View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Miami School of Law

University of Miami Law Review

Volume 27
Number 3 *Volume 27 Numbers 3-4 (Spring & Summer 1973)*

Article 12

7-1-1973

The Expansion of State Power Through the Twenty-First Amendment

Jeffrey L. Berkowitz

Follow this and additional works at: https://repository.law.miami.edu/umlr

Recommended Citation

Jeffrey L. Berkowitz, *The Expansion of State Power Through the Twenty-First Amendment*, 27 U. Miami L. Rev. 509 (1973)
Available at: https://repository.law.miami.edu/umlr/vol27/iss3/12

This Case Noted is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

flict exists, can do little to promote uniformity in the law. These shortcomings may, however, do much to lighten the supreme court's work load by discouraging deserving litigants from seeking supreme court review of conflicting decisions.

LARRY C. LINDER

THE EXPANSION OF STATE POWER THROUGH THE TWENTY-FIRST AMENDMENT

Following public hearings which revealed numerous incidents of sexual conduct between dancers and customers[1] in bars licensed and regulated by the California Department of Alcoholic Beverage Control, the Department promulgated regulations expressly prohibiting sexual live entertainment and films in such bars and nightclubs. Plaintiffs, including holders of various liquor licenses issued by the Department, and dancers at premises operated by such licensees, unsuccessfully sought discretionary review of the regulations in both the state court of appeals and in the Supreme Court of California. The Department then joined with plaintiff-petitioners in requesting the three-judge federal district court to decide whether the regulations were invalid under the United States Constitution. The district court held that the regulations unconstitutionally abridged the freedoms guaranteed to petitioners by the first and fourteenth amendments.[2] The United States Supreme Court *held*, reversed: States have broad latitude under the twenty-first amendment to control the manner and circumstances under which liquor in bars and nightclubs may be dispensed. The Department's conclusion that both the sale of liquor and lewd or naked entertainment should not take place simultaneously in licensed establishments was not irrational nor was the prophylactic solution unreasonable. *California v. LaRue*, 93 S. Ct. 390 (1972).

The Court, while admitting that the regulation would prevent certain activities which would not be obscene under *Roth v. United States*,[3] and subsequent Supreme Court decisions, granted the state agency wide latitude to suppress not only obscenity outside the scope of the first amendment, but also speech which is clearly protected.[4] In justifying

1. The Court summarized the transcript of the hearings by stating:

> Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself.

California v. LaRue, 93 S. Ct. 390, 393 (1972) [hereinafter referred to as *LaRue*].

2. California v. LaRue, 326 F. Supp. 348 (C.D. Cal. 1971).

3. 354 U.S. 476 (1957) [hereinafter referred as *Roth*].

4. The obscenity test developed in *Roth* requires that the material must be taken as a whole and when so viewed, must appeal to a prurient interest in sex, patently offend

such a result, the Court employed a line of commerce clause cases in which the broad sweep of the twenty-first amendment[5] was recognized.[6] The significance of this decision rests on the fact that the Court's interpretation of the twenty-first amendment extends power to the states to regulate liquor in a manner which would otherwise be constitutionally impermissible.

Historically, there was a recurring confrontation between state regulation of liquor under the twenty-first amendment and the limitations imposed upon the states by the constitutional grant to Congress of power over foreign and interstate commerce. States' efforts to restrict the importation of alcoholic beverages were rendered ineffective on the basis of the commerce clause[7] by the Court in 1890.[8] Congress reacted to the Court's suggestion that only with congressional approval could the states be permitted to regulate interstate commerce in liquor, by enacting the Wilson Act.[9] The Act authorized state control of intoxicating liquors "upon arrival" into the state for use, sale or storage. Shortly thereafter, the Court construed "upon arrival" to mean actual receipt by the consignee, thereby permitting an extensive evasion of the prohibition laws by shipping directly to the consumer.[10] Congress responded by passing the Webb-Kenyon Act,[11] which originally was entitled "An Act divesting intoxicating liquors of their interstate character in certain instances.[12] The statute prohibited the interstate transportation of intoxicating beverages when the intended receipt, possession, sale or use was in violation of the laws of the receiving state.

