such information. After reviewing the history of the legislation which resulted in the 21st Amendment, as well as the Supreme Court decisions interpreting the right of states under that Amendment, the memorandum reaches the following conclusion:

". . . we are left with what must be the logical construction of section 2; that is, it must restrict Congress' powers under the Commerce Clause as well as restrict the force of the Commerce Clause itself. If that is the case, then enactment of H.R. 2096 is beyond Congress' power."

The Attorney General of the State of Arkansas has also furnished me an opinion on this issue, which reaches a similar conclusion, and I ask unanimous consent to have it included at this point in the record.

Mr. Chairman, I am completely in accord with the sum and substance of the Library of Congress' memorandum and the Attorney General's opinion on the constitutionality of this legislation. Although I consider myself a strong advocate of Congressional prerogatives, I do not believe it is within Congress' power under the Commerce Clause to try to legislate away powers conferred upon the states by the Constitution.

While some may contend that recent dicta of the Supreme Court concerning the relationship of the 21st Amendment and Commerce Clause invites Congressional legislation in this area, the clear precedents, reaffirmed as recently as last summer by the Court, are otherwise and repudiate this notion. The House record reflects that the Justice Department reaches a similar conclusion, and in its comments on a bill substantively identical to H.R. 2096 informed the House Interstate and Foreign Commerce Committee that—

"... it would be necessary for the Supreme Court to reverse a well-established line of precedents for the legislation to be sustained."

Therefore, in the final analysis, I question our power to enact this legislation, and for this reason, as well as the economic ones discussed previously in my statement. I am opposed to H.R. 2096, and urge the Committee not to report this bill.

## THE ARKANSAS WINE INDUSTRY: HISTORY, ECONOMIC IMPACT, FUTURE

(By Leon Joseph Rosenberg, Ph.D., Associate Professor of Marketing, University of Arkansas and Robert W. Bell, Ph.D., Professor of Marketing, University of Arkansas)

### SUMMARY

The winemakers of Arkansas have developed a growth industry important to agricultural interests, to business and commercial firms, as an employer of labor, and as an increasing source of tax revenue. The sales increase of Arkansas wines has been dramatic: total volume in 1970 was $2,437,100, up $1,858,400 from 1960 sales of $578,700, or a 320% sales *increase* for the ten-year period.

While 1970 sales of Arkansas wines within the state itself were $1,901,200 and accounted for the largest share of the total, sales of Arkansas wines to out-of-state firms were $535,900, and are projected at $840,000 in 1973. There were no out-of-state sales in 1960. The 1970 out-of-state sales figure was almost as great as total industry sales in 1960. Sales trends were computed by the method of least squares which fits a mathematical curve to the data such that the total of the squared deviations from the curve is less than for any similar curve.

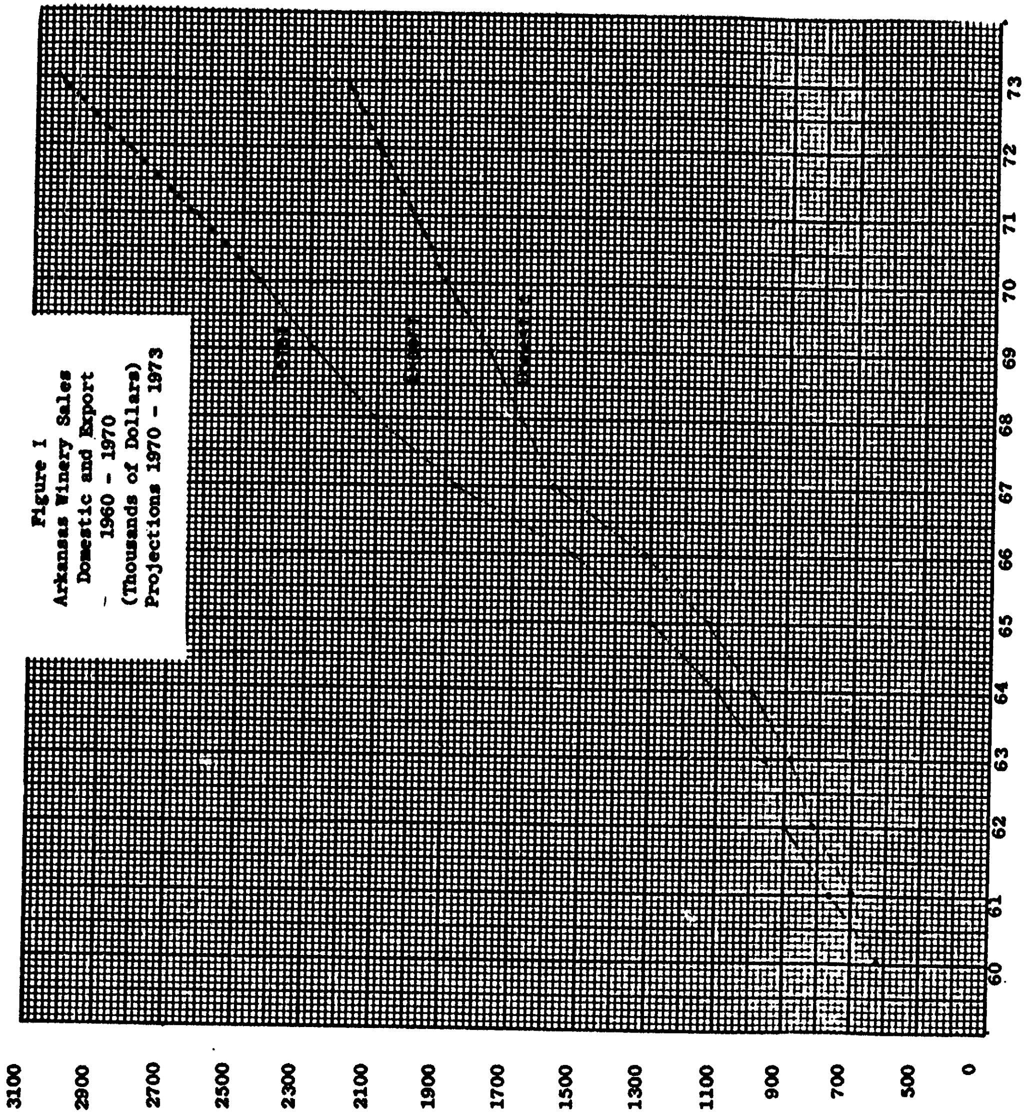



Figure I
Arkansas Winery Sales
Domestic and Export
1960 - 1970
(Thousands of Dollars)
Projections 1970 - 1973

The various projections are based on a continuation of the present tax structure, which is similar to that of a number of other states including Florida, Georgia, Illinois, Michigan, and New Mexico. It is particularly significant that the wine growing industry of Arkansas provides a rapidly expanding market for grape growers. Arkansas farmers, as well as commercial and industrial interests within the state, are primary beneficiaries of the current tax schedule. Direct payroll of the Arkansas wine industry in 1970 was $194,000, over two and a half times as large as the payroll in 1960. The tax structure has provided some shelter to Arkansas producers and Arkansas farmers from a flood of low cost out-of-state wine imports. The domestic demand has provided a sales base which has enabled Arkansas wineries to enlarge their facilities and to expand sales into nearby states.

The development of a growth industry providing payroll opportunities, an expanding tax base, an increasing market for agricultural products, and opportunities for industrial expansion appears to present a challenging potential for the state which should be actively encouraged.

**ECONOMIC IMPACT: SALES**

Arkansas winery sales were $2,437,100 in 1970. Sales to other states (export) only were $535,900 in 1970. Export sales have very important economic implications for the state of Arkansas because every dollar's worth of wine sold out of state brings new expenditures into the state in some multiple manner. The export of $500,000 in wine products in 1970 conservatively generated another $400,000 to $500,000 in expenditures in the state for a total economic impact of approximately $900,000 to $1,000,000. It is anticipated that by 1973 out-of-state exports will amount to about $840,000. This means the state can expect between $1,500,000 and $1,700,000 in total expenditures generated in Arkansas due to the export of domestic wines. Part of the export multiplier effect is, of course, offset by purchases of the industry from sources outside the state, but the net figure should still run between $1,000,000 and $1,350,000 by 1973.

Domestic sales continue to increase within the state. Table 2 shows the increasing importance of the domestic producer relative to the out-of-state wineries. In 1955 the domestic wineries produced only 22% of the total taxed gallonage in the state while in 1965 it had increased to 49% and was up to 58% in 1970. This reflects a relative decrease in the amount of money being spent on out-of-state wine products and means more money is spent on Arkansas home products.

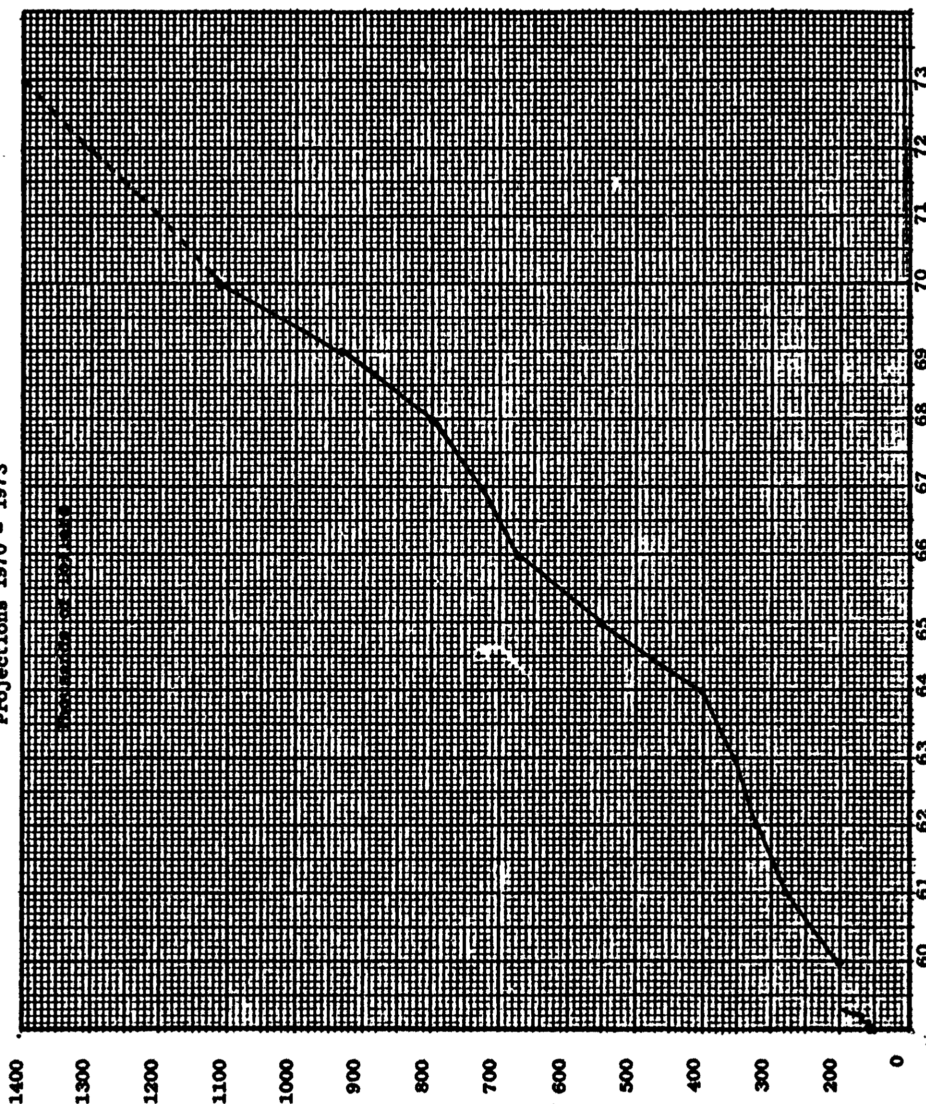



Figure II
Total Expenditures In Arkansas By
The Arkansas Wine Industry
1960 - 1970
Projections 1970 - 1973

TABLE 1.—WINE SALES OF ARKANSAS WINERIES: 1950, 1955, 1960-70, ACTUAL; PROJECTED SALES 1971-73

| Year | Domestic sales | Export sales [1] | Total sales |
|---|---|---|---|
| 1950 | $186,600 | | $186,600 |
| 1955 | 205,500 | | 205,500 |
| 1960 | 578,700 | | 578,700 |
| 1961 | 732,500 | $14,500 | 747,000 |
| 1962 | 873,600 | 28,800 | 902,400 |
| 1963 | 883,900 | 67,800 | 951,700 |
| 1964 | 1,009,000 | 102,800 | 1,111,800 |
| 1965 | 1,119,000 | 176,600 | 1,295,600 |
| 1966 | 1,324,000 | 195,200 | 1,519,200 |
| 1967 | 1,580,000 | 298,800 | 1,878,800 |
| 1968 | 1,691,000 | 416,500 | 2,170,500 |
| 1969 | 1,770,600 | 525,500 | 2,296,200 |
| 1970 | 1,901,200 | 525,900 | 2,437,100 |
| 1971 | 2,000,000 | 640,000 | 2,640,000 |
| 1972 | 2,100,000 | 740,000 | 2,840,000 |
| 1973 | 2,200,000 | 840,000 | 3,040,000 |

[1] Out of State.

Source: Arkansas wineries.

TABLE 2.—GALLONS OF DOMESTIC WINE BOTTLED AND GALLONS OF OUT-OF-STATE WINES IMPORTED IN SELECTED YEARS

[In thousands of gallons]

| Year | Domestic | Import | Total | Percent of total accounted for by domestic producers |
|---|---|---|---|---|
| 1955 | 172 | 626 | 798 | 22 |
| 1960 | 302 | 529 | 831 | 27 |
| 1965 | 460 | 482 | 942 | 49 |
| 1970 | 810 | 586 | 1,396 | 58 |

Source: These figures were computed by the following method: (1) Domestic figures were obtained from Arkansas wineries or from wine tax data; (2) total Arkansas wine tax paid by out-of-State wineries was divided by 0.75 to obtain gallons imported.

TABLE 3.—SELECTED EXPENDITURES ON INPUTS PURCHASED IN ARKANSAS BY THE ARKANSAS WINE INDUSTRY 1960-70 AND 1971-73 PROJECTIONS

[In thousands of dollars]

| Input | 1960 | 1961 | 1962 | 1963 | 1964 | 1965 | 1966 | 1967 | 1968 | 1969 | 1970 | 1971 | 1972 | 1973 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Total | 200 | 280 | 311 | 350 | 402 | 550 | 665 | 718 | 800 | 944 | 1,119 | 1,200 | 1,300 | 1,400 |
| Wages and salaries | 75 | 17 | 90 | 92 | 96 | 123 | 135 | 204 | 189 | 190 | 194 | | | |
| Grapes | 83 | 92 | 100 | 150 | 153 | 184 | 285 | 251 | 228 | 303 | 408 | 450 | 490 | 508 |
| Sugar | 24 | 34 | 48 | 49 | 50 | 66 | 64 | 69 | 62 | 73 | 118 | (1) | (1) | (1) |
| Glass | 10 | 14 | 14 | 17 | 18 | 18 | 21 | 22 | 26 | 39 | 61 | (1) | (1) | (1) |
| Advertising | | | | 1 | 17 | 33 | 28 | 41 | 45 | 61 | 62 | (1) | (1) | (1) |
| Taxes, total, State only | 5 | (2) | (2) | (2) | (2) | 14 | (2) | 39 | 48 | 53 | 63 | (1) | (1) | (1) |

[1] No projection.
[2] Not available due to imcomplete reporting.

Source: Arkansas wine industry.

ECONOMIC IMPACT EXPENDITURES

The Arkansas Wine Industry spent about $1,100,000 for Arkansas goods, services and taxes in 1970 (see Figure II). This figure includes wages and salaries, grapes, other fruits and berries, sugar, glass products, advertising, forest products, freight equipment, interest expense, fertilizer and large payments for taxes. The figure stated above is conservative because several of the reporting companies did not report their total Arkansas purchases. If a multiplier of 1 is applied to this figure it indicates that $2,200,000 in business activity was generated through-

out the state during 1970. It is anticipated that total wine industry expenditures spent in the state in 1973 will approximate $1,400,000 or have a total impact of about $2,800,000.

Table 3 indicates the total amount of reported wages and salaries paid, dollar grape purchases, and expenditures for sugar, glass products, advertising and taxes paid to several counties and the State. Figure III shows grape purchases, including a projection through 1973. Expenditures have increased two to six times on all items between 1960 and 1970 which indicates the rapid growth in the industry. Total state taxes paid have shown a dramatic increase over the last ten years and reflect the increasing dollar sales of the industry.

The purchase of grapes is essential to the industry and vital to Arkansas grape growers. Since 1954 the Arkansas wineries have been taking an ever larger share of total Arkansas grape production. In 1954 the industry purchased 5% of the total tonnage produced; in 1964 it purchased 20%, and by 1970, 32% of the tonnage produced in the state was consumed by the wineries. (See Table 4).

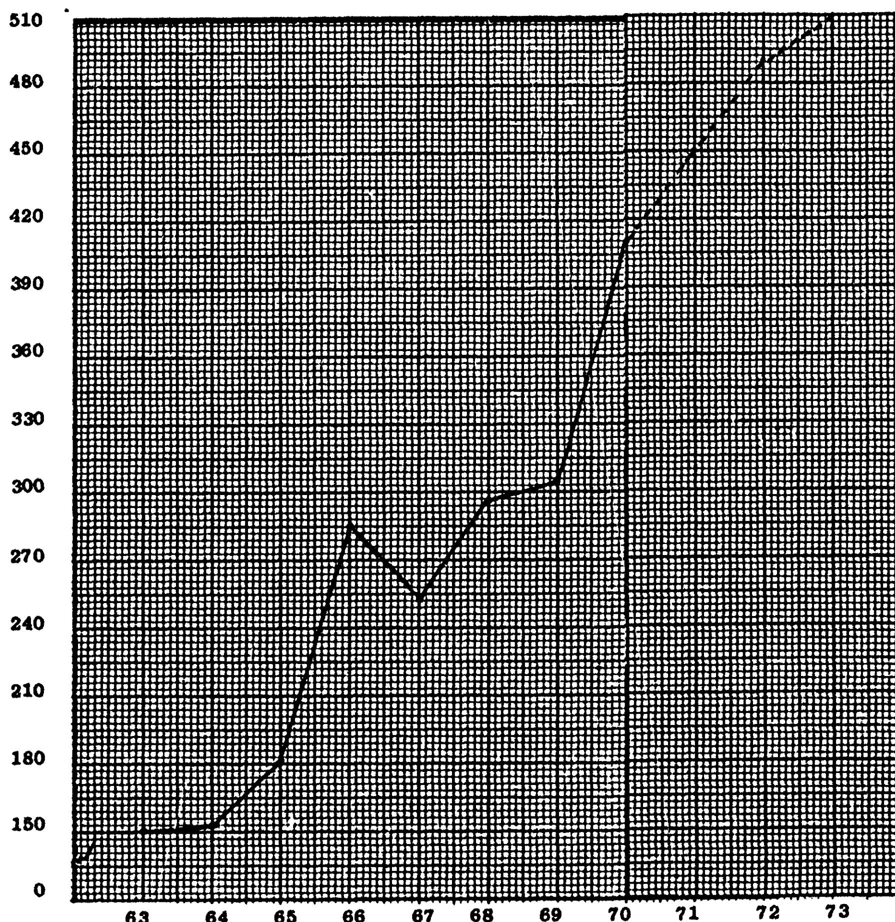
Wine producers estimate that Arkansas farmers have increased grape acreage by 60% to 90% during the last two years. When the new vines begin to bear, Arkansas farmers will have a source of additional revenue. The additional acreage will also provide an enlarged, agricultural base for the wine industry.

Figure III

Purchases of Grapes By
The Arkansas Wine Industry

1963 - 1970

Projections 1970 - 1973
(Thousands of Dollars)



In 1970, total capital investment in the Arkansas wine industry was at least $1,100,000 which is a low figure due to nondisclosure of this information by some of the reporting firms. In addition to the direct capital investments in the wineries themselves, their existence creates investment opportunities for Arkansas in such related industries as vineyards or in industries from which the wine industry purchases some of its key inputs.

It is regrettable that each county which has a winery cannot be analyzed, but this is impossible because disclosure of confidential information about some of the firms in the industry would be revealed if a county analysis was made.

TABLE 4.—TOTAL TONS OF GRAPES PRODUCED, TONS OF GRAPES PURCHASED, AND PERCENTAGE OF GRAPES, PURCHASED BY ARKANSAS WINE INDUSTRY, SELECTED YEARS

| Year | Total tons produced | Tons purchased by Arkansas wine industry | Percentage of grape production purchased by Arkansas wine industry |
|---|---|---|---|
| 1954 | 5,000 | 250 | 5 |
| 1959 | 7,700 | 1,078 | 14 |
| 1964 | 6,600 | 1,320 | 20 |
| 1970 | 8,700 | 2,750 | 32 |

Sources: (1) Arkansas wine industry; (2) U.S. Agriculture Statistical Office, Little Rock, Ark.

## HISTORY OF THE ARKANSAS WINE INDUSTRY

European Heritage plays an important role in the modern, multi-million dollar Arkansas Wine Industry. Settlers from Austria, Switzerland, and Germany settled in the mountainous region around Altus in the early 1880's and made wine to satisfy their native taste and customs and to celebrate various religious and festive holidays. These original settlers were not winemakers *per se*, merely producing wine for their own consumption and selling a little to the coal miners who worked the deposits around Denning, Alix, and later, Coal Hill. The first wine was sold in large jugs with corn-cob stoppers, a far cry from the sophisticated packaging of the modern industry.

Interest in vineyards and winemaking began to increase in the early 1900's and a Farmers Club was organized in Franklin County to discuss local farm problems, including those of the vineyards and wineries. During that period the area around Tontitown, in Washington County, was also developing vineyards and wineries and today most of the Arkansas vineyard acreage and grape production is located in Northwest Arkansas.

Prohibition dealt a hard blow to the wine and grape industry in Arkansas, but the industrious grape growers and winemakers were able to survive by grafting table grape varieties on wine grape root stock and producing a table grape. Some winemakers turned to other endeavors during this period and it looked like the wine industry in Arkansas was going to be extinct. However, a few entrepreneurs remained and shortly after Prohibition ended the wine industry began in earnest with at least eight wineries in production.

In order to prevent an influx of low cost bulk west coast wines from ruining the domestic grape growing and wine producing industry, two special protection laws were passed during the later half of the 1930's.

The first act specified that Arkansas wineries must use Arkansas-grown grapes, berries, and fruits to produce their wines. However, due to the limited number of the vineyards in the state at that time and to the large demand from other users of grapes, it soon became apparent that there was a shortage of grapes. It was further apparent that Arkansas wineries had an impossible economic assignment since they were required to use Arkansas grapes that cost 3 or 4 times more per ton than the grapes used by west coast wineries. In order to help remedy the situation, a special Arkansas wine tax of 75¢ a gallon was placed on out-of-state wines and a 5¢ a gallon tax was imposed on Arkansas wines. In essence the special tax, similar to that of a number of other states, helps to equalize cost of production and thus prices, and gives Arkansas wines an equal chance to compete against low-cost out-of-state wines.

Expansion in the industry continued until World War II when wine making was somewhat curtailed. During the War the wine makers furnished sugar syrup to certain essential industries. After the War the industry continued its expansion

in terms of sales, numbers of businesses, and the impact of the expanding industry began to reach into Poinsett County, with further expansion in Washington, Conway, and Franklin counties. Several recent developments include: in 1961 the establishment of an out-of-state sales program which has met with outstanding success; in 1970 two producers began commercial production of champagnes which gives Arkansas wineries a full line of products.

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U.S. SENATE,
*Washington, D.C., September 25, 1973.*

Hon. RUSSELL B. LONG,
*Chairman, Committee on Finance, U.S. Senate,*
*Washington, D.C.*

DEAR MR. CHAIRMAN: There is presently pending in the Committee on Finance H.R. 2096, a bill to prohibit the imposition by the states of discriminating burdens upon interstate commerce in wine.

We have very strong objections to this measure which are based upon its economic and constitutional ramifications. Moreover, representatives of the wine industry in Arkansas, which would be adversely affected by the passage of this bill, have notified us today that they wish to publicly testify against this legislation.

We, therefore, respectfully request that before action is taken on H.R. 2096, public hearings with adequate notice be scheduled and held so that all interested parties, including the Senators from Arkansas and spokesmen for the wine industry in our State, will be assured of the opportunity to present their views to the Committee. We look forward to hearing from you in regard to this matter.

With best wishes, we are

Sincerely yours,

JOHN L. MCCLELLAN,
*U.S. Senator.*
J. W. FULBRIGHT,
*U.S. Senator.*

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STATE OF ARKANSAS,
OFFICE OF THE ATTORNEY GENERAL,
*Little Rock, January 18, 1974.*

Re H.R. 2096 pending in the Committee on Finance, entitled: "A bill to prohibit the imposition by the States of discriminating burdens upon interstate commerce in wine, and for other purposes."

Hon. J. W. FULBRIGHT,
*U.S. Senator,*
*Senate Office Building,*
*Washington, D.C.*

DEAR SENATOR FULBRIGHT: In your letter of January 2, 1974, you asked for my comments regarding the constitutional considerations involved in the above bill.

The basic constitutional question raised by H.R. 2096 is the extent to which the power of Congress to regulate interstate commerce pursuant to Article I, Sec. 8, Cl. 3 of the United States Constitution has been limited with regard to alcoholic beverages by Section 2 of the Twenty-first Amendment, which reads:

"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."

Much of the debate in Congress on Section 2 was concerned with the right of the individual states to remain "dry", if they so desired, in spite of the repeal of prohibition.

However, in the first case to challenge the Twenty-first Amendment, *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936), the Supreme Court held that because of Section 2, the new amendment did more than end prohibition.

The *Young's Market* case involved a California statute which imposed a license fee of $500.00 for the privilege of importing beer. The Court upheld the statute, noting that prior to the enactment of Section 2, it would probably have been found to be an undue burden on commerce. Referring to the language of the Amendment, the Court said:

"The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The

plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it. (299 U.S. at 62)

"The plaintiffs argue that, despite the Amendment, a state may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer's license fee was not imposed to that end. Surely the State may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importatons, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?" (299 U.S. at 63)

An equal protection argument was rejected by the Court with the statement that "a classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the fourteenth." (299 U.S. at 64)

Of the argument that the legislative history of the Amendment limited its effect, Justice Brandeis said:

"As we think the language of the Amendment is clear, we do not discuss these matters." (299 U.S. at 63–64)

In *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1930), the Court upheld a Minnesota statute which prohibited importation of certain brands of liquor not registered with the United States patent office. In holding that the equal protection clause was not applicable to the importation of alcoholic beverages since the adoption of the Twenty-first Amendment, the Court said:

"That, under the Amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic, was settled by *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59." (304 U.S. at 403)

*Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939) and *Finch & Co. v. McKittrick*, 305 U.S. 395 (1939) dealt with legislation enacted by Michigan and Missouri, respectively, which prohibited the importation of beer manufactured in any state discriminating against beer produced in Michigan and Missouri.

Although, the statutes involved were clearly "retaliatory", the Court held them valid regardless of their character, noting:

"Since (the Twenty-first) Amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." (305 U.S. at 394, 305 U.S. at 398)

Plainly, the Supreme Court has held that the effect of Section 2 was to dispense entirely with any Commerce Clause limitations on state liquor regulations.

Later decisions indicate that the Court's position has not changed. In *Hostetter v. Idelwild Liquor Corp.*, 377 U.S. 324 (1964), the Court said: "This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution or consumption within its borders." (377 U.S. at 330. See also *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 42 (1966).

In 1972 the Court extended the authority of Section 2 even to the cartilage of First Amendment rights in utilizing Section 2 to uphold state restrictions on sexual explict entertainment in establishments serving liquor. *California v. La Rue*, 409 U.S. 109 (1972). (Justice Marshall was disturbed by the Court's resolution of the First Amendment questions involved and argued in a dissenting opinion that the Twenty-first Amendment spoke only to state control of the importation of liquor and that no mention was made of First Amendment rights.)

Perhaps as Justice Marshall urges, the Twenty-first Amendment may not remove state statutes from all constitutional restrictions. But it *is* clear that the Court is committed to the holding that State regulation of the importation of liquor is not restrained by the Commerce Clause.

I conclude that the United States Congress lacks the power to enact H.R. 2096. Clearly, Congress cannot overrule the restrictive legislation of a "dry" state and thereby authorize the importation and sale of alcohol in such a state. Section 2 of the Twenty-first Amendment casts a cloak of constitutional authority protecting such state legislation from congressional interference. Logically, therefore, the Amendment must safeguard other state legislation held by the Court to be immunized by Section 2 from congressional responsibilities or authority under the Commerce Clause.

In *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945), a case involving a Sherman antitrust prosecution for price-fixing of liquor, the Court granted, ". . . the states' full authority to determine the conditions upon which liquor can come into its territory . . ." (324 U.S. at 299). In a concurring opinion, Justice Frankfurter noted that since the Commerce Clause was subordinate to the exercise of state power under the Twenty-first Amendment that the Sherman Act, which derived its authority from the Commerce Clause, ". . . must equally yield to state power drawn from the Twenty-first Amendment." (324 U.S. at 301)

My conclusion is that the enactment of H.R. 2096 would be a direct infringement of the powers granted to the states by Section 2 of the Twenty-first Amendment and is beyond the power of Congress to act under the Commerce Clause.

Very truly yours,

JIM GUY TUCKER,
*Attorney General, State of Arkansas.*

Senator MONDALE. Our next witness is the distinguished Senator from California, Alan Cranston, who had suggested that these hearings be held along with Senator Tunney and we are very pleased to have you here. Is Congressman Sisk here?

Senator CRANSTON. Yes; he is.

Senator MONDALE. Perhaps he would like to come to the witness stand at the same time? You can both testify and then I can question you together.

Congressman, we are very pleased to have you with us here this morning.

## STATEMENT OF HON. ALAN CRANSTON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA, AND HON. B. F. SISK, A REPRESENTATIVE IN CONGRESS FROM THE 18TH CONGRESSIONAL DISTRICT OF THE STATE OF CALIFORNIA

Senator CRANSTON. Mr. Chairman, I thank you very much for arranging this hearing. I think it is very appropriate that we start the new session of Congress on this matter and I hope we can deal with it expeditiously.

Senator Tunney would have been here but he is unable to. He is a staunch supporter, of course, of this legislation.[1]

Senator MONDALE. He called me personally, as did Senator Cranston, urging these hearings and I would like the record to so reflect.

Senator CRANSTON. H.R. 2096, would prohibit any State from imposing discriminatory taxes and other burdens on wines produced out-of-State.

The purpose of this bill is to remove discriminatory barriers to the movement of wine in interstate commerce. The bill does not limit the power of a State to regulate the sale of alcoholic beverages. It only requires that a State act in an even-handed and nondiscriminatory manner when it taxes, controls or regulates the sale of wine.

I represent California, a State which produces 84 percent of the domestic wine and 74 percent of all the wine, including foreign imports, consumed in the United States. This legislation is of great importance to California. It was supported by the entire California delegation in the House of Representatives where it passed by a 248 to 152 vote on September 11, last year. Congressman Sisk here played a major part in that very successful effort in the House.

[1] Senator Tunney's statement appears at p. 83 ff.

Nature has favored California with soil and climate which encourage the growth of the great wine grapes, such as the Cabernet Sauvignon, the Pinot Noir, the Pinot Chardonnay and other equally noble grapes. As a result, California wines enjoy a worldwide reputation as being among the finest, and in my opinion they are the finest produced anywhere in the world.

But the blessings of nature are not unique to California. Other States enjoy conditions which growers believe may turn out to be equally favorable for the growth of wine grapes and for the production of great wines. New York State wines, for example, enjoy a fine reputation. The largest winery in the southern part of the United States is located in Arkansas, which produces a number of fine wines, including a dry champagne said to be a favorite at the annual testings of the American Society of Enologists.

Other leading producers of wine include New Jersey, Georgia, Michigan, Ohio, and Washington. A substantal increase of plantings of vines in Oregon promises to lift that State to prominence within a few years.

The U.S. wine industry now grosses over $1.7 billion annually and is growing. The Bank of America forecasts a national demand for wine in excess of 650,000 gallons by 1980—an amount which will require an annual growth rate of 8.6 percent, making the United States the fastest growing wine market in the world.

But if the wine industry is to become a truly "all-American" industry, the past tendency of some States to consider their wine industries as completely indigenous, to be favored with trade barriers, must be corrected. I want to respond to the argument that the 21st amendment empowers the State to impose discriminatory taxes and other regulatory burdens on out-of-State wines.

There is considerable evidence that the original purpose of the amendment was to permit dry States to protect themselves from the importation of liquor rather than to permit liquor-producing States to set up trade barriers against out-of-State products in favor of their own.

The present state of the law is that in the absence of Congressional action under the commerce clause, States can tax alcoholic beverages in any manner they see fit. A number of States have taken advantage of this situation to enact laws specifically discriminating against wines produced outside the State or from materials produced outside the State.

One State taxes out-of-State wine at $1.15 per gallon and taxes domestic wine at 37 cents per gallon. Another State imposes a $50 fee on a winery which uses only local grapes, but a $500 fee on wineries using grapes from other States. In yet another State, agents for out-of-State wine shippers must obtain a license at an annual fee of $300, whereas an agent soliciting for an in-State producer need only obtain a license at an annual fee of $10.

Few industries are subjected to the type of discrimination which some States practice against out-of-State wines. Some of these same States also have local wineries which are competing aggressively in out-of-State markets.

In today's fast expanding wine market, I doubt whether protectionism actually benefits a local producer over the longrun. It certainly does not benefit the consumer.

I believe that Congress has the power under the commerce clause to prohibit a State from discriminating against wines produced outside the State or from materials produced outside the State.

Support for this view is found in *Heublein, Inc.* v. *South Carolina Tax Commission*, 409 U.S. 275 (1972), in which the Supreme Court notes that—

though the relationship between the 21st amendment and the force of the commerce clause in the absence of congressional action has occasionally been explored by this Court, we have never squarely determined how that amendment affects Congress' power under the commerce clause.

The Department of Justice, Mr. Chairman, has indicated that the Court never has considered the effect of legislation by Congress, and I would like to quote a letter from the Department of Justice dated January 3, 1972, to the Honorable Harley O. Staggers, chairman of the Interstate and Foreign Commerce Committee of the House, written at that time in regard to a measure similar to this measure.

The letter states, in one place:

There is evidence that the original purpose of the amendment was to permit dry states to protect themselves from importation of liquor rather than to permit liquor producing states from erecting trade barriers against out-of-state products. Generally speaking there has always been a strong policy in favor of interpreting the Constitution to prohibit such barriers.

Thus spoke the Department of Justice on this issue.

Clearly Congress has exercised tax power over liquors so the 21st amendment does not in any way completely insulate liquor from Federal control.

Senator MONDALE. Could I interrupt you? Does the Department of Justice oppose this bill?

Senator CRANSTON. No.

Senator MONDALE. It has no position?

Senator CRANSTON. No.

Senator MONDALE. All right, we will put that Justice Department letter in the record following your testimony.

Senator CRANSTON. Thank you.

[The letter referred to above follows:]

DEPARTMENT OF JUSTICE,<br>
OFFICE OF THE DEPUTY ATTORNEY GENERAL,<br>
*Washington, D.C., January 3, 1972.*

Hon. HARLEY O. STAGGERS,<br>
*Chairman, Interstate and Foreign Commerce Committee, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 9029 to prohibit the imposition by the states of discriminatory burdens upon interstate commerce in wine, and for other purposes.

The Department takes no position on the merits of the bill and limits its comments to the legal issues involved. The Twenty-first Amendment to the Constitution repealed the Eighteenth (Prohibition) Amendment. It also forbids the transportation or importation of intoxicating liquors into any state for use in the state in violation of state law. In a series of interpretative decisions rendered shortly after ratification of the Amendment, the Supreme Court established the proposition that states are thus competent under the Twenty-first Amendment to adopt legislation discriminating against intoxicating liquors imported from other states in favor of those from within the state. The Court has said that such discrimination is not limited by the commerce clause. *E.g., State Bd.* v. *Young's Market Co.*, 299 U.S. 59 (1936).

The bill would have Congress make findings that the imposition by states of taxes which discriminate against out of state wine obstructs commerce. It would prohibit states which permit the sale of wine within the state from imposing discriminatory measures on wine from without the state. Persons engaged in the transportation or importation of wine would have standing to file suit in Federal district court to enjoin the enforcement of discriminatory state laws.

The purpose of the bill, which we understand is supported by the California-based Wine Institute, is presumably to set up a new test case in the courts as to the scope of the Twenty-first Amendment. The sponsors of the bill may feel that there is a better chance of getting the Supreme Court to reverse itself if Congress legislates in this area. We doubt however that the findings by Congress based on the commerce clause would be of any particular help in such a test case since this does not seem to be an area where the Constitution confers on Congress the right to define the scope of the Amendment by legislation.

