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Eighth Circuit Rejects State Action Taken Pursuant to Twenty-first Amendment [United States v. North Dakota, 856 F.2d 1107 (8th Cir. 1988)]

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EIGHTH CIRCUIT REJECTS STATE ACTION TAKEN PURSUANT TO TWENTY-FIRST AMENDMENT

[*United States v. North Dakota*, 856 F.2d 1107 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989)]

INTRODUCTION

In *United States v. North Dakota*,[1] the Eighth Circuit Court of Appeals struck down a North Dakota law that regulated the importation of liquor destined for military bases in order to control its unlawful diversion into the state's domestic commerce.[2] The court held that the twenty-first amendment provided no basis for such regulation.[3] Alternatively, the court found that even if the twenty-first amendment provided a basis, a balancing of state and federal interests would require that the state law be preempted by federal law.[4]

This Comment will analyze the *North Dakota* decision. The analysis will include an examination of the facts, issues and applicable law. However, the thrust of this Comment will focus on the weakness of the majority's analysis in striking down the state law. In short, the authors take three positions. First, the holding in *North Dakota* is wrong. Second, the analysis used to reach that holding is weak. Third, in the interest of federalism, we should expect a more clear and compelling analysis when a federal court strikes down state law.

This Comment will take the following organizational approach. First, a brief summary of the twenty-first amendment is provided. Second, the facts of the *North Dakota* case and the lower court holding are discussed. Third, the substantive portion of this Comment explores the three bases upon which the court rested its holding. Finally, the conclusion discusses the consequences of the *North Dakota* decision and emphasizes the need for greater caution when reaching such decisions.

I. BRIEF SUMMARY OF THE TWENTY-FIRST AMENDMENT

The Eighth Circuit held that the twenty-first amendment provided no basis for North Dakota's regulation that attempted to prevent diversion of out-of-state liquor destined for military bases in North Da-

1. 856 F.2d 1107 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

2. *Id.* at 1114 (striking down N.D. ADMIN. CODE § 84-02-01-05(7) (1987); *see infra* note 19).

3. *North Dakota*, 856 F.2d at 1112.

4. *Id.*

kota. In order to analyze the court's decision, a brief summary of the twenty-first amendment is helpful.

In 1919, passage of the eighteenth amendment prohibited the manufacture, sale or transportation of intoxicating liquors.[5] Fourteen years later, the eighteenth amendment was replaced by the twenty-first amendment, which sought only to regulate—instead of prohibit—the use of intoxicants.[6]

Section one of the twenty-first amendment formally repealed the eighteenth amendment.[7] Section two gave states the authority to control the flow of intoxicants in and out of its borders and at the same time avoid potential conflict with the commerce clause of the United States Constitution.[8] Section two provides: "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[9] Nothing in the section's language or legislative history indicates that this was to be a plenary grant of power to the states over all facets of the liquor business.[10] Indeed, an analysis of the amendment's history reveals that

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5. U.S. CONST. amend. XVIII:

> Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
>
> Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

This amendment took effect on January 29, 1920.

6. The twenty-first amendment took effect on December 5, 1933.

7. *See* U.S. CONST. amend. XXI, § 1. Section one provides that "[t]he eighteenth article of amendment to the Constitution of the United States is hereby repealed."

8. The commerce clause provides, in part, "The Congress shall have power . . . [to] regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes. . . ." U.S. CONST. art. I, § 8, cl. 3. *See generally* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) (commerce clause deprives the state of power to prevent alcohol transactions supervised by the Bureau of Customs); Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) (state tax on liquor imported from Scotland violates the Export-Import clause of the Constitution).