The twenty-first amendment, repealing national prohibition and authorizing the states to regulate liquor in a fashion which previously had been constitutionally prohibited, was ratified in 1933.[13] The resultant

community standards relating to the depiction of sexual matters, and be utterly without redeeming social value. The Court recognized that the conduct there proscribed was not obscene under these standards and was therefore within the protection of the first amendment. While the Court in *LaRue* drew the distinction that the regulations were upheld not in the context of censorship but rather in the context of licensing bars to sell liquor by the drink, Mr. Justice Marshall noted in his dissent that the legislative history pertaining to the regulations indicated that California adopted them for the specific purpose of evading the obscenity standards. 93 S. Ct. at 395, 401 n.4.

5. In addition to repealing Prohibition, the amendment in its second section 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.

U.S. CONST. amend. XXI.

6. 93 S. Ct. at 395-97.

7. U.S. CONST. art. I, § 8, provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

8. Leisy v. Hardin, 135 U.S. 100 (1890).

9. 26 Stat. 313 (1890), 27 U.S.C. § 121 (1934). The Court validated the Act in *In re* Rahrer, 140 U.S. 545 (1891).

10. Rhodes v. Iowa, 170 U.S. 412 (1898).

11. 37 Stat. 699 (1913), 27 U.S.C. § 122 (1939).

12. 27 U.S.C.A. § 122 (Supp. 1973).

13. The eighteenth amendment, which forbade "the manufacture, sale, or transportation of intoxicating liquors," was ratified in 1919. The net result of the twenty-first amendment

controversy as to the purpose and scope of the amendment has revolved around two basic positions. It has been argued that the legislative and judicial history preceding the amendment and the almost exact duplication of the language of the Webb-Kenyon Act[14] indicated merely an intention to enable those states which wished to do so to remain "dry." In his dissenting opinion in *LaRue*, Mr. Justice Marshall, a proponent of this historical purpose view, stated:

> But the Amendment by its terms speaks 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. [citations omitted] There is not a word in that history which indicates that Congress meant to tamper in any way with First Amendment rights.[15]

The proponents of the alternative interpretation prefer to accept the plain meaning of the amendment as it applies to commerce.[16] The *LaRue* Court's construction of the twenty-first amendment granting extremely broad powers to the states to regulate the use of intoxicants is consistent with precedent and is largely based on this second view.

Consequently the majority of the cases dealing with the twenty-first amendment relate to the surrender of federal power to the states largely in the area of interstate commerce. If the original purpose can be accepted as the desire to allow states to remain dry, abrogation of the commerce clause as applied to intoxicating liquors was perhaps logically necessary to effect that result.

The majority in *LaRue*, speaking through Mr. Justice Rehnquist, relied heavily on several twenty-first amendment commerce clause cases in justifying its decision. The Court cited *State Board of Equalization v. Young's Market Co.*,[17] which upheld the constitutionality of a California

was to shift control over the liquor traffic from the federal government, as the repository of the police power under the eighteenth amendment, to the states.

14. The text of the Webb-Kenyon Act, omitting words irrelevant to the subject now under consideration, reads as follows:

> That the shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind, from one State or territory or district of the United States . . . into any other . . . to be received, possessed, sold or in any manner used . . . in violation of any law of such state, territory or district of the United States . . . is hereby prohibited.

In support of an interpretation that the amendment was intended as an incorporation of the Act, *see, e.g.*, Clark Distilling Co. v. Western Md. R.R., 242 U.S. 311, 324 (1917); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 336-39 (1964) (Black dissenting); de Ganahl, *The Scope of Federal Power over Alcoholic Beverages Since the Twenty-First Amendment*, 8 GEO. WASH. L. REV. 819, 822-23 (1940) [hereinafter cited as de Ganahl].

15. 93 S. Ct. at 405.

16. State Board of Equalization v. Young's Market Co., 299 U.S. 59, 63-4 (1936) (responding to the argument that the broad language of the twenty-first amendment is limited by its history the Court replied that "[a]s we think the language of the Amendment is clear, we do not discuss these matters.").

17. 299 U.S. 59 (1936) [hereinafter referred to as *Young's Market*].

statute imposing a license fee for the privilege of importing beer to any place within its borders, which prior to the twenty-first amendment would have been void as a direct burden on interstate commerce. The Court in *Young's Market* held that since the adoption of the twenty-first amendment, a state was not required to let imported liquors compete with domestic liquors on equal terms. The Court stated that to hold otherwise, "would involve not a construction of the Amendment, but a rewriting of it."[18]

Following this decision, the Court has, on numerous occasions, consistently held that the amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories and that the right of a state to prohibit or regulate the importation of intoxicating liquor is *not limited by the commerce clause.*[19]

The rationale employed by the Court to permit the twenty-first amendment to override the commerce clause in previous cases, and to some extent the first amendment in *LaRue*, is based on the premise that the states, having the power to prohibit absolutely the manufacture, sale or possession of intoxicants, irrespective of the time and place of production or prospective use, must be afforded great flexibility in prescribing conditions under which its use may be regulated.[20] Under this interpretation the Court has sanctioned the regulation,[21] prohibition,[22] discrimination,[23] confiscation,[24] and taxation[25] of intoxicating liquors in apparent disregard of the resultant balkanization of the trade in liquor among the states.