We cannot say, of course, that it is impossible to suppose that the Supreme Court might change its position on this matter. There is evidence that the original purpose of the Amendment was to permit dry states to protect themselves from importation of liquor rather than to permit liquor producing states from erecting trade barriers against out-of-state products. Generally speaking, there has always been a strong policy in favor of interpreting the Constitution to prohibit such barriers.

Nevertheless, we feel it appropriate to inform the Committee that if the Congress were to enact H.R. 9029, it would be necessary for the Supreme Court to reverse a well established line of precedents in order for this legislation to be sustained.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

RICHARD G. KLEINDIENST,
*Deputy Attorney General.*

Senator CRANSTON. As long as a protectionist state of mind exists it is unreasonable to expect that individual States will voluntarily lower the barriers they have erected against the produce of other States. In this regard, California has been no exception.

For many years we have had a law which effectively barred the sale of Florida-grown avocados in California. Last fall, a three-judge Federal court ruled this law unconstitutional. The court described the law as "irrational, arbitrary and discriminatory." I agree and I was glad to see that decision.

It was necessary for a Federal Court—acting as a referee in interstate commerce—to remove California's unfair and discriminatory barrier against Florida avocados. It will be necessary for Congress, acting in its role as referee of commerce among the States, to remove similar barriers against out-of-State wines.

The principle which is involved here, nondiscriminatory commerce among the States, is a fundamental aspect of the relationship of the States within the Union. Our entire economic system depends upon free movement of goods in interstate commerce. We should be on watch to protect the unobstructed flow of commerce.

Commerce in wine and avocados is not unique in being subjected to discriminatory burdens by individual States. Such commercial discrimination, however, I think is wrong. I strongly urge this committee to uphold the concept that one State may not discriminate against the produce of another State whether the trade be in avocados or wine, or in grapes, apples, and other fruits from which wine can be made.

H.R. 2096 will establish this principle by ending unfair discrimination against wines produced in other States.

Thank you very much, Mr. Chairman.

Senator MONDALE. Thank you very much, Senator Cranston.

I gather the basis for optimism that this legislation might be constitutional is the *Heublein* case to which you make reference, which suggests that the Supreme Court, in 1972, did not feel that the issue of the power of the Congress to deal with this question, as distinct from the power of the States, has been directly faced by the Court. Is that correct?

Senator CRANSTON. Yes.

Senator MONDALE. Has any research been done on whether this matter was discussed at the time the constitutional amendment was proposed? Do we know whether its framers had in mind this aspect of the problem?

Senator CRANSTON. No, we do not know of any.

Senator MONDALE. Congressman Sisk?

Mr. SISK. Mr. Chairman, I think the best record on that was established in Senate debate at the time the 21st amendment was passed—now I do not have the reference to it at the moment.

We did do a good deal of investigation over the years that we have been working on this matter in the House, and I think the Senate debate probably more clearly delineates actually for us what the intent was in connection with the right of the State to preclude the importation of liquor if they chose to remain dry. That was the full emphasis and never at any time, it seems, as we interpret that language, was there to be any actual discrimination permitted in connection with interstate commerce.

Now, without going into detail, it was just called to my attention here, the legislative history of the 21st amendment shows clearly that there is no evidence that the Congress intended to permit States to Balkanize this country.

A central principle of the Founding Fathers was that the various States should constitute a single, united trading union. The only purpose of section 2 of the 21st amendment was to perpetuate the protection given to States to remain dry by the Webb-Kenyon Act.

Now it quotes from Senator Borah, here is a quote—Senator Borah, and this is 76 Congressional Record, 2170, after reviewing the "history of the right of dry States to remain dry and be protected," spoke against a motion from the floor by Senator Robinson of Arkansas to strike out section 2. He said, and I quote: "Mr. President, as I understand, this is the question of striking out section 2, which provides for the protection of the so-called dry States. * * *"

"I look upon this provision of the amendment as vital. It does not seem to me that we can afford to strip the amendment of all that which protects the dry States. Indeed, if I understand the two platforms, that is a part of the pledge of the platforms * * *," apparently to party platforms at that time.

"Mr. President, it has been said that the Webb-Kenyon Act is sufficient protection to the dry States. The Webb-Kenyon Act was sustained by the Supreme Court of the United States by a divided court. * * *"

And further quoting, "Secondly, we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon Act."

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And then Senator Borah went along and discussed the *Clark distilling* case and other Supreme Court cases under the Webb-Kenyon Act.

I think, Mr. Chairman, if I might add, there will be some further testimony by Mr. Peyser and others on this particular matter.

Senator MONDALE. Yes; I think that would be helpful because that is the central question. I do not think there is any doubt about the public policy favoring the free flow of commerce. That, as you point out, is one of the central points in the U.S. Constitution.

The question is whether in adopting the 21st amendment the Congress intended a different result for alcoholic beverages. I think that is the issue we have to face.

Senator CRANSTON. Mr. Chairman, I think the research indicates that it was never contemplated at the time the 21st amendment was considered and adopted that it would be used in this fashion and, that the purpose was to permit dry States to protect themselves against any alcoholic beverages coming in, but not to permit them—or to permit any States to simply try to protect local industry by discriminatory acts.

Senator MONDALE. Do you think it was intended for a State to decide, we are not going to have any booze in, say, California, but not to be able to say we will only have California booze——

Senator CRANSTON. Right.

Senator MONDALE [continuing]. You have to do it uniformly?

Senator CRANSTON. Yes; exactly that.

Senator MONDALE. I see. Very good. I appreciate your testimony, Congressman Sisk. Did you have more to say on this issue?

Senator CRANSTON. No; thank you very much.

Senator MONDALE. Thank you very much.

Senator CRANSTON. I think he may have more to say.

Mr. SISK. Mr. Chairman, I am going to ask unanimous consent that a very brief statement be made a part of the record in view of the fact that I do not want to take the time of the committee and be repetitious.

Senator Cranston, I think, has done a very excellent job in presenting our position.

I am here, of course, basically representing all 43 members of the California delegation in strong support of this legislation. This is a matter of course that we have worked on for quite a long while and, then of course as is indicated by the Senator, passed rather substantially during this last session.

And of course we would hope that maybe your committee, in its wisdom, would look favorably on the legislation.

Our main basis, really, in let us say rebutting some of the comments by the distinguished senior Senator from Arkansas, is the fact that the Court itself has said in cases where they have spoken, that in fact this is a matter on which they have, in essence, not ruled—that is, on this principle—and therefore, have left it up to the Congress to legislate, if they see fit to legislate.

Then, finally, again of course commenting a little further in connection with the debates that went on in connection with this matter, in particular the Senate debate at the time of the 21st amendment, seems at least to an objective view, to indicate that certainly there was no

contemplation of any discriminatory actions being permitted in connection with the commerce clause, but simply the right of the State to remain dry or not to remain dry as they saw fit.

And, therefore, in no sense was it to, in essence, permit discrimination.

Senator MONDALE. That is very useful, Congressman.

I appreciate those comments. If you have further materials you can submit for the record on the debate that bears on this question of what was intended by section 2 of the 21st amendment, I would certainly appreciate having it.

Mr. SISK. I would be very happy to make a part of the record, any and all of the material that we used in the House side. I am sure that Mr. Peyser will give his statement.

Senator MONDALE. Yes; we have your hearing record and we have the committee report from the Interstate and Foreign Commerce Committee. These materials are part of our official file on H.R. 2096.

Thank you very much for a most useful contribution.

[Mr. Sisk's prepared statement and a letter from Sen. Cranston follow:]

STATEMENT OF HON. B. F. SISK, A U.S. CONGRESSMAN FROM THE STATE OF CALIFORNIA

Mr. Chairman, it is indeed a pleasure to address the Subcommittee this morning, on behalf of the entire California Delegation, in strong support of H.R. 2096. Virtually identical in substance to legislation previously co-sponsored by every Representative from California, the present bill seeks both to reassert Congressional intent over legislation enacted many years ago and to prohibit the imposition of descriminatory burdens by individual states in the interstate commerce of wine.

As you know, the early history of our country saw commerce inhibited by artificial trade barriers which were established by one state against products entering from another state. At the Constitutional Convention, the equitable regulation of interstate commerce proved a focal point in bringing together the representatives of diverse state interests and allowing them to perceive the national importance of eliminating undue hindrances to trade among the several states. Unfortunately, by a parochial misinterpretation of a section of the 21st Amendment, some states have chosen to impose arbitrary licensing, storage, and marketing regulations—in addition to discriminatory taxes—on wine imported from another state while at the same time exempting locally-produced products from being subject to similar regulations.

The vehicle for these discriminatory taxes is Section 2 of the 21st Amendment which reads: "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." The legislative history of this section, largely consisting of Senate debate, clearly indicates that the inclusion of Section 2 was merely intended as a safeguard to ensure that those states who desired to remain "dry" following the repeal of prohibition could do so. It was in no way to be a malleable mechanism for inhibiting the free flow of interstate commerce.

The Report of the House Committee on Interstate and Foreign Commerce (No. 93-264) accompanying this bill and House debate preceding its passage have well documented instances of blatant discrimination against out-of-state wines. I am confident, as well, that succeeding testimony here today will further focus on the unfair dollar disparities which some states condone in connection with taxes, use of raw materials in wine production, license fees for distributors, and the like. Perhaps it should be noted that we in California do not discriminate against wine produced elsewhere. All wine, whether from France, Florida, New York, Arkansas or California, pay the same State excise tax. The local wine industry, of course, is of tremendous importance to California's economic health, yet we have enough faith in the quality of our product to send it to the marketplace on an

equal footing with wines of other origins. This, in my judgment, is as it should be. For, aside from the economic factors involved with such discriminatory practices, we are a nation of United States and not merely individual economic entities.

While some fears have been expressed with regard to possible ramifications of this legislation, H.R. 2096 does not seek to repeal the wisdom of Section 2 of the 21st Amendment. It does not force "dry" states to open their borders, nor does it eliminate state regulation of wine. Quite simply, H.R. 2096 seeks to halt the discrimination against out-of-state wine by some states which have misconstrued a Constitutional provision for parochial purposes. In an effort to correct this discrepancy, my colleagues in the California Delegation join me in vigorously urging your favorable consideration of this legislation. Thank you.

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UNITED STATES SENATE,
*Washington, D.C.*

DEAR COLLEAGUE: We are sending this letter to you as a member of the Finance Committee. Presently pending in the Committee is legislation (H.R. 2096) to prohibit any State from imposing discriminatory burdens on wines produced outside the State or from materials produced outside the State. The bill passed the House on September 11, 1973, by a vote of 248 to 152.

The sole purpose of H.R. 2096 is to remove discriminatory tax barriers to the movement of wine in interstate commerce. The bill does not limit the power of a State to regulate the sale of alcoholic beverages or to prohibit the sale of alcoholic beverages. It only requires that a State act in an even-handed manner when it taxes, controls or regulates the sale of wine.

We represent States which produce the major portion of American domestic wines. The "tariff walls" erected by some States against the produce of other States, we believe, seriously obstruct interstate commerce in violation of the Commerce Clause of the Constitution.

The American Wine Industry now ranks as a major producer of high quality wines. During the years following repeal of Prohibition, when American wine growers were re-establishing their vineyards, discriminatory State taxation in favor of locally-produced wines may have had some limited value in fostering redevelopment of the wine industry. Today, however, the local shelters built through discriminatory taxation of out-of-state wines, serve no constructive purpose—if, indeed, they ever did.

Instead, discriminatory imposts on wines have obstructed the movement of a valuable commodity in interstate commerce in a manner reminiscent of the trade barriers that existed among the states in the days of the Articles of Confederation.

Some may argue that the Twenty-first Amendment inhibits Congress from legislating to prohibit discriminatory State taxation of wine produced outside the taxing authority. We believe, however, that the original purpose of the amendment was to permit dry states to protect themselves from the importation of liquor rather than to permit liquor-producing states to erect trade barriers against out-of-state products.

The Supreme Court in *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275 (1972) has noted that . . . though the relation between the Twenty-first Amendment and the force of the Commerce Clause in the absence of Congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress' power under the Commerce Clause.

We believe that Congress has the power under the Commerce Clause to prohibit a State from setting up a trade barrier in the form of taxes and regulations against wines produced outside the State or from materials produced outside the State. We believe that the strong Constitutional policy in support of free commerce among the States requires that Congress act to prohibit such barriers. H.R. 2096 is intended to accomplish that purpose and we hope that you will support the bill.

Sincerely,

ALAN CRANSTON.
JACOB K. JAVITS.
ADLAI E. STEVENSON III.
JOHN V. TUNNEY.
JAMES L. BUCKLEY.

Senator MONDALE. Senator Packwood regrets that he cannot be here at this time. He sent a statement and we will print it in the record at this point.

[Senator Packwood's prepared statement follows:]

STATEMENT BY HON. BOB PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

I welcome this opportunity to discuss the legislation before the Subcommittee. H.R. 2096, the so-called "Wine Bill", proposes to eliminate discriminatory excise tax barriers that have been erected by some States in an effort to obstruct free interstate commerce in wine.

Generally, I am convinced the measure has merit. This nation was founded on the principle that commerce among the States should not be restricted by any State, but that such legal regulation of interstate commerce as is necessary should rest solely with the United States Congress. According to the evidence that has been developed by the Staff of the Committee on Finance for use by this Subcommittee, this clearly is not the case with respect to the controversy before us. For one reason or another, many States have chosen to erect discriminatory barriers against the free trade of wine produced outside their respective borders. This condition, while of relative insignificance in comparison to other great issues facing the country today, must be faced and corrected by the Congress if we are to uphold our responsibility under the Constitution to regulate interstate commerce.

This legislation is perfectly consistent with the principle that any State may choose to regulate the consumption within its borders of alcoholic beverages in keeping with the authority contained in the 21st Amendment to the Constitution. It occurs to me that the 21st Amendment was not ratified with the intent to subrogate the "interstate commerce" clause of the Constitution. Rather, it was simply to extend to provide for any State the opportunity to decide for itself whether or not it would prefer to restrict the sale of alcoholic beverages within its borders once general prohibition was repealed. The 21st Amendment *does not* extend to the States the authority to assume the responsibility of the Congress of the United States to regulate the flow of interstate commerce.

Having said this, I should like to recognize the concerns expressed by Mr. Kenneth Underdahl, the Administrator of the Oregon Liquor Control Commission, and other State officials responsible for the operation of a State-controlled liquor dispensary system. Ken's concern is that the terms of H.R. 2096 will withdraw from him and his counterparts any authority to determine the extensiveness of the offering of wines for sale within their systems. I am convinced that this is an unfounded fear.

This very question was addressed by the House Committee on Interstate and Foreign Commerce during its consideration of this bill last year. Chairman Staggers addressed this point during the House debate on H.R. 2096. I would ask that, at the conclusion of my remarks, the text of an exchange between the Committee Chairman, Honorable Harley Staggers, and Honorable Edith Green that deals specifically with the concerns expressed by Ken Underdahl and others.

Finally, I would like to say just a word or two about my proposed amendment to H.R. 2096. Briefly stated, my amendment #509 will make honest, law abiding people of an awful lot of unwitting violators of the federal tax law.

Under present law, only heads of household are eligible to apply for and receive a permit to manufacture a limited quantity of wine for home consumption. Aside from the fact that this discrimination rankles an awful lot of unmarried people, not to mention spouses of a "head of household", we have a bit of a problem in the production and distribution of these make-wine-in-the-home kits that have cropped up on the market. Nobody has any idea of the number of people who have purchased such kits for themselves or their friends not knowing of the limitation contained in the law.

My amendment will make it possible for any person of legal age to obtain a permit from the Internal Revenue Service for home manufacture of up to 100 gallons of wine. The present law provides that any head of household can manufacture up to 200 gallons for home consumption.

My amendment will change the federal law [26 U.S.C. 5042(a)(2)] to read as follows: Subject to regulations prescribed by the Secretary or his delegate, any

individual who is legally entitled to purchase wine in the State in which he resides may, without payment of tax, produce for private use and not for sale an amount of wine not exceeding 100 gallons per annum.

I urge the Committee and the Congress to approve this change in the federal tax law as an amendment to H.R. 2096.

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[From the Congressional Record, Sept. 11, 1973]

Mr. STAGGERS. Mr. Chairman, I yield to the gentlewoman from Oregon for a question.

Mrs. GREEN of Oregon. I thank the distinguished chairman very much.

Apparently, the administrator of the Oregon State Liquor Control Commission has raised some questions about this legislation, Mr. Chairman, and in a letter from the Governor's office, signed by an administrative assistant, Dale Mallicoat, it states:

"This bill, among other things, would be very harmful to the operation of the OLCC retail stores.

"It is our understanding that the measure would require a State-owned store, if it lists one wine, to list all 60,000 to 75,000 domestic wines. The warehousing, inventory, and control needs of such a law would be absolutely impossible to meet and thus would force wines out of the state-controlled stores."

Mr. Chairman, my question is: Is this an accurate statement, and would this legislation indeed require them, if they listed one wine, to list 50 or 60 or 75,000 different wines?

Mr. STAGGERS. I might answer the question in this way by reading from the report:

"The only opposition to the legislation in the hearings was from representatives of the control States. They opposed the legislation *as introduced* on the grounds that it might be construed to require control States which stocked any brand or variety of wine to stock every wine which was tendered to it by supplier which could require such a State to stock as many as 40,000 brands of wine. In order to allay this concern even though it was believed to be without foundation, the Subcommittee adopted a revised section 3 which appears to the legislation herein reported."

I will read that section:

"SEC. 3. (a) Notwithstanding the provisions of section 2 of this Act, each State retains the right—

"(1) to engage in the purchase, sale, or distribution of wine; and

"(2) to exercise discretion in the selection and listing of wine to be purchased or sold by each such State."

I think that answers the question very conclusively.

Mrs. GREEN of Oregon. Most of the gentleman's answer was in regard to stocking of wines. It does not require, for the legislative history, any of the controlled liquor stores to list any wines or all of them?

Mr. STAGGERS. No, it does not.

Mrs. GREEN of Oregon. I thank the Chairman.

Senator MONDALE. Our next witness is the Honorable John Heinz, Representative from Pennsylvania.

Good morning, Congressman Heinz.

## STATEMENT OF HON. H. JOHN HEINZ III, A REPRESENTATIVE IN CONGRESS FROM THE 18TH CONGRESSIONAL DISTRICT OF THE STATE OF PENNSYLVANIA

Mr. HEINZ. Thank you, Mr. Chairman. I am very grateful for the opportunity to testify before your commitee in support of H.R. 2096. As you probably know, Mr. Chairman, I am a member of the delegation from a so-called control State; namely, Pennsylvania. Because of that, I think it is all the more important to dispel any confusion that may exist over what this bill actually does. Many control States, I understand, have expressed some concern over the bill, both here on

the Senate side, and they certainly did over on the House side when the bill was before my Interstate and Foreign Commerce Committee. These concerns are, of course, important and do need to be answered. But as a member from a control State, as a member of the House Interstate and Foreign Commerce Committee where the bill originated, and as a spokesman for the bill on the House floor when it was before us in the first part of the 1st session of the 93d Congress, I would like particularly to take this opportunity to stipulate five things the bill emphatically does not do.

First, the bill does not affect the right of any State in my judgment, to prohibit the sale of alcoholic beverages.

Second, the bill does not interfere in any way with the right of a State to fix license fees, markups, hours of sale, or the exercise of any other of its police powers.

Third, the bill does not affect the adoption by any State of local option laws.

Fourth, the bill does not interfere with the exercise of full discretion which the commissioners have regarding the number of brands or the kinds of brands of wine a State wishes to purchase or sell.

Fifth, and finally, the bill does not interfere in any way with the right of a control State to list or delist any or all brands of wine.

Mr. Chairman, the only purpose, as I see it, of H.R. 2096 is to prevent one State from passing any discriminatory tax, discriminatory regulation, discriminatory markup, or discriminatory requirement against wine produced simply because that wine is produced outside of that particular State.

Mr. Chairman, I suppose many of us, all of us have some kind of special interests in our district or our State. Most of us have particular agricultural or industrial enterprises within each of our States which are somewhat unique and which greatly affect the economies of our States. Each of us feels obligated, I am sure, to promote these local or regional interests in every way possible.

In the case of the wine industry, I suggest that the best and indeed the right way to promote these interests is to see that they are an attractive product competing in a free economy.

Mr. Chairman, I strongly believe that it is in the interest of every one of us to maintain and to increase the flow of commerce in this country. This, in fact, was and is clearly the intent of article I, section 10 of the Constitution.

This, Mr. Chairman, is what H.R. 2096 is all about. It is concerned with implementing the Constitution of the United States. I believe it is needed because of a few minor court decisions which favored special interests and which created an unwise legal precedent that has come into existence. Nothing more, nothing less is, I think, at stake here.

Senator MONDALE. As a general question of public policy, I think there is a very strong argument for removing various forms of discrimination, including discriminatory taxes, but the central question, as I see it here, turns on the whole constitutional issue of whether the 21st amendment did not in fact, as Senator McClellan argues, authorize State discrimination as a condition to the adoption of the 21st amendment, and that is the question that I think will bother this committee and the Senate.

Do you have any comments on that issue?

Mr. HEINZ. Only as a nonlawyer.

Senator MONDALE. That is usually the best.

Mr. HEINZ. I am glad you said that.

Mr. Chairman, I cannot help being struck by the fact that court interpretations of the Constitution are dynamic. Up until 1954, the law of the land with respect to education was that separate was equal. In 1954 the Court reversed the decisions of previous Supreme Courts in the *Brown* v. *Board of Education* suit and declared that separate was not equal.

I use that as an example simply to indicate that our Constitution is a dynamic instrument. We are engaged today in an argument in the House, in the House Judiciary Committee I believe, as to what the meaning of the impeachment clause is; should it be considered strictly as a legal kind of remedy, or has it got political implications.

I suggest that to my way of thinking that the laws are what we make them and what, at a particular point in time, the Court in its best judgment, interprets them to be in the light of a more complex and ever-changing society.

Senator MONDALE. Right out of Yale Law School.

Mr. HEINZ. Mr. Chairman, I have to confess that I went to Yale, but I did not go to Yale Law School. I probably could not have gotten in.

Senator MONDALE. I bet you drank wine with some of those guys. That was very good.

You come from a State which does in fact impose a different tax upon imported wines than upon its own Pennsylvania produced wines. Nevertheless, you feel in the interest of a national economy that this amendment should pass.

Mr. HEINZ. Mr. Chairman, we do have some Pennsylvania wines which are excellent, and I commend them to anybody who reads this record. Unfortunately, we do not have as many as we would like.

Senator MONDALE. You do not even show up on the figures here.

Mr. HEINZ. Well, one of the vineyards, Mr. Chairman, I thank you for giving me this opportunity, is the Pennzel Vineyard in Erie, Pa.

Senator MONDALE. Is that the same one that makes oil?

Mr. HEINZ. No, that's Pennzoil.

Senator MONDALE. I thought it was one of the distillates.

Mr. HEINZ. I think the interest here is what is in the best interest, not only in the people who produce wine in Pennsylvania, of which by the way, it is impossible to buy a bottle of wine unless you go to a State run store or to a restaurant, of course, with a liquor license. We are a control State, and I do not think that the people of Pennsylvania feel that they are well served by discrimination that militates against their freedom of choice.

Senator MONDALE. I thank you very much for your fine statement, and for your legal analysis.

Mr. HEINZ. Mr. Chairman, thank you very much. I appreciate the opportunity of appearing before your committee.

Senator MONDALE. We are very pleased to have you.

Our next witness is Jefferson E. Peyser, General Counsel of the Wine Institute in San Francisco.

Mr. Peyser, we are pleased to have you here.

## STATEMENT OF JEFFERSON E. PEYSER, GENERAL COUNSEL, WINE INSTITUTE, SAN FRANCISCO, CALIF., ACCOMPANIED BY ARTHUR L. SILVERMAN, ESQ.

Mr. PEYSER. Thank you, Mr. Chairman, for the opportunity of being here.

May I ask the privilege at this time of responding to statements that may be made by witnesses in opposition following me?

Senator MONDALE. I think I will have to deny that request but we would be very pleased to have you submit a letter. It might be better as a matter of policy if we had debates rather than these statements, but as a rule we have tried to avoid such debates here. Therefore, we would be very appreciative if you would write us a letter stating your responses to other statements made, and we, of course, will accord this same opportunity to the other speakers this morning.

So, feel free to do that, and your written material will be analyzed by me and by the staff.

Mr. PEYSER. Thank you very much, Senator.

In order to be brief, I will not repeat some of the earlier statements. Oh, yes. May I state that I also am authorized to represent the Finger Lakes Wine Growers Association of New York, and the Ohio Grape Growers and Vintners Association of Ohio, in addition to, of course, the California wine industry.

Senator MONDALE. I see. The Wine Institute is the California Wine Institute?

Mr. PEYSER. Yes.

Senator MONDALE. And you also represent these other concerns? Very well, if you would proceed.

Mr. PEYSER. May I just briefly reiterate that the purposes of this bill and by its terms, does not affect the right of any State to do anything that it is presently doing, that is, regulate the sale or distribution of wine within its borders, or regulate or legislate within the purview of its police powers. It can prohibit in whole or in part the sale and distribution of alcoholic beverages. It can levy taxes. It can do anything it wants to do. It can also exercise discretion in control States as to what brands or how much of any brand they wish to purchase or sell.

There is only one thing this bill has as its purpose, and the only thing it does do by its terms is to end economic discrimination by a State that produces wine against wine produced outside of the State.

For example, Hon. Senator McClellan's State imposes a 75 cent tax on wines produced outside the State, and a tax of 5 cents on its own wine. That is a very substantial amount per bottle differential in the marketplace.

There are other discriminations in the State of Arkansas also. They permit the sale only of Arkansas wine in restaurants and no out of State wines can be sold in restaurants.

I think the thing that you appear to be most interested in, Mr. Chairman, and the thing that is most vital is whether this bill, whether this legislation is constitutional.

Senator MONDALE. Yes. I think as a matter of public policy, the arguments favor the adoption of this bill, but I am troubled about the question of constitutionality, so maybe you could address yourself to that issue.

Mr. PEYSER. Yes.

Well, the proposed legislation is definitely within the power and scope of the Congress, and it is constitutional, for even if one chooses to follow the four Brandeis decisions that have been referred to in the late 1930's, and ignore totally the congressional debates on section 2 of the 21st amendment, the proposed legislation is constitutional.

The Congress always has power to legislate in a field in which the Supreme Court has not acted or made any decision. My personal feeling is that the Congress, as a matter of law, has the right to legislate at any time, and it is for the Court to make a determination whether that legislation in their wisdom is constitutional or unconstitutional.

Senator MONDALE. That is correct, but we do not want to just pass blatantly unconstitutional bills. We do want to show some deference to the Court. I know what you are saying, but if we are convinced that this is clearly violative of the 21st amendment, I think my colleagues would be disinclined to pass it. So I would like you to address the question of whether you, as I assume you do, have a strong argument for the proposition that this bill is consistent with the 21st amendment.

Mr. PEYSER. That is correct.

I was interested—I will do that. I was interested in the comment made about the expanded activities of the courts, the civil rights cases, where for many, many years they made one determination about the interpretation and then in its wisdom, based upon further considerations, it changed its mind.

However, the legislative history of the 21st amendment shows clearly that there is no evidence that the Congress intended to permit States to Balkanize this country. A central principle of the Founding Fathers was that the various States should constitute a single, united trading union. The only purpose of section 2 of the 21st amendment was to perpetuate the protection given to States to remain dry by the Webb-Kenyon Act. In other words, before prohibition, alcoholic beverages had the benefit of the commerce clause, the same as shoes, shirts or anything else. It was the Webb-Kenyon Act at that time that protected the dry States.

When the debates of the Congress took place——

Senator MONDALE. Now, you are very familiar with this matter.

Did the Webb-Kenyon Act clearly work the way you say section 2 should now work; namely, that States can have a uniform policy affecting alcohol, whether produced domestically or outside the State, but they cannot have a different policy——

Mr. PEYSER. That is correct.

Senator MONDALE. Was that your interpretation of the Webb-Kenyon Act?

Mr. PEYSER. Well, by its specific terms, it does not mention. All it talks about is that a State has a right to be dry or wet.

Now, the same way in the debates of the Congress, which I have read very carefully. I challenge anybody to find one State, in the debates of the Congress in which the 21st amendment was being discussed, where there was any discussion about giving a State the right

to discriminate. All they talked about is they wanted to repeal prohibition. They did not want the return of the saloon, and then those who were interested in the dry States went into this discussion, whether the Webb-Kenyon Act was sufficient protection, and they felt it was not sufficient protection because they said, after all, it is only an act of Congress and Congress could repeal that. We want it written into the Constitution.

So section 2 was put into the Constitution as a substitution, so to speak, for the Webb-Kenyon Act. Now, let's see what section 2 says. Section 2 says, "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 prohibited." Nowhere does it say that States can discriminate. Nowhere does it say anything except that the importation and transportation into the State in violation of its laws is prohibited.

Now, this is borne out further by Senator Borah's statement in the 76 Congressional Record 4170, who after reviewing the history of the right of dry States to remain dry and be protected, spoke against a motion from the floor by Senator Robinson of Arkansas to strike out section 2. In that debate he said, and I quote:

> Mr. President, as I understand, this is the question of striking out section 2, which provides for the protection of the so-called dry States.
>
> I look upon this provision of the amendment as vital. It does not seem to me that we can afford to strip the amendment of all that which protects the dry States. Indeed, if I understand the two platforms, that is a part of the pledge of the platforms.
>
> Mr. President, it has been said that the Webb-Kenyon Act is sufficient protection to the dry States. The Webb-Kenyon Act was sustained by the Supreme Court of the United States by a divided court.
>
> Secondly, we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon Act.

Now, Senator Borah then discussed the Clark distilling case and other Supreme Court cases under the Webb-Kenyon Act. After demonstrating that those cases did not, in fact, actually deter importation into dry States from wet, he concluded that "We must have some other method, some other provision of the Constitution than those which existed prior to the adoption of the 18th amendment in order to protect those States wishing to remain dry after repeal," 76 Congressional Record, 4172.

"All this," he continued, "was sought to be remedied by the Webb-Kenyon Act. I am very glad the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently into the Constitution of the United States," 76 Congressional Record, 4172.

Mr. Justice Marshall, in a dissenting dictum in *California* v. *LaRue*, 34 Law Edition 2d 342 (1972), discussed the true intent of section 2 of the 21st amendment only a few months ago. By its terms, he said, the amendment "speaks only, only to State control of the importation of alcohol, and its legislative history makes clear that it was intended only to permit dry States to control the flow of liquor across their boundaries despite potential commerce clause objections." In a footnote, Justice Marshall discusses the legislative history I have already set before you, detailing its genesis in the Webb-Kenyon Act which "was designed to allow dry States to regulate the flow of alcohol

across their borders," 34 Law Edition 2d 361, footnote 14. Justice Marshall then quotes the following language of Senator Blaine, who sponsored the 21st amendment on the floor of the Senate: "To assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line. The pending legislation will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity, namely, intoxicating liquor." 76 Congressional Record, 4141; that is in 1933.

Now, even if we wished to ignore the intent of the Congress as evidenced by the congressional debates on section 2 of the 21st amendment, this legislation is not unconstitutional per se because section 2 does not state anywhere that one State has the right to discriminate against the products of another State.

Some opponents of the proposed legislation endeavor to indicate that it involves States rights. It should be pointed out that the right to discriminate against the products of another State was prohibited by the inclusion into the Constitution of the commerce clause.

Prior to Prohibition, States could not discriminate against wines produced in another State. The 21st amendment does not provide that a State shall have the right to discriminate against the products of another State. And as I just reiterated, the debates of the Congress are completely silent.

The language of section 2 speaks only of the fact that the transportation of liquors into that State is something that a State can control.

Now, in a case that was decided only last December, December 18, *Heublein, Inc.* v. *South Carolina Tax Commission*, Justice Marshall this time writing for a clear majority of the Court, with only one dissent, pointed out that the Supreme Court has never squarely faced the question of the 21st amendment's relationship to the commerce clause: "Though the relation between the 21st amendment and the force of the commerce clause in the absence of congressional action has occasionally been explored by this Court, we have never squarely determined how that amendment affects Congress' power under the commerce clause.

Senator MONDALE. What did the *Heublein* case involve?

Mr. PEYSER. That was a question of taxation where the State set up guidelines as to what constitutes doing business within the State.

Senator MONDALE. For the purpose of reaching them for taxes?

Mr. PEYSER. For purposes of taxes, Heublein said, well, we're not doing business within the State. We don't have any representatives, we do not do this and that. The Court said, well, because of the 21st amendment, the State can make any guidelines it wishes to. It really is not a case, in my humble judgment, which was within the purview of the 21st amendment, but anyhow, the Court so held.

Senator MONDALE. The Supreme Court held that in 1972?

Mr. PEYSER. 1972.

Senator MONDALE. That, in effect, the States could do as they pleased in determining what was sufficient jurisdiction to tax an interstate alcoholic company.

Mr. PEYSER. That is right.

Senator MONDALE. Now, why, if this is fundamentally a constitutional question, as I believe it to be, why have there not been Supreme Court decisions directly answering this question?

Mr. PEYSER. I do not know. There has never been a case involving—the Supreme Court has never acted on the matter of excise taxes.

Senator MONDALE. Why does the California Wine Institute not bring action against say one of these States and find out?

Mr. PEYSER. Well, because we believe that in the many years that have gone by, the congressional intent may have been somewhat obliterated in the minds of the Court. We believe that the Congress should reiterate its idea that this is a union and that tariffs within States was not within the intention so that the Court can clearly understand that the Congress of the United States does not want tariff barriers.

Senator MONDALE. In other words you think that if the Congress were to pass this bill, it would strengthen the Court case, or a court case would not be necessary?

Mr. PEYSER. Of course, we would not be challenging then, I suppose, but I think yes. I think the Court would clearly get the message, as we say in the vernacular, because Justice Marshall stated in the *Heublein* case, and then later on also stated virtually invited the Congress to act, saying that they would be glad to—well, he says:

> Though the relation between the 21st Amendment and the force of the Commerce Clause in the absence of Congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress's power under the Commerce Clause.

Senator MONDALE. What you are saying is you cannot bring a law suit to determine what a court would hold as to congressional powers until you have had a congressional enactment upon which such a case could be based.

Mr. PEYSER. Well, effectively I say, yes, because the Court from the days of the *Brandeis* decisions—I only think in one case it has really gone back to it to review the debates thoroughly, and it seems to me that this issue of Union and tariff walls is something that the Congress would care to and should address itself to.

Senator MONDALE. Has there been a specific case where, say a wine firm or a liquor firm has brought action against a discriminatory tax in a consuming State alleging that the 21st amendment only permits a State to decide whether they are going to be dry or wet, and does not empower the State to tax in discriminatory fashion?

There is not a direct case on this?

Mr. PEYSER. Not on the excise tax issue, no, sir.

Now, I also think I should like to address myself to the fact that the Department of Justice in its report on this bill which was in a prior Congress on January 3, 1972, said—this is the Department of Justice report—there is evidence that the original purpose of the amendment was to permit dry States to protect themselves from importation of liquor rather than to permit liquor producing States from erecting trade barriers against out-of-State products. Generally speaking, there has always been a strong policy in favor of interpreting the Constitution to prohibit such barriers, so that from a constitutional point of view, in my humble judgment, there is nothing that would preclude

this Congress from acting, and if someone cared to challenge it, it would give the Court a new opportunity of looking at what the Congress intended to do.

After all, I think we, as lawyers, all recognize that judicial legislation is not something that is desired. We have three branches of Government, and judiciary is supposed to interpret statutes in the light of the intent of the legislative body, meaning the legislature or the Congress. It is not supposed to judicially legislate. But it is very apparent that section 2, in its history, nowhere by the far stretch of the imagination would indicate that there was authority intended or given by one State to discriminate against the products of another State, whether it be alcoholic beverages or anything else.

Now, if I may make one comment, and if I may just anticipate one thing, there will be—the control States have opposed this bill, and as I indicated, section 3 specifically gives them the right to exercise discretion in the brands, anything they want to do. Also, it is significant that though they represent—they make representation that 18 States are opposed to this bill, in the House of Representatives, five control States supported this bill, 2 unanimously and 3 by a vote: Ohio, 12 to 8; Maine, 2 to 0; West Virginia, 3 to 1; and Idaho, 2 to 0. And four States, control States, sort of split down the middle. So it would appear that 18 States are not opposing this legislation, at least if their Representatives speak for the true intent of the people of those States.

Now, one other thing, then I shall close, with your indulgence.