9. U.S. CONST. amend. XXI, § 2.

10. There is nothing substantive in the legislative history of section two of the twenty-first amendment to indicate any intention of incorporating a grant of plenary power to the states through the twenty-first amendment. 76 CONG. REC. 4001–02, 4055, 4138–79, 4215 (1933).

its purpose was to protect dry states[11] from the influx of alcoholic beverages.[12]

In 1933, when Congress was debating the repeal of prohibition, opponents were concerned that individual states would be unable to remain dry.[13] This was a salient issue because many states had sanctioned "prohibition" before the eighteenth amendment was adopted.[14] These states wanted the opportunity to continue their "dry" policies if the eighteenth amendment was repealed. In response to this concern, section two of the twenty-first amendment was proposed. Senator Blaine, the amendment's sponsor, explained that section two would "assure the dry states against the importation of intoxicating liquors into those states."[15]

There is no mention in the Congressional Record that section two was proposed for any other purpose than to enable a state to remain dry if it chose to.[16] It should be noted, however, that in determining state powers under the twenty-first amendment, the United States Supreme Court has focused primarily on the language of the provision rather than the history behind it.[17] Consequently, it seems that the twenty-first amendment gives no more to the states than it *literally* promises—the control over "transportation or importation" of alcoholic beverages.[18] North Dakota enacted its regulatory scheme against this backdrop.

II. *UNITED STATES V. NORTH DAKOTA*

A. Facts

The state of North Dakota enacted regulations which required out-

11. "Dry states" refer to those states that completely prohibit the manufacture, sale, or use of intoxicating beverages except for medical purposes.

12. *See* Comment, *Preempting State Action Taken Pursuant To The Twenty-First Amendment*, 53 TEMP. L.Q. 590, 601 (1980) ("sole purpose [of Section 2] was protection of dry states") [hereinafter *Preempting State Action*]; Comment, *State Power To Regulate Liquor: Section Two Of The Twenty-First Amendment, Reconsidered*, 24 SYRACUSE L. REV. 1131, 1133 (1973) (Section 2 enacted to enable states to remain dry) [hereinafter *Reconsidered*]; Note, *Retail Price Maintenance For Liquor: Does The Twenty-First Amendment Preclude A Free Trade Market?* 5 HASTINGS CONST. L.Q. 507, 511 (1978) (Section 2 enacted to establish dry states' authority to bar importation of intoxicants); Note, *The Twenty-First Amendment Versus The Interstate Commerce Clause*, 55 YALE L. J. 815, 818 (1946) (protection against importation of liquor).

13. 76 CONG. REC. 4170–71 (1933) (remarks by Sen. Borah).

14. Before the eighteenth amendment was adopted, 33 states had imposed some form of prohibition. *Id.* at 4172 (remarks by Sen. Borah).

15. *Id.* at 4141 (remark by Sen. Blaine).

16. *Preempting State Action*, *supra* note 12, at 602.

17. *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc., 445 U.S. 937, 944 (1980).

18. *Reconsidered*, *supra* note 12, at 1134 (in the final draft of the amendment Congress deleted references to a right to regulate on-premises beverage consumption).

of-state suppliers of liquor to affix a label to each bottle of liquor destined for military installations in North Dakota. The label had to indicate that the liquor was exclusively for consumption within a federal military enclave.[19] The United States sued the state of North Dakota seeking a declaration that the regulations were unconstitutional and an injunction against their enforcement.[20]

The military installations in North Dakota are not exclusive jurisdiction enclaves.[21] Rather, North Dakota shares jurisdiction with the federal government. The federal government controls the clubs and package goods stores located on the military installations in North Dakota. These stores are known as non-appropriated fund instrumentalities (NFI).[22] These instrumentalities purchase alcoholic beverages for resale to active and retired military personnel and their families.[23] The purpose of the NFI is to generate profits to support military recreational activities.[24]

The United States argued that the North Dakota liquor regulation effectively increased the price of out-state liquor, and therefore conflicted with a federal regulation that required the military to procure liquor under the most advantageous contract.[25] This conflict, the

19. N.D. ADMIN. CODE § 84-02-01-05(1)(1987) provides:

> All persons sending or bringing liquor into North Dakota shall file a North Dakota Schedule A Report of all shipments and returns for each calendar month with the state treasurer. The report must be postmarked on or before the fifteenth day of the following month.