While the Court admitted in *Joseph E. Seagram & Sons, Inc. v. Hostetter*,[26] that the twenty-first amendment has not operated totally to repeal the commerce clause in the area of liquor regulation, it stated that

> [w]e need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause.[27]

It is clear, then, that important constitutional restrictions on state powers have been removed and that these state powers have been extended beyond the ordinary bounds of the commerce clause.

---

18. *Id.* at 62.
19. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).
20. Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939).
21. State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936).
22. *Id.*
23. Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).
24. Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939).
25. Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1939).
26. 384 U.S. 35 (1966).
27. *Id.* at 42-3.

As noted by Mr. Justice Marshall in his dissent in *LaRue*,[28] the amendment by its terms speaks only to state control of the transportation and importation of alcohol. States may prohibit completely the manufacture of liquor within their borders and may prohibit or condition its importation *for delivery or use* therein. However, the Court, in the past, has refrained from extending the scope of the amendment beyond these terms to situations in which the liquor is not brought into the state for delivery or use therein. In *Collins v. Yosemite Park & Curry Co.*,[29] intoxicants were physically transported across California's territory to Yosemite National Park, jurisdiction over which had been ceded by California to the federal government. The Court held that "[t]here was no transportation into California for 'delivery or use therein'. . . . Where exclusive jurisdiction is in the United States . . . the [Twenty-first] Amendment is not applicable."[30]

After its decision in *Collins*, the Court on two occasions[31] upheld state regulations dealing with the transportation of intoxicating liquors *through* the states. However, the Court held that the twenty-first amendment did not govern in such a situation and based its decision on traditional commerce clause grounds, finding that the regulations were within the reasonable police power of the state and were reasonably necessary to protect the local public interest.

A recent case, discussed by the Court in *LaRue* as supportive of the broad sweep of the twenty-first amendment, is *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,[32] in which the Court found the twenty-first amendment inapplicable and constitutionally insufficient to grant New York the power to prohibit absolutely the passage of liquor through its territory. In *Hostetter*, the petitioner, a New York liquor dealer, sold tax-free liquor to passengers embarking for foreign destinations from John F. Kennedy International Airport. Having been informed by the New York State Liquor Authority that its business was illegal under New York's Alcoholic Beverage Control Law, petitioner sought injunctive relief to restrain the Authority from interfering with its business. The Court, in responding to the argument that the twenty-first amendment gives to the state complete and exclusive control over commerce in intoxicating liquors, stated that:

28. 93 S. Ct. at 405.

29. 304 U.S. 518 (1938) [hereinafter referred to as *Collins*].

30. *Id.* at 538. *Accord,* Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944).

31. Carter v. Virginia, 321 U.S. 131 (1944), held that regulations applicable to transportation through Virginia required that (1) the vehicle must use the most direct route and carry a bill of lading showing the route it will travel; (2) the carrier must post a bond in the penal sum of $1,000 conditioned on lawful transportation; and (3) the bill of lading must show the name of the true consignee. Mr. Justice Frankfurter concurred, noting that while the legislation could not survive under the commerce clause alone, state control over liquor had been extended by the twenty-first amendment. Duckworth v. Arkansas, 314 U.S. 390 (1941), upheld a statute making it unlawful for anyone to ship into the state any intoxicating liquor without first having obtained a permit from the state commissioner of revenue. Mr. Justice Jackson concluded that the regulations in question were not sustainable under the commerce clause alone.

32. 377 U.S. 324 (1964) [hereinafter referred to as *Hostetter*].

> To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. . . . Such a conclusion would be patently bizarre and is demonstrably incorrect. . . .
>
> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in the light of the other . . . .[33]

The distinction that was drawn limiting the state's power was based on the Court's finding that the ultimate delivery and use *were not in* New York, but, rather, in a foreign country. The first major limitation, then, on the twenty-first amendment's scope as a power source is the adherence to the language of the amendment itself, requiring transportation *into a state* for delivery or use therein.