Senator McClellan has spoken about the winery which is in his district. It is a very fine winery, and they plead that they are a small winery. But the fact is they have over 2 million gallons in storage. They boast about the fact that they can bottle 3,000 cases a year, and they do business in the States of Arkansas, Oklahoma, Texas, Louisiana, Missouri, Mississippi, and Tennessee, and I respectfully submit that that is not quite so small.

And then, of course, there will be Mr. Sands, who will be represented, I assume, by Mr. Wiederkehr, and he has wineries in Hammondsport, Va., Canandaigua, N.Y., and South Carolina, with a total storage capacity of 10—12,500,000 gallons, in South Carolina, bottling capacity of 4,800 cases per day, and in Canandaigua, 10,000 cases per day, Virginia, 8,400 cases per day, and Hammondsport, 1,500 cases per day; my point being that it is very clear that the opposition is from those who are deriving an economic advantage from this discrimination, and yet not only take advantage of the economic advantage in their own respective States, but export into all the States, or many of the States of the Union, taking another advantage in the fact that those States permit them to do business free and not to discriminate.

Thank you.

Senator MONDALE. Would you, for the record, indicate who is accompanying you at the table?

Mr. PEYSER. Oh, Mr. Arthur Silverman, attorney at law, and my associate.

Senator MONDALE. Very well.

Have you reviewed the relevance, if any, of the 14th amendment to this issue?

Mr. PEYSER. The 14th amendment?

Senator MONDALE. Yes.

Mr. PEYSER. Have I reviewed——

Senator MONDALE. Have you considered whether the 14th amendment in its powers——

Mr. PEYSER. Well, the 14th amendment was very clearly analyzed for the purpose of the civil rights cases. I do not know just exactly what you have in mind.

Senator MONDALE. Well, your argument is based primarily, then, on the commerce clause, the power of the Congress to regulate interstate commerce?

Mr. PEYSER. Yes.

Senator MONDALE. Thank you very much, Mr. Peyser.

Mr. PEYSER. Thank you.

[The prepared statement of Mr. Peyser follows:]

STATEMENT ON BEHALF OF WINE INSTITUTE, SUBMITTED BY JEFFERSON E. PEYSER, GENERAL COUNSEL, WINE INSTITUTE, AND ARTHUR H. SILVERMAN, WASHINGTON COUNSEL, WINE INSTITUTE

H.R. 2096, which passed the House of Representatives on September 11 by a vote of 248 to 152, has as its sole purpose the abolishment of discriminatory taxes, license fees, and other discriminatory burdens imposed by some States on wines produced outside of the State. (House Report No. 93-264, Page 2, Report on H.R. 2096).

Before further discussing the bill, a little background may be in order.

Prior to prohibition wine as well as other alcoholic beverages had the protection of the Commerce Clause of the Constitution and no state could discriminate against wine produced in another state any more than a state could discriminate against a necktie, shoes, fruit or any other commodity produced in another state.

The legislative history as indicated by the debates relative to the repeal of the Eighteenth Amendment disclosed that there were three subject matters of prime concern:

1. The repeal of the Eighteenth Amendment;
2. Assurance that there should be no return of the saloon; and
3. That the integrity of dry states be protected.

On the last subject matter there were those who believed that the Webb-Kenyon Act which prior to prohibition protected the integrity of dry states would still be sufficient. Others felt that Constitutional protection was necessary. In order to compromise the matter Section 2 was drafted and it is now in the Constitution. The language is very simple and very clear. It states:

> "*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." (Emphasis ours).

It is very clear from this language that all that Congress was concerned with was that there should be no transportation or importation of intoxicating liquors if the laws of the State prohibit the sale or use of alcoholic beverages within the State.

The only substantial opposition to H.R. 2096 except from some of those states which actually discriminate against wines is from some of the monopoly or control States; that is, those States which themselves engage in the sale and distribution of wine. Their opposition so far as can be ascertained is that this bill would require their Liquor Commissions which stocked any brand or variety of wine to stock all wine which was tendered to it by a supplier which would require such a State to stock as many as 40,000 brands of wine. This, of course, is patently untrue beyond any doubt in that the Legislation, specifically in Section 3 thereof, provides as follows:

"(a) Notwithstanding the provisions of Section 2 of this Act, each State retains the right—

1. To engage in the purchase, sale or distribution of wine; and
2. To exercise discretion in the selection and listing of wine to be purchased or sold by each State."

It is also stated by some that this bill would affect States Rights and that the Supreme Court would be required to reverse a line of prior decisions which permit such discrimination. This false contention that States Rights would be affected

is best answered by the statement of Congressman Staggers in his presentation of the bill as set forth on Page H 7728 of the Congressional Record, September 11, 1973, as follows:

"Mr. Chairman, it is seldom that in considering legislation in this House that we can relate its purpose directly to our constitutional scheme. However, it can be done in the case of H.R. 2096. As students of our history know, after the conclusion of the Revolutionary War the Thirteen Colonies entered into Articles of Confederation which were the supreme law of the United States from March 1781 until the Constitution was adopted in 1789. One of the essential defects in the articles was that they established 13 separate economic systems—1 for each of the original 13 States. The system was unworkable and intolerable. The trade barriers which have been established by some States under the Court's mistaken interpretation of Section 2 of the 21st Amendment return us to the Articles of Confederation insofar as wine is concerned. Enactment of the legislation now under consideration by the House is necessary to correct that.

"Mr. Chairman, I am not one who favors the consumption of alcoholic beverages. But as alcoholic beverages go, certainly wine is to be preferred to most others. My purpose in supporting the legislation now under consideration by the House has nothing to do with the desirability of wine drinking, it is based on my belief that discriminatory trade barriers which have been established by some States with respect to wine are contrary to the Constitution and our system of government and should not be permitted to continue."

In connection with the contention that it would be necessary to reverse present Supreme Court decisions, I believe this is best answered by the statement of Congressman Eckhardt in the debate which is herein set forth on Page H 7729 of the Congressional Record, September 11, 1973:

"Mr. STAGGERS. I can give an answer to it, but I think the gentleman from Texas is one of the most distinguished constitutional lawyers in this House, and I yield to him for an answer.

"Mr. ECKHARDT. Mr. Chairman, I thank the chairman of the committee, the gentleman from West Virginia (Mr. Staggers). I doubt that I deserve that credit.

I would say this: That we are not trying to overturn constitutional determinations that the Constitution permits the kind of taxes involved here. What we are trying to say is that we in Congress have the right to prevent a burden on interstate commerce in that our act in so doing is not unconstitutional. We are not in any way trying to reinterpret any constitutional decisions to the effect that the States may under existing provision of the Constitution and under present law limit or encumber importation of wine, but we, on our part certainly have the right to pass legislation which prevents a burden on interstate commerce.

"I think the points that were made here a minute ago that there can be a special shelf tax put on wine or some kind of special encumberance placed on a product made out of State, and this should be permitted, is entirely invalid. We certainly could not put such a tax on steel produced in Pennsylvania or oil produced in Texas because it would obviously be a burden on interstate commerce.

"So what we are attempting to do here is to prevent the Balkanization of the rest of the country in an area in which an interpretation of an amendment which was solely passed for the purpose of permitting prohibition locally is applicable. What we are trying to do is prevent an economic barrier with respect to this particular type of product from being imposed by virtue of the permissive provisions of the end section of the 21st Amendment.

"It is an anomaly in the first place that alcoholic beverages are not subject to absolute prohibitions in the Constitution against a burden on interstate commerce, and we are simply abolishing that anomaly. But we are certainly not attempting to do anything which overrules the Supreme Court with respect to its decisions."

The Department of Justice in its report to the Committee (Report No. 93-264, Report on H.R. 2096) points out that the present conditions exist by reason of a series of interpretations of the Supreme Court rendered shortly after the ratification of the amendment. It then states and I quote:

"We cannot say, of course, that it is impossible to suppose that the Supreme Court might change its position on this matter. *There is evidence that the original purpose of the Amendment was to permit dry states to protect themselves from importation of liquor rather than to permit liquor producing states from erecting trade barriers against out-of-state products.* Generally speaking, there

has always been a strong policy in favor of interpreting the Constitution to prohibit such barriers." (Emphasis ours)

Congress has the right to legislate in this field although the Supreme Court has rendered interpretative decisions on a section which certainly does not lend itself to the interpretation given by the Supreme Court. It is respectfully submitted that the decisions of the Supreme Court are not interpretative of the section based upon the intention of the Congress as indicated in its debates but are rather judicial legislation. Further, the Supreme Court of recent times has reversed itself on some very important subjects, vis, Civil Rights and the Miranda Decision.

For those who contend that the Congress does not have the right to act, it should be pointed out that the Supreme Court has never decided the issue as to whether discriminatory taxes may be levied. There is appended hereto a legal memorandum which supports this position.

It should be further emphasized that in construing the Twenty-first Amendment the Supreme Court has never been confronted by legislation enacted by the Congress in the exercise of its power under the Commerce Clause. Thus, in the very recent case of *Heublein, Inc. v. South Carolina Tax Commission*, 409, U.S. 275–282 (1972), Note 9, the Court stated in part and directly:

". . . Though the relation between the Twenty-first Amendment and the force of the Commerce Clause *in the absence of Congressional action has occasionally been explored by this Court, we have never squarely determined* how that Amendment affects Congress' power under the Commerce Clause." (Emphasis supplied)

It would seem that the Court has actually requested the Congress to act.

This bill does not in any way impinge upon the police powers of the State and its rights to do any and everything that it presently does, except the right to discriminate.

There is annexed hereto a copy of a letter addressed to the National Alcohol Beverage Control Association in which their statements were challenged by us. They have to this writing never in any way answered the challenge nor denied the correctness of the communication.

LAW OFFICES OF JEFFERSON E. PEYSER,
*San Francisco, Calif., April 2, 1973.*

NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION,
*Washington, D.C.*
(Attention Ms. Dorothy Kelly, Executive Vice President)

GENTLEMEN: I would earnestly request that this letter be read to the Members in Convention Assembled.

This communication is made necessary by the many misconceptions which appear to be present with regard to the purpose and effect of the H.R. 2096 (Moss) Bill on control states.

As I have many times stated to representatives of the NABCA, the Bill is not intended to nor does it *in any way* affect the powers or operations of any control state, or any other state.

*H.R. 2096 does not* interfere in any way with the right of a control state to list or delist any or all brands of wines.

*H.R. 2096 does not* interfere with the exercise of full discretion which the Commissioners have regarding the number of brands or the kinds of brands of wine a state wishes to purchase or sell. (The statement made by the representative of the NABCA to the effect that the Bill would require a control state to purchase *all* brands of wine or any given number of brands is not true.)

*H.R. 2096 does not* affect the adoption by any state of Local Option Laws.

*H.R. 2096 does not* affect the right of any state to prohibit the sale of all or any alcoholic beverages.

*H.R. 2096 does not* interfere in any way with the right of a state to fix license fees, markups, hours of sale, or the *exercise of any other police powers it now has.*

What the bill does:

The *only* purpose of H.R. 2096, and all it does, is to prevent one state from passing any *discriminatory* tax, *discriminatory* regulation, *discriminatory* markup, or *discriminatory* requirement against wines produced outside of the particular state.

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**The undersigned challenges the NABCA to indicate any provision of the Bill which contradicts any of the above stated facts, and the undersigned respectfully requests that in the absence of successful contradiction that the NABCA withdraw its opposition to said H.R. 2096 and advise the member states accordingly.**

**Respectfully,**

JEFFERSON E. PEYSER,
*General Counsel, Wine Institute.*

Senator MONDALE. Our next witness is Mr. William G. Clark, counsel to National Alcoholic Beverage Control Association.

Mr. Clark, welcome to the committee.

## STATEMENT OF WILLIAM G. CLARK, GENERAL COUNSEL, NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION, INC.

Mr. CLARK. Mr. Chairman, thank you very much for the opportunity to address you this morning and the committee on the question of H.R. 2096, which is before you.

Senator MONDALE. What is the Alcoholic Beverage Control Association?

Mr. CLARK. The National Alcoholic Beverage Control Association, Mr. Chairman, is an association of the 18 States which have elected, under the provisions of the 21st amendment, to engage in the alcoholic beverage business within their own respective borders.

Senator MONDALE. I see. You are basically representing States here.

Mr. CLARK. Yes, sir.

Senator MONDALE. Governmental bodies.

All right.

Mr. CLARK. The 18 States have been listed in my statement to you. I will not bother to take up the committee's time in going through the list of these States. I think they are probably well known to the chairman.

Those States cover or represent approximately 62 million people in this country, and they do account for one-fourth of the alcoholic beverage sales in this country. Needless to mention, the alcoholic beverage business in those 18 States is a very vital factor in their own State operations.

Mr. Chairman, you put your finger on a very good question about the question of whether the approach to the solution of this alleged problem should be through the courts or through asking Congress for relief, and I would like to defer a response to that for a few minutes and then comment on it, if I may.

That has been one of our contentions all along. We followed this bill since it started, and previous bills which have not survived other sessions of the Congress. We have been opposed to it in every instance. Our view is that in looking at the bill and trying to analyze why a bill with such possible repercussions for State operations, seemingly so innocuous, would be propounded and carried through Congress, eludes us.

Our only conclusion is that it is a special interest bill for the California wine producers, those giants of the grape business out there, that by the admission of previous witnesses produce over 70 percent of all of the wine produced in this country, including imports. The

State of California alone produces over 85 percent of the wine produced in this country.

In our view, Mr. Chairman, if this legislation is enacted into law the following things will undoubtedly occur. Those control States which are engaged in the wine business will get out of the wine business altogether. Most, if not all, of the small independent wineries in this country will fall by the wayside. The alcoholic beverage tax excise laws of the 50 States will have to be modified in one manner or another.

Senator MONDALE. Now, this bill just applies to wine, does it not?

Mr. CLARK. Yes, sir.

Senator MONDALE. Now, give me a typical control State and how such a State would deal with wine and how this bill would affect how it deals with it now.

Mr. CLARK. That is a very good question, Mr. Chairman. It is a matter that we have been trying to get across as the basis for our concern. The 18 control States, or monopoly States, if you will, operate their own business. In most instances their inventory, the amount of their inventory, is dictated by capital restraints placed on them by the legislatures. Therefore, they are unable to supply and offer to the consumers every single alcoholic beverage product that is offered.

Senator MONDALE. Do they usually operate through State-owned retail——

Mr. CLARK. In most cases they operate through State stores.

Senator MONDALE. All right. Let's take that example where the State wholesale and retail distribution organization——

Mr. CLARK. Let's take the State of Pennsylvania, incidentally, while we are talking about it, since we had a witness from Pennsylvania.

Senator MONDALE. All right. Fine.

Now, I assume the State buys liquor and wine and beer on the market, and then distributes these items to their outlets. That would be the way you do it?

Mr. CLARK. Yes, sir. Yes.

Senator MONDALE. Now, would you not be interested, then, in getting wine at the cheapest cost?

Mr. CLARK. Absolutely. The way it works is this——

Senator MONDALE. So then if your State—let me ask the questions, because I am ignorant of all this, and then you can explain.

If the State had a higher tax on wine produced, say, in California, than on wine produced in Pennsylvania, you would have to sell California wine either at a higher price or not handle it; would you not?

Mr. CLARK. If in the net price to the consumer was included an excise tax which was somewhat higher than the tax imposed on a locally produced wine, that would be the case. But the way the system works is this. The State of Pennsylvania has in excess of 700 State stores. Potential vendors are invited into the State to submit their products for listing with the State. They have to show what their market projections are, what their prices are. The States do not set prices of the goods sold to them. They have to convince the State that the product which is offered to them would be competitive, that there would be a market for it, and if bought, it would be sold. If the State is convinced

that a given product meets all of these tests, then that product is listed.

Senator MONDALE. Does the Pennsylvania Alcohol Commission, or whatever the organization is called, turn revenues over to the State from its operation?

Mr. CLARK. Yes, sir, they do. I think in Pennsylvania they contribute in excess of $150 million a year to the general funds of the State.

Senator MONDALE. Are they more interested in reducing the price to the consumer or increasing revenues to the State?

Mr. CLARK. The control State operation, Mr. Chairman, has as its charter moderation. The State is not in the business of selling whiskey simply to enhance profits and enhance revenue. They have a combined purpose. One is to not encourage consumption but, recognizing the modern day concept that people do drink, they do want to consume alcoholic beverages, the State sells them. The State has a uniform markup in many cases which applies to every single product that is imported into the State.

[The following additional material was submitted for the record. Oral testimony continues on p. 66.]

NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION, INC.,
*Washington, D.C., January 23, 1974.*

Re H.R. 2096.

Hon. WALTER F. MONDALE,
*Chairman, Senate Subcommittee on State Taxation of Interstate Commerce, Washington, D.C.*

DEAR CHAIRMAN MONDALE: During the recent public hearing on H.R. 2096, you asked whether the principal aim of the Control State system was to raise revenue. My response was that those 18 States which have elected to operate the alcoholic beverage business within their respective borders stress moderation over revenue.

I am taking the liberty of enclosing a recent publication of the National Alcoholic Beverage Control Association which bears directly on the question you raised. Should the Committee desire, we will be pleased to furnish more information on this point.

Yours truly,

WILLIAM G. CLARK,
*General Counsel.*

# CONTROL STATES STRESS MODERATION YET RETURN INDISPENSABLE REVENUE

National Alcoholic Beverage Control Association, Inc.
5454 Wisconsin Avenue, Suite 1700
Washington, D. C. 20015
(301) 654-3366

As of January 15, 1974

## National Alcoholic Beverage Control Association, Inc.

### Control States

| | |
|---|---|
| Alabama | Ohio |
| Idaho | Oregon |
| Iowa | Pennsylvania |
| Maine | Utah |
| Michigan | Vermont |
| Mississippi | Virginia |
| Montana | Washington |
| New Hampshire | West Virginia |
| North Carolina | Wyoming |

Participating Members:

Montgomery County, Maryland

North Carolina Association of ABC Boards

## CONTROL STATES STRESS MODERATION YET RETURN INDISPENSABLE REVENUE

The precise role alcoholic beverages play in society has never been satisfactorily defined, but any financial expert can sum up their status in our economy in a single word.

Indispensable!

This was true 180 years ago when Alexander Hamilton balanced the national budget with an excise tax on distilled spirits, and it is true today when alcoholic beverage levies amounting to in excess of $5.1 billion in 1972 produce more revenue for the U. S. Treasury than anything else save the income tax.

Furthermore, alcoholic beverages also generate slightly less than $3 billion a year -- $15.63 for every man, woman, and child in America -- from state and local revenues.

Obviously, therefore, the average citizen has a tremendous stake in the alcoholic beverage business and this is no less true of the millions who never patronize it. Because it exists and is flourishing, a significant portion of the cost of government at all levels is financed by its customers -- and only by them.

Should this revenue be eliminated or significantly reduced, immediate heavy federal and state tax increases

would be inevitable and, inescapably, they would be most burdensome on the non-consumer. He would have to help make up the loss of funds once supplied solely by his less abstemious neighbors.

Governors and State Legislators are fully aware of this, but many taxpayers are not. And this is especially true in the 18 Control States where the paramount emphasis is always on regulation, control and law enforcement. Revenue is an adjunct of their respective operations, but only an adjunct. Hence the local individual hears more about moderation than he does about money, and he appraises his officials on the basis of what is shown on the police blotter instead of the balance sheet.

## Control States in Perspective

Because of the unique character of the alcoholic beverage business, it is important that the Control States System be placed in perspective. Now in its 40th year, it functions in 18 different states -- on the Atlantic coast and on the Pacific, on the Gulf of Mexico and along the Canadian border, on the Great Lakes and in the Great Plains, in the Cotton Belt and in the Rocky Mountains.

Those sovereign states within a sovereign nation represent a cross-section of the United States that ideally typifies the American way of life. But none was

"hand-picked" for that, or any other reason. The 18 Control States were not "put together," nor do they constitute a "clique" or a "bloc" within the nation or within the alcoholic beverage industry. Each was self-selected and all are bound together only by the bonds that unite all 50 of our states and by a common dedication to the principle that the sale of alcoholic beverages should not be promoted, but that purchases by competent adults should be permitted.

The substitution of permissive buying for aggressive selling is largely responsible for recurrent attacks on the Control States System. Virtually without exception they originate with producers of alcoholic beverages, in sharp contrast to the usual run of complaints about one aspect or another of the business which almost always come from buyers.

And this is an eye-opening story in itself, for when a producer finds fault with the method by which his product is made available to the ultimate consumer, it isn't fear of over-use that worries him -- it's the personal profit he thinks is getting away from him because the "hard sell" isn't being utilized.

In short, these critics want to make more money for themselves, and that will require expanded sales which, in turn, cannot help but increase overall consumption. The established customer would be continually prodded into buying (and consuming) more than he has in the past, and the abstainer would be under

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continuing pressure to change his habits and "take one" now and then.

This is not the way the Control States operate and as a consequence, there can be no boom in the alcoholic beverage business within their territorial limits unless and until the operation is taken out of state hands and vested in private, profit-seeking interests.

In the latter event, more money undoubtedly would be made -- but less would accrue to the respective state treasuries, for the net revenue would by-pass them and flow steadily into private bank accounts.

Those who want this to happen never cease their assurances that the states would retain regulatory and law-enforcement powers -- an empty gesture, of course, for they cannot be taken away by anyone -- but neatly side-step the proven fact that those who control sales are in the best position to control consumption as well. They also are neither candid nor convincing when appraising the Control States System in general terms.

## More Revenue From Less Consumption

An unbiased appraisal of the Control States System is in order at all times and it is especially appropriate when an alternative proposal is being advanced. But its merits should be judged with the background of

its opponents in mind as well as on its own performance. The latter may well be considered first, and since money is at the core of complaints filed against this business operation of the people, by the people and for the people, these indisputable facts deserve review:

The 18 Control States have about 30 percent of the nation's population;

That 30 percent of the population accounts for only about 25.4 percent of the total volume of distilled spirits sold and presumably consumed in the United States; and

That same 25.4 percent of sales yields about 36 percent of the total state and local revenue all 50 of our states obtain from the alcoholic beverage business.

The above figures were not just "pulled out of a hat." All are based on data supplied by authoritiative sources and, so far as is known, none has been challenged by any responsible business concern, trade group, or individual.

By way of illustration, the United States Census Bureau recently estimated that the United States has a population of over 208 million and that some 63 million reside in the 18 Control States. Estimates of the Distilled Spirits Institute, Inc., place apparent consumption of distilled spirits during the year 1972 at somewhat more than 393 million wine gallons, but attribute only a trifle more than 97.5 million gallons to the

Control States. Finally, state and local revenues from the alcoholic beverage business, as reported by the respective fiscal agencies, exceed $3.2 billion annually in the United States as a whole and more than $1,172 million of this is accounted for by the 18 Control States.

Such data make it self-evident that the Control States System is highly remunerative to those states and to their citizens and taxpayers. Further worth noting is the additional fact that upwards of 9 percent of the total revenue those states collect from all sources is furnished by their alcoholic beverage operations.

Understandably, this makes vastly more enjoyable reading for Control State taxpayers than for certain producers and those endeavoring to help them boost their sales. What these worthies most like to see is a chart depicting rising sales and swelling profits, neither of which appears prominently when Control State operations are plotted. In the 18 Control States, sales move up at approximately the same rate as the growth in adult population, and revenue gains at a similar pace, meaning that neither shows a marked increase.

Per capita figures illustrate this more clearly. For instance, in 1971 per capita consumption of distilled spirits in the Control States was 1.51 gallons, according to the Distilled Spirits Institute. In 1972 it edged up to 1.55 gallons and such data as presently are available indicate that the final figure for 1973 will not greatly differ from 1972.

Contrasting figures ior the 32 states and the District of Columbia, where the alcoholic beverage business is strictly a private operation from A to Z, show why the zealots opposing the Control States System are less than happy with things as they now are. Those so-called License States had a per capita consumption of 2.01 gallons in 1971 and 2.04 gallons in 1972. Some increase is anticipated when figures for 1973 are compiled. However, comparing 1972 figures, which are a known quantity, this fact shines forth like a beacon:

> Per capita consumption is more than 31.6 percent greater in the License States than in the Control States!

That extra 31.6 percent means money, for those who manufacture the goods. Quite a lot more, as per capita figures again illustrate. In 1972, the per capita return in the License States was $14.33, but in the Control States it was $18.61, or slightly less than 23 percent.

That money, of course, went to the states in each instance, but the significance to those in the industry who value business methods on the basis of the cash return to themselves is that more drinking is done where liquor is sold by private dealers. It is the taxpayer and the Governor and the State Legislature who see the vastly greater significance!

The Control States produce more public revenue while inducing their citizens to drink less!

These twin objectives should be above condemnation, and generally speaking, they are seldom criticized. Nevertheless, in spite of their desirability, the system that makes their attainment possible is under fire for reasons that cry out for explanation.

Who's Complaining About What?

The only real opposition to the Control States System comes from a small minority in the alcoholic beverage industry. Unlike its more responsible leaders, they want to shelve the system in favor of an "every man for himself" type of marketing which would increase their own profits at the expense of taxpayers in the 18 Control States and to the aggravation of law enforcement problems in each of them.

Not surprisingly, they tend to rely on others to argue their alleged case, probably on the well-known theory that it's better to keep a dog than do your own barking. The ideal "pitchman" comes from one group or another, under whose aegis he can rail against the Control States without imperiling the anonymity of his sponsors.

Since their case is weak and ammunition is nonexistent they are reduced to dealing in platitudes, and that is why they consistently present themselves as "defenders of free enterprise," "guardians of individual rights," "supporters of the U. S. Constitution," and similar guises.

Noticeably absent in each broadside against the Control States System is reference to the predominantly important aspects of the alcoholic beverage business. Seldom, if ever, do they offer so much as a "once over lightly" comment on the "preventive enforcement" policies which the Control States so successfully employ to keep indulgence by adults moderate, to stamp out sales to minors entirely (a goal unhappily not yet reached, but closer to achievement in the Control States than anywhere else), and to keep sociological problems from arising instead of punishing those involved after they develop.

Obviously such endeavors are not attacked because they are unassailable. However, they face the prospect of being undermined by the insidious campaign to abolish the system under which the people who do the buying also control the selling.

The whole point of the anti-Control State drive is that not enough selling is being done in those 18 states, but no one would ever guess it from the stories being told. On the contrary, he hears that the alcoholic beverage business, and the beverages themselves, have been relegated to "second class" status -- and by the U. S. Supreme Court, no less.

That high tribunal, to the indignation of the small but vociferous money-hungry sector of the industry, has ruled that the individual states have the right of determination where the sale, consumption and taxation of

alcoholic beverages are concerned. It could hardly have ruled otherwise inasmuch as that right is specifically conferred in the 21st Amendment to the U. S. Constitution, so the agitators are stymied there. But they are far from silenced. They are going after the states who have set up what their voters want instead of what a minority in the industry wants.

Typical is the complaint that alcoholic beverages cannot be sent through the mails. Why, it is asked, should they not be as readily obtainable from a mail order house as, say, a pair of shoes, or a TV set?

There are many answers to this preposterous, though often-voiced query, but so far as the Control States are concerned one reason overshadows all others. In those states you simply cannot buy, possess or consume alsoholic beverages until you are of legal age and there is no way of guaranteeing that a teenage boy or girl will not get hold of a bottle the postman delivers to the household.

Then there is the plaint that a state operation violates the principle of free enterprise. This has been shouted so often that it is threadbare, and it collapses of its own weight anyway because free enterprise is an offshoot of freedom of choice, and the free people of the Control States have freely chosen to conduct the alcoholic beverage business themselves. They do not manufacture it -- that is done by private companies. They do handle or supervise its storage, distribution

and sale -- in their own state, but nowhere else -- by their own choice and without dictation from anyone else anywhere.

This is an exercise in democratic self government which would be totally negated should anyone or any group from the outside succeed in dictating a change. No enterprise is "free" that professional lobbyists and calamity howlers coerce an unwary public to accept as a replacement for the business it already owns. A change, if any is desired, can always be made at the polls and it should never be made anywhere else.

## The Issue in Retrospect

It has never been contended, even by its most enthusiastic supporters, that the Control States System is perfect. Nothing man-made is. It is subject to improvement, as every business operation is, and it is steadily improving over the years as, indeed, most other business operations also are.

Most observers recognize this. Unfortunately, there is less general awareness that the Control States System is not competitive to private industry but, on the contrary, is complementary to it. All save the final three or four stages of the alcoholic beverage operation in a typical Control State are reserved solely for privately owned concerns. The people take charge only at the point where it is the people who are most involved



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and this, of course, is where the product is received, stored, distributed and made available for purchase by competent adult consumers. The key factor is consumption, which must be restricted to those old enough and capable enough to indulge with sufficient moderation to avert injury or annoyance to themselves and/or to their neighbors.

The people of the Control States assure this, to the maximum extent that such assurance is possible, by conducting those final stages of the business operation themselves. Necessarily, they shoulder the expenses themselves, and, justifiably, they retain the resulting net revenue for themselves. As previously noted, that revenue accounts for roughly 9 percent of the aggregate state budgets in the 18 Control States. It is a bit less in some of the states and more in others but it is indispensable in all of them. Sharp, and in many cases, severe tax increases would be mandatory if this established revenue were eliminated or reduced.

A substantial reduction would be inevitable if the alcoholic beverage business should be transferred to private hands for then the only revenue would be that accruing from taxes and license fees. The probable increase in consumption, which no one save the opposition wants, probably would yield higher tax and license receipts than the Control State System but they would be trifling compared to the net revenue from sales which the Control States now receive. It is inconceivable that so much more drinking would occur that the taxes on the product would equal today's taxes plus net return from sales.

Viewed purely from the financial standpoint, the people could not help but lose. And they would certainly have nothing to gain otherwise by placing more reliance in self-chosen profit-seeking businessmen than in the officials they elect and the public servants those officials in turn appoint.

Finances, however, are subordinate to the more pressing questions of law enforcement, sales to minors, moderation and the countless related aspects of the alcoholic beverage business which make it different from all others. To say that disassociated private dealers, however upright and high principled they may be, can serve these imperative interests of the people better than the people can themselves is equivalent to alleging that a baby-sitter can take care of a young child better than its own parents.

The suggestion, of course, is patently absurd and so is any contention that a Control State can afford to dispense with its own alcoholic beverage operation. The people simply could not endure such a change. And neither could the state's budget.

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# PER CAPITA STATE AND LOCAL REVENUE
## YEAR - 1972

| State | Revenue | Per Capita Revenue |
|---|---|---|
| Alabama | $ 67,389,529 | $19.20 |
| Idaho | 14,782,499 | 19.55 |
| Iowa | 40,563,292 | 14.07 |
| Maine | 22,718,652 | 22.08 |
| Michigan | 177,142,883 | 19.50 |
| Mississippi | 37,221,683 | 16.45 |
| Montana | 15,462,532 | 21.51 |
| New Hampshire | 25,747,722 | 33.40 |
| North Carolina | 98,579,915 | 18.91 |
| Ohio | 201,236,431 | 18.66 |
| Oregon | 39,596,065 | 18.15 |
| Pennsylvania | 183,209,429 | 15.36 |
| Utah | 14,306,461 | 12.71 |
| Vermont | 13,055,429 | 28.26 |
| Virginia | 87,159,786 | 18.30 |
| Washington | 102,307,921 | 29.71 |
| West Virginia | 28,702,932 | 16.12 |
| Wyoming | 3,805,300 | 11.03 |
| TOTAL CONTROL STATES | $1,172,988,461 | $18.61 |
| TOTAL LICENSE STATES | $2,081,092,764 | $14.33 |

Source: DSI

## PER CAPITA GALLONAGE CONSUMPTION OF DISTILLED SPIRITS
### YEAR - 1972

| State | Total Gallonage Consumption | Per Capita Gallonage Consumption |
|---|---|---|
| Alabama | 4,706,906 | 1.34 |
| Idaho | 969,397 | 1.28 |
| Iowa | 3,426,346 | 1.19 |
| Maine | 1,754,674 | 1.71 |
| Michigan | 16,206,128 | 1.78 |
| Mississippi | 2,879,373 | 1.27 |
| Montana | 1,294,643 | 1.80 |
| New Hampshire | 4,142,895 | 5.37 |
| North Carolina | 7,893,941 | 1.51 |
| Ohio | 14,378,691 | 1.33 |
| Oregon | 3,452,362 | 1.58 |
| Pennsylvania | 16,771,530 | 1.41 |
| Utah | 1,052,813 | .94 |
| Vermont | 1,463,728 | 3.17 |
| Virginia | 8,168,640 | 1.71 |
| Washington | 5,978,342 | 1.74 |
| West Virginia | 2,304,567 | 1.29 |
| Wyoming | 697,148 | 2.02 |
| TOTAL CONTROL STATES | 97,542,124 | 1.55 |
| TOTAL LICENSE STATES | 295,829,043 | 2.04 |

Source: DSI

Senator MONDALE So the States that have these alcoholic associations, or State controls, generally oppose this bill?

Mr. CLARK. Yes, sir, they do.

Senator MONDALE. Now, do I understand that you might not oppose a different measure which permitted States to vary their taxes, but further provided that they may not discriminate between domestically produced wines and those produced outside the State?

In other words, uniformity would be something that you would accept?

Mr. CLARK. Yes, we would accept that principle. We are not opposed to the general philosophical argument that trade barriers should not exist. However, we already have the right to do what we are doing under the provisions of the 21st amendment. No court has told us to the contrary, notwithstanding a footnote in a case which has been cited here this morning.

We just do not know. We have attempted—and through the good offices of your staff, I might indicate—to work out some acceptable language, amendatory language, but the other side will not listen. They are not interested in talking about it, and, therefore, we have gotten nowhere.

Senator MONDALE. Well then, we have three positions that I have heard thus far. One is the position that the 21st amendment gives blanket authority to the States, period, to do as they please. Another position is that, through the commerce power, the Congress can prohibit State taxes which discriminate against imported wine. A third position, which I think you are stating, is that you would accept legislation which retained the power of the States to set their own taxes, provided they do not discriminate.

Mr. CLARK. I would like to comment briefly on each one of those.

Senator MONDALE. Well, let me just be sure I understand your position. Did I State that accurately?

Mr. CLARK. Yes, you did. We do not know how it can be done with this bill. We have indicated our willingness to attempt to do it, but this bill, in our judgment, is so inartfully drawn that it would be almost impossible, if not impossible, to amend it to alleviate or eliminate our fears of what would happen if this bill is enacted into law. This bill, in our judgment, is designed to eliminate a problem which is not, in effect, a problem.

A question of impairment of commerce, Mr. Chairman, is the degree to which a burden impairs commerce. In our system in this country it is not possible to operate the 50 States without having burdens on interstate commerce, and the courts have recognized consistently that the legal question is whether the burden is so substantial as to impair the free flow of commerce between the States, not whether the burden does, in fact, exist.

Senator MONDALE. We will put your full statement in the record.

Could you refer me to the part of your statement where you describe what you could accept by way of changes in Federal law?

Mr. CLARK. Mr. Chairman, there is nothing in my statement that indicates any language that would be acceptable to us, because we attempted to discuss that with proponents of this legislation prior to the hearing, and we did not get anywhere. So, therefore, we have fallen back to our old position of being totally in opposition to this bill.

The problem with this bill, Mr. Chairman, is—and you put your finger on it—allegedly it is designed to eliminate an impediment in the free flow of commerce of wine between the States. The impediment consists of some excise tax differential on some wines produced in this country.

The clear fact is there are seven States that produce wine that have a most-favored nation type of status. The State of California alone produces 6 times more wine than all the other States combined in this country, including New York; 12 times more than the State of New York, and 80 times more wine than the few States which produce their own wine under the benefit of a local statute encouraging development within that State. Seven States.

The question that we have asked all along is, if that is such a substantial burden, why does the California Wine Institute not go to court to seek redress? Admittedly in this hearing this morning, they have never gone to court to seek redress. Why not go to court to settle this matter rather than jeopardize the wine business of 18 control States, automatically nullify the excise tax laws on wines of 50 States, possibly put the independent wineries of seven States completely out of the business, and generate a blizzard of litigation?

As the Attorney General stated in his letter to the committee on this matter, there is no doubt in his mind that this matter would result in a Supreme Court test. And if that were the case, it would be necessary to, he says here, nevertheless——

Senator MONDALE. What about the argument, or at least the hint in the footnote in the Heublein case, that there just may be authority under the Commerce Clause? Could that not be litigated, because there is not any law?

Mr. CLARK. Well, you have to understand what that case was all about, Mr. Chairman. It was a tax case, a case involving——

Senator MONDALE. I understand that, and it's only dicta. But the court says——

Mr. CLARK. It is not even dicta. It is just a footnote that Justice Marshall decided that he would get that in there, or one of his clerks.

Senator MONDALE. Well, that is the argument, as I understand it here. If that hint in a footnote means something, it could only mean something after Congress had enacted the bill.

Mr. CLARK. That question is a novel one. The theory proposed by the proponents of this bill, is a novel theory. It has never been tested in court, and that is that the 21st amendment, section 2 thereof, was really enacted to protect those States that wanted to stay dry from the onslaught of out-of-State booze. That is not the case. The courts never held that.