N.D. ADMIN. CODE § 84-02-01-05(7)(1987) provides:

> All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in a form and manner described and approved by the state treasurer.

20. United States v. North Dakota, 856 F.2d 1107, 1108 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

21. *See infra* note 36 and accompanying text. The parties stipulated that the bases were not under exclusive federal jurisdiction. *North Dakota*, 856 F.2d at 1110.

22. "A nonappropriated fund instrumentality is not supported by direct government funding. NFI's are expected to support military recreational activities through the generation of profits by virtue of the sale of alcoholic beverages or otherwise." United States v. North Dakota, 675 F. Supp. 555, 556 n.1, *rev'd*, *North Dakota*, 856 F.2d 1107 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

23. *Id.* at 556.

24. *North Dakota*, 856 F.2d at 1108.

25. *Id.* The purchase of alcoholic beverages by the military is controlled by the Department of Defense's "Armed Services Military Club and Package Store Regulation," DoD 1015.3R (codified at 32 C.F.R. § 261.4 (1988)), which provides as follows:

> C. COOPERATION. The Department of Defense shall cooperate with local, state, and federal officials to the degree that their duties relate to the provisions of this chapter. However, the purchase of all alcoholic beverages

United States argued, required the preemption of the state regulation by the supremacy clause of the United States Constitution.[26] North Dakota responded that "the twenty-first amendment, which forbids the importation of alcohol into a state in violation of the laws of that state, [gave] it the power to regulate the importation of liquor destined for military bases in order to control its unlawful diversion into the state's domestic commerce."[27]

B. Lower Court Holding

The case was presented to the district court on cross motions for summary judgment.[28] In holding the North Dakota regulation valid, the district judge reasoned that, "although the [North Dakota] regulations may have indirectly caused an increase in the military's liquor costs, they did not conflict with the regulations requiring the most advantageous contract. Rather, they merely made the most advantageous contract more expensive."[29] The district court went on to state that, "assuming a conflict between the state and federal interests, the State would prevail," as its interests outweighed the federal interests.[30] The district court granted North Dakota's motion for summary judgment, and denied the summary judgment motion of the United States. The United States appealed to the Eighth Circuit.[31]

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for resale at any camp, post, station, base, or other DoD installation within the United States shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors. These other factors shall not be construed as meaning any submission to state control, nor shall cooperation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state.

32 C.F.R. § 261.4 (1988).

The other federal law at issue was 10 U.S.C § 2488 (Supp. 1988) which basically incorporates 32 C.F.R. § 261.4 (1988). Section 2488 provides, in pertinent part, as follows:

(a) The Secretary of Defense shall provide that

(1) Covered alcoholic beverage purchases made for resale on a military installation located in the United States shall be made from the most competitive source, price and other factors considered. . . .

10 U.S.C. § 2488(a)(1) (Supp. 1988).

26. *North Dakota*, 856 F.2d at 1108.

27. *Id.*

28. *Id.*

29. *Id.* at 1109.

30. *Id.*

31. *Id.*

III. Eighth Circuit's Analysis

A. Mississippi Tax Cases

In reversing the lower court, the Eighth Circuit initially focused on two Supreme Court decisions arising from *United States v. Tax Commission of Mississippi*.[32] The first of these decisions was announced in 1973 (*Tax I*), the second, in 1975 (*Tax II*). These cases are briefly described in this section. However, the primary purpose of this section is to provide a twofold criticism of the Eighth Circuit's use of *Tax I* and *Tax II*. First, the Eighth Circuit's interpretation of these cases will be examined. Second, the appropriateness of using *Tax I* and *Tax II* as precedent for striking down a state liquor regulation will be addressed.