Notwithstanding the fact that under the twenty-first amendment the states have the power to regulate traffic in alcoholic beverages largely unrestricted by the commerce clause, the Court has generally resisted attempts by the states to compel Congress to surrender the power reserved to it by the export-import clause.[34] In *Department of Revenue v. James B. Beam Distilling Co.*,[35] petitioner, an importer of scotch whisky from abroad, filed a claim for refund on a tax levied by Kentucky on imported liquor, which was clearly contrary to the provisions of the export-import clause. The Court, confronted again with conflicting provisions of the Constitution, noted that to sustain the tax would require a holding that the "Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned"[36] and that "[n]othing in the language of the Amendment nor in its history leads to such an extraordinary conclusion."[37] The Court seems to have distinguished the result in *Beam Distilling Co.* from those cases overriding the commerce clause on the basis that the export-import clause is "a constitutional provision which flatly prohibits any state from imposing a tax upon imports from abroad" as opposed to the commerce clause, which merely provides Congress with "generalized authority."[38]

The dichotomy presented here is one which appears to sanction the classification of the separate clauses of the Constitution according to a scale which rates as constitutionally inferior those which require judicial

33. *Id.* at 331-32.

34. U.S. CONST. art. I, § 10, provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws."

35. 377 U.S. 341 (1964) [hereinafter referred to as *Beam Distilling Co.*].

36. *Id.* at 345.

37. *Id.* at 345-46. *See* Ammex Warehouse Co. v. Department of Alcoholic Bev. Comm., 224 F. Supp. 546 (S.D. Cal. 1963), *aff'd per curiam*, 378 U.S. 124 (1964).

38. Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 344 (1964); *see generally* Note, *The Evolving Scope of State Power under the Twenty-first Amendment: The 1964 Liquor Cases*, 19 RUTGERS L. REV. 759, 775 (1965) [hereinafter cited as *Evolving Scope*].

interpretation. It has been observed that the equal protection, commerce, and due process clauses, under which state retaliatory and regulatory legislation have been challenged in the past are neither precise nor explicit.[39] Such a distinction is equally applicable to the first amendment, subordinated by the Court in the instant case.

Germane to this discussion is the question of whether the Court in refusing to apply the amendment to "through the state" liquor cases and to export-import cases was doing so on the basis of a redefinition of the terms "for delivery or use therein" or whether it was committing itself to limiting the scope of state power granted by the amendment to the extent that the result would be consistent with other constitutional guidelines. *LaRue* seems to indicate that the latter is not the approach adopted by the Court. While the cases indicating the prior approach are not legion, there seems to be a willingness on the part of the Court to subordinate not only first amendment freedoms, but also the due process and equal protection clauses to the power of the states to regulate the liquor industry in an arbitrary and often unreasonable manner.

The Court, speaking through Mr. Justice Brandeis in *Young's Market*[40] was apparently unconcerned with the legislation discriminating between domestic beer and beer imported from other states, when it noted:

> The claim that the 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.[41]

The inapplicability of the equal protection clause has subsequently been reaffirmed by the Court on numerous occasions.[42]

Such decisions might be indicative of a tendency on the part of the Court to permit the amendment to shift the supremacy of power were it not for the Court's expressed reticence to do so. The Court in *Young's Market*,[43] having held that the state power sanctioned by the twenty-first amendment was not subject to the constitutional limitations embodied in the commerce clause and the due process clause, refused to hold that the amendment had "freed the states from all restrictions upon the police power to be found in other provisions of the Constitution."[44] A further manifestation of the Court's intent not to eliminate completely such

39. *Evolving Scope*, *supra* note 38, at 775.

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

41. *Id.* at 64. *See* Skilton, *State Power under the Twenty-first Amendment*, 7 BROOKLYN L. REV. 342, 352-54 (1938).

42. *E.g.*, Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938). *But see* Clark Distilling Co. v. Western Md. R.R. Co., 242 U.S. 311 (1917), where the Court in upholding the constitutionality of the Webb-Kenyon Act remarked that the government can forbid the manufacture and sale of liquor and regulate its traffic without violating the due process clause.

43. 299 U.S. 59 (1936).