Senator MONDALE. The argument, as I understand it is that Congress has authority to pass legislation such as the House did under the commerce clause; and your argument is that it should be tested in court. But how can you test a bill that has not been passed in court?

Mr. CLARK. Mr. Chairman, there are plenty of bills, laws on the books, that are available to the wine institute or any other potential litigant in this country if they want to go to court.

Senator MONDALE. That asserts the commerce power?

Mr. CLARK. Absolutely.

Senator MONDALE. What are they?

Mr. CLARK. Well, there would be bills involving discrimination, interstate, under the commerce clause, the interstate transportation of any commodity. I do not have a citation of those.

Senator MONDALE. We are talking specifically about whether the Congress has authority under the commerce clause to affect State taxation of alcoholic beverages when the States discriminate against outside producers.

Now, is there any law of that general character which one could use to challenge such restrictions?

Mr. CLARK. Your Honor——

Senator MONDALE. We are not honorable here; we are just crummy politicians.

Mr. CLARK. I am sorry.

Mr. Chairman, the litigants can go to court, they can file a declaratory suit in any court, any Federal court, to challenge the law of a given State. They can go to Arkansas——

Senator MONDALE. Yes. But based upon exercise of the commerce clause?

Mr. CLARK. Absolutely.

Senator MONDALE. What would be the exercise of the commerce power to which they would refer?

Mr. CLARK. They would attempt to assert the commerce power as having supremacy over the 21st amendment. You understand that question has never been resolved in the courts, because there has never been a case on all fours on that question.

They could go to Arkansas. They could file a case in the Fifth District Circuit Court of Appeals in Arkansas, or wherever that court would meet in that jurisdiction, and challenge the excise tax law of the State of Arkansas and say that it is unconstitutional.

Senator MONDALE. I understand that.

Mr. CLARK. But they have not done that.

Senator MONDALE. I do not think you hear my question.

As I understand that note in the *Heublein* case, Justice Marshall said that the Court had not met the issue of a congressional enactment in the exercise of the commerce power. Mr. Justice Marshall said in that note:

> * * * though the relation between the 21st Amendment and the force of the Commerce Clause, in the absence of Congressional action, has occasionally been explored by this court, we have never squarely determined how that amendment affects Congress' power under the Commerce Clause.

In other words, I would assume that, in order to determine what Congress' power is under the commerce clause in the face of the 21st amendment, you would have to have an assertion of that power, would you not?

Mr. CLARK. The mere fact that the commerce clause is a part of our constitutional system, Mr. Chairman, asserts the right of anyone to challenge a State law that, in their opinion, violates the commerce clause, or the supremacy clause, or the 14th amendment, or whatever they may feel. That is a very clear channel of litigation, and the way it is handled is simply this: It is that someone challenges the constitutionality of the law of the State of Arkansas. That automatically goes to the Supreme Court. It does not take an act of Congress to give them that authority.

Senator MONDALE. Well, as I understand it, the argument is that the 21st amendment could be overridden—pardon me, not overridden, but the 21st amendment would not bar the Congress from asserting, under the commerce power, the power contained in the House-passed bill. That is the argument.

The proponents of this bill refer to the note in the *Heublein* case for the suggestion that this might be possible, and on the basis of that, ask for the Senate to follow the House's action.

You say that would not change the nature of the lawsuit at all. Is that right?

Mr. CLARK. What I said, Mr. Chairman, is the question that you yourself asked. Why do you not go to court and find out if the law of Arkansas is in violation of the commerce clause? Why come to Congress and ask Congress to reassert by an inartfully drawn piece of legislation——

Senator MONDALE. You say "reassert." When did it assert that power first?

Mr. CLARK. That power—I am speaking of the power, the language of the commerce clause itself. It has never been tested in court. I do not think it is necessary—it would be possible, of course, to come to Congress and ask for a bill that might reach the very question that the court is expected to reach.

The problem is, Mr. Chairman, that the cases that have been cited and the cases that have not been cited would hold, in my judgment, in our judgment, that the burdens, the alleged burdens, on interstate commerce that are imposed by a few States having excise taxes which favor local wine are so insignificant in our Federal system that they legally would not be declared in violation of the commerce clause. If they are in violation of the commerce clause, Mr. Chairman, do away with them. We support that principle.

What we do not support, and what we object to, is taking this bill, which is so inartfully written, has so many dangers in it, and using this in lieu of either going to court or having another bill. The 18 control States cannot run the risk that their systems would be declined illegal. They cannot run the risk of the proliferation of Ralph Nader type, if you will, lawsuits springing up all over the country. Your State, the other States, in my judgment, cannot take the risk that the excise taxes that are established by your State on wine would be declared a nullity as a result of this bill.

Our complaint is this: Let's either go to court, let them go to court and challenge it in the way that——

Senator MONDALE. Does Minnesota have a tax that discriminates?

Mr. CLARK. No, sir, it does not, but Minnesota has an excise tax.

Senator MONDALE. What do we risk, then? What does Minnesota risk, then?

Mr. CLARK. Minnesota has an excise tax which is different in category than the standard of wine classification proposed by this bill. This bill proposes to use as a standard of classification to determine whether there is a discrimination or not an Internal Revenue standard, which is an arbitrary standard developed simply to develop and to impose Federal excise taxes on wine. This bill says that all the States have to impose that standard. Minnesota does not have that standard; Minnesota has different standards.

In our judgment, if this bill is adopted, your legislature would have to amend its own laws with respect to the excise taxes on wine to conform to a Federal uniform standard. Now, whether that is good or bad is not the question. The point is; this legislation would require you to do that.

Senator MONDALE. Well, does that apply where the State does not discriminate under this bill?

Mr. CLARK. It would apply to every State, because——

Senator MONDALE. Even where it does not discriminate?

Mr. CLARK. Absolutely. Because it imposes classifications upon a State which that State may not have.

Senator MONDALE. The committee staff does not agree with you.

Mr. CLARK. Well, that is a good question for staff to look into. We have given them a memorandum on that and, Mr. Chairman, it really does not make any difference whether we agree or disagree on those niceties.

The point that we have tried to make, and the point you picked up, being a stranger to this whole argument—that is, comparably a stranger—we have been through this with the wine institute for a number of years, is why go to this trouble? Why create problems for the monopoly States, the control States? Why create problems for the other States if all you are getting at is the question of the constitutionality of a local State statute? Go to court and try that, and if the courts do not support your position, if the courts do not say that the commerce clause prevails in this case, come to Congress for relief.

Do not come to Congress first, pass bad legislation which, because of the way it was drawn will jeopardize so many other operations, that is our only point. We are not opposed to the principle; we are not opposed to the philosophy; we are opposed to the approach.

We cannot stand the danger of lawsuits and other things that are going to put our operations in jeopardy.

Senator MONDALE. Thank you very much.

Mr. CLARK. Thank you.

[The prepared statement of Mr. Clark follows:]

STATEMENT BY WILLIAM G. CLARK, GENERAL COUNSEL, NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION, INC.

SUMMARY

1. There is no demonstrated need for the proposed legislation. H.R. 2096 is a special interest bill introduced solely for the benefit of the California wine producers which collectively already control over 70% of all wine sold in the United States, including imports. In 1972, the wine giants based in California produced 6 times more wine than all of the other 50 states *combined*, 12 times more than New York, and eighty times more wine than the mere handful of states which are trying to encourage local industry. Without the honest and sincere efforts of states such as Arkansas, the wine industry in this Country would be totally and completely monopolized by just a few large companies.

2. The broad language of H.R. 2096 will compel the withdrawal of the Control States from the sale of wine. Because of the manner by which the Control States purchase and market wine—the so-called "listing system"—the purchase of a single item of a given class could compel any such state to purchase every wine item of the same class offered to it by the vendors. With more than FORTY THOUSAND wine items available in this Country, it is obvious that the Control States will have no choice but to abandon the business altogether, and with it many millions of dollars of much-needed revenue. The amendatory language offered in the House of the proponents for the alleged purpose of preventing such divestiture from occurring will not work and, in point

of fact, merely serves to aggravate the problem. The next step will be similar legislation requested by producers of distilled spirits, beer and other alcoholic beverages.

3. H.R. 2096 is inartfully drawn, legally unsound and its enactment will automatically invalidate most state laws dealing with excise taxes on wine. By imposing wine classifications which were established solely for the purpose of collecting federal revenue—which classifications are totally unrelated to the promotion of interstate commerce in wine or to the protection of such commerce from discriminatory taxation or regulation by the states—the excise taxes on wine presently collected by the individual states will be placed in jeopardy. Either they will have to change their own tax structure to conform to an arbitrary federal classification system—a dubious prospect—or face legal challenges right on up to the Supreme Court.

4. The provisions of H.R. 2096 relating to enforcement will generate litigation nationwide in blizzard proportions. By abandoning the traditional procedure for challenging the constitutionality of a state law, consumer advocates and other special interest groups throughout the Country will be encouraged to file lawsuits against just about every state. If the prospect of such an orgy of litigation wasn't so downright serious, the medicine proposed by H.R. 2096 to cure an imagined ill could be compared with shooting the dog to get rid of the fleas.

Mr. Chairman, the opportunity to present this information on behalf of the 18 states which have chosen to operate the alcoholic beverage business within their respective borders, pursuant to the 21st Amendment, is greatly appreciated. After considering all of the facts, the Committee is urged to reject H.R. 2096 in its entirety.

Respectfully submitted,

WILLIAM G. CLARK.

STATEMENT

DEAR MR. CHAIRMAN: The National Alcoholic Beverage Control Association, Inc., and its eighteen Member States appreciate the opportunity to appear before this Committee to express the collective opinion that H.R. 2096 could have a permanent damaging effect on the alcohol beverage business which each State conducts as a public service operation.

The stated purpose of H.R. 2096 is to "eliminate the obstruction to the free flow of commerce in wine" by setting aside the laws of a handful of States which establish "artificial trade barriers" relative to the merchandising of wine. However, the practical effect of the bill has much broader ramifications. This legislation, if enacted, would overturn many State laws and regulations which were enacted pursuant to the provisions of the Twenty-first Amendment to control the purchase, storage, distribution, sale and consumption of alcoholic beverages strictly within the affected State's own territory. Such action would result in a permanent damaging effect on the alcohol beverage business which each State conducts as a public service operation.

The proponents of the type of legislation represented by H.R. 2096, principally the California-based Wine Institute, would have it believed that a great injustice is being fostered so long as any State imposes a "barrier" to total market saturation, regardless of the purpose of any such barrier. A careful analysis of the facts will demonstrate the fallacy of such a position.

According to a recent trade publication, California alone presently accounts for approximately SEVENTY PERCENT (70% of the total wine sales in this Country. With such vast market domination already a fact, the question really boils down to whether it is worth irreparably damaging the wine business of many States in order to satisfy the ambitions of the major supplier to capture even more of the market.

Let it be emphasized at the outset that this Association and its Member States endorse the principle that no artificial or discriminatory barriers should be allowed to impede interstate commerce. However, we cannot agree that State laws and regulations enacted to control the purchase, storage, distribution, sale and consumption of alcohol beverages strictly within the affected State's own territory constitute a barrier to interstate commerce. We feel, on the contrary, that such laws and regulations represent a proper exercise of State authority, and their enforcement a necessary discharge of State responsibility to assure the being and safety of its citizens.

The citizens of 18 States—Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming,—and of Mont-

gomery County, Maryland, have chosen pursuant to the Twenty-first Amendment of the Constitution of the United States to have the alcohol beverage business conducted within their respective territories by their respective governments. In a majority of those 18 States and in Montgomery County, Maryland, the alcohol beverage operation includes wines.

These States have a population in excess of 62 million—roughly 30 percent of the population of the entire United States—and they account annually for about one-fourth of the nation's alcohol beverage sales. Last year, 1972, sales in the 18 States involved—generally referred to as the "Control States"—approximated $2.5 billion and the net revenue therefrom represented upwards of 8 percent of the total revenue collected from all sources by the governments of those States.

It is obvious, therefore, that millions of American citizens in the 18 States we represent have a vital interest in the continued success of the alcohol beverage operations they themselves own and which they themselves conduct through duly constituted and local boards and commissions.

The role of wines in these operations has assumed substantial proportions. In 1972, for example, those Control States which include wines in their operation reported wine sales aggregating 9,560,000 cases. Total sales actually were considerably in excess of this amount inasmuch as two of the Control States do not include any wines in their sales statistics and several others include only certain categories of wines. Nevertheless, the figures are impressive and it is not without significance as well that more than 90 percent of the 1972 reported Control States wine sales consisted of products manufactured in the United States—principally in California and, to a lesser extent, in New York.

Naturally, this question then arises: How, and to what extent, would the enactment of the pending legislation affect Control State operations?

Our answer is that such legislation, if enacted, could and probably would force the Control States to withdraw from the wine business.

This conclusion appears inescapable because each Control State would then be required by Federal law to purchase and stock each and every wine, regardless of type or origin, offered to it by a supplier. Yet no State has the facilities, the finances and the manpower to comply with such a sweeping mandate. It is estimated that there are more than 40,000 different wines on the American market. To stock even a moderate percentage of this huge selection is beyond the capability of any wine dealer, State or private.

In this connection, we recognize and appreciate the provision in H.R. 2096 which extends to a State the right "to exercise discretion in the selection and listing of wine to be purchased or sold by each State."

Unfortunately, this apparent grant of discretion is neutralized by concurrent declaration in the bill that such discretion may be exercised only subject to the provisions of Section 3.(b) which, in effect, requires that a State which permits the sale of any wine within its territory must permit the sale of all wines.

Admittedly, this would impose no burden on a State which itself does not sell wine. On the other hand, it is intolerable where, as in most of the Control States, the State itself is both a buyer and a seller of wine.

Consider, if you will, precisely what such a requirement would entail. The Control States would have to purchase at least some quantity of wine of each brand and type upon solicitation by any wine supplier—if it purchased any wine at all. The absence of local consumer demand could not be taken into account. Consumer preferences would be completely subordinate to wine supplier wishes. The possibility that many wines could not be resold by the State would not be allowed to enter into consideration. The purported "right of selection and listing," therefore, would be meaningless.

Now contrast this situation with that in a State which does not itself engage in the wine business but permits the sale of wines by private licensed establishments. Under the terms of this legislation, such a State would not be required to expend so much as a single penny. It would merely be prohibited from interposing any restrictions on the purchase by its wine licensees of whatever types of wines they themselves might care to acquire and offer for resale to the public.

The taxpayers of such a State would, in consequence, neither be required to make an expenditure for wines nor face a loss of revenue as a result of local wine purchasing policies.

Significantly, private wine licenseees would likewise be unaffected by such legislation. They could purchase and stock what their customers desire and decline to purchase any other type of wine without in any way contravening the provisions of the legislation now being considered.

The Control States feel that they too should enjoy such a privilege. It would be denied by this legislation.

This incongruity arises from the fact that the Control States must first purchase before they can sell and, being States rather than individual wholesalers or retailers, they could not decline to purchase a proffered wine whereas an individual storekeeper in another State could.

For the Committee's information, the Control States, without exception, purchase, stock and sell all types of distilled spirits and wines for which there is a local public demand. Their inventories, as a result, necessarily include some fairly slow-moving items. For the most part, however, they are made up of types, brands and container sizes which have a fairly ready market. This is nothing more nor less than good merchandising. It averts the danger of typing up excess capital on the one hand and of disappointing the consuming public on the other. What most customers want is always available while at the same time the taxpayer is not penalized by having sizable amounts of State funds frozen, as they would be if the State had purchased quantities of merchandise which could not be profitably disposed of within a reasonable period of time.

In the Control States we call the brands, types and container sizes offered for sale "listings." Potential vendors are invited to submit their products to the appropriate state agency for consideration. A detailed amount of information must accompany the submission such as, cost, freight, package details, etc. In addition, the vendor is expected to justify selection by including either in the written submission or during his oral presentation, market projections, advertising programs and the like. As you can imagine, with limited capital and storage space, the purchasing agency must be careful to select those items for which a public demand has been demonstrated, or can reasonably be expected, and which will, therefore, have an acceptable turnover.

Due to capital, marketing and space limitation, the states simply cannot accept for listing all of the alcoholic beverage items, including many thousand wine items alone, offered from time to time. It is at this point where the great potential for being accused of discrimination occurs. Because of some "regulations", i.e., limitation on number of items of the same type, quality, class, proof, size, etc., that can be accommodated in the State sales operation, only one or a few of the items offered will be "listed".

The listing is important because when any item is "listed" it is concurrently and automatically stocked—meaning that a substantial outlay of public funds is made to purchase the affected merchandise, including wines.

These cash outlays, of course, cannot be made if the money is not available and if there is not sufficient warehouse space to store the merchandise prior to distribution to wholesale and retail outlets.

This is self-evident and it must be repeated that no Control State possesses either sufficient funds or sufficient storage space to comply with the provisions of this legislation.

It is for this reason that we say enactment of the bill you are considering would be tantamount to forcing the Control States completely out of the wine business.

In addition to "regulations", there exists a number of "prohibitions" which, under the very broad language of H.R. 2096, could be used as the basis for a charge of discrimination. For instance, an alcoholic beverage product may be prohibited from sale in a given State because of the type of container it is in, the type or content of the label, its questionable origin, and the like. Therefore, a wine item "of such class" may be rejected at the same time another wine item of the same class is being accepted for listing.

Control State procedures are fully understood by the alcohol beverage industry and by the consuming public they serve. In essence, the States stock the items which enjoy the widest popularity and even include a moderate range of slow-moving items to accommodate people with special preferences. In some of the larger States, such as Pennsylvania, as many as 628 different wine items may be listed. Most of the States also accept what are known as "Special Orders," meaning orders for brands or types not normally carried. A customer who desires a particular wine not carried on State store shelves can place such a special order.

The authority of a State to regulate the alcohol beverage business within its own territory does not extend to dictating what brands or types of beverages its citizens must consume, if they consume at all, and this has never either been attempted or contemplated by a single Control State.

On the other hand, this bill could have the effect of permitting the wine industry to dictate the wine-purchasing policy of every Control State which engages in the wine business. Any winery could offer such State any brand of wine, however obscure or little known, and cite it for Federal law violation if it declined to make a purchase.

This is what we mean when we say this bill would negate the authority of the several Control States to serve their citizens as those citizens desire to be served. We seriously doubt that this is the intent of Congress. Unfortunately, the fact remains that this would be the end result.

In summary, the situation is this: The Control States—18 of the nation's 50—with a population of approximately 62 million, are in the wine business (as part of their alcohol beverage business) as a public service. Coincidentally, they are reliant to a substantial extent on the revenue derived from that business.

Any restrictive Congressional legislation such as the bill now under consideration by your committee would impede the Control States in the rendering of that public service and simultaneously threaten curtailment of the ensuing public revenue.

The impediment referred to would be very real. The Control States cannot afford to invest public funds in wines whose ultimate resale is open to serious question. Yet they would be compelled to do so under the terms of this proposed legislation and, faced with such an ultimatum, most if not all probably would have to divest themselves of their wine business completely.

Divestiture, of course, would be both very disruptive and extremely costly. The public would be deprived of the State's service to the extent that wine wholesaling and/or retailing is involved and the State's Treasury would be deprived of essential revenue. Neither prospect can be viewed with equanimity.

To those who say that the opponents of H.R. 2096 are blowing the matter of potential litigation all out of proportion—that the Control State procedures are specifically and adequately reserved—we cite the opinion of the Attorney General of the United States, expressed in a letter to the Hon. Harley O. Staggers, Chairman of the Interstate and Foreign Commerce Committee of the House, that, "The purpose of the bill, which we understand is supported by the California-based Wine Institute, is presumably to set up a new test case in the courts as to the scope of the Twenty-first Amendment."

To those who argue that the opponents of this type of legislation are incorrect in their assertion that its enactment into law would represent a drasic change in the interpretation of the Twenty-first Amendment, we cite the Attorney General's further opinion that "we feel it appropriate to inform the Committee that if the Congress were to enact H.R. 9029 (prior, similar legislation), it would be necessary for the Supreme Court to reverse a well established line of precedents in order for the legislation to be sustained."

For these reasons, the Committee is respectfully urged to disapprove this proposed legislation. Should you desire any additional information in support of our position. we will be more than happy to supply it.

Respectfully submitted.

William G. Clark,
*General Counsel.*

Senator Mondale. Our final witness is Mr. Wiederkehr, Al Wiederkehr, president of Wiederkehr Wine Cellars, Inc., Altus, Ark., accompanied by Harold Smith and James Warner.

We are very pleased to have you with us this morning. If you will proceed. Do we have just one statement?

## STATEMENT OF ALQUIN WIEDERKEHR, PRESIDENT, WIEDERKEHR WINE CELLARS, INC., ALTUS, ARK., ACCOMPANIED BY HAROLD SMITH, COUNSEL, AND JAMES WARNER, WARNER VINEYARDS, PAW PAW, MICH.

Mr. Wiederkehr. Mr. Chairman, I am Al Wiederkehr, of Ozark, Ark., part owner of the Wiederkehr Winery at Altus, Ark.

Mr. Chairman, I appear this morning on behalf of a number of small wineries located in various States of the United States and

whose names you will find at the end of this statement. I did want to point out one statement made earlier about the size of our winery. It is not very large. It is the largest in the Southwest. It was listed as having 2-million-gallon storage capacity—that is because we put in a lot of new tanks that are empty and our sales per year are around 500,000 gallons.

And we, as I say, speak for many wineries that only have 10,000 as their total capacity. On the converse, all of our whole total annual sales would fit into only one storage tank at Gallo Winery, who has 150-million-gallon storage capacity with the ability to bottle 150,000 cases per day—150,000 cases per day. The size is awesome, and we have another giant in Italian Swiss, et cetera, et cetera.

This morning, Mr. Chairman, the subcommittee is considering H.R. 2096 and I am here to urge the defeat of H.R. 2096.

While H.R. 2096 is titled, "An act to prohibit the imposition by the States of discriminatory burdens upon interstate commerce in wine, and for other purposes," it is our position that contrary to this alleged purpose the act will, in fact, discriminate against America's small wineries. Our position is supported by statistics which clearly indicate that huge winery operations located in the States of California, New York, and Ohio, own and control the manufacturing facilities which produce approximately 90 percent of the wines sold in the United States.

If H.R. 2096 were to be passed, the wineries in those States such as Florida, Arkansas, Georgia, Michigan, South Carolina, New Mexico, and others, which have farsightedly, by giving small wineries certain tax incentives, created thriving wine industries which include, Mr. Chairman, not only the wine manufacturer, but the farmer who grows the fruit for the wine, and the large number of people working in the industry indirectly such as bottling and shipping of the wine—all of whom would be faced with almost certain disaster.

Mr. Chairman, I think I should pause here to point out that American wines are made not only from grapes, but from peaches, apples, oranges, and other fruits. The passage of this bill would lead to large-scale unemployment of those people who work directly with the wineries and those who receive employment indirectly therefrom.

It must also be recognized that not only would there be irreparable injury to the wineries, but also to industries such as glass, and paper box manufacturers, farm machinery equipment for the vineyard producer, and those who manufacture materials such as fertilizer and pesticides used in growing the fruit and in the production of the wine. Obviously, the kind of business loss I have described in both earnings and capital would result in a direct loss of tax revenue on a State and Federal level.

My experience has been that support for H.R. 2096 has come almost exclusively from those large corporately controlled wineries located primarily in the States of California, New York and Ohio, who by urging the passage of this bill would effectively stifle competition in the production and sale of wines produced in America.

The effective stifling of competition which would be accomplished by the passage of H.R. 2096 will in the long run result in higher prices to the American consumer for wine, the drinking of which is becoming more and more a part of the American way of life.

Frankly, Mr. Chairman, when I say in the long run, I am really not speaking of that many years from now. The effect might very well be felt price-wise in a matter of months.

Senator MONDALE. Now do you compete with California wines in States where there is no discriminatory taxation?

Mr. WIEDERKEHR. Yes, we just recently tried, mainly because of the bills such as H.R. 2096 that have been introduced in the last few years; and are still trying to break out of our State—and when he says (Mr. Peyser), we are in those States, what it amounts to is, we've filed to put our wines in other States but it is difficult to grow in all of these States. We are small, and most of our business is in Arkansas.

Senator MONDALE. You are basically in Arkansas?

Mr. WIEDERKEHR. We put all of our eggs in the Arkansas basket is what it amounts to.

Senator MONDALE. When you go into a State which has the same tax upon out-of-State wines and compete with California wines, how does that work? Do you come out very well?

Mr. WIEDERKEHR. Not very good when you have to go in against large, entrenched companies.

Senator MONDALE. Does it cost more to produce wines in Arkansas than in California?

Mr. WIEDERKEHR. Yes, because we are obliged to buy Arkansas grapes only for our wine and we can't produce as much per acre, or as cheaply as California, who can buy raisin culls, packing house culls and vineyard strippings at very low prices.

Senator MONDALE. Are they more expensive than California grapes?

Mr. WIEDERKEHR. Yes. There is evidence in the record that we are putting in that was submitted in the House which gives statistics from the California Federal Marketing Service in San Francisco, and the California Wine Institute figures on where the tonnage of grapes come from out there, and prices that we had to pay in our area—as high as $600 a ton for grapes the counterpart of which, the Thompson Seeds in California, go on an average of $45 to $50 a ton.

So there is a tremendous difference. Plus, some of the huge wineries even have their own glass factories out there. They are so huge that their efficiency is awesome.

Senator MONDALE. Of course, they can afford large advertising budgets.

Mr. WIEDERKEHR. Right, that is very difficult for us, as I said, too. The leverage that we have in Arkansas has indeed gotten us out in this area. I also would like to point out that one of the founders of the wine institute, Mr. Leon Adams, does not agree with them. He sent a letter which is in the record*. He helped found the institute and he feels that wineries such as ours, across the country, are actually helping California.

Senator MONDALE. Who is that?

Mr. WIEDERKEHR. Mr. Leon Adams who has written a couple of books on wine, a very reputable man, who helps the California Wine Institute. He feels we are helping the California Wine Institute because, in essence, we are in the Bible Belt. We are cultivating the people on a local basis to properly use the wine. Their sales, indeed, have

*Additional materials, attached to this letter have been retained in the permanent files of the Committee on Finance on H.R. 2096.

gone up, as Senator McClellan pointed out, 31.7 percent in 1972, and our sales, under this present protection, decreased 6 percent.

Senator MONDALE. In Arkansas?

Mr. WIEDERKEHR. In Arkansas. So while imports from California and other areas went up 31.7 percent, our sales went down 7 percent. It hardly looks like we are hurting them very much.

Senator MONDALE. Now there was a representative, just before you, from the National Alcoholic Beverage Control Association, which takes today the same position you do, but had earlier suggested there might be a compromise permitting the States to do as they please in terms of taxing of wines, but they must treat domestically produced wines and out-of-state wines on the same basis.

Would that be a basis of compromise?

Mr. WIEDERKEHR. Well, it is sort of a miniature economy all in itself. We are tied to the high-priced grapes of Arksansas and it is really helping the growers, that is what it is doing. And it is good for Arkansas because we are expanding, especially in our area near Ozark where we have much poverty as severe as Appalachia, and there are a lot of people who really would suffer severely from this bill who are too proud to go on welfare.

Let me proceed.

There is no doubt in any one's mind that under the law, the States have the right where they see fit to give certain industries tax incentives. To grow the fruit and process it, to produce wine, requires the making of large investments of money. Only by such investment can there be created a successful farming and winery operation.

What is equally important is to recognize that I, and the other small fruitgrowers and wine producers that I speak for here today, had the right to and did, in fact, rely upon these tax incentives. I should point out for example that in the case of grapes, it takes approximately 4 to 5 years to produce a grape harvest that will result in a decent wine.

Again, it is obvious that the direct effect of the passage of H.R. 2096 will not only destroy the tax incentive plans created by the various States of the Union, but will directly and proportionately destroy those of us who have acted in reliance and in good faith upon the creation of the tax incentive plans.

Even under the present system, that is to say with the tax incentive plans in existence, the wine giants of America have succeeded in systematically and substantially reducing the share of the market available to myself and those I speak for here today, the small wineries and fruit growers located in the tax incentive States.

While I do not wish to be overly dramatic, I, and those I speak for, feel strongly that H.R. 2096 is, in effect, a bill that will punish, and in so doing, create a result exactly the opposite of its stated purpose.

I submit, Mr. Chairman, that the small wineries, one of which I am connected with, and those small fruit farmers whom I have already mentioned, as well as the American consumer will suffer and suffer directly and extensively, should H.R. 2096 be enacted into law.

Thank you for the opportunity to testify before you this morning.

28-456 O—74——6

And I would like to mention the wineries that I speak for: Tenner Bros. Wine Co.; Brante Wines & Champagne, Inc.; Frontenac Wine Co.; Milan Wine Co.; St. Julian Wine Co.; Taber Hill; Molly Pitcher Wine Co.; Warner Vineyards, Inc.; Center Ridge Winery; Cowie Wine Cellars; De Salvo's Winery; Valley Vineyard Fruit Co.; Freyaldenhoven's Winery; Granata's Winery; Heckmann's Winery; Mount Bethel Winery; Post Winery; Sax Winery; Toddhunter Co.; Viking Wine Co.; Monarch Wine Co. of Georgia; Corrales Winery; Gros Winery; and Rico's Winery; and Swiss Valley Vineyards, and the Fruit Growers Association from the State of Arkansas.

Senator MONDALE. Do you happen to know if the same situation exists in alcoholic beverages? That is, the hard liquors? Do we have situations where States tax domestically produced liquor at a preferential rate? Do you happen to know, or is this a problem unique to the wine industry?

Mr. WIEDERKEHR. I could not understand that. What was that?

Senator MONDALE. Well, this is a question that may not be in your field. Do we have States, where hard liquor is produced and those States tax the liquor produced in their own State, at a lower rate than that produced outside the State? Do you know?

Mr. WIEDERKEHR. I do not know of any—of course they are huge corporations. Fruit, and the type of wineries that we have, tend to grow up right on the farm. A lot of these little wineries are actually grape growers, too, so they are combined together and especially the fact that they grow specialized wine grapes, there is no market for them as juice, fresh market or jams and jellies.

Senator MONDALE. So the wine industry is typified by more small operators than the liquor business?

Mr. WIEDERKEHR. Yes, we are not asking for really any special favors. All we simply ask for is what is fair. We have been in business for a long time and simply in all fairness, I would like to stay in business.

My grandfather started there in 1880 and if this thing goes through, we are finished, we are bankrupt, and the growers too, and I think exactly, this is what the California wine institute looks for. Our loss will be their gain in a market which they already dominate and monopolize.

Senator MONDALE. What were your gross sales? I do not want to give any trade secrets away——

Mr. WIEDERKEHR. Well, gross is very deceiving if you are competing against California. We are also collecting Federal taxes. We grossed, let's see, about 1,700,000 gallons last year, but about $650,000 of that was——

Senator MONDALE. You said "gallons." You meant dollars? $1.7 million?

Mr. WIEDERKEHR. I meant dollars, yes. And about $650,000 to $700,000 of that is Federal excise tax and State tax and taxes in other States that we go into, and the profit margin, I must say, is quite thin because Prudential Life Insurance Co. that loans us money, were not very happy with it.

And I am sure if this thing goes through, they would not be interested in loaning us any more money because I do not think that we could succeed.

Senator MONDALE. Well thank you very much for your statement. You certainly have good support from your own Arkansas delegation, and I would place in the record, following the statement of Senator McClellan, a statement by Senator Fulbright, who had hoped to be here but, as you know, was at the White House. This statement will appear following Senator McClellan's statement.

There are other miscellaneous statements here which I would ask the staff to include in the record together with any of the appropriate tables.

We, of course, will receive written comments if you would like to submit them for the record.

Mr. WIEDERKEHR. Mr. Chairman, yesterday a lot of the little wineries—I called a lot of the wineries and they did not even know the bill existed. I wonder if the record could stay open until February 15, possibly? Is that okay?

Senator MONDALE. That is fine.

Mr. WIEDERKEHR. Also, Mr. Chairman, I would like to point out a correction to a mistake made earlier, in Mr. Peyser's statement. He said that Arkansas' restaurant law prohibits imported wine to be served at restaurants, and this is not true. As a matter of fact, the grape growing association and the Arkansas Winery Association, sponsored the bill to put wines in the restaurants, so all imports, California, imports from Europe, or anywhere can be sold now in any restaurant that can sell a native wine, so there is no discrimination in that case. That is an error, evidently.

Senator MONDALE. I see.

[The prepared statement with attachments of Mr. Wiederkehr follow:]

TESTIMONY OF ALQUIN WIEDERKEHR, PRESIDENT, WIEDERKEHT WINE CELLARS, INC.

SUMMARY

Mr. Wiederkehr will testify in opposition to HR 2096. He will do so on behalf of Wiederkehr Winery of which he is part owner and several other companies involved in wine production.

It is his position and those for whom he speaks that HR 2096 will discriminate against America's small wineries, fruit growers, the persons in companies indirectly connected with farming and wine making in what is referred to as the tax incentive States of the United States, and the American Consumer, who is the ultimate user of the wine product.

Mr. Wiederkehr will note that support of HR 2096 is forthcoming entirely from the wine giants of America who control approximately 90% of the American wine Industry and whose operations are located primarily in the States of California, New York and Ohio.

In summation, HR 2096 is unfair and discriminatory as to the small farmer and the small winery operator.

STATEMENT

Mr. Chairman, members of the subcommittee: I appear this morning on behalf of a number of small wineries located in various states of the United States and whose names you will find at the end of this statement. This morning, Mr. Chairman, the Sub-committee is considering HR 2096. I am here to urge the defeat of HR 2096.

While HR 2096 is titled, "An Act to prohibit the imposition by the States of discriminatory burdens upon interstate commerce in wine, and for other purposes", it is our position that contrary to this alleged purpose the Act will, in fact, discriminate against America's small wineries. Our position is supported by statistics which clearly indicate that huge winery operations located in the

States of California, New York and Ohio, own and control the manufacturing facilities which produce approximately 90% of the wines sold in the United States.

If H.R. 2096 were to be passed, the wineries in those states such as Florida, Arkansas, Georgia, Michigan, South Carolina, New Mexico and others which have far sightedly, by giving small wineries certain tax incentives, created thriving wine Industries which include, Mr. Chairman, not only the wine manufacturer, but the farmer who grows the fruit for the wine, and the large number of people working in the Industry indirectly such as bottling and shipping of the wine all of whom would be faced with almost certain disaster. Mr. Chairman, I think I should pause here to point out that American wines are made not only from grapes but from peaches, apples, oranges and other fruits. The passage of this bill would lead to large scale unemployment of those people who work directly with the wineries and those who receive employment indirectly therefrom.

It must also be recognized that not only would there be irreparable injury to the wineries, but also to Industries such as glass and paper box manufacturers, farm machinery equipment for the vineyard producer, and those who manufacture materials such as fertilizer and pesticides used in growing the fruit and in the production of the wine.

Obviously, the kind of business loss I have described in both earnings and capital would result in a direct loss of tax revenue on a State and Federal level.

My experience has been that support for H.R. 2096 has come almost exclusively from those large corporately controlled wineries located primarily in the States of California, New York and Ohio, who by urging the passage of this bill would effectively stifle competition in the production and sale of wines produced in America.

The effective stifling of competition which would be accomplished by the passage of H.R. 2096 will in the long run result in higher prices to the American Consumer for the wine, the drinking of which is becoming more and more a part of the American way of life.

Frankly, Mr. Chairman, when I say in the long run, I am really not speaking of that many years from now. The effect might very well be felt price-wise in a matter of months.

There is no doubt in any one's mind that under the law the States have the right, where they see fit, to give certain industries tax incentives. To grow the fruit and process it to produce wine requires the making of large investments of money. Only by such investment can there be created a successful farming and winery operation. What is equally important is to recognize that I and the other small fruit growers and wine producers that I speak for here today, had the right to, and did in fact rely upon these tax incentives. I should point out for example that in the case of grapes it takes approximately four to five years to produce a grape harvest that will result in a decent wine. Again, it is obvious that the direct effect of the passage of HR 2096 will not only destroy the tax incentive plans created by the various States of the Union, but will directly and proportionately destroy those of us who have acted in reliance and in good faith upon the creation of the tax incentive plans.

Even under the present system, that is to say, with the tax incentive plans in existence the wine giants of America have succeeded in systematically and substantially reducing the share of the market available to myself and those I speak for here today, the small wineries and fruit growers located in the tax incentive States.

While I do not wish to be overly dramatic, I and those I speak for feel strongly that HR 2096 is in effect a bill that will punish, and in so doing create a result exactly the opposite of its stated purpose. I submit, Mr. Chairman, that the small wineries, one of which I am connected with and those small fruit farmers whom I have already mentioned as well as the American Consumer will suffer and suffer directly and extensively should HR 2096 be enacted into law.