In *North Dakota* the majority held that state regulation of the means by which Congress seeks to procure liquor for military enclaves is prohibited.[33] Despite the state's concurrent jurisdiction over the bases and its power under the twenty-first amendment,[34] the majority inclined to this view, in part, because it believed that *Tax I* and *Tax II* mandated such a conclusion.[35]

The primary issue in *Tax I* and *Tax II* was whether Mississippi could require out-of-state liquor distillers and suppliers to collect and remit to the state a tax on liquor sold to concurrent or exclusive jurisdiction military bases.[36] By contrast, the proper issue in *North Dakota* was whether the state could exercise its twenty-first amendment or police power to prevent liquor destined for concurrent jurisdiction enclaves from entering domestic commerce.[37] Despite the

32. United States v. Tax Comm'n of Miss., 412 U.S. 363 (1973) [hereinafter *Tax I*]; United States v. Tax Comm'n of Miss., 421 U.S. 599 (1975) [hereinafter *Tax II*].

33. *North Dakota*, 856 F.2d at 1112.

34. *Id.*

35. *Id.*

36. *Tax II*, 421 U.S. at 604; *Tax I*, 412 U.S. at 364. It is important to understand, for the purposes of this Comment, the distinction between a military base existing under exclusive jurisdiction and one existing under concurrent jurisdiction. An exclusive jurisdiction enclave receives power to exist as such an entity from the Constitution. Article I, section eight, clause 17, empowers Congress to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." The federal government may assert concurrent jurisdiction over military instrumentality by virtue of the United States Constitution Article I, section eight, clauses 12–14 and 18 which vest authority in Congress to maintain the federal military services and to make necessary and proper laws for the government and regulation.

37. The majority has framed the issue as being whether state power extends so far as to enable the state to regulate instrumentalities of the United States over which the state exercises concurrent jurisdiction. *North Dakota*, 856 F.2d at 1109. The authors disagree. The issue presented in *North Dakota* need not be framed in such broad terms as "regulate instrumentalities." Rather, a specific statement of what ac-

distinct issues presented in the Mississippi tax cases and *North Dakota*, the Eighth Circuit has effectively meshed these distinctions and rendered North Dakota powerless to prevent the flow of military liquor into its domestic commerce.

1. Tax I

In *Tax I*, the Court held that the twenty-first amendment did not authorize Mississippi to tax the importation of alcoholic beverages into exclusive jurisdiction bases, regardless of whether some of the liquor might have been consumed off the base.[38] Despite the fact that *Tax I* dealt with a state's inability to tax the federal government,[39] *Tax I* provided some of the direction necessary to properly reconcile the issue presented in *North Dakota*.

In *Tax I*, the Mississippi Tax Commission was attempting to regulate the transaction between out-of-state suppliers and the *exclusive* jurisdiction bases by means of a tax. The Court reasoned, *inter alia*, that this regulating was occurring on the exclusive jurisdiction base. Thus, the state clearly had no authority under the twenty-first amendment to regulate liquor procurement. However, recognizing that the state was not powerless in this area, the Court added:

> This is not to suggest that the State is without authority either to regulate liquor shipments destined for the bases while such shipments are passing through Mississippi or to regulate the transportation of liquor off the bases and into Mississippi for consumption there. Thus, while it may be true that the mere "shipment [of liquor] through a state is not transportation or importation into the state within the meaning of the [Twenty-First] Amendment," . . . a State may, in the absence of conflicting federal regulation, properly exercise its police powers to regulate and control such shipments during their passage through its territory insofar as necessary to prevent the "unlawful diversion" of liquor "into the internal commerce of the State. . . ."[40]

The Court also addressed this point in an earlier footnote when it stated that "[t]he State's power to regulate transportation of alcoholic beverages through its territory to the bases or from the bases back into its jurisdiction is, however, a different question. . . ."[41]

These statements in *Tax I*, which were ignored by the majority in

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tually occurred is more appropriate, i.e., a state attempting to prevent liquor destined for military enclaves from entering domestic commerce. Of course, if the North Dakota regulation amounted to a tax on a federal enclave, the regulation would be preempted as the federal government enjoys freedom from taxation by a state pursuant to the supremacy clause.