44. *Id.* at 64.

important constitutional restrictions on state power was evident in the case of *Wisconsin v. Constantineau.*[45] There, the Court invalidated a Wisconsin statute pursuant to which a notice was posted in all retail liquor outlets in the city of Hartford that sales or gifts of liquor to the petitioner were forbidden for one year. The rationale employed by the Court in finding the statute unconstitutional was that, although the powers of the states under the twenty-first amendment were extremely broad, the characterization given a person by "posting" constituted such a potential stigma that procedural due process required notice and an opportunity to be heard.

In another recent decision where a black guest in a private club was refused service of food and beverages because of his race, the Court held that he was entitled to a decree enjoining the enforcement of regulations promulgated by the Pennsylvania Liquor Control Board insofar as those regulations required compliance with the club's constitution and by-laws which contained racially discriminating provisions.[46] Given the frequent fluctuations in the Court's disposition regarding fundamental personal freedoms and the twenty-first amendment, it is not surprising that the majority in *LaRue*[47] cited *Wisconsin v. Constantineau* as supportive of the proposition that the prior decisions do not go so far as to hold that the twenty-first amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. The obvious question, considering the two decisions above, was posed by Mr. Justice Marshall in his dissenting opinion in *LaRue* when he pondered, "I am at a loss to understand why the Twenty-first Amendment should be thought to override the First Amendment but not the Fourteenth."[48]

Mr. Justice Marshall well describes the esteem and, perhaps, the reverence in which our first amendment values have been held:

> For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment.[49]

Mr. Justice Marshall's dissent presents a compelling argument that such a "broadscale attack on First Amendment freedoms" requires a reorder-

45. 400 U.S. 433 (1971). The Court declared the statute unconstitutional as constituting a denial of *procedural* due process. The Court has long refused to use substantive due process to strike down laws which were thought unreasonable, retaliatory or discriminatory. Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), *citing* Ferguson v. Skrupa, 372 U.S. 726 (1963). Although a dead issue for many years, substantive due process as a viable limitation has gained considerable life in the recent decision of Roe v. Wade, 93 S. Ct. 705 (1973), where the Court held a Texas abortion statute unconstitutional under fourteenth amendment substantive due process.

46. Moose Lodge No. 107 v. Irvis, 92 S. Ct. 1965 (1972).

47. 93 S. Ct. at 395.

48. *Id.* at 406.

49. *Id.*

ing of priorities. It is difficult to justify the Court's unwillingness to limit the state's power to control the sale of alcoholic beverages when refusal to do so required the subordination of these freedoms. In the past, the Court has subordinated the enormous powers granted the states by the twenty-first amendment to lesser federal enactments. Against the twenty-first amendment, the Court has upheld labelling provisions contained in the Federal Alcohol Administration Act,[50] prosecution based on the Sherman Anti-trust Act,[51] government order based on the Emergency Price Control Act of 1942, compelling numerous distilleries to convert their operations from the manufacture of alcoholic beverages,[52] and congressional power to design such powers of inspection under the liquor laws as it deems necessary.[53]

The ratification of the twenty-first amendment resulted in a remarkable enlargement of state power and a fundamental change in the constitutional relationship between the states and the federal government relating to the control of alcoholic beverages. The Court's decision in *California v. LaRue* is a far cry from that which upheld the validity of the Webb-Kenyon Act, upon which the twenty-first amendment was based:

> [T]he exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace.[54]

The Court, in subordinating the first amendment to the twenty-first amendment, has engaged in an unwarranted and unprecedented extension of the scope of the language of the twenty-first amendment to include all things remotely associated with "the transportation and importation" of intoxicating beverages. It has clearly manipulated the language of the amendment to endow the states with awesome powers.

The staggering ramifications for the twenty-first amendment, a seemingly innocuous measure designed to enable states to control traffic in liquor, long a subject of speculation,[55] as the Court has interpreted it, are only now becoming apparent. If the Court is not to be limited by the language of the amendment nor guided by its intended purpose, how far and in what direction will the Court extend the scope of the states' power unrestricted by the Constitution?

JEFFREY L. BERKOWITZ

50. William Jameson & Co., Inc. v. Morgenthau, 307 U.S. 171 (1939).
51. United States v. Frankfort Distilleries, 324 U.S. 293 (1945).
52. Dowling Bros. Distilling Co. v. United States, 153 F.2d 353 (6th Cir.), *cert. denied*, 228 U.S. 848 (1946).
53. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).
54. Clark Distilling Co. v. Western Md. R.R. Co., 242 U.S. 311, 332 (1917).
55. de Ganahl, *supra* note 15, at 901.