Thank you for the opportunity to testify before you this morning.

ALQUIN WIEDERKEHR
(And 24 others).

Senator MONDALE. We have received a letter from Senator Helms, indicating his desire to submit a written statement on this question. He regrets that he cannot be here at this point. He will provide us with a statement which will be printed in the record at this point.

[Senator Helms subsequently submitted his statement referred to below:]

STATEMENT BY SENATOR JESSE HELMS (R-N.C.) BEFORE THE SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE, CONCERNING H.R. 2096

Mr. Chairman. The issue involved in H.R. 2096 is clear. Simply stated, this bill attempts to take from the States sovereign rights guaranteed to them under Section 2 of the Twenty First Amendment to the Constitution of the United States.

The stated purpose of this bill is to "eliminate the obstructions to the free flow of commerce in wine" by setting aside state laws which supposedly established artificial trade barriers to the merchandising of wine. However, in practice, this bill does much more. This legislation, if passed by the Congress, would overturn many existing state laws and regulations which were enacted to control the purchase, storage, distribution and sale of alcoholic beverages in line with the preferences of that state's citizens.

This legislation provides that wherever the law of any state permits the importation of wine into that state, the state in quesion may not impose any tax regulation, prohibition or requirement with regard to wine produced outside the state which is not equally applicable with respect with wine produced in the state. It further provides that any state which permits the sale of wine within the state shall be required to permit the importation of wine produced outside the state and offer such wines for sale upon terms equally applicable to all wines sold in the state, including those produced therein.

Mr. Chairman, Section 2 of the Twenty First Amendment to the Constitution of the United States states:

"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."

The Supreme Court has consistently held that the language of this Amendment clearly leaves the States free to control the importation of and traffic in liquors within their boundaries.

At this time, Mr. Chairman, I would like to cite several of the more important Supreme Court decisions consistent with this view.

In *State Board of Equalization of California vs. Young's Market Company*, 299 U.S. 59 (1936), it was argued that State action requiring a fee on persons importing beer from outside of a State was a violation of the Commerce Clause and of the Equal Protection Clause. Pointing out that such a discrimination would have violated the Commerce Clause prior to the adoption of the Twenty First Amendment, the Court held that subsequent to that Amendment's adoption a State was not required to "let imported liquors compete with the domestic on equal terms." To say otherwise would involve "not a construction of the Amendment, but a rewriting of it," the Court pointed out. The Court went on to hold that claims that the State's discriminatory "statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty First Amendment cannot be deemed forbidden by the Fourteenth."

In *Mahoney vs. Joseph Triner Corporation*, 304 U.S. 401 (1938), the Court sustained a Minnesota statute imposing additional processing conditions on liquor coming from other states, a statute which the Court noted "clearly discriminates in favor of liquor processed within the state against liquor completely processed elsewhere." (304 U.S. at 403) In this case, the Triner Corporation had in its possession at the time of the passage of the Minnesota statute liquor which it had been selling lawfully under a Minnesota license granted prior to the passage of the statute in question, but which it later could not sell lawfully because passage of the statute required further processing. The Court said these facts were immaterial since the State had the power to terminate the license independent of the Twenty First Amendment (304 U.S. at 404).

Michigan statutes prohibiting dealers in beer from selling beer manufactured in other states if such other states discriminated against beer manufactured in Michigan were upheld in *Indianapolis Brewing Company vs. Liquor Control Commission*, 305 U.S. 391 (1939) in spite of Commerce, Due Process, and Equal Protection arguments to the contrary.

Mr. Chairman, these cited cases clearly recognize that the Twenty First Amendment has withstood arguments against the force of the Commerce Clause in the absence of Congressional action; yet, here today, we are dealing not with State action, but with proposed legislative action by the Congress. In this area, the Court has never squarely determined how that Twenty First Amendment affects Congress' power under the Commerce Clause.

A close look a this history of the Amendment's adoption, however, makes it clear that the intent of Congress at the time of the Amendment's passage was to return absolute control of liquor traffic to the States.

As reported by the Senate Committee on the Judiciary in S.J. Res. 211, 72nd Congress, Second Session, the proposed amendment contained a Section 3, not found in the present Amendment. That Section provided, "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138 (1933).

Proposals to leave even this remnant of Federal control over liquor traffic gave rise to the only real controversy over the wording of the final version of the proposed amendment. Senator Wagner of New York argued that giving the Federal Government even "apparently limited power," as Section 3 proposed to do, would allow such federal power to be "extended to boundaries now undreamed of and unsuspected" by those supporting the measure. Having heard this fear expressed, Senator Robinson of Arkansas, the Senate Majority Leader, asked for a vote "to strike out Section 3." It was because of these fears that the Senate then voted to take Section 3 out of the proposed amendment, while retaining Section 2 and its broad grant of power to the States. 76 Cong. Rec., 4179 (1933).

Senator Blaine of Wisconsin, Chairman of the Subcommittee which held hearings on the resolution and floor manager of the resolution in the Senate, agreed that Section 3 "ought to be taken out of the resolution" and Section 2 left in, because the "purpose of Section 2 is to restore to the States by constitutional amendment *absolute control* . . . over interstate commerce affecting intoxicating liquors which enter the confines of the States." 76 Cong. Rec., 4143 (1933). (Emphasis added)

The legislative history of the Twenty First Amendment, of which these passages are typical, readily shows that when the Senate agreed to Section 2 its members understood that they were returning "absolute control" of liquor traffic to the States. This view was forcefully expressed by Senator Wagner, who, when urging that Section 3 be eliminated from the proposed amendment and the States be given complete control of liquor traffic, said: "Let the people of each State deal with the subject, and they will do it more effectively and more successfully than the Federal Government has done, because it is not the business of the Federal Government."

It is clear, then, Mr. Chairman, from the legislative history of Amendment, that Congress intended for the Twenty First Amendment to restore to the States "absolute control" over liquor traffic.

For these many reasons, Mr. Chairman, I strongly oppose the enactment of H.R. 2096.

Senator Mondale. We stand adjourned, thank you.

[Whereupon, at 11:55 a.m., the subcommittee adjourned, subject to the call of the Chair.]

# Appendix A

## Communications Received by the Committee Expressing an Interest in H.R. 2096

STATEMENT OF HON. JOHN V. TUNNEY, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

I am pleased to have this opportunity to comment in favor of H.R. 2096, a bill to prohibit states from imposing discriminatory taxes on wines produced in other states.

The legislation does not effect the police power of any state; rather, it requires the states to regulate sales fairly by removing discriminatory trade barriers.

Traditionally, it has been argued that section 2 of the Twenty-first Amendment gives the states the power to impose discriminatory taxes on wine produced in another state. The legislative history of the Amendment, however, did not contain substantive debate on the purpose or meaning of Section 2 other than a general agreement that it was necessary in order to protect dry states. Indeed, in a series of decision known as the "Brandeis cases," the Supreme Court refused to look at the Congressional intent of the language of section 2 and upheld the State Statutes.

The Court has not been confronted by a situation in which it must construe the Twenty-first Amendment in light of legislation enacted by Congress under the Commerce Clause. The Court noted the following in *Heublein, Inc.*, v. *South Carolina Tax Commission*:

"And through the relation between the Twenty-first Amendment and the force of the Commerce Clause in the absence of Congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress' power under the Commerce Clause."

Mr. Chairman, it is important to California, which produces eighty-four percent of our domestic wine, that H.R. 2096 be enacted. When it passed the House last September, it was supported by the entire California delegation.

I believe that Congress should enact this legislation in order for the Courts to decide the relationship between the Twenty-first Amendment and Congressional action under the Commerce Clause.

We left the era of the Articles of Confederation to the era of the Constitution because it was in the Nation's best interest to have a national economic system. Discriminatory taxes do not support the principle of free movement of goods through interstate commerce and do not benefit a consumer who may be forced to pay substantially higher prices for his preference in wine.

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NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION, INC.,
*Washington, D.C., September 19, 1973.*

Hon. RUSSELL B. LONG,
*Chairman, Senate Committee on Finance,*
*Washington, D.C.*

DEAR CHAIRMAN LONG: It has come to our attention that H.R. 2096, passed by the House of Representatives on September 11, 1973, has been referred to your Committee.

As General Counsel for the National Alcoholic Beverage Control Association, Inc., consisting of the 18 Control States which operate the alcoholic beverage business within their respective borders, I wish to go on record as respectfully requesting a public hearing before the Committee on the merits of H.R. 2096.

The stated purpose of H.R. 2096 is to "eliminate the obstruction to the free flow of commerce in wine" by setting aside the laws of a handful of States which establish "artificial trade barriers" relative to the merchandising of wine. However, the practical effect of the bill has much broader ramifications. This legislation, if enacted, would overturn many State laws and regulations which were enacted pursuant to the provisions of the Twenty-first Amendment to control the purchase, storage, distribution, sale and consumption of alcoholic beverages strictly within the affected States's own territory. Such action would result in a permanent damaging effect on the alcoholic beverage business which each State conducts as a public service operation.

The proponents of the type of legislation represented by H.R. 2096, principally the California-based Wine Institute, would have it believed that a great injustice is being fostered so long as any State imposes a "barrier" to total market saturation, regardless of the purpose of any such barrier. A careful analysis of the facts will demonstrate the fallacy of such a position.

According to a recent trade publication, California alone presently accounts for approximately SEVENTY PERCENT (70%) of the total wine sales in this Country. With such vast market domination already a fact, the question really boils down to whether it is worth irreparably damaging the wine business of many States in order to satisfy the ambitions of the major supplier to capture even more of the market.

Let it be emphasized at the outset that this Association and its Member States endorse the principle that no artificial or discriminatory barriers should be allowed to impede interstate commerce. However, we cannot agree that State laws and regulations enacted to control the purchase, storage, distribution, sale and consumption of alcohol beverages strictly within the affected State's own territory constitute a barrier to interstate commerce. We feel, on the contrary, that such laws and regulations represent a proper exercise of State authority, and their enforcement a necessary discharge of State responsibility to assure the well being and safety of its citizens.

The citizens of 18 States—Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming—and of Montgomery County, Maryland, have chosen pursuant to the Twenty-first Amendment of the Constitution of the United States to have the alcohol beverage business conducted within their respective territories by their respective governments. In a majority of those 18 States and in Montgomery County, Maryland, the alcohol beverage operation includes wines.

These States have a population in excess of 62 million—roughly 30 percent of the population of the entire United States—and they account annually for about one-fourth of the nation's alcohol beverage sales. Last year, 1972, sales in the 18 States involved—generally referred to as the "Control States"—approximated $2.5 billion and the net revenue therefrom represented upwards of 8 percent of the total revenue collected from all sources by the governments of those States.

It is obvious, therefore, that millions of American citizens in the 18 States we represent have a vital interest in the continued success of the alcohol beverage operations they themselves own and which they themselves conduct through duly constituted and local boards and commissions.

The role of wines in these operations has assumed substantial proportions. In 1972, for example, those Control States which include wines in their operation reported wine sales aggregating 9,560,000 cases. Total sales actually were considerably in excess of this amount inasmuch as two of the Control States do not include any wines in their sales statistics and several others include only certain categories of wines. Nevertheless, the figures are impressive and it is not without significance as well that more than 90 percent of the 1972 reported Control States wine sales consisted of products manufactured in the United States—principally in California and, to a lesser extent, in New York.

Naturally, this question then arises: How, and to what extent, would the enactment of the pending legislation affect Control State operations?

Our answer is that such legislation, if enacted, could and probably would force the Control States to withdraw from the wine business.

This conclusion appears inescapable because each Control State would then be required by Federal law to purchase and stock each and every wine, regardless of type or origin, offered to it by a supplier. Yet no State has the facilities, the finances and the manpower to comply with such a sweeping mandate. It is estimated that there are more than 40,000 different wines on the American market.

To stock even a moderate percentage of this huge selection is beyond the capability of any wine dealer, State or private.

In this connection, we recognize and appreciate the provision in H.R. 2096 which extends to a State the right "to exercise discretion in the selection and listing of wine to be purchased or sold by each State."

Unfortunately, this apparent grant of discretion is neutralized by concurrent declaration in the bill that such discretion may be exercised only subject to the provisions of Section 3(b) which, in effect, requires that a State which permits the sale of any wine within its territory must permit the sale of all wines.

Admittedly, this would impose no burden on a State which itself does not sell wine. On the other hand, it is intolerable where, as in most of the Control States, the State itself is both a buyer and a seller of wine.

Consider, if you will, precisely what such a requirement would entail. The Control States would have to purchase at least some quantity of wine of each brand and type upon solicitation by any wine supplier—if it purchased any wine at all. The absence of local consumer demand could not be taken into account. Consumer preferences would be completely subordinate to wine supplier wishes. The possibility that many wines could not be resold by the State would not be allowed to enter into consideration. The purported "right of selection and listing," therefore, would be meaningless.

Now contrast this situation with that in a State which does not itself engage in the wine business but permits the sale of wines by private licensed establishments. Under the terms of this legislation, such a State would not be required to expend so much as a single penny. It would merely be prohibited from interposing any restrictions on the purchase by its wine licensees of whatever types of wines they themselves might care to acquire and offer for resale to the public.

The taxpayers of such a State would, in consequence, neither be required to make an expenditure for wines nor face a loss of revenue as a result of local wine purchasing policies.

Significantly, private wine licensees would likewise be unaffected by such legislation. They could purchase and stock what their customers desire and decline to purchase any other type of wine without in any way contravening the provisions of the legislation now being considered.

The Control States feel that they too should enjoy such a privilege. It would be denied by this legislation.

This incongruity arises from the fact that the Control States must first purchase before they can sell and, being States rather than individual wholesalers or retailers, they could not decline to purchase a profferred wine whereas an individual storekeeper in another State could.

For the Committee's information, the Control States, without exception, purchase, stock and sell all types of distilled spirits and wines for which there is a local public demand. Their inventories, as a result, necessarily include some fairly slow-moving items. For the most part, however, they are made up of types, brands and container sizes which have a fairly ready market. This is nothing more nor less than good merchandising. It averts the danger of tying up excess capital on the one hand and of disappointing the consuming public on the other. What most customers want is always available while at the same time the taxpayer is not penalized by having sizable amounts of State funds frozen, as they would be if the State had purchased quantities of merchandise which could not be profitably disposed of within a reasonable period of time.

In the Control States we call the brands, types and container sizes offered for sale "listings." Potential vendors are invited to submit their products to the appropriate State agency for consideration. A detailed amount of information must accompany the submission such as, cost, freight, package details, etc. In addition, the vendor is expected to justify selection by including either in the written submission or during his oral presentation, market projections, advertising programs and the like. As you can imagine, with limited capital and storage space, the purchasing agency must be careful to select those items for which a public demand has been demonstrated, or can reasonably be expected, and which will, therefore, have an acceptable turnover.

Due to capital, marketing and space limitation, the States simply cannot accept for listing all of the alcoholic beverage items, including many thousand wine items alone, offered from time to time. It is at this point where the great potential for being accused of discrimination occurs. Because of some "regulations", i.e., limitation on number of items of the same type, quality, class, proof, size, etc., that can be accommodated in the State sales operation, only one or a few of the items offered will be "listed."

The listing is important because when any item is "listed" it is concurrently and automatically stocked—meaning that a substantial outlay of public funds is made to purchase the affected merchandise, including wines.

These cash outlays, of course, cannot be made if the money is not available and if there is not sufficient warehouse space to store the merchandise prior to distribution to wholesale and retail outlets.

This is self-evident and it must be repeated that no Control State possesses either sufficient funds or sufficient storage space to comply with the provisions of this legislation.

It is for this reason that we say enactment of the bill you are considering would be tantamount to forcing the Control States completely out of the wine business.

In addition to "regulations", there exist a number of "prohibitions" which, under the very broad language of H.R. 2096, could be used as the basis for a charge of discrimination. For instance, an alcoholic beverage product may be prohibited from sale in a given State because of the type of container it is in, the type or content of the label, its questionable origin, and the like. Therefore, a wine item "of such class" may be rejected at the same time another wine item of the same class is being accepted for listing.

Control State procedures are fully understood by the alcohol beverage industry and by the consuming public they serve. In essence, the States stock the items which enjoy the widest popularity and even include a moderate range of slow-moving items to accommodate people with special preferences. In some of the larger States, such as Pennsylvania, as many as 628 different wine items may be listed. Most of the States also accept what are known as "Special Orders," meaning orders for brands or types not normally carried. A customer who desires a particular wine not carried on State store shelves can place such a special order.

The authority of a State to regulate the alcohol beverage business within its own territory does not extend to dictating what brands or types of beverages its citizens must consume, if they consume at all, and this has never either been attempted or contemplated by a single Control State.

On the other hand, this bill could have the effect of permitting the wine industry to dictate the wine-purchasing policy of every Control State which engages in the wine business. Any winery could offer such State any brand of wine, however obscure or little known, and cite it for Federal law violation if it declined to make a purchase.

This is what we mean when we say this bill would negate the authority of the several Control States to serve their citizens as those citizens desire to be served. We seriously doubt that this is the intent of Congress. Unfortunately, the fact remains that this would be the end result.

In summary, the situation is this: The Control States—18 of the nation's 50—with a population of approximately 62 million, are in the wine business (as part of their alcohol beverage business) as a public service. Coincidentally, they are reliant to a substantial extent on the revenue derived from that business.

Any restrictive Congressional legislation such as the bill now under consideration by your committee would impede the Control States in the rendering of that public service and simultaneously threaten curtailment of the ensuing public revenue.

The impediment referred to would be very real. The Control States cannot afford to invest public funds in wines whose ultimate resale is open to serious question. Yet they would be compelled to do so under the terms of this proposed legislation and, faced with such an ultimatum, most if not all probably would have to divest themselves of their wine business completely.

Divestiture, of course, would be both very disruptive and extremely costly. The public would be deprived of the State's service to the extent that wine wholesaling and/or retailing is involved and the State's Treasury would be deprived of essential revenue. Neither prospect can be viewed with equanimity.

To those who say that the opponents of H.R. 2096 are blowing the matter of potential litigation all out of proportion—that the Control States procedures are specifically and adequately reserved—we cite the opinion of the Attorney General of the United States, expressed in a letter to the Hon. Harley O. Staggers, Chairman of the Interstate and Foreign Commerce Committee of the House, that, "The purpose of the bill, which we understand is supported by the California-based Wine Institute, is presumably to set up a new test case in the courts as to the scope of the Twenty-first Amendment."

To those who argue that the opponents of this type of legislation are incorrect in their assertions that its enactment into law would represent a drastic

change in the interpretation of the Twenty-first Amendment, we cite the Attorney General's further opinion that "we feel it appropriate to inform he Committee that if the Congress were to enact H.R. 9029 (prior, similar legislation), it would be necessary for the Supreme Court to reverse a well established line of precedents in order for the legislation to be sustained."

For these reasons, the Committee is respectfully urged to disapprove this proposed legislation. Should you desire any additional information in support of our position, we will be more than happy to supply it.

Respectfully submitted.

WILLIAM G. CLARK,
*General Counsel.*

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NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION, INC.,
*Washington, D.C., October 1, 1973.*

Hon. WALTER F. MONDALE,
*Chairman, Senate Subcommittee on State Taxation of Interstate Commerce, Washington, D.C.*

DEAR CHAIRMAN MONDALE: It has come to our attention that H.R. 2096, passed by the House of Representatives on September 11, 1973, has been referred to your Committee.

As General Counsel for the National Alcoholic Beverage Control Association, Inc., consisting of the 18 Control States which operate the alcoholic beverage business within their respective borders, I wish to go on record as respectfully requesting a public hearing before the Committee on the merits of H.R. 2096.

On September 19, 1973, we sent a letter to the members of the Senate Finance Committee expressing our views as to what practical effect the enactment of H.R. 2096 would have on the wine business of the 18 Member States of the Association. At this point, we would like to submit our views on the constitutionality of H.R. 2096 and how its enactment would seriously jeopardize the excise tax laws on wine of most of the States in this country.

The classification standards imposed on the States by this Bill are those of Section 5041(b) of the Internal Revenue Code of 1954. However, the text of that provision makes it clear that such standards cannot effectuate the antidiscrimination purpose recited in Section 1 of the Bill.

The effect of these federally imposed standards is to require the States to divide wine for regulatory purposes into five different classes, defined by alcoholic content or method of manufacture. The Revenue Code applies a federal excise tax to each class at rates ranging from 17 cents to $3.40 per wine gallon. It is itself a perfect example of discrimination between kinds of wine that has no rationale except the need for federal revenue. The classes it establishes are unrelated to the promotion of interstate commerce in wines or to the protection of such commerce from discriminatory taxation or regulation by the States.

By using these federal wine classifications, made for a different purpose, to define the kind of state discrimination against interstate commerce in wine that the Bill purports to prohibit, the House has produced a bill so incoherent that it may violate the due proceed standards of the Fifth Amendment, as well as the Commerce Clause. The purpose stated in Section 1, to eliminate obstructions "resulting from acts of the States which impose discriminatory and unreasonable burdens" on interstate commerce, is a valid one. But the Bill has no standards by which "discriminatory" or "unreasonable" burdens on such commerce are to be distinguished from the burdens routinely imposed by states forming part of a federal system. Our government has a constitutional framework in which all kinds of incidental burdens are placed on interstate commerce by state or local regulations that are reasonable because they serve a valid purpose.

Section 2 provides that states in which wine is sold may not impose with respect to such wine any form of tax, regulation or prohibition that does not treat equally all wine within the same class, as defined by Section 5041(b) of the Internal Revenue Code of 1954, whether produced inside or outside the state or produced from products produced inside or outside the state. No matter how useful another classification may be for a state's own purpose, Section 2 prohibits it. For example, if a state wished to prohibit the sale of all alcoholic beverages including wine, having an alcoholic content of more than 17%, Section 2 would prohibit the enactment of such a state temperance standard. That standard would require different treatment of wine with an alcoholic content of 18–21% from wine with an alcoholic content of 15–17% but wines of both these

classes are included within a single 5041(b) tax rate class, to wit, number (2), "still wines containing more than 14% and not exceeding 21%."

Indeed, the imposition of these federal classifications on the states puts in jeopardy the excise taxes presently collected by the states on wine. These state classifications are especially adopted to their own needs. For example, Louisiana applies varying excise taxes on "sparkling wines" and "still wines." In terms of alcoholic content, the dividing points are "not more than 14%," "15% to 24%", and "more than 24%.[1]" Minnesota, on the other hand, imposes varying excise taxes on "fortified" and "unfortified" wines, with the dividing points for alcoholic content fixed at 14% to 21%, 22% to 24% and over 24%.[2] The federal classifications in Section 5041(b) of the Revenue Code are "still wines," "champagne or other sparkling wines" and "artificially carbonated wines," with the dividing points for alcoholic content, applicable only to "still wines", fixed at 14%, 15% to 21% and 22% to 24%.[3]

Louisiana, Minnesota, and many other so-called license states are faced with the prospect of having the Bill cut off their wine excise tax revenues. Whether they can pass amending legislation that will conform with the Bill's standards is doubtful. Yet there is nothing in the hearings, the Committee Report on the Bill or the debate that suggests an awareness of this prospect by the Congressional representatives of the license states or their interested state officials. In practical effect, the Bill proposes to remove state imposed burdens on interstate commerce in wine by destroying establised state excise tax classifications. Yet that result has been effectively obscured by using a code reference that requires further research to discover its meaning. This may account for the fact that the adversely affected license states have not been heard from.

Turning to Section 3(a), we learn that although Section 2 is directed only at state action it is not intended to prevent so-called control states from buying, selling or distributing wine or from exercising discretion in buying wine or listing it for sale. But Section 3(b) provides that any state exercising 3(a) rights is subject to even broader regulatory restrictions than those imposed by Section 2. In Section 3, the prohibited state action is not limited to a tax, regulation, prohibition or similar requirement as in Section 2, but embraces "any tax, regulation, license fee, prohibition or mark-up," which discriminates against wine of such class (a class defined by Section 5041(b) of the Internal Revenue Code of 1954) produced outside such state. Most of the control states produce no wine and therefore apply such regulations only to wine produced outside the state. This kind of regulation, per se, may be prohibited by the Bill as a discrimination against imported wine because it inevitably increases the intrastate price of the wine.

Section 3(b) emphasizes a basic misconception of the thrust of the Commerce Clause that underlies the entire bill. Its sponsors evidently thought that the Commerce Clause conferred power on the U.S. Congress to establish for the several states a uniform system of taxing and controlling wine sales within their respective borders. These sponsors had evidently forgotten the reason for the 18th Amendment. Prior to that amendment, commercial liquor sales within a state had been tightly regulated or entirely prohibited by the several states for nearly a century under their respective police powers. There was no uniformity in their regulations and the Congress did not then suppose that a uniform temperance policy could be established by it through Commerce Clause legislation, without a constitutional amendment. While lawyers, scholars and judges may differ as to what if any inroads the 21st Amendment made upon the Commerce Clause, the Export-Import Clause, the Supremacy Clause, or any other pre-existing Clauses of the U.S. Constitution, the fact that the 21st repealed the 18th has never been in doubt.

Unfortunately, H.R. 2096 was reported and debated upon the mistaken assumption that Supreme Court decisions construing the 21st Amendment had erected new interstate trade barriers in the alcoholic beverage business. Many Congressmen were prevailed upon to support the Bill on the ground that it would provide a test case for overruling these decisions and thereby allow free trade in wine between the states. Since the same kind of barriers had been in force before the 18th Amendment, this was a specious argument.

However, Section 4 of the Bill is so drafted as to create serious doubt as to its alleged purpose to reverse existing Supreme Court precedents. Normally, if a

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[1] Louisiana Revised Statutes, Section 341 (2) and (3).
[2] Minnesota Statutes, Section 340.47, (1), (2), (3) and (4).
[3] 26 U.S.C. 5041, (1), (2), (3), (4) and (5).

state statute or regulation is thought to violate a federal statute, its validity is determined in the first instance by a three-judge District Court in a suit brought by the United States. Direct appeal to the Supreme Court is provided so that the issue may be expeditiously determined without the usual appeal from a District Court to a United States Court of Appeals, followed by Supreme Court review on a certiorari petition.

Section 4 completely by-passes the enforcement procedures ordinarily used to resolve federal-state conflicts by eliminating both the customary expediting procedure and the normal review of contemplated action against a state by responsible federal officials before a suit is begun. Section 4, when read with the definition of the term "person" in Section 5(2), is an attempt to authorize any interested individual, corporation, partnership, or other business entity to sue to enjoin a state law that is believed by the plaintiff to violate any of the provisions of Section 2 or 3(b). We say "attempt to authorize" because the authorizing language is so vague and contradictory that it may be judged a nullity on that ground.

Read literally, Section 4 makes no sense. The first sentence authorizes a suit to *prevent* enforcement of Section 2 or 3(b). The second sentence authorizes the Court hearing the suit to do what is needed to *achieve* enforcement of those sections. Presumably the plaintiff in the suit is interested either in enjoining enforcement of Section 2 or 3(b) or in enjoining enforcement of a state law or regulation claimed to violate Section 2 or 3(b); but not both. The same plaintiff, if rational, cannot want the contradictory relief provided by both the first and second sentence. The House Report, No. 93–264, 93rd Congress, 1st Session, suggests in its discussion of Section 4 at page 9 that what the Congress meant to say was that any interested person may sue to enjoin state action that violates Section 2 or 3(b), but this is not what the Bill says.

In any event, the Report supplies no explanation as to why a federal-state conflict should be left for resolution in an action available only to a private plaintiff. The comment on page 9 as to Section 5, which defines person so as to exclude the United States or any of its agencies, merely repeats the language of this section of the Bill. The absence of any explanation of this extraordinary exclusion raises a serious question as to why sellers of wine, the persons meeting the statutory definition who would be most interested in enforcing Section 2 and 3(b), should be given this extraordinary power to use federal litigation or a threat of such litigation to influence state action. They all, of course, wish to get their wines listed for sale by a control state. In many instances such a state might well conclude, regardless of the merits of the threatened law suit, that it would rather list than litigate. In sum, the curious terms of the Bill do nothing to dispel the motion that the drafter's purpose was to give members of the wine industry a unique status as private enforcers of a federal policy that the Supreme Court will not likely uphold.

The basic issue as to whether state regulation of intrastate alcoholic beverage sales violates the Commerce Clause because it burdens importation into the state was settled in the *License Cases, 5 Howard 504 (1847)*. Those cases involved Massachusetts, Rhode Island, and New Hampshire statutes and resulted in a series of opinions covering more than a hundred pages. The gist of the prevailing opinions was that the control of alcoholic beverages is an exercise of state police power that takes precedence over the federal goal of free trade between states. Their reasoning was that alcoholic beverage abuse creates local problems that may be dealt with most effectively on a local basis.

Following is a brief summary of subsequent Supreme Court decisions supporting the view that the Commerce Clause does not authorize the application of uniform federal standards to alcoholic beverage sales made wholly within a state. The earliest cases in which the Court rejected efforts to supplant state with federal standards appear to be two cases involving criminal enforcement of Massachusetts liquor laws. *In McGuire v. Massachusetts, 3 Wall, 387 (1866)* and *Perycar v. Massachusetts 5 Wall, 475 (1867)*, the Court rejected attempted defenses against prosecution for selling liquor without a state license, based on the possession of a valid Internal Revenue dealer's license.

In *Vance v. Vandercook, 170 U.S. 438 (1898)*, the Court rejected a claim that South Carolina's liquor monopoly was inherently discriminatory against interstate commerce because its purchasing officials could adversely affect such commerce by arbitrary decisions. In *Cox v. Texas, 202 U.S. 446 (1906)*, the Court

sustained a Texas statute that discriminated in favor of dealers in Texas made liquor.

No purpose would be served by extending this list of cases since the House Report ignores them all. None of them has been reversed by the Court although all of them would be overturned by H.R. 2096 if Congress could reverse Supreme Court decisions based upon constructions of the United States Constitution.

Finally, in view of the arrested need for a new 21st Amendment case, the decision on June 2, 1973, in *United States v. Mississippi,* *U.S.* , *37L.Ed.2d,* should be noted. In that case, it was argued unsuccessfully on behalf of Mississippi that the 21st Amendment permitted that state to apply its wholesaler's mark-up to sales of alcoholic beverages made to military bases. While the constitutional conflict there was between the 21st Amendment and the Supremacy Clause, the Court's narrow construction of that amendment should quiet any real fears of those who claim that it may be used to impose new and unwarranted burdens on interstate commerce.

As is known, Mississippi has been trying for four years to get a decision from the Supreme Court that will settle the constitutional validity of Mississippi's wholesale mark-up and is now faced with another three-judge court decision on the remand and perhaps a subsequent appeal before a final decision is reached. If H.R. 2096 should become law, Mississippi could apparently look forward to several years more of litigation with the wine industry to find out whether its markup is valid under the new standards proclaimed by that law.[4]

Perhaps one further comment is in order on the general question of state support of a local industry that may incidentally burden interstate commerce. California, the principal source of domestic wine, is also the principal source of another grape product, raisins. In *Parker* v. *Brown, 317 U.S. 341 (1943),* the Court sustained California's statute and regulations intended to hold up raisin prices against a claim that the state price support violated the Sherman Anti-trust Act. In his opinion, Chief Justice Stone, a friend of vigorous anti-trust enforcement, pointed out that words like "discriminatory" and "unreasonable burden" mean nothing in solving the practical problem of accommodating preferential state regulation with free trade among the states. His comment that problems of "the safety, health, and well-being of local communities" may never be adequately dealt with by Congress, because of their local character (*317 U.S. 341, 362–63*) also has special application to H.R. 2096. California, nor any state, cannot reasonably expect both to protect its grape growers by state law from the rigors of competition and to frustrate by federal law, competing grape growers in other states who seek similar preferential treatment.

In conclusion, the Subcommittee is urged to hold a public hearing on this critical piece of legislation in order that the views of all 50 States may be heard. Should any additional information in support of our position be required, we will be happy to furnish it.

Respectfully submitted,

WILLIAM G. CLARK,
*General Counsel.*

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STATE OF WYOMING,
SECRETARY OF STATE,
*Cheyenne, September 25, 1973.*

Re H.R. 2096, the so-called "Wine Bill."

Hon. WALTER F. MONDALE,
*Washington, D.C.*

DEAR SENATOR MONDALE: As a member of the Wyoming Liquor Commission, I oppose the passage of H.R. 2096.

It seems particularly inappropriate in light of the findings of the National Institutes on Alcoholism and Alcohol Abuse to undermine the right of the individual states to control the sale of liquor within their borders.

Sincerely,

THYRA THOMSON,
*Secretary of State.*

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[4] Mississippi Code, Title 40, Sec. 102, 65–104, also levies excise taxes on only two classes of wine, "sparkling wine and champagne" and all other wine. No wine is produced in Mississippi. How it could comply with H.R. 2096 and still collect *any* excise taxes on wine is not known.

STATE OF NORTH CAROLINA,
DEPARTMENT OF JUSTICE,
*Raleigh, October 22, 1973.*

Hon. WALTER F. MONDALE,
*Chairman, Senate Subcommittee on State Taxation of Interstate Commerce, Washington, D.C.*

DEAR SENATOR MONDALE: I am writing to you regarding H.R. 2096, passed by the House of Representatives on September 11, 1973, and which has been referred to your Committee.

Please be advised that we have reviewed this legislation and believe it carries significant legal ramifications. Because of this we respectfully urge that a public hearing be held before the Committee on the merits of H.R. 2096.

We feel the points presented in the letter of Mr. William G. Clark, General Counsel, National Alcoholic Beverage Control Association, Inc., dated October 1, 1973, should be given full consideration by the members of your Committee.

As a member of the National Alcoholic Beverage Control Association, Inc., we feel this bill would have a great effect upon the State of North Carolina. We sincerely appreciate your understanding in this matter.

Very truly yours,

ROBERT MORGAN,
*Attorney General.*
HOWARD A. KRAMER,
*Associate Attorney.*

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STATE OF UTAH,
UTAH LIQUOR CONTROL COMMISSION,
*Salt Lake City, Utah, October 4, 1973.*

Hon. WALTER F. MONDALE,
*Chairman, Senate Subcommittee on State Taxation of Interstate Commerce, Washington, D.C.*

DEAR CHAIRMAN MONDALE: We have been advised by our industry representative in Washington, D.C., that H.R. 2096 had been referred to your Committee, after passage by the House of Representatives.

The Utah State Liquor Control Commission has been seriously concerned about the consequences which would follow from the enactment of this bill. The bill, as presently written gratuitously sets forth the rights of the Control States under the Twenty-First Amendment to the constitution of the United States. Utah is a control state and all intoxicating beverages, other than light beer, are purchased by the State and sold to the inhabitants of the State in State Liquor Stores.

The Act, with provisions above referred to in Section 3, reserves the right of such states to purchase, sell and distribute wine and to exercise discretion in selecting and listing items of wines purchased for sale, in Utah. However, the Act further provides that if the State exercises said rights it may not impose with respect to wine of any class any regulation or prohibition which discriminates against wine of such class produced outside of such State.

Section 2 provides that whenever the law of a state permits importation of wine into that State, such State may not impose with respect to any wine produced outside the State any prohibition or requirement which is not equally applicable with respect to wine of the same class produced outside the State. The Act further authorized interested persons to bring suits against States in Federal District Courts to prevent such discrimination.

Wine is not produced in Utah and we purchase from non-resident wineries throughout the country. The Commission cannot accept, warehouse or finance the cost of the purchase of wines from all companies and must exercise some discrimination concerning purchases which discriminate against wines not purchased.

We feel that it would be important to have a public hearing in this matter so that our views could be fully expressed before the Committee and before the bill is reported out for consideration and earnestly urge you to set the matter for a Hearing Date and permit all persons interested to present their views to the Committee for consideration.

Sincerely,

UTAH LIQUOR CONTROL COMMISSION.
F. GERALD IRVINE, *Commissioner.*

STATE OF UTAH,
UTAH LIQUOR CONTROL COMMISSION,
*Salt Lake City, Utah, January 17, 1974.*

Mr. MICHAEL STERN,
*Staff Director, Committee on Finance,*
*Washington, D.C.*

DEAR SIR: The following statement is forwarded to you to present the views of the State of Utah in the Hearing involving H.R. 2096 on January 21, 1974.

The State of Utah is a "Monopoly State" and the Utah Liquor Control Commission is created by statute, and is charged with the control, importation and sale of alcoholic beverages, including wine, in the State of Utah (Liquor Control Act—Title 32 Utah Code Annotated 1953). The importation of alcoholic beverages into the State of Utah for sale to the inhabitants is unlawful except only so far as the Utah Liquor Control Commission imports alcoholic beverages. Alcoholic Beverages offered for sale by the Commission are purchased directly from the manufacturer, listed on Price Lists and stored in the State's Warehouse in Salt Lake City and distributed to be sold in state stores. The Commission determines the amount and class of beverage to be imported and sold in the State and it has limited storage space and marketing facilities and imports only those wines having general acceptance in Utah.