38. *Tax I*, 412 U.S. at 368.

39. *North Dakota*, of course, had nothing to do with the taxing power of a state.

40. *Tax I*, 412 U.S. at 377 (citations omitted).

41. *Id.* at 371 n.13 (citations omitted).

North Dakota, assist in the resolution of the issue presented in *North Dakota*. In *North Dakota*, the issue was not, as the majority broadly suggested, "whether State power extends so far as to enable [North Dakota] to regulate instrumentalities of the United States over which the State exercises concurrent jurisdiction."[42] More precisely, the issue was whether a state may regulate the transportation of liquor destined for United States military enclaves in order to keep it out of the state's domestic commerce. As pointed out in the *North Dakota* dissent, the Supreme Court has observed that the twenty-first amendment empowers states to prohibit the diversion of liquor being imported to federal enclaves located within their boundaries.[43]

There was no evidence that North Dakota was attempting to do anything but control the diversion of the military's liquor into the state's domestic commerce. Clearly, the regulatory scheme was not a tax.[44] The only valid allegation was that North Dakota's regulation conflicted with the federal regulation that required the United States to purchase alcoholic beverages at the "lowest cost." However, as the district court explained: " 'Lowest cost' is a relative term. The state's regulation may have indirectly caused the price of out-of-state supplies to increase, but [the regulations] do not prevent the federal government from obtaining those beverages at the 'lowest cost.' The 'lowest cost' has merely increased."[45]

2. *Tax II*

The issue of whether Mississippi could tax liquor destined for concurrent jurisdiction bases was remanded in *Tax I* in light of the argument that the national government enjoys absolute immunity from

42. *North Dakota*, 856 F.2d at 1109.

43. *Id.* at 1115 (Lay, C.J., dissenting). The dissent's conclusion that this power comes from the twenty-first amendment is inconsistent with the passage cited which indicates that such authority comes from the police power. The majority in *North Dakota* did not address the issue of whether the labeling regulations were a proper exercise of the state's police power. This omission is puzzling in light of the Supreme Court's statement in *Tax I* that a state may "exercise its police powers to regulate and control . . . shipments [of liquor] . . . insofar as necessary to prevent the 'unlawful diversion' of liquor 'into the internal commerce of the State.' " *Tax I*, 412 U.S. at 377. Indeed, North Dakota's regulations would appear to be specifically directed at preventing such unlawful diversion, and this would qualify as a valid exercise of the state's police power. *See also infra* notes 114–15 and accompanying text.

44. *See* United States v. North Dakota, 675 F. Supp. 555, 556 n.2 (D.N.D. 1987), *rev'd*, 856 F.2d 1107 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989). "The State asserts that the labels are not tax stamps, and do not constitute an attempt to tax the shipments." *Id.* Compare this notion to the issues in *Tax I* and *Tax II* wherein it was held that a state could not tax the federal government by way of a Liquor Regulatory Scheme.

45. *Id.* at 557. *See also infra* notes 88–91 and accompanying text.

state taxation by virtue of the supremacy clause.[46] This issue was raised on appeal to the Supreme Court in *Tax II*.

The *North Dakota* majority's use of *Tax II* further illustrates the court's misunderstanding of the issue presented in those cases. The majority's decision rests, in part, on both an over-broad interpretation of a factually distinguishable case and a passage that, if taken out of context, inevitably leads to the wrong conclusion.

Again, the issue in *Tax II* was whether Mississippi Regulation 25,[47] which required out-of-state liquor distillers and suppliers to collect a tax from military installations, imposed an unconstitutional state tax upon federal instrumentalities. The Court held that Regulation 25 directly conflicted with provisions of the Federal Buck Act,[48] and therefore, under the supremacy clause, had to be struck down.[49] By contrast, the regulation at issue in *North Dakota* presented no such "taxing" conflict.

