TO: David
FROM: Lewis F. Powell, Jr.

79-97 Midical

I commend you first on the promptness with which you have prepared a first draft. It also reflects your usual quality of work.

My comments are as follows:

In the introductory paragraph, would it be helpful to identify Midical as a private wine wholesaler? Perhaps something along the following lines might do:

"In a private state court action instituted by respondent - a wine producer - California's resale price maintenance and price posting statutes for the wholesale wine trade were held to be violative of the Sherman Act. The issue presented on this appeal is whether, etc., . . . ."

Your part I is fine, although it might be well to identify Midical a little more specifically.

Part II is excellent. I suppose we need not say that the California pricing scheme would be a per se violation of the Sherman Act. On page 7, where you cite Schwegmann (which, of course, is the most relevant case) I think it would be helpful to cite additional Sherman Act cases supporting the invalidity of this type of price fixing.

As you have pointed out, Part III - the 21st
Amendment issue - is a bit more difficult. It is not easy to identify, on the basis of prior authority, a consistent and coherent line of analysis. You end up balancing competing state and federal interests. I can think of no better approach.

Yet, I do have the impression that we may overemphasize the weight to be accorded state interest. The discussion begins on page 20. The first point made is the relative indifference of California to this particular case. I really do not view this as significant. Our decision would be the same regardless of the state's enthusiasm so long as it kept the statute on the books and enforced it. Perhaps we could move this reference to a footnote.

You then rely primarily on the view of the California statute taken by California courts. This is more relevant, but again would not be controlling with me in terms of deciding whether the state interest is sufficient to outweigh the federal interest. Customarily, we look to the brief of the State Attorney General for the state interests served by legislation. I have not checked his brief, but if it identifies state interests you might rely on him for these and on the California court's rebuttal to show how insubstantial they are.

While I certainly would not foreclose the
possibility of state interests outweighing a federal commerce clause interest in a case involving alcoholic beverages, it is difficult for me to imagine such a case involving the Sherman Act and where the state action is not protected in any event under Parker v. Brown.

In sum, take another "swing" at the final five pages (commencing at page 20 of the draft) with the foregoing thoughts in mind.

Without rechecking the draft and accompanying notes, I do not believe you have been quite specific enough in making clear that under the 21st Amendment a state may do as Virginia does: exercise a state monopoly on the importation, distribution and sale of alcoholic beverages. This would be protected both by the 21st Amendment and Parker v. Brown.

L.F.P., Jr.

ss
February 15, 1980

Re: 79-97 - California Retail Liquor Dealers Association v. Midcal Aluminum

Dear Lewis:

Please join me.

Respectfully,

[Signature]

Mr. Justice Powell

Copies to the Conference
RE: No. 79-97 California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., et. al.

Dear Lewis:

Please note that I did not participate in the consideration or decision of this case.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference
February 19, 1980

Re: No. 79-97 - California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

cc: The Conference
February 20, 1980

Re: No. 79-97, California Liquor Dealers v. Midcal Aluminum

Dear Lewis,

I am glad to join your opinion for the Court.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
February 20, 1980

Re: No. 79-97 California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., et al.

Dear Lewis:

Although I voted the other way at Conference, I shall, as Byron puts it "acquiesce" in your opinion.

Sincerely,

Mr. Justice Powell

Copies to the Conference
Re: No. 79-97 - Calif. Retail Liquor Dealers Assn. v. Midcal Aluminum

Dear Lewis:

Please join me.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference
Re: 79-97 - California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.

Dear Lewis,  

Please join me.  

Sincerely yours,  

[Signature]

Mr. Justice Powell

Copies to the Conference
February 28, 1980


Dear Lewis:

I join.

Regards,

Mr. Justice Powell

Copies to the Conference
This case comes to us from the California Court of Appeal.

California has a resale/price maintenance statute for wine. Under this statute, a wine producer may set prices through a fair trade contract. If this is not done, the wholesalers must post a resale price schedule for that producer's brand. Wine merchants are required to sell to retailers only at prices established in this manner.

Respondent, charged with violating established prices, successfully challenged the California system as violative of the Sherman Act. We granted cert.

The California statute was defended in this Court on two grounds: First, that its program is immune from federal antitrust laws under the "state action" exception—an exception this Court has recognized since its decision in Parker v. Brown in 1943.

Secondly, it was argued...
Secondly, it was argued that the 21st Amendment, that repealing the Prohibition Amendment, authorized the states to regulate traffic in liquor.

For the reasons stated in the Court's opinion, we reject both of these arguments. Neither the state action doctrine of Parker v. Brown, nor the 21st Amendment, authorizes a state to delegate to private parties the right to fix prices in a manner that would violate federal antitrust laws. We therefore affirm the judgment of the California Court of Appeal.

Mr. Justice Brennan took no part in the consideration or decision of this case.