There are no wineries in the State of Utah and all wine is purchased from wineries outside of the State. H.R. 2096 provides inter alia that a State which permits the importation of wine may not impose with respect to any wine produced outside the State any regulation, prohibition or requirement which is not equally applicable with respect to wine of the same class produced outside of the State and it further provides that a State which permits the sale of wine within the State shall permit the importation of wine of the same class produced outside of the State, into such State for sale therein upon terms and conditions equally applicable to all wines of the same class sold in the State. The effect of the enactment of H.R. 2096 would be to render invalid that part of the Liquor Control Act of the State of Utah relating to the determination by the Utah Liquor Control Commission of the wines to be imported and sold in Utah. The sale of alcoholic beverages produces revenue in the State of Utah which is a vital part of the states total income.

The enactment of this legislation would result in Utah purchasing and importing all wines of a class sold, or force the State of Utah out of the wine business and would be a step in the destruction of the control system enacted by the Utah Liquor Control Law of this State.

Utah is opposed to the enactment of this legislation and urges the Committee not to approve, but to reject H.R. 2096.

Respectfully yours,

UTAH LIQUOR CONTROL COMMISSION,
F. GERALD IRVINE, *Commissioner.*

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NATIONAL LIQUOR STORES ASSOCIATION, INC.,
*Worcester, Mass., February 4, 1974.*

Re H.R. 2096.

SENATE FINANCE COMMITTEE,
SUBCOMMITTEE ON INTERSTATE TAXATION,
*U.S. Senate, Washington, D.C.*

GENTLEMEN: I have been directed to advise you that at a meeting of the Board of Directors of this Association, held in Chicago, Illinois on August 14, 1973 this Association went on record as being opposed to the enactment of H.R. 2096.

It is our belief that this bill is not constitutionally sound, that it attempts to take from the States, rights guaranteed to them by Section 2 of the 21st Amendment to the Constitution and would attempt to superimpose the Commerce Clause of the Constitution over the 21st Amendment, all of which would be inimicable to the best interests of the individual States and the alcohol beverage retailers of those States.

Sincerely,

JAMES C. ALTHOFF,
*President.*

WINE INSTITUTE,
OFFICE OF GENERAL COUNSEL,
*San Francisco, October 30, 1973.*

Hon. WALTER F. MONDALE,
*Chairman, Senate Subcommittee on State Taxation of Interstate Commerce, Washington, D.C.*

DEAR CHAIRMAN MONDALE: H.R. 2096, the so-called wine bill, passed the House of Representatives on September 11, 1973, and has been referred to your Committee. From the debates in the House, and from the minority views of the House Committee on Interstate and Foreign Commerce, which reported the bill to the whole House, there seem to be two principal objections: (1) the bill removes from the states rights which are guaranteed to them by the Twenty-first Amendment to the Constitution, and (2) the bill would impose an intolerable burden on the 18 so-called "monopoly" states which, in one form or another, participate in the commercial distribution of alcoholic beverages within their borders.

We would be less than candid if we did not acknowledge the existence of the constitutional question. Certainly, language exists in the first four Supreme Court decisions, by Mr. Justice Brandeis (*State Board v. Young's Market Co.*, 299 U.S. 59 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939); *Finch & Co. v. McKittrick*, 305 U.S. 395 (1939)), interpreting the Twenty-first Amendment which suggests that the states may broadly discriminate against wine made elsewhere or from products grown elsewhere. It is our contention, however, and the contention of H.R. 2096's sponsors in the House, that these judicial decisions do violence to the clearly expressed intent of the Congress which enacted the Twenty-first Amendment and the specific language of Section 2 thereof. As the House debates on H.R. 2096 made clear, the Congressmen who enacted the Twenty-first Amendment had but two clear intentions and purposes: (1) to repeal prohibition and (2) to allow states to remain dry if they wished.

In addition, and perhaps just as important, a majority of the Supreme Court has recently expressed a willingness to re-examine the relationship of the Commerce Clause and the Twenty-first Amendment:

"And, though the relation between the Twenty-first Amendment and the force of the Commerce Clause in the absence of congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress' power under the Commerce Clause." *Heublein v. South Carolina Tax Commission*, 409 U.S. 275, 282 n.9 (1972).

Recently, the members of the Senate Finance Committee received a letter under date of September 19, 1973, from the National Alcoholic Beverage Control Association, the association of monopoly states, expressing its views on the "practical effect the enactment of H.R. 2096 would have on the wine business of the 18 member states of the association." We assume that the NABCA's opposition to the bill, and its view of the bill's "practical effect" is essentially the same as the fears voiced in the NABCA's behalf by the House minority in the Interstate and Foreign Commerce Committee's Report on H.R. 2096 (H.R. REP. No. 93-264, 93rd Cong., 1st Sess. (1973) and in the House debates on the bill (see, for example, the remarks of Representative Broyhill, 110 Cong. Rec. 7720-30 (daily ed. Sept. 11, 1973); viz, that enactment of H.R. 2096 would force the monopoly states to list and sell every wine item produced in the United States or none at all. We agree that such a requirement would be impractical. However, the intent of the sponsors and the specific language of the bill negates any such contention. Contrary to the NABCA's fears, nothing in the bill would, or could reasonably be construed to require the destruction or diminution of the wine market in a single one, let alone in more than one-third of the United States. It runs counter to common sense to suggest that a bill which has received overwhelming support from the Representatives of New York and California, our two largest wine producing states, could have the practical effect of eliminating more than thirty-three percent of the U.S. wine market.

On October 1, 1973, Mr. William G. Clark, NABCA General Counsel, wrote you suggesting other arguments against the adoption of H.R. 2096. The remainder of this letter will address itself to those arguments.

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Mr. Clark begins his attack on the bill by suggesting that the adoption of the wine classification standards of Internal Revenue Code Section 5041 (b) "cannot effectuate the anti-discrimination purpose recited in Section 1 of the Bill . . . [because these classification standards] . . . are unrelated to the promotion of interstate commerce in wines or to the protection of such commerce from discriminatory taxation or regulation by the states." We agree that reference to the Federal wine taxing statute "cannot effectuate . . . anti-discrimination," but, of course, the Internal Revenue Code Section in question is not *designed* to effectuate anti-discrimination. Rather, the bill's anti-discrimination purposes are effectuated by specific language in the following sections: Section 2(a) : A state which allows the transportation or importation of wine into its borders "may not impose . . . any tax, regulation, prohibition, or requirement which is not equally applicable" to both locally produced and imported wine. Likewise, Section 2(b) requires a state which permits the sale of wine to "permit the transportation or importation of" out-of-state wine into the state for sale "upon terms and conditions equally applicable to all wine . . . sold in the state." And Section 3(b), which is included in the bill specifically to protect the monopoly states in their wine dealings, forbids such monopoly states to impose "any tax, regulation, license fee, prohibition or markup, which discriminates" against out-of-state wine.

Sections 2 and 3(b) of H.R. 2096 adopt the classification of wine "established under section 5041(b) of the Internal Revenue Code of 1954," and then prohibit discrimination against wine of the same class produced out-of-state or from out-of-state materials. It would have been possible to have forbidden discrimination by states against "wine of like kind" (or other similar language) produced out-of-state or from out-of-state materials. But the phrase "wine of like kind," while intended to apply to wine of the same class and type (e.g., table wine, dessert wine, sparkling wine and champagne, etc.) could be construed in different ways by different states. Thus, one could construe the phrase to apply only to wine of the same varietal designation (e.g., Cabernet Sauvignon) or even, arguably, to wine of similar price (e.g., Cabernet Sauvignon costing no more than $4 per fifth bottle). To obviate such difficulties the sponsors of H.R. 2096 sought an acceptable shorthand alternative. Several varying designations already exist in Federal law and regulations (see, e.g., 27 U.S.C. section 211(a)(7) and 27 CFR section 4.21), and rather than establish yet another series of designations regarding the same subject matter, the framers of the bill reasonably decided to adopt the designations which are perhaps most familiar to the general reader of the United States Code; those found in section 5041(b) of the Internal Revenue Code.

Since Mr. Clark has questioned the bill's adoption of the wine classifications in I.R.C. section 5041(b), it seems appropriate to discuss traditional notions of classification in the constitutional law. Most of the cases which address this question arise under the 14th Amendment Equal Protection Clause which simply states that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Although no comparable constitutional provision expressly limits act of the Federal government, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court made it clear that the guarantee of equal protection is implicit in the Due Process Clause of the Fifth Amendment which provides that "No person shall be deprived of life, liberty or property without due process of law."

The theory behind the concept of equal protection is that where possible, laws should be applied equally to all. The evil sought to be eliminated is that of unfair discrimination.

Most laws are usually based on certain classifications of persons or property. Such classifications are not per se violative of equal protection. The only general constitutional requirement is that the classification be *reasonable*. Over the years, the Supreme Court has established general criteria which it uses to examine each individual case. Thus, to uphold a classification, the Court requires only that (1) the classification itself is a rational one, bearing some reasonable relation to the object of the legislation; (2) that the object of the classification must be to accomplish or implement a proper legislative purpose or policy; and (3) that all persons within the classes established be treated equally.

Even opponents of the bill cannot fail its legislative purpose, which is to effectuate the Commerce Clause by the removal of discriminatoy burdens on interstate commerce in wine. Any criticism of the legislative purpose of the bill would have to be leveled equally against the Commerce Clause itself. For nearly two centuries the Commerce Clause has been the bulwark of this nation's

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economic viability. It was the absence of economic unity which was one of the primary weaknesses of the Articles of Confederation. The Commerce Clause provides the basis for our economic unity.

As already stated, the classification must be rational, bearing some reasonable relation to the object of the legislation. Classifications have usually been upheld where based on age, sex, weight, height, or geographic location as long as they are related to a proper legislative purpose. *Miller* v. *Oregon*, 208 U.S. 412 (1908) (statute limiting working hours for women); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1939) (statute fixing minimum wages for women); *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897) (statute making it a misdemeanor for Louisiana resident to use the mails to enter into a contract in New York with an insurance company not licensed to do business in Louisiana to insure goods shipped from Louisiana to Europe *held*, unconstitutional).

As Mr. Justice Brewer said in *Atchison, Topeka & S.F. R.R.* v. *Matthews*, 174 U.S. 96, 106 (1899), "It is the essence of classification that upon the class are cast . . . burdens different from those resting upon the general public. . . . Indeed, the very idea of classification is that of inequality." In an article entitled "The Equal Protection of the Law" in 38 California Law Review 341 (1949), Professors Tussman and ten Broek address themselves to the paradox created by the fact that although, in Mr. Justice Brewer's words, "the very idea of classification is that of inequality," the "equal protection of the laws is a pledge of the protection of equal laws." The method by which the Supreme Court deals with this paradox, the authors say, is by resolving "the contradictory demands of legislative specialization and constitutional generality by a doctrine of *reasonable classification*." (Emphasis supplied.) They continue, "The essence of that doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, *that those who are similarly situated be similarly treated*. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated . . ." (Emphasis supplied.) 37 CALIF. L. REV. 341, 344 (1949).

H.R. 2096 prohibits discrimination against wine "of the same class," that is, against wine *similarly situated*.

What is more, the Supreme Court has recognized a presumption which usually operates in favor of the reasonableness of the legislative classification. *If any state of facts can reasonably be conceived that would justify the classification, the Court will assume the existence of those facts so as to uphold the legislation. Lindsley v. National Carbonic Co.*, 220 U.S. 61 (1911).

Mr. Clark also objects to H.R. 2096 because in his view it would prohibit or "cut off" the wine excise tax statutes of the various states which do not conform to the Federal taxing statute. But the bill in no way, as Mr. Clark suggests "proposes to remove state imposed burdens on interstate commerce in wine by destroying established state excise tax classifications." All that the bill actually requires is that if a state imposes a tax on locally produced wine of a given class (as, for example, the tax of $.05 per gallon on local fortified wine imposed by North Carolina General Statutes of 1953, section 105–113.95) it cannot impose a different tax on wine of the same class produced elsewhere (as, for example, the tax of $.70 per gallon on imported fortified wine imposed by North Carolina General Statutes of 1953, section 105–113.95). This is the essence of discrimination and this, and only this, is what H.R. 2096 is designed to prohibit.

Mr. Clark asks how Mississippi, which, under Mississippi Code, Title 40, section 10265–104 levies excise taxes on only two classes of wine, "sparkling wine and champagne" and [all other] "wines" could "comply with H.R. 2096 and still collect *any* excise taxes on wine . . ." especially since that state produces no wine. The question is self-answering. As long as Mississippi produces no wine it cannot discriminate against imported wine in favor of wine produced in the state. This being the case, it cannot violate H.R. 2096.

This is perhaps the most serious weakness of Mr. Clark's arguments. He points out that "[m]ost of the control states produce no wine and therefore apply . . . regulations [prohibited by the bill] only to wine produced outside the state. This kind of regulation, per se, may be prohibited by the Bill as a discrimination against imported wine because it inevitably increases the intrastate price of the wine." The fact that a regulation may increase the price of wine is not, however, by definition, discriminatory. Webster's Seventh New Collegiate Dictionary defines "discriminatory" as applying or favoring discrimination in treatment. "Discriminate" is defined, in part, as "to distinguish by discerning or exposing

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differences; esp; to distinguish (one like object) from another." It is thus impossible to discriminate against something (e.g., out-of-state wine) unless one also at the same time discriminates in favor of some like object (e.g., locally produced wine). Mr. Clark admits that "most of the control states produce no wine . . ." Thus, it would be impossible for such states to discriminate against wine produced elsewhere if they produce no wine of their own in favor of which they can themselves discriminate. Since "most control states produce no wine" H.R. 2006 would not in any way operate against such monopoly states. It is therefore difficult to understand why the monopoly states take such vociferous exception to the bill, for the plain fact is that the bill will not affect them.

Mr. Clark also suggests that by referring to section 5041(b) of the I.R.C. the framers of the bill "effectively obscured" the result he mistakenly feels would obtain (i.e., the destruction of established state excise tax classifications) because reference to the I.R.C. "requires further research to discover its meaning" "This may account," he continues, "for the fact that the adversely affected license states have not been heard from."

Such a suggestion does no particular credit to anyone who has previously considered H.R. 2006. Neither the 248 Representatives who voted for the bill, the 152 who voted against it, the members of the House Committee on Interstate and Foreign Commerce who carefully considered it during and after hearings, nor the representatives of the various agencies (Agriculture, Commerce, Justice, Treasury, and the Office of Management and Budget) who commented on H.R. 9029, a substantively identical bill introduced in the previous Congress, indicated any awareness of the bill's alleged hidden effects. It therefore seems reasonable to conclude that this omission on the part of the aforementioned individuals is due, not to any willingness or inability to research and comprehend the true meaning of the reference to I.R.C. section 5041(b), but rather because the NABCA's fears in this regard are totally without merit or basis in fact.

The NABCA also apparently feels that H.R. 2006 "is so vague that it may violate the due process standards of the Fifth Amendment, as well as the Commerce Clause." Although we are not told how the bill, which is specifically directed to effectuating the purposes of the Commerce Clause, and which is framed in traditional Commerce Clause language, actually violates that clause, we do learn that basis for the alleged due process objection: the bill lacks "standards by which 'discriminatory' or 'unreasonable' burdens on . . . commerce are to be distinguished from the burdens routinely imposed by state forming part of a federal system."

Mr. Clark suggests that within our "constitutional framework" any state or local regulation which incidentally burdens commerce is permissable as long as it is "reasonable because they serve a valid purpose." But, in a firmly established line of cases, the Supreme Court has held that burdens which discriminate against interstate commerce are neither "reasonable" nor constitutional, even if they may have been designed to serve what might otherwise have been a valid purpose, *e.g.*, the protection of a state's milk supply and industry, *Baldin v. Seelig*, 294 U.S. 511 (1935); *Hood & Sons v. DuMond*, 336 U.S. 525 (1949); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

And, as we have previously indicated, H.R. 2006 clearly established standards by which the "unreasonable and discriminatory burdens" is proscribes in section 1(b) are to be judged. Section 2(a) provides, simply, that where a state permits wine to be imported or transported thereto, that state must treat wine produced in another state, or from out-of-state materials, in the same manner it treats wine of the same kind (or "class") produced locally or from local products. Section 2(b) is essentially similar: Where a state permits the sale of wine it shall treat all wine of the same kind (or "class") whether produced out-of-state or from out-of-state materials equally regarding transportation, importation and sale. And section 3(a)(2), which was inserted into the bill only to allay the fears of the monopoly states, provides that such states, shall have full business "discretion in the selection and listing of wine to be purchased or sold by each such state." However, section 3(b) merely requires monopoly states to treat all wine of the same kind (or "class"), whether produced within or without the state, equally. These sections are the heart of the bill. All they say is that in Congress' judgment, it is not a valid exercise of state authority to enact laws or regulations which extend preferential treatment to local wine at the expense of the same kind (or "class") of wine produced elsewhere, or from out-of-state products. This hardly seems unconstitutionally vague.

Mr. Clark also suggests that the aforementioned injunction in favor of equal treatment would forbid a state from enacting other classifications. But, as long

as these classifications do not discriminate against out-of-state wine, we can find no merit to his argument.

The NABCA also takes issue with section 4 of H.R. 2006, which, among other things, vests jurisdiction in competent Federal district courts to hear and determine matters brought pursuant to the bill. Mr. Clark proposes that the first sentence of section 4 prohibits what the second sentence authorizes, and that the section therefore "makes no sense." However, the House Report on the bill disagrees with him:

"This section allows any interested person who has reason to believe that any State has violated any of the provisions of section 2 or 3(b), to file in any United States district court of competent jurisdiction, a civil action to enjoin the enforcement of the action of the State which violates those provisions. Such court shall have jurisdiction to hear and determine such action, and to take such action as it determines necessary to prevent any violation of section 2 or 3(b)." H.R. REP. NO. 93-304, 93rd Cong., 1st Sess., p. 9 (1973).

Mr. Clark contends, however, that the House Report is incorrect, and suggests that those who have considered the bill have not, in effect, realized the true meaning of plain language.

But even if one is convinced, as Mr. Clark appears to argue, that section 4 may be inelegantly drafted, there can be no question about its meaning. The House Committee on Interstate and Foreign Commerce understood it (as indicated above), the bill proponents in the House understood it, and even its opponents seemed to understand it, for they certainly did not raise Mr. Clark's objections in debate. And, where statutory clarification is needed, courts often refer to a bill's legislative history for such clarification. Nothing in the legislative history of section 4 suggests, let alone sustains, Mr. Clark's contention.

But even if one accepts, for the sake of argument, the NABCA's attack on section 4, H.R. 2006 would still emerge unscathed. This is because under general Federal law, section 4 (and, indeed, section 5) is not strictly necessary. Section 1337 of 28 U.S.C. provides that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." H.R. 2006 is obviously an Act of Congress contemplated by section 1337. And, were this not enough, section 1331(a) of 28 U.S.C., provides that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." Thus, if the jurisdictional minimum is met, an action arising under H.R. 2006 can without question be brought in Federal district court. And, of course, either of these sections permits public, as well as private plaintiffs access to appropriate Federal courts. Thus, the NABCA's suggestion that H.R. 2006 is designed "to give members of the wine industry a unique status as private enforcers of a federal policy" does not seem well taken, particularly since even under the express provisions of section 4, "*any* interested person" (emphasis supplied) may sue to enforce the statute, not just a member of the wine industry.

The NABCA has also suggested that the supporters of H.R. 2006 are proceeding on the erroneous assumption that Congress has the power to create "a uniform system of taxing and controlling wine sales" under the authority of the Commerce Clause. Contrary to the NABCA's assertion, the sponsors of the bill have neither forgotten the reason for the enactment of the Eighteenth Amendment nor doubted that the Twenty-first repealed the Eighteenth. There is absolutely no evidence in the Committee hearings on the bill, in the House debate on the bill or in the bill itself to support the assertion that H.R. 2006 would create a uniform system of taxing and controlling wine even if Congress did have this power. Under H.R. 2006 each and every state will be able to regulate and tax wine in a manner which comports with local interests so long as such regulations or taxes do not discriminate against wine produced outside the state. How a state regulates wine, including prohibition, is a matter of local interest; preventing discriminatory barriers to interstate commerce is a federal interest.

Mr. Clark further argues that supporters of the bill were misled to believe that the Twenty-first Amendment "erected new interstate trade barriers." While this is indeed what the bill's supporters believed, they were not being misled. In *State Board v. Young's Market*, 299 U.S. 59 (1936), which dealt with an importer's license, Justice Brandeis admitted that "[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The fee would be void, not because it resulted in discrimination but

because the fee would be a direct burden on interstate commerce." 299 U.S. 59, 62 (1936). It is difficult to adduce more concrete evidence that the Twenty-first Amendment has been held to authorize what the Commerce Clause had previously prohibited.

In addition, in a 1944 decision Justice Frankfurter pointed out that prior to the effective date of prohibition (January 16, 1920), the Supreme Court had

"Decided that intoxicating liquor is a legitimate subject of commerce, as much so as cabbages and candlesticks, and as such within the protection of the Commerce Clause. In the absence of regulation by Congress, the movement of intoxicants in interstate commerce like that of all other merchantable goods was 'free from all state control.' . . . Mr. Justice Holmes was able to say: 'I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it.'" *Carter v. Commonwealth of Virginia*, 321 U.S. 131, 139 (1944) (Frankfurter, J., concurring).

To bolster his argument that the Twenty-first Amendment as interpreted by the Brandeis decisions did not erect new barriers to interstate commerce, Mr. Clark cites a line of cases in an attempt to show that prior to the enactment of the Twenty-first Amendment, discriminatory barriers had been authorized; these cases purportedly show that *burdens* on the interstate commerce of alcoholic beverages did not violate the Commerce Clause but were merely the valid exercise of police power over intrastate commerce. While the courts have been struggling to make a viable interstate-intrastate commerce distinction for well over 100 years, the proposition is well established that interstate commerce must be protected "from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens." *Welton v. Missouri*, 91 U.S. 275, 281 (1876). A tax on an item at one rate (local wine) and a separate tax rate on the same item based solely on origin (out-of-state wine) is not in any sense the regulation of intrastate commerce under the police power.

H.R. 2096 does not seek to, nor does it limit the *legitimate* exercise of a state's police power to regulate alcoholic beverages; it only seeks to prevent discrimination between domestic wines and wines imported into the state. *The License Cases*, 5 How. 504 (1847), upheld state power to regulate liquor imported into a state. Chief Justice Taney stated that "[a]s Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited . . . (5 How. 504, 586). The three statutes attacked in the case did not, however, discriminate between domestic beverages and beverages imported into a state from abroad or from other states.

At issue is not whether the state can regulate wine, nor whether the Federal government should put forward uniform standards, but whether the States' admitted power to regulate shall include the power to discriminate. No one has suggested that H.R. 2096 would create a single Federal system of control; the bill's stated congressional purpose, once again, is to "eliminate the obstructions to the free flow of commerce in wine among the several states resulting from the acts of the states which impose discriminatory burdens upon such commerce."

*Vance v. Vandercook*, 170 U.S. 438 (1898) did, as Mr. Clark indicates, reject the claim that the South Carolina liquor monopoly was discriminatory because it provided the monopoly with the *potential* for arbitrary decisions. This, however, is not a basis for striking down H.R. 2096, but shows instead that section 3(a)(2), which permits monopoly states to exercise discretion in selecting and listing wines, is valid. *Vance v. Vandercook* also illustrates that the type of discrimination which H.R. 2096 seeks to eliminate was prohibited prior to the adoption of the Twenty-first Amendment. The Court held that "[b]eyond dispute the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, *provided* . . . that the regulations as adopted *do not operate as a discrimination* against the rights of residents or citizens of other states of the Union." 170 U.S. 438, 444 (Emphasis supplied). Since H.R. 2096 neither creates a uniform Federal control system nor limits the State power to regulate so long as the power is not exercised in a discriminatory manner, *McGuire v. Massachusetts*, 3 Wall. 387 (1866), and *Peryear v. Massachusetts*, 5 Wall. 475 (1867), cited by Mr. Clark, are not relevant to the bill.

Nor is, as the NABCA maintains, *Cox v. Texas*, 202 U.S. 446 (1906), a case which "sustained a Texas statute that discriminated in favor of dealers of Texas made liquor." In the Court's own language, "[t]he main argument ad-

dressed to us was rested on the notion that the statutes discriminate unconstitutionally between two classes in the state, naturally existing there. . . . The case was discussed throughout on the footing of classification." 202 U.S. 446, 450. The Court held that the statute did not favor a particular class in violation of the Fourteenth Amendment. The issue of discrimination against interstate commerce was never raised. As the Court specifically noted, "[t]he case was argued before us on the Fourteenth Amendment alone, and although there is some slight reference to interference with commerce in one of the briefs, it is rather in aid of the argument based on *Connolly v. Union Sewer Pipe Co.* [citations omitted] than as an independent point. At all events, the question is not open here." 202 U.S. 446, 452.

Thus, it is clear that prior to the Brandeis decisions interpreting the Twenty-first Amendment (beginning with the *Young's Market* case), the states had broad regulatory power over wine only so long as "the regulations as adopted do not operate as a discrimination against the rights of residents or citizens of other states of the union." *Vance v. Vandercook*, 170 U.S. 438, 444. Under the Wilson Act, 26 Stat. 313, wines were subject to state regulation pursuant to the police power "*to the same extent and in the same manner as though such liquids or liquors had been produced in such State* . . ." H.R. 2096 would not emasculate the state police power regarding wine, but would merely reinstate the *status quo ante* whereby states could not discriminate against interstate commerce.

The NABCA's suggestion that *U.S. v. Mississippi*, ——— U.S. ——— (1973) provides a delineation of the Twenty-first Amendment which should satisfy proponents of H.R. 2096 is totally unrealistic. This case holds that a state may not regulate the importation of intoxicating liquir into a Federal enclave over which the U.S. exercises exclusive jurisdiction, although it may regulate transportation through the state to the enclave in order to prevent diversion of intoxicating liquors. The Court remanded the case to determine whether the markup constituted a sales tax to which the U.S. has consented under the Buck Act. The case in no way concerns itself with the discriminatory barrier to interstate commerce which are the only objectives of H.R. 2096.

Finally, Mr. Clark cites *Parker v. Brown*, 317 U.S. 341 (1943), in support of his proposition that the local police power should include the power to discriminate against interstate commerce. This case dealt with the enforcement of a raisin marketing program under the California Agricultural Prorate Act. The Court determined that the program was concerned with the control of raisin production *prior* to the introduction of the raisins into interstate commerce. Chief Justice Stone specifically found that "[t]he program was *not aimed at nor did it discriminate against interstate commerce* . . ." 317 U.S. 341, 367. (emphasis supplied). In addition, the Court found that the Prorate Act and its implementing regulations were of a type "whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it." 317 U.S. 341, 368. Similarly, H.R. 2096 would enforce a policy whose effect upon the national commerce is such as not to conflict but to coincide with a policy which the *Constitution* has established with respect to it.

The Courts continue to hold that discrimination against goods in interstate commerce constitutes a significant evil. A three-judge Federal District Court in San Francisco recently held that California's 1925 law that in effect barred the sale of Florida-grown avocadoes in California was unconstitutional. *J. R. Brooks & Son v. Reagan*, N.D. Cal. No. C-71-1811 SC (Sept. 18, 1973) (three-judge court). H.R. 2096 offers Congress an opportunity to reinstate wine as a valid article of interstate commerce. States will retain their right to control local problems pursuant to the police power *so long as* such control does not conflict with the national policy of nondiscrimination.

Mr. Clark, in his letter, purports to represent the Eighteen states which are members of the NABCA. We challenge Mr. Clark's contention that he represents these states since in the House of Representatives, two of the states he claims to represent voted unanimously for H.R. 2096 while representatives of the other states were split on the issue.

We urge your Subcommittee's favorable action on H.R. 2096. Should you desire any further information in support of our position it would be our pleasure to supply it.

Respectfully submitted,

JEFFERSON E. PEYSER,
*General Counsel, Wine Institute.*

WINE INSTITUTE,
OFFICE OF GENERAL COUNSEL,
*San Francisco, Calif., November 12, 1973.*

Hon. RUSSELL B. LONG,
*Chairman, Senate Committee on Finance,*
*Washington, D.C.*

DEAR SENATOR LONG: On September 11, 1973, the House of Representatives passed and sent to the Senate H.R. 2096, the so-called wine bill. We understand that H.R. 2096 has been referred to your Committee.

A letter to you regarding H.R. 2096 from Mr. William G. Clark, General Counsel of the National Alcoholic Beverage Control Association, under date of September 19, 1973, has recently come to my attention and, since it seriously misstates the bill's purpose and potential effects, I would like to take this opportunity to respond.

H.R. 2096's only purpose, clearly stated in section 1(b) "is to eliminate the obstructions to the free flow of commerce in wine among the several States resulting from acts of the States which impose discriminatory and unreasonable burdens upon such commerce." Indeed, Mr. Clark himself assures your Committee that the NABCA "and its Member States endorse the principle that no artificial or discriminatory barriers should be allowed to impede interstate commerce." Why, then, does the NABCA lodge such a substantial attack on a bill designed to effectuate an end which it endorses?

The answer is apparently based on the NABCA's utter confusion about how the bill, if enacted, would work. For example, Mr. Clark indicates that although he and his client endorse the elimination of discriminatory barriers to commerce

"We cannot agree that State laws and regulations enacted to control the purchase, storage, distribution, sale and consumption of alcohol beverages strictly within the affected State's own territory constitute a barrier to interstate commerce. We feel, on the contrary, that such laws and regulations represent a proper exercise of State authority, and their enforcement a necessary discharge of State responsibility to assure the well being and safety of its citizens."

Yet not one of the bill's sponsors, insofar as we are aware, feels that H.R. 2096 would operate against State laws and regulations enacted pursuant to the States' admitted authority, under their police power, "to assure the well being and safety" of their citizens. All H.R. 2096 does, all it is intended to do, and all that any reasonable reading of it may suggest that it could do, is to prevent one State from passing any law or regulation which *unreasonably discriminates* against wine produced outside of the State, or from out-of-State materials, in favor of wine produced within the State, or from in-State materials.

The NABCA's single overriding basic objection, the concern which Mr. Clark voices over and over again, and which he takes great care to explicate, is that if H.R. 2096 is enacted each monopoly State "would then be required by Federal law to purchase and stock each and every wine, regardless of type or origin, offered to it by a supplier." This is an intentional misstatement of the bill, as I shall demonstrate. Mr. Clark estimates "that there are more than 40,000 different wines on the American market," and points out, quite properly, that no monopoly State could reasonably be expected to stock each and every one of these. Even Pennsylvania, the largest monopoly State and the biggest single purchase of alcoholic beverages in the United States, lists for sale, at Mr. Clark's estimate, only 628 different wine items. While we agree that requiring a monopoly State to accept every wine offered to it for listing would be an intolerable burden, we have repeatedly assured the NABCA that such a result could not occur. In fact, at the hearing last year on H.R. 9020, substantially identical legislation, the NABCA was invited to submit amendatory language to make certain that the bill would not be susceptible to monopoly States' unrealistic interpretation. When they failed to respond to this opportunity, and in order to remove the slightest scintilla of doubt regarding the bill's purpose or effects, the bill's sponsors incorporated into it section 3. Section 3(a) makes absolutely clear that the bill would not affect monopoly States' listing procedures:

"Notwithstanding the provisions of section 2 of this Act, each State retains the right—

(1) to engage in the purchase, sale, or distribution of wine; and

(2) *to exercise discretion in the selection and listing of wine to be purchased or sold by each such State.*" (Emphasis supplied.)

This plain and simple language, added only to allay what, in my opinion, and in the opinion of other counsel who have examined the bill, were the NABCA's

perfectly groundless fears, is limited only by section 8(b) of the bill, which provides as follows:

"No State which exercises the rights set forth in subsection (a) may impose with respect to wine of any class . . . any tax, regulation, license fee, prohibition or markup, *which discriminates against wine* of such class *produced outside such State.*" (Emphasis supplied.)

But, according to Mr. Clark's September 19 letter to you, section 8(b) takes away from the monopoly States what section 8(a) specifically authorizes, rendering the assurances of section 8(a) nugatory. In Mr. Clark's view, section 8(b) "in effect ... requires that a State which permits the sale of *any* wine within its territory must permit the sale of *all* wines." (Emphasis supplied.) Yet this is not what section 8(b) says and no amount of verbal conjuring on the NABCA's part can make it so. Section 8(b), as is apparently obvious to all who understand plain English, merely prohibits monopoly State action "which discriminates against wine . . . produced outside such State." And as should be equally obvious, H.R. 2096 applies only to States which both produce wine and discriminate in its favor against wine produced elsewhere. *If a State produces no wine, it cannot under any circumstances violate the provisions of the bill.*

In a letter of October 1, 1978, to Senator Mondale, Mr. Clark acknowledges that "[m]ost of the control states produce no wine . . ." In fact, statistics prepared by the California Wine Advisory Board indicate that in 1972 only eight of the 18 monopoly States produced any wine at all. And these amounts, as the following table shows, were minuscle:

*Gross wine production in monopoly States*

*Crop year 1972 (estimated)*

[Percent of total U.S. production]

| Monopoly State: | |
|---|---|
| Michigan | 0.5. |
| Ohio | 0.3. |
| Washington | 0.3. |
| Oregon | 0.1. |
| Idaho | Less than 0.05. |
| Iowa | Do. |
| Pennsylvania | Do. |
| Vermont | Do. |

In addition, you should be aware that in Michigan the State exercises monopoly control only over wine which contains more than 16 percent alcohol, in Ohio only over distilled spirits, in Oregon, Vermont and Idaho only over wine which contains more than 14 percent alcohol, and in Washington, although all alcoholic beverages are sold in State stores, all wines are also sold by private licensees. Thus, among monopoly States which produce wine, only in Pennsylvania and Iowa do the States exercise full monopoly control over all wines. Obviously, the potential for discrimination by monopoly States is statistically insignificant.

And as I have suggested in my own letter to Senator Mondale of October 30, Mr. Clark would do well to examine the standard dictionary definition of "discriminatory." Webster's Seventh New Collegiate Dictionary defines "discriminatory" as "applying or favoring discrimination in treatment." "Discriminate" is defined, in part, as "to distinguish by discerning or exposing differences; esp, to distinguish (one like object) from another." It is thus impossible to discriminate against something (e.g., out-of-State wine) unless one also at the same time discriminates in favor of some like object (e.g., locally produced wine). Thus, it would be impossible for a State to discriminate against wine produced elsewhere if it produces no wine of its own in favor of which it can discriminate. Since "most control states produce no wine" H.R. 2096 would not in any way operate against such monopoly States. It is therefore particularly difficult to understand why the monopoly States take such vociferous exception to the bill, for the plain fact is that the bill will not affect them.

Nor do Mr. Clark's "examples" of the alleged mischief H.R. 2096 would purportedly create for the monopoly States disclose a realistic understanding of the bill. Thus, he suggests that "the great potential for being accused of discrimination occurs . . . [b]ecause of some [monopoly State] 'regulations,' i.e., limitation on number of items of the same type, quality, class, proof, size, etc.," required by necessarily limited monopoly State resources. However, it is per-

fectly clear that section 8(b) of the bill would only prohibit such regulations if they were drawn in a way "which discriminates against wine of such class produced outside such State." Thus, a monopoly State could perfectly legally limit the number of items of the same type (e.g. a regulation limiting the percentage of wine in total inventory to 10 percent), quality, (e.g., a similar regulation on cost of such wine), class (e.g., a similar regulation regarding sparkling wine), proof (e.g., a similar regulation regarding wine over 14 percent alcohol) and size (e.g., a similar regulation regarding wine in quart bottles). The only thing a monopoly State could *not* do would be to condition these limitations on the origin of the wine by discriminating in favor of wine produced in the State or from State-grown products.

Likewise, Mr. Clark suggests that numerous monopoly State "'prohibitions' . . . could be used as the basis for a charge of discrimination." As example he cites prohibitions on wine sales based on container type, label content or type, and "questionable origin" (by which I assume he means that a wine the label of which may mislead the consumer as to the wine's true origin may be prohibited). Without belaboring the issue unnecessarily it seems perfectly reasonable for a monopoly State, or any other State for that matter, to choose to prohibit the sale of wine in certain containers (e.g., in containers over a given size, or in pocket flasks), or bearing certain label matter (e.g., labels which contain obscene, indecent or patently offensive matter) or the origin of which is misrepresented on the label (e.g., American wine labeled so as to appear to be French wine). All H.R. 2096 requires is that such prohibitions apply equally to both locally produced and out-of-State wine. Thus it would not be permissible to permit the sale of local wine in quarts while prohibiting the sale of quarts from out-of-State, nor would it be permissible to permit local wine labels to contain obscene matter while prohibiting such material on out-of-State wine labels, nor, finally, would it be permissible for a State to permit the origin of locally produced wine to be misrepresented to the public, while prohibiting such misrepresentations by out-of-State wine producers (in fact, such misrepresentations are prohibited by overriding Federal regulations in any case). To repeat, all H.R. 2096 prohibits is discrimination against wine based on the wine's origin.

Mr. Clark paints a bleak picture indeed. As he sees it, H.R. 2096 would permit "The wine industry to dictate the wine-purchasing policy of every Control State which engages in the wine business. Any winery could offer such State any brand of wine, however obscure or little known, and cite it for Federal law violation if it declined to make a purchase. . . . We seriously doubt that this is the intent of Congress."

We find ourselves in full accord with the NABCA on the last sentence quoted above. Congress does not intend such an absurd result, nor, fortunately, could any rational court construe the language in H.R. 2096 so that such a result would obtain.

In this connection it is worth noting that when a court is called upon to ascertain Congress' intent in enacting legislation it will usually turn to the legislative history of the bill in question. H.R. 2096 was reported out of the House Committee on Interstate and Foreign Commerce (H.R. Rep. No. 93-264, 93d Cong., 1st Sess. (1973)) and debated on the floor of the House of Representatives, and passed, on September 11, 1973 (119 Cong. Rec. 7727-39 (daily ed. Sept. 11, 1973)). Nowhere in the House Committee Report or in the House debate did any proponent of the bill suggest that it would have the effect Mr. Clark attributes to it. The issue was raised, of course, but only by opponents and only in support of the NABCA's contentions. The responses of several of the bill's proponents are clear and unambiguous. Representative Moss, who introduced the bill, said in part:

"The idea that anyone in the exercise of business judgment—and in this legislation we tie the exercise of business judgment as an essential in determining the promulgation of lists—nobody in the exercise of a business judgment is going to make a list requiring either the stocking or the buying or the canvassing of every single product offered for sale. That would be an outrageous exercise of the poorest sort of business judgment.

"*So, these laws, this freedom upon the choice of management by the control States is not threatened. It is not a problem.*" (Emphasis supplied.) (*Id.* at 7730.)

Represenative Holifield pointed out that:

"Section 8 of the bill was amended so as to make it clear that each State retains the right to exercise discretion in the selection and listing of wine to be sold by the State. This intention is supplemented by language in the committee report." (*Id.* at 7731.)

Representative Staggers, the Chairman of the House Committee that reported the bill, read the monopoly State objection from the committee report and answered it by reading section 8 of the bill. "I think this answers the question very conclusively," he said. (*Id.* at 7783.) Representative Johnson of California stated that "[t]he bill is not intended to, nor does it in any way, affect the powers or operations of any control States." (*Id.* at 7786.) And Representative Heinz of Pennsylvania, which as I have indicated is the largest of the monopoly States, strongly supported the bill, saying, in part,

". . . [T]he bill does not interfere with the exercise of full discretion which the Commissioners have regarding the number of brands or the kinds of brands of wine a State wishes to purchase or sell.

"... [T]he bill does not interfere in any way with the right of a 'control' State to list or delist any or all brands of wine.

"Let me repeat. The only purpose of H.R. 2096 is to prevent one State from passing any discriminatory tax, discriminatory regulation, discriminatory markup, or discriminatory requirement against wine produced simply because that wine is produced outside of the particular State." (*Id.* at 7781.)

No court or individual who examined this legislative history could construe H.R. 2096 to affect the monopoly States in the adverse way Mr. Clark suggests "would be the end result" of its enactment.

Mr. Clark points out that 18 States, plus Montgomery County, Maryland, are members of the NABCA. A majority of these monopoly jurisdictions include wine in their operations. According to Mr. Clark, "[t]hese States have a population in excess of 62 million—roughly 30 percent of the population of the entire United States—and they account annually for about one-fourth of the nation's alcohol beverage sales." Mr. Clark's clear implication is that H.R. 2096 would thus affect twenty-five percent of the nation's wine sales and one-third of its population. But these impressive statistics are misleading. For example, of the 9,560,000 cases of wine Mr. Clark indicates the monopoly States sold in 1972, fully 4,645,217 cases, or about 48.6 percent were sold in Pennsylvania alone. And, as I have mentioned, one of the strongest speeches supporting H.R. 2096 in the House was offered by Henry Heinz III, who represents Pennsylvania's Eighteenth District. Thus, not only do very few monopoly States produce wine (and so would be theoretically subject to H.R. 2096), but all of the monopoly States account for a very small portion of total wine sales, and one Representative from the monopoly State which accounts for nearly half of this small amount rose in vigorous support of H.R. 2096. Nevertheless, it should be obvious that if H.R. 2096 would have *any* adverse effect on the sale of wine in any States, including monopoly States, the bill would not have received the overwhelming support of Representatives from California and New York, our two States which between them produce the largest amount of American wine. Mr. Clark's contrary suggestion simply runs counter to common sense.

Mr. Clark also suggests that H.R. 2096 was really introduced "in order to satisfy the ambitions of the major supplier [of wine—California] to capture even more of the market." Although 248 Representatives voted in favor of the bill, and although it received wide support from many Representatives of States other than California, Mr. Clark bases his somewhat contentions and unsupported assertion on the statement that "California alone presently accounts for approximately SEVENTY PERCENT (70%) of the total wine sales in this Country." (Emphasis in original.) But even if the bill's broad-based support from other States fails to convince the NABCA that the legislation's purpose will benefit *all* wine suppliers by removing unreasonable discrimination against their wines, an examination of California's overall share of the American wine market should. It is true, according to Wine Advisory Board statistics, that in 1972 California produced about 70.6 percent of the wine entering U.S. distribution channels. But in 1971 California's market share was 73.9 percent. Thus, in one year the State's market share decreased by a full 3.3 percent. During the same period the market share of wine produced in States other than California rose 1.1 percent from 14.3 percent in 1971 to 15.4 percent in 1972, and, perhaps most significant, the market share of wine imported from abroad rose 2.2 percent from 11.8 percent in 1971 to 14 percent in 1972. If these trends continue H.R. 2096's enactment will benefit wine producers outside of California, both in other States and other countries, who are gaining an increasing share of the U.S. wine market, on a proportionally larger basis than it will benefit California producers. And, as Representative Holifield suggested in the House debate,

"In a period when we are running deficits in our balance of payments and are seeking to increase trade with foreign nations, discriminatory State imposts on wine which apply to foreign wines as well as out-of-State wines seriously im-

pair our ability to trade with wine exporting nations," (110 Cong. Rec. 7781 (daily ed. Sept. 11, 1978)).

In the final paragraphs of his September 19 letter to you Mr. Clark sets up two straw men and then attempts to demolish them: He first contradicts

"Those who say that the opponents of H.R. 2096 are blowing the matter of potential litigation all out of proportion—that the Control State procedures are specifically and adequately reserved—[by citing] . . . the opinion of the Attorney General of the United States . . . that, 'The purpose of the bill which we understand is supported by the California-based Wine Institute, is presumably to set up a new test case in the courts as to the scope of the Twenty-first Amendment!"

Although it may be quibbling, we note that when former Attorney General Kleindienst wrote the quoted opinion on January 8 of 1972 he was, in fact, Deputy Attorney General under then Attorney General Mitchell. Of course it is true that Wine Institute supports H.R. 2096, as did 248 Representatives and as do others, including many consumers, who stand to profit from a bill which removes impediments to the free flow of commerce among the several States. But in my opinion it does not follow that any "new test case in the courts" will be brought against the monopoly States, as Mr. Clark implies. Such a case, if brought at all, will no doubt be directed against a State which unreasonably discriminates against wine produced elsewhere, and which produces wine of its own in favor of which such discrimination would operate. In any event, not even the language which Mr. Clark quotes supports his implication that the enactment of H.R. 2096 would provoke a spate of suits against the monopoly States.

Finally, Mr. Clark quotes Deputy Attorney General Kleindienst to refute the claims of "those who argue that the opponents of this type of legislation are incorrect in their assertions that its enactment into law would represent a drastic change in the interpretation of the Twenty-first Amendment . . ."

The enactment of H.R. 2096 might well cause a reappraisal of the scope of the Twenty-first Amendment, and we are at a loss to know just who has said that this is not the case. But Mr. Clark's quote from the Justice Department letter, correct as far as it goes, does not go far enough. Mr. Clark quotes only this much:

"We feel it appropriate to inform the Committee that if the Congress were to enact H.R. 0020 [prior, similar legislation], it would be necessary for the Supreme Court to reverse a well established line of precedents in order for the legislation to be sustained."

However, as two Representatives specifically pointed out in the floor debate (Representative Latta—an opponent of the bill—and Representative Moss), the very next sentence of Mr. Kleindienst's letter provides as follows: "*The [Supreme] Court noted recently that it had never squarely determined how the Amendment affects the power of Congress under the commerce clause.*" (Citing *Heublein v. So. Carolina Tax Commission*, 409 U.S. 275, 282 note 9.) (Emphasis supplied.)

And, although it is true that the Justice Department raised certain questions regarding the bill's scope in the light of the Twenty-first Amendment, the Department also stated:

"There is evidence that the original purpose of the Amendment was to permit dry states to protect themselves from importation of liquor rather than to permit liquor producing states from erecting trade barriers against out-of-state products. Generally speaking, there has always been a strong policy in favor of interpreting the Constitution to prohibit such barriers."

In brief summary, then, we feel the NABCA's fears are entirely groundless. The enactment of H.R. 2096 would in no way affect monopoly State operations, as section 3 of the bill makes clear, unless such monopoly States unreasonably discriminate against wine produced out-of-State or from out-of-State materials. In no case would the bill operate against a State, monopoly or otherwise, unless that State produced its own wine and then discriminated in its favor. Nothing in the bill would require the monopoly States to list every wine item offered to them, or remove from them the right to exercise their business judgment regarding the purchase and sale of wines. Any other conclusion is simply irrational. In fact, the enactment of H.R. 2096 would benefit the consumers of all States which the bill would affect by ensuring a greater choice and selection of wine, regardless of origin.

For all the reasons set forth above we respectfully urge your Committee to approve H.R. 2096. Should you require any additional information in support of our position, it would be our pleasure to supply it.

Respectfully submitted,

JEFFERSON E. PEYSER,
*General Counsel, Wine Institute.*

## The Constitutional Background and History of State Trade Barriers Against Wine*

### A. The Constitutional Background up to the Twenty-First Amendment

Legislative barriers to trade between the states, including discriminatory state taxes, were among the principal grievances in the colonies in the years immediately preceding the Federal Constitutional Convention, " '* * * each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.' " *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 533 (1949), *Gibbons* v. *Ogden*, 9 Wheat. 1, 11–12 (1824) (argument of Webster), Crosskey, *Politics and the Constitution*, c.x. (1953). The commerce clause was inserted in the Constitution to extinguish such barriers to trade. *Freeman* v. *Hewit*, 329 U.S. 249 (1946).

At an early date, however, the Supreme Court upheld state power to regulate liquor imported from abroad or from other states. In *The License Cases*, 5 How. 504 (1847), the Court sustained Massachusetts, Rhode Island, and New Hampshire Acts which, among other things, required retailers of liquor to secure a license as a condition of doing business. The Rhode Island case involved brandy imported from France (5 How. 540), and in the New Hampshire litigation, the defendant had sold gin imported from Boston (5 How. 555). Chief Justice Taney stated that "[A]s Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited * * *" (5 How. 586). These statutes were pursuant to the police power, however, and did not discriminate between domestic beverages and beverages imported into a state from abroad or from other states.

In 1888, the Supreme Court adopted a different theory of state power over commerce. In *Bowman* v. *Chicago & N.W. Ry. Co.*, 125 U.S. 465 (1888), the Court held invalid as an undue burden upon interstate commerce an Iowa statute which prohibited common carriers from bringing liquor into the state without first having secured a certificate from a state official that the consignee was duly authorized to receive the shipment. The Court said that the state could prohibit the manufacture of liquor and regulate trade between its own citizens within the state but that it could not "regulate commerce between its people and those of other states of the Union * * *." The underlying rationale of the Bowman case was adumbrated in *Leisy* v. *Hardin*, 135 U.S. 100 (1890), when the Court ruled that liquor arriving in a state in the original package was still in interstate commerce and therefore immune from state regulation. "[S]o long as Congress does not pass any law to regulate it * * * it thereby indicates its will that such commerce shall be free and untrammelled."

Congress thereupon passed the Wilson Act, 26 Stat. 318, note following 27 U.S.C. § 1, which provided as follows:

"All fermented, distilled, or other intoxicating liquors or liquors 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, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (Emphasis supplied.)

The constitutionality of the Wilson Act was upheld in *In re Rahrer*, 140 U.S. 545 (1891). *Discriminatory legislation was held to be forbidden by the Wilson Act.* In *Scott v. Donald*, 165 U.S. 58, 17 S.Ct. 265 (1897), the Court said that "evidently equality or uniformity of treatment under state laws was intended." The Court asserted that a state could lawfully forbid the manufacture and sale of liquor but that "the *state cannot*, under the Congressional legislation referred to (i.e., the Wilson Act) *establish a system which, in effect, discriminates between interstate and domestic commerce*, in commodities to make and use which are admitted to be lawful." (17 S. Ct. at 272). (Emphasis supplied.)

These views were reiterated in *Vance v. W. A. Vandercook*, 170 U.S. 438, 18 S. Ct. 674 (1898): "Beyond dispute the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, provided * * * that *the regulations* as adopted *do not operate as a discrimination against the*

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*This material submitted for the record by Jefferson E. Peyser, general counsel, Wine Institute.

*rights of residents or citizens of other states of the union.*" (18 S. Ct. at 676) (Emphasis supplied.)

The Wilson Act was drained of vitality in *Rhodes v. Iowa*, 170, U.S. 412, 18 S. Ct. 664 (1898), the Court ruling that the phrase "upon arrival" in that statute referred only to delivery to the consignee and that the state had no jurisdiction to regulate liquor in possession of the carrier. Political agitation engendered by restrictive interpretation of the statute led to the enactment in 1912 of the Webb-Kenyon Act, 37 Stat. 699, note following 27 U.S.C. § 1, which prohibited shipment into any state "in the original package or otherwise, in violation of any law of such state * * *" Liquor shipments were thus "divested" of their interstate commerce character and made subject to state law insofar as entry into the state was concerned. The Webb-Kenyon Act was intended to enable the "dry" states to protect themselves against an inflow of liquor from the "wet" states. As the Supreme Court put it in *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S. Ct. 180 (1917):

"* * * there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to *prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce* in states contrary to their laws, and thus in effect afford a means of subterfuge and indirection to set their laws at naught." (Emphasis supplied.)

In its original form, the Webb-Kenyon Act contained language patterned after that used in the Wilson Act to prevent discrimination against out-of-state products. See 49 Con. Rec. 1087. But the Act as finally passed did not provide that a state exercise its police powers against out-of-state liquors only "in the same manner as though such * * * liquors had been produced in such state." But the Supreme Court viewed the Wilson and Webb-Kenyon Acts as "essentially *identical*, the one being but a larger degree of exertion of the *identical* power which was brought into play in the other." *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917). The character of the evil designed to be remedied by the Webb-Kenyon Act—evasion by "subterfuges" of the laws in "dry" states—militates against the conclusion that Congress intended to authorize discriminatory economic statutes. No case involving discriminatory legislation by a wet state arose under the Webb-Kenyan Act. This self-denying action by the state legislatures is proof that such statutes were not deemed permissible.

*To sum up:* Before the subject was made academic on January 16, 1919, by the prohibition amendment, the Supreme Court had "decided that intoxicating liquor is a legitimate subject of commerce, as much so as cabbages and candlesticks, and as such within the protection of the Commerce Clause. In the absence of regulation by Congress, the movement of intoxicants in interstate commerce like that of all other merchantable goods was 'free from all state control.' * * * Mr. Justice Holmes was able to say: 'I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it.' " *Carter v. Commonwealth of Virginia*, 321 U.S. 131, 139 (Frankfurter, J., concurring).

B. THE TWENTY-FIRST AMENDMENT

In 1933 the Twenty-First Amendment was ratified and the Eighteenth Amendment repealed. The debates in Congress support the conclusion that the purpose of the second section of the Twenty-First Amendment was to elevate to a constitutional level the formula for adjustment of federal and state interests which had been articulated in the Webb-Kenyon Act. The basic notion was that the states were to be freed in the field of liquor control from the inhibitance of the interstate commerce clause to the same extent that they had been freed by the Webb-Kenyon Act.

C. THE BRANDEIS CASES

But in four opinions in the Supreme Court in 1936, 1938 and 1939, all written by Justice Brandeis and frequently referred to as the Brandeis cases, the Supreme Court unanimously took the view that the Twenty-First Amendment immunizes all state liquor regulation from all possible attacks predicated on the interstate commerce clause, that the legislative history and decisions of the Webb-Kenyon Act are not to be considered in construing the Twenty-First Amendment and that neither the due process, nor the equal protection, nor the privileges and immunities clauses of the Fourteenth Amendment, nor the impairment of con-

tract clause offers any basis for attack upon such regulation. The Court took the view that the Twenty-First Amendment overrides all other constitutional provisions and permits the states complete latitude in the area of liquor control. (*California State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936); *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co.* v. *Liquor Commission*, 305 U.S. 391 (1939); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395 (1939).)

As a direct result of these decisions, states have enacted statutes which discriminate against out-of-state wine, and regulations which restrict by discriminatory license fees and other discriminatory regulations the marketing and sales of wine. In other words, significant trade barriers have been erected by the various states.

THE PROPOSED LEGISLATION IS CONSTITUTIONAL*

The relevant section of the Twenty-First Amendment, Section 2, provides as follows:

"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."

The legislative history of this section clearly indicates that it was not intended to provide the states with a virtual *carte blanche* to enact laws and regulations discriminating against alcoholic beverages. Indeed, five Senators, Blaine of Wisconsin, Fess of Ohio, Borah of Idaho, Robinson of Arkansas (the Senate Majority Leader) and Walsh of Montana, commented that Section 2 was intended to protect those states wishing to remain dry after repeal from importation from wet states; that is, that Section 2 was designed to elevate Webb-Kenyon to constitutional status. 76 Cong. Rec., 72d Cong., 2d Sess., 1933. The entire amendment had been referred to the Senate Judiciary Committee (no record was made of that committee's discussions on the subject) and was favorably reported out. Senator Blaine, "In explanation of the action of the Committee," soon turned his attention to Section 2. 75 Cong. Rec. 4139. To prevent any misunderstanding, he said, and "to assure the so-called dry states against the importation of intoxicating liquors into those states, it is proposed to write permanently into the constitution a prohibition along that line . . . The pending proposal will give the states that guarantee." 76 Cong. Rec. 4141.

Senator Fess concurred with Senator Blaine's first construction: ". . . the second section of the joint resolution that is now before us is designed to permit the federal authority to assist the states that want to be dry to remain dry. I am in favor of that." 76 Cong. Rec. 4168.

The remarks of Senator Borah are of particular significance since he participated in the debate over the Webb-Kenyon Act, had been a member of the Judiciary Committee which considered S.J. Res. 211 (the Twenty-First Amendment), and was one of the leading opponents of repeal.

After reviewing the "history of the right of the dry states to remain dry and be protected," 76 Cong. Rec. 4170, Senator Borah spoke against a motion from the floor by Senator Robinson of Arkansas to strike out Section 2:

"Mr. President, as I understand, this is the question of striking out Section 2, *which provides for the protection of the so-called dry states* . . .

"I look upon this provision of the amendment as vital. It does not seem to me that we can afford to strip the amendment of all effort to protect the dry states. Indeed, if I understand the two platforms, that is a part of the pledge of the platforms . . .

"Mr. President, it has been said that the Webb-Kenyon Act is a sufficient protection to the dry states. The Webb-Kenyon Act was sustained by the Supreme Court of the United States by a divided court. The President of the United States—President Taft, who was afterwards Chief Justice—vetoed it on the grounds that it was unconstitutional. The Attorney General of the United States rendered an opinion to the effect that it was unconstitutional. Elihu Root, when in the Senate, argued that it was unconstitutional. Mr. Justice Southerland, who is now upon the Supreme Court, argued before the Senate that it was unconstitutional. Therefore, Mr. President, we are turning the dry states over for protection to a law which is still of doubtful constitutionality, and which, as it was upheld by a divided court, might very well be held unconstitutional upon

*This material submitted for the record by Jefferson E. Peyser, general counsel, Wine Institute.

a re-presentation of it. Secondly, we are asking the dry states to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law.

"Mr. President, I want to go back a little in the discussion of the matter to the history of the fight of the dry states to remain dry and be protected * * *" 76 Cong. Rec. 4170–4171. (Emphasis supplied.)

Borah then discussed the *Clark Distilling* case and other Supreme Court cases under the Webb-Kenyon Act. After demonstrating that those cases did not, in fact, actually deter importation into dry states from wet he concluded that "we must have some other method, some other provisions of the constitution, than those which existed prior to the adoption of the eighteenth amendment" in order to protect those states wishing to remain dry after repeal. 76 Cong. Rec. 4172.

"All this," he continued, "was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able senator from Arkansas has seen fit to recognize the justice and fairness to the states of incorporating it permanently in the constitution of the United States." 76 Cong. Rec. 4172.

Senator Robinson had just withdrawn his motion to strike Section 2, saying that he did "not wish to ask the Senate to put itself in the position of denying any measure of protection to dry territory." 76 Cong. Rec. 4171.

Later in the debate Senator Walsh explained that "the purpose of" Section 2 "was to make intoxicating liquor subject to the laws of the state once it passed the state line and before it gets into the hands of the consignee as well as thereafter." 76 Cong. Rec. 4210. Senator Walsh then made reference to a Supreme Court case which reached the same conclusion. This case was *Rhodes v. Iowa*, 170 U.S. 412, which held that the phrase "upon arrival" in the Wilson Act referred to delivery to the consignee. The Webb-Kenyon Act was designed to plug the hole opened by this decision.

It should also be noted that Senator Tydings of Maryland later read into the record an editorial from the Washington News which called Section 2 "a restatement of the Webb-Kenyon law already on the law books, which would write into the constitution the right of the dry states to have federal protection against any importation of liquor." 76 Cong. Rec. 4428.

During the House debates, several Representatives made statements similar to those of their conferees in the Senate. These included Representatives Robinson, Garber (both opponents of the legislation), Tierney and McLeod. In addition, a colloquy between Representatives Thatcher and Glover also indicated the importance of protecting those states which wished to remain dry.

In summary, the legislative history indicates that Section 2 was understood in the Seventy-Second Congress as a safeguard to the dry states. The Webb-Kenyon Act was given constitutional status by Section 2 and the "dry" states were thereby assured that a change in Congress or in the composition of the Supreme Court would not overturn the cornerstone of the state regulatory scheme. There is not an iota of evidence to indicate that the Congress understood that the "wet" states would acquire power under Section 2 to erect trade barriers against out-of-state products.

Members of Congress were by no means the only people who felt that Section 2 was merely an elevation of Webb-Kenyon. Several contemporaneous legal writers who have examined the question concur in this opinion: Notes, 7 So. Calif. L. Rev. 280 (1934); 28 Ill. L. Rev. 960 (1934); 83 U. of Pa. L. Rev. 510 (1935). Epstein, *Intoxicating Liquors in Interstate Commerce: Validity of State Discriminatory Legislation*, 25 Calif. L. Rev. 718 (1938). Later independent writers who have retraced the legislative history are also in accord with this position. Comment, *The Twenty-First Amendment Versus the Interstate Commerce Clause*, 55 Yale L. J. 815 (1946); Carr, *Liquor and the Constitution*, 7 L. & Contemp. Prob. 709, 710 (1940); Note, *The Evolving Scope of State Power Under the Twenty-First Amendment*, 19 Rutgers L. J. 759 (1965); see also HAMILTON & ASSOCIATES, PRICE AND PRICE POLICIES, at 426 (1938).

Perhaps even more important, the Supreme Court has, in two cases decided last year, itself indicated that the legislative history of the Twenty-First Amendment has been more honored by the breach, rather than the observance, of Congress' actual intent. In a strong dissent in *California v. LaRue*, — U.S. — (1972), Justice Marshall stated that "the Amendment by its terms speaks *only* to state control of the *importation* [Justice Marshall's emphasis] of alcohol, *and its legislative history makes clear that it was intended only to permit 'dry' States to control the flow of liquor across their boundaries despite potential Commerce Clause objections.*" (Emphasis supplied.) — U.S. — (1972). In a long footnote Justice Marshall discussed the legislative history of Section 2 of

the Twenty-First Amendment, detailing its genesis in the Webb-Kenyon Act which "was designed to allow 'dry' States to regulate the flow of alcohol across their borders," — U.S. —, — at n. 14. The Twenty-First Amendment, he continues, "was intended to embed this principle permanently into the Constitution." *Ibid.* He quotes the language of Senator Blaine, who sponsored the Amendment in the Senate, as authority for the above proposition. And in the body of his opinion Justice Marshall submits that "the framers of the [Twenty-First] Amendment would be astonished to discover that they had inadvertently enacted a *pro tanto* repealer of the rest of the Constitution." — U.S. —, — (1972).

In *Heublein v. South Carolina Tax Commission*, — U.S. — (1972), Justice Marshall, this time speaking for a majority of the Court, disagreed with Justice Blackmun's conclusion regarding the operative statute, 15 U.S.C. § 381 (1970) (which prohibits state taxation of income from interstate sales unless the seller has certain minimum contacts in the taxing state). Justice Blackmun felt that the statute could not constitutionally apply to sales of alcoholic beverages since such sales are governed by the Twenty-First Amendment. In a footnote Justice Marshall noted that:

"Mr. Justice Blackmun, in his separate statement, suggests that § 381 does proscribe what South Carolina has done here, but that the Twenty-First Amendment prohibits such an action by Congress. In his view, to the extent that § 381 prohibits taxing activities undertaken in order to comply with a regulation valid under the Twenty-First Amendment, it is unconstitutional. We prefer to read the statute and its legislative history, ambiguous though they may be, to avoid such a holding. Cf. *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1961). And, though the relation between the Twenty-First Amendment and the force of the Commerce Clause in the absence of congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress' power under the Commerce Clause. Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951)." — U.S. —, — n. 9.

Legislative history, Justice Marshall noted elsewhere in the opinion, may in fact be determinative: "As we said last Term, 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.' " — U.S. —, —, quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971).

However, even if one chooses to follow Justice Brandeis, and ignore totally the congressional debates on Section 2 of the Twenty-First Amendment, the proposed legislation is still constitutional since *at no time since the enactment of that Amendment has the Supreme Court considered the validity of discriminatory state excise taxation of wine or other alcoholic beverages.*

Congress is constantly expanding traditional notions of constitutional doctrine by acting, *under the Constitution, in areas in which the Supreme Court has not previously spoken.* It is *then* up to the Supreme Court to decide whether such action, if challenged, is, in fact, constitutional. Such legislative action is so common that one example will suffice. The Civil Rights Act of 1964 forbids racial discrimination in public accommodations that affect interstate commerce (theaters, hotels, restaurants, etc.). Congress chose to base this Act on its power over commerce, even though the Commerce Clause says nothing about civil rights, rather than on the Due Process or Equal Protection clauses of the Fourteenth Amendment. As everyone anticipated, the Act was immediately challenged in the courts on the theory that Congress has exceeded its authority over commerce by striving to regulate purely "local" operations. The Court upheld the Act in its landmark decision of *Heart of Atlanta Motel, Inc.* v. *U.S.*, 379 U.S. 241 (1964) (See also *Katzenbach* v. *McClung*, 379 U.S. 294 (1964)).

In any event, since Congress has the power to legislate in constitutional areas in which the Supreme Court has not spoken, it therefore may enact the proposed legislation. It may also be relevant to note here that even if one accepts, *arguendo*, the questionable premise that the Brandeis decisions and their progeny gives the states the right to impose almost any unreasonable burdens on the wine industry, the history of the Supreme Court is studded with examples of frequent overdue, but often dramatic, reversal, *Erie R. Co.* v. *Tomkins*, 304 U.S. 64 (1938) (per Mr. Justice Brandeis by the way), reversed a 96-year old precedent established by *Swift* v. *Tyson*, 16 Pet. 1 (1842). *Brown* v. *Board of Education*, 347 U.S. 483 (1954) specifically overruled *Cumming* v. *Board of Education*, 175 U.S. 528 (1899) and *Gong Lum* v. *Rice*, 275 U.S. 78 (1927). The number of such reversals is legion. See, for example, the compilation in Brandeis'

dissent in *Burnet* v. *Coronado Oil and Gas Co.*, 285 U.S. 393, n. 406–409 (1932); Emmet E. Wilson, *Stare Decisis, Quo Vadis?* 33 Geo. L. J. 251, 254, n. 17, 265 (1945); William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735–743, 756–758 (1949); Albert R. Blaustein and Andrew H. Field, *Overruling Opinions in the Supreme Court*, 57 Mich. L. Rev. 151, 184–194 (1958); and *The Constitution of the United States of America, Analysis and Interpretation*, 1964 ed., S. Doc. No. 39, 1541–1549.

And in *Harris v. New York*, 401 U.S. 222 (1971), the Supreme Court retreated from its landmark decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), by upholding the impeachment of a defendant by use of earlier conflicting statements which would apparently have been inadmissible under the *Miranda* doctrine. In a 5–4 decision, speaking through Mr. Chief Justice Burger, and over a strong dissent, the court said, "Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, *but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." (Emphasis supplied.) 401 U.S. 222, 224 (1971).

Thus the Court, by restricting *Miranda* to the exact facts under which it was decided, has effectively overruled the broad and sweeping prohibitions and principles for which that case originally stood. The Supreme Court has indicated, in the previously quoted language from the LaRue and Heublein cases, that it may be willing to do at least this much in reconsidering the Brandeis decisions and their holdings and dicta regarding the relationship of the Twenty-First Amendment and the Commerce Clause. The proposed legislation, as well as providing the Court with a new and thus compelling expression of congressional intent on the matter, could well serve as the vehicle for such a reevaluation.

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JEFFERSON E. PEYSER,
*San Francisco, Calif., February 6, 1974.*

Re H.R. 2096
Hon. WALTER F. MONDALE,
*Chairman, Senate Subcommittee on State Taxation of Interstate Commerce, Washington, D.C.*

DEAR CHAIRMAN MONDALE: At the hearing concerning H.R. 2096 before the Subcommittee on State Taxation of Interstate Commerce of the Committee on Finance held on January 21, 1974, you expressed interest in the propriety of Federal legislation to prohibit discrimination against out-of-state wines.

An answer is provided by Justice Louis Brandeis (whose Supreme Court decisions interpreting the Twenty-First Amendment made state discrimination against wines possible). On January 9, 1915, less than a year and a half before he was elevated to the Supreme Court, Louis Brandeis addressed the House Committee on Interstate and Foreign Commerce, the same Committee which reported H.R. 2096 in 1973, as follows:

"Congress has the ultimate power to decide the matter of public policy for the nation. The Supreme Court has the right to determine what is public policy in a limited number of cases *as long as Congress has not declared what it is. If the Supreme Court has made an error, it is the duty of Congress to correct the error.* (Emphasis supplied)

"*In a very large number of cases where questions of strict law are before the court we have to accept the decision of the court as the highest authority. But on a question of public policy it is no disrespect to the Supreme Court to say that the majority of the court were mistaken.* There is no reason why five gentlemen of the Supreme Court should know better what public policy demands than five gentlemen of Congress. (Emphasis supplied)

"*In the absence of legislation by Congress, the Supreme Court expresses its idea of public policy, but in the last analysis it is the function of the legislative branch of the government to declare the public policy of the United States.* There are a great many rules which the Supreme Court lays down which may afterwards be changed, and are afterwards changed, by legislation. It is no disrespect to the Supreme Court to do it. *Their interpretations of law may be set aside by a new law.*

*"It may be expressed by constitutional amendment or by act of Congress."* Quoted in the Brandeis Guide to the Modern World 64–65 (A. Lief ed. 1941.) (Emphasis supplied)

H.R. 2096 is manifestly the kind of act of Congress to which Mr. Brandeis referred. It cannot be doubted that a central policy of the Founding Fathers was to establish a single trading union among the several states.

In the Brandeis decisions, the Supreme Court has established a policy which allows states to discriminate against wines produced in other states. H.R. 2096 seeks merely to remedy the economic evils caused by discriminatory trade barriers erected pursuant to what we feel are incorrect judicial interpretations of the Twenty-First Amendment.

The Commerce Clause was clearly adopted by the framers of the Constitution to prevent economic balkanization. However, because of the judicial interpretations of the Twenty-First Amendment, the wine industry has been denied the protection afforded by the Commerce Clause. It is necessary to look to the Congressional debates at the time. Section 2 of the Twenty-First Amendment was drafted in order to determine the public policy underlying the enactment of that Section.

There can be no question that the sole purpose of Section 2 was to protect states which wished to retain dry states after the repeal of the Eighteenth Amendment (Prohibition). At the hearing before your Subcommittee I discussed the remarks of Senator Borah during the Senate debate on Section 2. The debates contain other similar examples of Congressional intent, some of which I wish to reproduce for the record.

Senator Fess stated: "The second section of the joint resolution that is now before us is designed to permit the federal authority to assist the states that want to be dry to remain dry. I am in favor of that." (76 Cong. Rec. 4168.)

Senator Robinson, who had moved to strike Section 2, withdrew his motion and stated: "I do not wish the Senate to put itself in the position of denying any measure of protection to dry territory." (76 Cong. Rec. 4171.)

In the House of Representatives, Representative Tierney, who supported the resolution had the following to say:

"I feel that one of the strongest elements in this measure is the feature which gives to each state the right to regulate its own liquor traffic free from wet states' interference or so-called regulation by the present government's discredited prohibition service. It will aid and protect the so-called dry states in permitting them to exclude, if their citizens so wish, all liquor traffic in their domains." (76 Cong. Rec. 4526.)

Numerous other quotes indicating that Section 2 of the Twenty-First Amendment was aimed solely at allowing states to remain dry could be included. Suffice it to say that nowhere in the Congressional debates is there any indication that Congress wished to allow wet states to discriminate against alcoholic beverage produced outside the state. The policy of Congress was clear, states wishing to prohibit alcoholic beverages could do so.

The Supreme Court, in the Brandeis decisions, engaged in judicial legislation by allowing states to discriminate against out-of-state wines. H.R. 2096 merely would restore the law to its status prior to Prohibition and would assert Congressional policy as expressed in the debates on the Twenty-First Amendment.

Recently, in the case of *Heublein* v. *South Carolina Tax Commission*, 409 U.S. 275 (1972). Justice Marshall writing for the majority of the court noted:

"And though the relation between the Twenty-First Amendment and the force of the Commerce Clause in the absence of Congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress' power under the Commerce Clause."

H.R. 2096 would provide the vehicle for determining the relationship between the Commerce Clause and the Twenty-First Amendment. (It would be futile to attempt a court case where a state discriminates against out-of-state wines without Congressional action expressing its intent pursuant to its Commerce powers, indicating that discrimination against wine shall not be allowed.) The futility of an effort to bring a court case in the absence of legislation such as H.R. 2096 is made manifest by the fact that all of the Brandeis decisions and subsequent cases challenging the Twenty-First Amendment have upheld the rights of a state to discriminate.

At the Subcommittee hearing on January 21st, opponents of the bill claimed that the measure was contrary to the interests of small wineries. One owner of a winery who testified against the bill has a storage capacity of two million

gallons. In California, there are 184 wineries with storage capacity of less than two million gallons and 103 wineries in California with a storage capacity of less than 500,000 gallons. These wineries operating in a state that does not discriminate do not appear to need protective legislation in order to survive. In New York, 21 wineries have a storage capacity of less than two million gallons and 19 of those wineries have a storage capacity of less than 500,000 gallons. The majority of the New York wineries, as well as the vast majority of California wineries, are smaller than the opponent of the measure yet the number of wineries in New York and California continues to grow. Wine, like other products, should be sold on the basis of quality and consumer demand and not by virtue of protectionist barriers.

Very truly yours,

JEFFERSON E. PEYSER,
*General Counsel, Wine Institute.*

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WINE INSTITUTE,
*San Francisco, Calif., February 7, 1974.*

Hon. WALTER MONDALE,
*U.S. Senate,*
*Washington, D.C.*

DEAR SENATOR MONDALE: At the January 21st hearing on H.R. 2096, before your Subcommittee on State Taxation of Interstate Commerce, it was contended that adoption of the legislation would require amendment of the wine excise tax laws of any state which does not presently conform to the uniform Federal standard for tax classification. Thus, a state such as Minnesota, which taxes all unfortified wines regardless of alcoholic content at the same rate would, it is contended, be required to amend its wine excise tax law to bring it into conformity with the tax classifications found in 26 USC 5041(b). This contention is not valid.

The House of Representatives Report on H.R. 2096, specifically states on Page 2, under the heading "Purpose," that "The sole purpose of H.R. 2096, as reported, is to abolish discriminatory taxes, license fees, and other discriminatory burdens imposed by some States on wines produced outside of the State or from materials produced outside of the State. The legislation does no more than require that each State treat any such wine as favorably as any other wine of the same class sold in the State."

It is evident from the above that the sole purpose of the bill is to prevent discrimination. There is nothing in the proposed legislation that would prohibit preservation of a state distinction of any tax classification desired by a state so long as that tax classification is not discriminatory. If this point is somehow deemed to be in need of clarification, language should be inserted in the Senate Report or by colloquy on the floor of the Senate to reflect Congressional intention that a state retains the power to classify wine for tax purposes other than as established by the Federal tax classification provided there is no discrimination.

Very truly yours,

ARTHUR H. SILVERMAN,
*Washington Counsel.*

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DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS'
INTERNATIONAL UNION OF AMERICA,
*Englewood, N.J., January 16, 1974.*

Hon. WALTER F. MONDALE,
*Chairman, Subcommittee on State Taxation of Interstate Commerce, Senate Finance Committee, Washington, D.C.*

DEAR CHAIRMAN MONDALE: Attached hereto is a statement setting forth the position of the Distillery, Rectifying, Wine and Allied Workers' International Union of America, AFL–CIO with regard to H.R. 2096, which was passed by the House of Representatives on September 11, 1973, and Senate Amendment Number 509 to the bill introduced by Senator Robert Packwood.

The principal points in that statement can be summarized as follows:

(1) Our International Union, as the representative of thousands of American workers engaged in the production and sale of wine, has an interest in H.R. 2096 which stems from a concern for the earnings and job security of those we are privileged to represent.

(2) The opposition of our International Union to the imposition by any State of discriminatory taxes and/or other discriminatory measures on wines produced

outside of the State is concerned with similar stands taken by our International Union with respect to discrimination in such areas as excise taxation, tariff and non-tariff barriers to trade and allocation of acreage.

(3) Enactment of H.R. 2096 would be a further spur to the economic viability and resiliency of the wine industry which has registered unprecedented expansion during the past decade and which has projected similar growth during the period ahead.

(4) Arguments made by opponents of H.R. 2096 have no foundation either in the facts relating to the economic and distribution structure of the wine industry or in the question of intent as underscored in the language of the bill and during the course of debate in the House of Representatives.

These points will be amplified upon in the accompanying statement as well as in oral testimony to be presented by Mr. Abraham S. Weiss, our Legislative Representative and Research Director.

Very truly yours,

GEORGE J. ONETO,
*General President.*

SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE OF THE SENATE FINANCE COMMITTEE IN THE MATTER OF H.R. 2096

STATEMENT IN BEHALF OF THE DISTILLERY, RECTIFYING, WINE AND ALLIED WORKERS' INTERNATIONAL UNION OF AMERICA, AFL–CIO

(By George J. Oneto, General President)

*Legislative proposals and intent*

As passed by the House of Representatives on September 11, 1978 and since referred to the Senate Finance Committee, H.R. 2096:

(1) Makes a congressional finding that the imposition by one State of discriminatory taxes or other measures on wine produced in other States or from materials produced in other States, and the imposition of unreasonable requirements for shipment into and sale or distribution of wine in a State, obstructs commerce among the several States;

(2) Declares that the legislation is enacted as an exercise of the power conferred on Congress by the Commerce Clause (Article I, section 8, clause 3) of the United States' Constitution;

(3) Prohibits any State from imposing discriminatory taxes or other discriminatory measures on wines produced outside of the State, or from materials produced outside of the State;

(4) Underscores the right of each State to continue to exercise its prerogatives in the purchase, sale or distribution of wine as well as to have unrestricted discretion in the selection and listing of any wines purchased, sold, listed, or distributed by the State;

(5) Gives any interested person standing to file suit in a district court of the United States of competent jurisdiction to enjoin any discriminatory measures proscribed by the legislation.

*Interests and concerns of the DWU*

The Distillery, Rectifying, Wine and Allied Workers' International Union of America, AFL–CIO—hereinafter referred to as the DWU—is a labor organization of approximately 40,000 members in more than 100 affiliates. There is a score of DWU affiliates which encompass in their membership thousands of men and women whose occupation, in whole or in large part, centers on the production and sale of wine. Obviously, any legislative act which places an obstacle on the wine industry will inexorably have a negative impact on its economic resiliency and by that token on the earnings and job securiey of DWU members.

In this context it should be noted that the report (No. 98–264) issued by the House Committee on Interstate and Foreign Commerce which had primary consideration of H.R. 2096 paid tribute to the wine industry as being "of increasing importance in our national economic system" (p. 6). During the decade from 1962 to 1972 consumption of wine in the United States more than doubled—from 168 million gallons to 350 million gallons. And while the figures for 1978 are not as yet compiled with finality, it is quite likely that they will demonstrate that the country is not far from the consumption benchmark of 400 million gallons. Indeed, the House Report predicts conservatively on the basis of data gleaned from various Federal agencies, including the Department of Commerce,

that "this increase in consumption will continue to rise at a rate of at least 20 million gallons per year for at least the next few years." (P. 7).

At a time of general economic uncertainty, with projections of mounting unemployment during 1974 in the American economy as a whole, any development which contributes to economic expansion and acts as a countervailing force to joblessness should manifestly be encouraged. Because of the vital stake the DWU, in behalf of its members, has in the wine industry, we categorically favor any measure which will contribute to a favorable climate in the industry. Conversely, we stand opposed to any legislative proposal which will redound disadvantageously to the interests and needs of those we are privileged to represent.

Apart from our concern for the livelihood and job security of our members, which understandably has the highest priority in our function as a labor organization, it is relevant to point out that the DWU has steadfastly taken a stand against economic discrimination both in policy statements adopted at Conventions and in hearings before various Congressional committees during the past decade.

Thus, we protested against proposed Congressional legislation which would have placed a sumptuary levy—superimposed upon existing excise taxes—on alcoholic beverages. Similarly, at hearings before and after enactment of the Trade Expansion Act of 1926, the DWU took the initiative at hearings before the House Ways and Means Committee against the panoply of discriminatory obstacles to trade, especially those designed to curtail the export of American wines and spirits. We also took the stand in voicing opposition to an allocation of acreage under the Sugar Act which would have militated against the interests of the California beet sugar industry whose employees are members of our organization. And more recently, we joined with the AFL-CIO in recording objections to the sections of the Economic Stabilization Act of 1978 which singled out wage-earners for discriminatory treatment. Hence, the DWU has a long history of unswerving opposition to economic discrimination in any form.

*Impact of existing discriminatory plans*

The eighteenth amendment remained in force until December 5, 1933, when the Twenty-first Amendment to the Constitution, which specifically repealed it, was proclaimed as ratified. Section 2 of the Twenty-first Amendment is of specific concern in connection with H.R. 2096, for it provides that "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."

It is not the purpose of this statement to go into the constitutional question as to the relationship between Section 2 of the Twenty-first Amendment and H.R. 2096, for this issue has been explored at length in a memorandum, dated October 30, 1973 by the office of the General Counsel of the Wine Institute to Senator Walter F. Mondale, Chairman of this Subcommittee. It is germane to add only that a reading of the legislative history of the Twenty-first Amendment supports the conclusion that Congress intended to couple two basic objectives—the repeal of prohibition and, as Representative Tierney put it, "to protect so-called dry States in permitting them to exclude, if their citizens so wish, all liquor traffic in their domains (76 Cong. Rec. 4526, 1933).

When the reach and effect of section 2 came to be interpreted by the Supreme Court, Justice Brandeis who wrote the decisions pointedly refused to look behind the language of Section 2 to the intent of Congress in adopting it and upheld State statutes under Section 2 which otherwise would clearly have been unconstitutional under the Commerce Clause of the Constitution. As a consequence of the juridical approach thus adopted, the following discriminatory statutory plans applicable to wine have been enacted by one or more States:

(1) Several States impose a higher excise tax on wine produced outside the State or produced with products grown outside the State than on wine of the same class which is produced within the State. In one of those States out-of-State wine is taxed at the Rate of 75 cents per gallon, while wine produced in the State from products grown in the State, is taxed at the rate of 5 cents per gallon.

(2) Some States require an out-of-State firm soliciting orders for wine within the State or shipping wine into the State to pay a non-resident license or registration fee.

(3) Wine in bulk may only be imported for blending with a wine produced in the State—and in order to be eligible for a tax rate which is less than one-tenth

of that for wines bottled outside of the State, no more than 25% of the finished wine product may be out-of-State wine.

(4) A higher license fee is imposed on establishments which produce wine from products grown outside the State than on establishments which produce wine from products grown within the State.

(5) A higher license fee is imposed on retail establishments selling out-of-State wines than on establishments which sell only wines produced within the State.

(6) A higher license fee is charged to sell wine at wholesale which is produced outside of the State than is charged if only wine produced within the State is sold at retail.

(7) Wine made from products grown within the State may be sold directly to consumers, whereas wine produced outside of the State must be sold to the State liquor control commission.

(8) A tax is placed on products grown outside of the State which are used for the production of wine, while no tax is imposed on products grown within the State.

These eight statutory schemata which have actually been enacted in various States are illustrative rather than exhaustive of the types of discriminatory State legislation which could be enacted with respect to wine under the Court's interpretation of Section 2 unless H.R. 2096 is enacted into law. It is true that in 1972 a majority of the Supreme Court expressed a willingness to re-examine the relationship of the Commerce Clause and Section 2 (see *Heublein v. South Carolina Tax Commission*, 409 U.S. 275, 282 n. 9). But while this is both proper and necessary, the issue could be affirmatively and more promptly resolved in our estimation by enactment of H.R. 2096.

*An invitation to chaos*

Historians as divergent in their thinking as Charles A. Beard (*An Economic Interpretation of the Constitution*) and Samuel Eliot Morison (*The Oxford History of the American People*) agree that the Constitution of the United States was adopted because of a consensus that the thirteen competing economic systems under the Articles of Confederation was an invitation to economic desuetude and disaster. Indeed, as Professor Morison points out, it was a conviction that the Nation would grow and prosper under a national economic system which proved to be the "fillup to the movement for stronger union" (*op. cit.*, p. 302). The emergence of the United States of America as the world's strongest economic power is a tribute to the foresight of the Founding Fathers.

But opponents of H.R. 2096 are, in effect, trying to turn the clock back to the economic anarchy of the Articles of Confederation, at least with respect to the wine industry. As the consumption of wine has increased, according to an analysis of the industry incorporated in a Report by the General Officers to the DWU Convention in May, 1972, the search for suitable areas in which to grow grapes for wine production has spread to more and more States. It should be noted that while California and New York are still the leading wine producing States in the nation, their relative weight has been declining during the past few years as more and more States gravitate in the orbit of wine production. In many instances, too, wineries have been established near these vineyards.

As the House Report, cited above, correctly observes: "To permit the continuation or further proliferation of trade barriers which have been imposed by some States against out-of-State wines or products used in the production of wine threatens to return the United States to the era of the Articles of Confederation insofar as commerce in wine and products used in its production is concerned." And the Report continues on the same page 7 to the conclusion that "today as a result of these trade barriers, consumers in some States are limited in their freedom of choice of wines and must pay substantially more for the opportunity to purchase a wine which they favor merely because it was produced outside of the State or from products which were produced outside of the State."

*Misinterpretation and misunderstanding*

In opposing H.R. 2096, the National Alcoholic Beverage Control Association, the coordinated arm of the 18 so-called monopoly States, went on record on September 19, 1973 that the "practical effect" of such legislation would require a control State which stocked *any* brand or variety of wine to stock *every* wine which was tendered to it by a supplier—a requirement which, if true, would dictate stocking upwards of 40,000 brands of wine. There is absolutely no warrant for such fears as expressed by the NABCA. For one thing, if such were the case, it would have

the immediate impact of destroying or at the very least of diminishing the wine market in these 18 States. The fact that this legislation has the virtually cohesive backing of the Congressmen from California and New York—the two largest wine producing States—is a solid indication of their concern about not eliminating or even disturbing what amounts to more than one-third of the wine market in the United States.

For another thing, as underscored in Section 3 of H.R. 2096, the control States will retain their undiminished authority to engage in the purchase, sale or distribution of wine, and to exercise discretion and latitude in the selection and listing of wine to be purchased or sold by them. This major point of consideration was reinforced during the course of the House debate and in the context of the House Report.

It should be emphasized, in conclusion, that H.R. 2096 addresses itself to the single issue of abolition of discriminatory taxes and license fees as well as related discriminatory burdens imposed by some States on wines produced outside of the State. The measure now under consideration by the Senate after passage in the House would not in any way interfere with the right of any State to prohibit the production, sale or distribution of all wines or any class of wine within the State. Nor would H.R. 2096 obtrude on the police power of any State or any laws, regulations and rules pertaining to the wine industry so long as application is made in a non-discriminatory manner.

For the reasons set forth above, therefore, the DWU urges favorable consideration of H.R. 2096 by this subcommittee of the Senate Finance Committee and its prompt passage by the United States Senate.

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CALIFORNIA FARM BUREAU FEDERATION,
*Berkeley, Calif., January 28, 1974.*

Hon. WALTER F. MONDALE,
*Chairman, Finance Subcommittee on State Taxation,*
*Washington, D.C.*

DEAR SENATOR MONDALE: The California Farm Bureau Federation urges you and the Finance Subcommittee on State Taxation of Interstate Commerce to support passage of H.R. 2096 which prohibits the levying by states of discriminatory taxes on wines in interstate commerce. Action by the delegates to the recent annual meeting of the California Farm Bureau Federation, which included many wine-grape producers, stated that any program affecting agriculture should:

"Adhere to the competitive principle. Be consistent with the law of supply and demand. Strengthen the free market system. Stimulate market expansion."

The wine industry is rapidly growing into one of the most important economic agricultural industries in this nation. Although California leads the nation in wine production, grape producers in Oregon, Washington, Michigan, Pennsylvania, New York and many other states are benefitting from this growth. Also, this new growth is opening up many new employment opportunities across the nation.

We believe that the discriminatory taxes on wines being levied in some eighteen states is counter productive to market expansion, supply and demand, the competitive principle, and the free market system. We believe that all states should tax wine on the same basis, no matter what state it is produced in, thus putting all producing areas on an equal competitive level.

We urge you and your Subcommittee to favorably consider H.R. 2096 to achieve the principles outlined in this statement.

Sincerely,

ALLAN GRANT, *President.*

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Re Opposition to H.R. 2096.

FEBRUARY 5, 1974.

Hon. WALTER F. MONDALE,
*Chairman, Subcommittee on Finance,*
*Dirksen Office Building*
*Washington, D.C.*

DEAR SENATOR MONDALE: Enclosed herein, pursuant to agreement, is material which I would like included in the record on behalf of my client in opposition to HR 2096.

The material consists of excerpts in a letter to me as counsel from J. K. Warner, President of Warner Vineyards, Inc. (Michigan) along with certain statistics.

As indicated please make all of this part of the record.

Best personal regards.

Sincerely yours,

HAROLD SMITH.

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JANUARY 31, 1974.

HAROLD SMITH,
*Attorney at Law,*
*Washington, D.C.*

DEAR HAROLD: (1) In Michigan a tax differential law was put into effect back in the thirties that would enable Michigan to get a wine industry started. At that time they charged fifty cents a gallon on *all* wine, but if we, a Michigan winery, would buy our grapes in Michigan and pay at least $100.00 a ton or more for those grapes by December 15th, we were allowed a forty six cents a gallon rebate. As I stated this was done to get a wine industry started in Michigan as well as to set a floor on fresh grapes received. We, as a winery in Michigan, do not blend more that 25% of an outstate wine with our own wine of Michigan grown grapes to be allowed this preferential treatment.

(2) In our area where grapes are grown, we, as a group are the largest employer, as well as many small growers would have no home for their grapes if this law was passed.

(3) We, as wineries, are supporting Michigan State University, who in turn is spending many thousands of dollars a year working on varieties of grapes the small grower and wineries can use. Many of these are now being planted.

(4) We believe if this law was passed the tax that is now being charged to out-state wineries of fifty cents a gallon in Michigan would not be changed, the only change to be made that instead of us as Michigan wineries paying four cents a gallon that we would all pay fifty cents a gallon. This would put most, if not all, the local wineries out of business and would leave the big wineries to set their prices higher in the long run.

(5) In California at the present time they have a state law that will not allow any fresh fruit and vegetables, chicken, etc., to come into their state even though they have been approved by the other state that they are germ free and government inspected. We call this discrimination.

(6) We, like all other states excluding California, have to pay a marketing tax of 1½ cents a gallon on all bulk wines that we purchase from California which we now use in the blending of our native wines. They in turn use this as promotion in advertising to promote California wine only.

(7) If House Bill #2096 is passed it would open up any discrimination between states in regard to transportation, agricultural products, Workmen's Compensation, insurance, etc. Many states have protections for the local small growers and business. Many states have discriminatory tax on public warehouse inventories, or personal property tax on inventories in the warehouse; but no personal property tax on the personal property on the manufacturers on that state's merchandise. If this law is passed it should also prohibit any state from having discriminatory taxes against the products or materials produced in that state as well as outside of that state. This is not true in many cases.

(8) There is a license fee charge difference in New York, Pennsylvania, Missouri, Nevada, New Mexico, Texas, and Tennessee—differential between local resident and non-resident.

Best Regards,

WARNER VINEYARDS, INC.,
J. K. WARNER,
*President.*

The State of Michigan has a separation of 20% wines and over that are sold through the State Liquor Stores. All these wines, whether they are outstate wines or Michigan manufactured wines, are sold at the same price with no tax; wines sold through distributors are wines 16% and under. These wines have a differential and taxed again if we Michigan wine producers pay the grower a $100.00 or more price for their grapes by December 15 of the year grapes are received.

LAST 20 YEARS OF SALES IN MICHIGAN, JAN. 31, 1974

| Year | Michigan wineries | Percent | Outstate wineries | Percent | Import wines | Percent | Total |
|---|---|---|---|---|---|---|---|
| 1952 | 2,650,448 | 56 | 1,957,554 | 42 | 107,997 | 2 | 4,715,999 |
| 1957 | 2,792,106 | 52 | 2,389,197 | 44 | 204,921 | 4 | 5,386,224 |
| 1962 | 2,299,551 | 42 | 2,844,922 | 51 | 383,779 | 7 | 5,528,252 |
| 1967 | 2,367,425 | 39 | 3,236,516 | 53 | 471,749 | 8 | 6,075,690 |
| 1972 | 1,996,228 | 16 | 9,364,281 | 76 | 1,025,030 | 8 | 12,385,539 |

You can see that the sales in Michigan, by Michigan wineries have decreased substantially from what they were twenty (20) years ago, and during all this time we have had a tax differential. What would it do if the taxes were the same, to the wineries of Michigan?

J. K. WARNER,
*President.*

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FEBRUARY 18, 1974.

HAROLD SMITH,
*Attorney at Law, Washington, D.C.*

DEAR HAROLD: The proponents of H.R. 2096 present a very weak argument in regards to the intent of Congress when Congress drafted the 21st Amendment to the Constitution. They offer no conclusive evidence that *directly indicates* that the drafters of the 21st Amendment fully intended to limit the States' regulatory powers over alcoholic beverages within its borders. If they intended to limit the 21st Amendment it would have been so simple to insert the limiting words or terminology that clearly described the powers that they might have wanted the Federal government to keep. But it is quite clear that the drafters of the 21st Amendment fully intended to return *complete* control to the states as evidenced by the following language of Senator Blaine, who sponsored the 21st Amendment on the Floor of the Senate: "When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal (sic 21st Amendment) is restoring to the states, in effect, the right to regulate commerce respecting a single commodity, namely, intoxicating liquor." Seventy-sixth Congressional Record, 4141, that is in 1933.

A long line of major Supreme Court cases interpreting the 21st Amendment has established that States have the authority and right under the 21st Amendment to adopt legislation discriminating against intoxicating liquors imported from other states in favor of those from the home state. The court has also said that such discrimination is not limited by the Commerce Clause. The first series of these interpretative decisions were rendered shortly after ratification of the 21st Amendment while the drafters of it were living and able to give statements of their intent, and they, no doubt, had the leadership-ability to modify the 21st Amendment and resubmit it for ratification if they had thought this necessary. Evidently, it carried out their intent, and a long line of Supreme Court decisions sustained it.

I would like to correct an untrue statement made by Mr. Peyser in his testimony before this subcommittee. He stated that Arkansas permits the sale of only Arkansas wine in restaurants and no out-of-state wines can be sold in restaurants. This is not true. Arkansas wineries were instrumental in passage of legislation that allows all types of both foreign and domestic (which includes California wines) to be served in Arkansas restaurants.

Mr. Peyser said, "There has never been a case involving—the Supreme Court has never acted on the matter of excise taxes." He fails to mention a similar case though which involved State Revenues in *California* vs. *Washington No. 12* Orig., October term, 1958. At that time Washington State controlled the liquor industry by selling through State owned stores. The profits from these State owned stores went to State Revenues. The State gave incentives to their Washingon State fruit industry and wineries by marking-up in-State wines less than they marked up wines produced outside of Washington State. To give the important points of this case as briefly as possible I submit some excerpts from a letter by John J. O'Connell, Attorney General of the State of Washington, to Senator R. R. Bob Greive, Chairman, Committee on Commerce, Industry, Trades and Professions, the letter being dated November 28, 1967, and I quote:

"Various provisions of the United States Constitution were referred to and relied upon by California in support of its contention that the Washington wine policy was unconstitutional, including the commerce clause of Article I, Paragraph 8, the equal protection and due process clause of Amendment 14, and the privileges and immunity clause of Article IV, Paragraph 2. However, upon researching the matter, we found a constitutional basis, in prior United States Supreme Court decisions, for rejection of the California argument based upon any or all of these constitutional provisions.

The basis for our response was the following language of Paragraph 2, of the 21st Amendment to the United States Constitution:

"The transportation or importation into any states, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In support of our position, we then cited several cases in which the United States Supreme Court had held that because of this language of the 21st Amendment, the commerce clause has no application to state laws and regulations dealing with intoxicating liquors imported from another state. See, *State Board of Equalization* v. *Liquor Control Commission*, 305 U.S. 391; and *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395. In addition, we noted that based upon this same reasoning, the United States Supreme Court had held that the equal protection clause of the 14th Amendment has no application to state laws dealing with imported liquor. See, *William Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401; and *State Board of Equalization* v. *Young's Market Co., supra.*

For a general summarization of these, and other cases of like import, see, as well, annotations appearing in 110 ALR at 951, and 138 ALR at 1150. Of course, with such an abundance of authority to support the position which we were asserting in defense of the Washington wine policy, we were successful in obtaining a summary disposition of the California complaint. On November 10, 1958, the United States Supreme Court entered a brief per curiam order disposing of the case of *California* v. *Washington*, No. 12 Orig., October Term, 1958, as follows:

"*PER CURIAM*: The motion for leave to file a bill of complaint is denied. U.S. Const. Amend. XXI, Sec. 2; *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U.S. 395; *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401; *State Board of California* v. *Young's Market Co.*, 299 U.S. 59."

See, *California* v. *Washington*, 358 U.S. 64, 3 L. Ed. 2d 106, 79 S. Ct. 116 (1958)." (Letter of John J. O'Connell, Attorney General, State of Washington.)[1]

Having failed in court the California wine interests dominated by two California wine Giants set about overturning Washington's wine law. By using the old theory of divide and conquer, they threatened to outlaw Washington beer in California and threatened to boycott Washington State apples, according to a former owner of a now bankrupt winery. This very effectively caused the beer and apple lobby to shy away from the wine lobbyists.

The following is a quote from the "California Wineletter", an independent wine industry news service dated (1/25/69), 2nd January issue Vol. 42, No. 2, quote:

"Members of the Washington State House of Representatives recently introduced a bill to do away with the provision that out-of-state wines must be sold through State Liquor Stores—at retail prices even to retailers and restaurants, so that the price must include two mark-ups. Washington State wines are available in groceries, super markets and restaurants, delivered direct without any State mark-up. A bill to do away with this trade barrier was introduced last year with backing by the grocers' association. It failed to pass. At that time, California legislators threatened to retaliate against the Washington law by pushing for a California law to keep Washington beer out of California. It is shipped to California in considerable quantity. It does appear that this move caused the Washington beer lobbyists to shy away from the Washington wine lobbyists. If this attitude exists in fact and continues to exist, two powerful Washington State groups—the grocers and the brewers—will be on the side of the California wine industry. Unfortunately, it is doubtful that the Washington State wine industry—both lambrusca and vinifera—would be able to survive because of high costs of production.

The owner of one Washington winery said that California wine interests managed to get the Grocers Association of Washington to carry their banner

[1] Additional materials, attached to this letter, have been retained in the permanent files of the Committee on Finance on H.R. 2096.

for them, but that lobbyists for California wine interests lobbied openly and vigorously in the Washington State legislature. All this he said, was coupled with a massive advertising campaign using multimedia to convince consumers that they would get cheaper wine prices if the law was overturned and that California Wineries promised to buy the grapes (mostly Concord) which they needed for the then booming "Cold Duck" market (which is now dropping in sales). The law was overturned and all the wineries went out of business or bankrupt except three who were in the juice business. The largest of the three said he survived by crushing Concords and tankering them down to California wineries.

Washington State representative, Newhouse, reported in the October 1969 issue of the Washington Goodfruit Grower magazine (6 months after law was overturned) that the cost of wine to the consumer had not gone down as promised and that the legislation was hurting the Washington wine industry.

Mr. Victor B. Allison of American Wine Growers said the onslaught of the California wine Giants was merciless after the law was overturned and that large volume case deals coupled with massive multimedia advertising by California wineries had most Washington wineries on the ropes in about nine months.

What happened to the Washington State wine industry was stated quite bluntly and clearly by Dr. W. J. Clore as he spoke at the 93rd Annual meeting of the Arkansas State Horticultural Society. Dr. Clore is a brilliant and internationally known grape research expert from Washington State. The Wineries of Arkansas give grants to the University of Arkansas which spends a great deal of money developing grapes for the small but growing Arkansas Wine industry, and brings speakers to Arkansas such as Dr. Clore. The following is a quote from his talk, published in the "Proceedings of the 93rd Annual Meeting of the Arkansas State Horticultural Society—November 29 and 30, 1972" beginning on page 79 he said, "The wine industry in Washington State started developing following the repeal of prohibition. By 1937 there were 42 wineries in existence . . . A Change in the wine law early in 1969 removed protective measures against out-of-state wines. This reduced the number of wineries to three."

Doctor Clore pointed out that 90% of the States' grapes were Concord. This enabled many to sell to juice operations and California Wineries. The anguish of owners of vineyards and wineries that failed was horrible to behold. For example, Santa Rosa Winery Inc., founded in 1934 at Sunnyside, Washington with 450,000 gallons storage and capable of bottling 1000 cases per day—shortly after their protective law was overturned the founder died of a heart attack and ten days later the president of the company died. The property was purchased by promoters who have so far done nothing with the property.

This is a good example of hindsight and it gives a preview of what could happen to the many small wineries and fruit growers in the various tax incentive states.

What could happen in Arkansas makes one shudder to even think of it, because Arkansas is planted to over 50% wine grapes only, meaning they can't be sold for juice or fresh market. The remaining 48% or so is contracted to Welch Grape Juice and is planted to Concord. It would be impossible to sell to Eastern wineries in New York for example, because in a rare bumper crop year we attempted to sell to New York wineries but they all informed us that they could buy 25% of their storage volume in bulk blending wines from California much cheaper. Besides, knocking out all the wineries in the 7 incentive states at one time would create a great surplus in all seven states at once, depressing the market severely and leaving most grapes hanging on the vines.

The old theory of divide and conquer is again being tried as the proponents of H.R. 2096 attempt to amend it to suit the 18 so called "Control States", or monopoly states, when their main objective is to knock out monopoly states and tax incentive in the long run. The double talk in H.R. 2096 that purports to do away with so called "discrimination" in the heart of the bill and then in a subsection guarantees the monopoly states the right to exercise discretion in the selection and listing of wine to be purchased or sold by each such state. What this allows in effect is discrimination by Monopoly States while it forbids it in Non-Monopoly States. I would much rather ship my wine into a tax incentive State such as I do now in Georgia than to be in effect barred completely from a Monopoly State because the Monopoly state didn't have room for my product and used discretion and decided to keep my product out of the State.

We see more double-talk by the California proponents of H.R. 2096 when they talk of discrimination by tax incentive States (which are not in violation of any law) while they discriminate against citrus fruit from other states (who have good inspection laws) under the guise of preventing disease from entering their

state. This is a clear violation of the commerce clause of the Constitution. They have other discriminatory laws on grapes, vegetables and poultry. Indeed, for many years, California had a law which effectively barred the sale of Florida-grown avocados in California. This law was finally overturned last fall by a 3 judge Federal Court which found this law in clear violation of the commerce clause and ruled it unconstitutional. The court described the law as "irrational, arbitary and discriminatory."

As our documented testimony in the Sub-Committee (on Commerce and Finance of the Committee on Interstate and Foreign Commerce, House of Representatives, Ninety-Third Congress, First Session),[2] indicates, we have very much higher production cost of grapes in the Eastern United States, compared to the lower priced grapes grown in California for the majority of their wine. In recent years this competition has become increasingly severe as the large so called, "Pop Wine" producers began using quantities of Apples & Apple Juice as the base for their flavored wines. It was found that a gallon of wine could be made about half as cheap with Apples as with Grapes, with some gallons being produced as cheap as 12 to 15 cents per gallon. Then by adding Strawberry flavor and carbonation or Blackberry flavor and carbonation they came up with a wine much cheaper than one produced completely from Strawberry or Blackberries, etc.

It was soon found that Apple concentrate could be brought into California from Europe much cheaper than local Apples. According to information from California the Giants had cornered the market on French and Italian Apple concentrate. These same major wineries from California had been instrumental in passage of high enough import taxes on Grape concentrates from foreign countries to make it less profitable for importing Grape concentrates for wines. However, there wasn't this type tariff on Apple concentrates. Pop Wines from these low cost Apple concentrates continued to grow at astronomical rates.

Suddenly an Industry Circular from the Department of the Treasury-Bureau of Alcohol, Tobacco and Firearms, Washington, D.C. 20226, Number 73-18, dated July 31, 1973 was sent to all wineries. I submit it as Exhibit "A"[3] and the main part reads as follows: *Purpose.* The purpose of this circular is to inform all winemakers of the appearance of adulterated fruit & grape concentrate in the United States and of the fact that such concentrates have been sold to winemakers as "pure". *Background.* It has been recently been disclosed that certain concentrate material imported from Europe as pure Apple concentrate is, in fact a mixture of Apple and Grape concentrate and also included approximately a one-third portion of sugar-water and citric acid.

It is not certain if an affiliate of one of the major California wineries in Europe was involved or not, but it is interesting to note that the flavored Strawberry wine label of one major winery was changed from Apple wine, natural Strawberry and other natural flavors, to Apple and Grape wine base with Strawberry and other natural flavors. Perhaps it's just an interesting coincidence.

However, the national wire service carried an article a few weeks ago of a major California winery who was fined $250,000.00 "to settle a violation" of shipping 28,000 gallons of wine on 308 occasions between May, 1972 and January, 1973, with labels that "claimed a varietal designation which was false and untrue."

We can see now that the wine giants of California in their ruthless stampede to take the whole wine market, will stop at nothing even the manipulation and abuse of Congress to achieve total and absolute dominance of the United States wine market, at the expense of destroying many small wineries and grape growers in the process.

According to Senator McClellan's and Senator Fulbright's testimony based on information supplied by the Arkansas Department of Finance and Administration, covering FY 1972, 31.7 percent more wine was imported into Arkansas from outstate wineries than in the year before.

During this same period, sales of Arkansas wines declined by 6%, these figures indicate no adverse effect by the Arkansas laws upon interstate commerce.

We note that in the last 20 years of wine sales in Michigan that there is a similar trend with Michigan Wineries indicating a drop from 56% of the total state market in 1952 to only 16% of the total state market by 1972. During the same period Outstate wineries increased their sales in Michigan from 42% in 1952 to an outstanding 76% of the total state market by 1972.

[2] The document was made a part of the official files of the committee.
[3] The document was made a part of the official files of the committee.

Therefore, the principal economic arguments advanced by the proponents of this measure—that the present laws result in discrimination and the "balkanization" of interstate commerce in wine—are, especially in the case of Michigan and Arkansas' experience completely without foundation. From the standpoint of Michigan and Arkansas' wine economy the data conclusively demonstrates just the reverse of their arguments—that the States laws which this legislation would prohibit have, in effect, been the leading factor keeping the market competitive.

We have no complaint against the small and medium sized wineries of California and New York or even the larger fine dinner wine producers such as Paul Masson. In fact we count many of them among our very closest friends and wineschool classmates. For the most part they are fair minded people who are also opposed to the monopolistic tendencies of the few California Giants that dominate and control the California Wine Institute.

They know we were instrumental in passing legislation to permit all wines imported and domestic to be served in Arkansas Restaurants and that we've even built our own Restaurant in Grandfather's old wine cellars to promote the proper use of wine with foods. They know that as we teach people in Arkansas about varietal wines that it will increase the sale of their's too.

Probably the only man in America today who understands the various tax incentives States and their beneficial contribution to the education of the total United States to the appreciation of wine, is the renowed author, Leon D. Adams of Sausalito, California. This unselfish and opened minded man is internationally known as an authority on wines and spirits. He was founder of the Wine Institute, served as its secretary for twenty years, and also founded the Wine Advisory Board. He is author of the Commonsense Book Of Wine, The Commonsense Book Of Drinking and the Wine Study Course. His latest book "The Wines Of America" is on the best sellers list. This book is also the first complete wine touring guide of North America for the amateur hobbyist, and connoisseurs. To write this book Mr. Adams spent many months visiting each wine district in great detail. As he visited these districts he was probably surprised at the quality of the wines and the fine people he met who were totally dedicated to the improvement of the quality of their wines. He saw first hand, the growers and workers in the vineyards and the families they toiled to support. With his background who would be more qualified to speak out on our plight?

He is an honest man and speaks from the heart and is the most unbiased wine author we have ever met, and his home is California.

An excerpt from a letter he wrote to me a few years back is as follows and I quote:

"It has disturbed me in recent weeks to read of the new efforts by my friends in the California wine industry to eliminate the tax protection which is enabling the local grape and wine industries of Arkansas, Michigan, New Mexico and Washington to develop their production of quality table wines and to educate consumers in their states to the use of this civilized mealtime beverage. As one of the founders of the Wine Institute, Wine Advisory Board, and Wine Conference of America, I have the long-range view that the best interests of the California winegrowers, as well as those of the other States, are served by encouraging the development of local wine industries throughout the United States, and this is only possible if the laws of such States as yours are such as to compensate for the lower production costs of the California dessert wines. Eventually, when you in Arkansas and the producers in such States as Michigan and Washington have developed vineyards and wines that have special qualities different from those of California and Europe, you will be able to compete successfully on the basis of your wines' special qualities, and without laws giving you spécial protection. The best example, of course, is the State of New York, whose winegrowing industry has had enough years to develop special Qualities of wines that actually do not compete with those of California. You are already making great progress, as I can personally testify after having tasted your good table wines when I visited Arkansas last year, but require at least several more years to expand your vineyards and winery and to develop the table wine market in your State. If the California producers only realized it, what you are doing is for their long-range advantage in helping to build a nationwide wine industry and a nationwide market for table wines used as a mealtime beverage.

I have expressed this view also to the Department of State, whom I serve, as you may recall, as one of the committee of experts advising the Department on American wines.

And as you also know, it is my hope that winegrowing will develop soundly in many of our States that motivated my undertaking last year to write "The Complete Book of American Wines" for the McGraw-Hill Book Company. I only regret that after a full year of field research, visiting virtually every winegrowing State, I am still many weeks away from finishing the book, which my editors await with some annoyance at my slow progress. When it is published, not many months hence, it will bring you and many others some of the recognition you richly deserve." (letter of Leon D. Adams)[4]

I hope this material will be of assistance to the Committee on Finance. Thank you very much.

Sincerely,

AL WIEDERKEHR,
*President, Arkansas Wine Producers Association.*

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*Ten largest wine advertisers by expenditures—1972* [1]

| | *Amount* |
|---|---|
| Boones Farm (Gallo) | $5,418,500 |
| Gallo wines | 3,281,100 |
| Cold Bear (Coca Cola) | 1,316,300 |
| Paul Masson (National Distillery) | 1,141,300 |
| Martini-Rossi | 1,097,000 |
| Annie Green Springs | 1,097,000 |
| Italian Swiss | 980,000 |
| Lancers (Heublein) | 869,000 |
| Harvey's Wines | 851,800 |
| Dubonnet | 819,700 |

[1] Compiled by Clark Gavin & Associates for Time magazine.

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[4] Additional materials, attached to this letter, have been retained in the permanent files of the Committee on Finance on H.R. 2096.

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