Before striking down Regulation 25, the *Tax II* Court grappled with whether the twenty-first amendment provided any protection for Regulation 25. The Court stated:

> Nor does the Twenty-first Amendment require a different result. When the case was last here [*Tax I*] we held that "the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction [pursuant to Art. I, § 8, cl. 17, of the Constitution]."

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46. *Tax I*, 412 U.S. 363, 380 (1973).

47. In 1966, Mississippi enacted the Local Option Alcoholic Beverage Control Law. MISS. CODE ANN. §§ 67-1-1 *et seq.* (1972 & Supp. 1988). Regulation 25 was promulgated by the Commission pursuant to the authority granted by the Local Option Alcoholic Beverage Control Law. Regulation 25 provides:

> Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission. All orders of such organization shall bear the usual wholesale markup in price, but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall, in turn, remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous months.

Tax II, 421 U.S. 599, 600-01 n.1 (1975).

48. The Buck Act of 1940 is now codified at 4 U.S.C. §§ 105-10 (1982). Section 105(a) provides that no person may be relieved of any sales or use tax levied by a state on the ground that the sale or use occurred in whole or in part within a federal area. 4 U.S.C. § 105(a) (1982). Section 107(a) provides that section 105(a) "shall not be deemed to authorize the levy or collection of any [state] tax on or from the United States or any instrumentality thereof. . . ." 4 U.S.C. § 107(a) (1982).

49. *Tax II*, 421 U.S. at 613.

> We reach the same conclusion as to the concurrent jurisdiction bases to which Art. I, § 8, cl. 17, does not apply: "Nothing in the language of the [Twenty-first] Amendment nor in its history leads to [the] extraordinary conclusion" that the Amendment abolished federal immunity with respect to taxes on sales of liquor to the military on bases where the United States and Mississippi exercise concurrent jurisdiction.[50]

This passage cannot be properly interpreted without considering the context in which it was used. The reference to "licensing, taxation, or otherwise" was based on the Court's interpretation of the holding in *Collins v. Yosemite Park & Curry Co.*[51] In *Collins*, California had ceded exclusive jurisdiction to the United States over Yosemite Park, but expressly reserved its taxing power. Nevertheless, California attempted to enforce a regulation which, in effect, would prevent the transportation of liquor into the federal enclave absent certain licensing requirements.[52] The court held that the California regulation was an attempt to legislate over an exclusive United States territory. The twenty-first amendment provided no authority for this regulation as it was found to be inapplicable in this instance.[53] Clearly, this is distinguishable from *North Dakota*.

The majority in *North Dakota* viewed *Tax II* as authority for the proposition that under the twenty-first amendment, a state may not regulate, in any manner, the importation of liquor into territories over which the United States exercises exclusive *or* concurrent jurisdiction.[54] This is an over-broad interpretation of *Tax II* and *Collins*.

In any event, this limitation cannot prevent a state from regulating the transportation of liquor through its territory to prevent the unlawful diversion of liquor into the state's domestic commerce. For instance, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,[55] an injunction

50. *Id.* at 613–14 (citations omitted). The majority in *North Dakota* places great emphasis on this passage. *See* United States v. North Dakota, 856 F.2d 1107, 1110–11 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

51. 304 U.S. 518, 538 (1938).

52. *Id.* Under the California Act ceding exclusive jurisdiction over territory in Yosemite National Park to the federal government, the state reserved the right to tax. The California Alcoholic Beverage Control Act required licenses for importation or sale of liquor and imposed excise tax on liquor sold by the importer and excise tax on liquor sold by rectifier or wholesaler. The payment was to be evidenced by stamps issued to licensees and others, and was enforceable as respects taxes, against the corporation selling liquor imported into the Park. However, the provisions of the California Alcoholic Beverage Control Act requiring licenses for importation or sale of liquor, with certain regulatory conditions to be satisfied before the grant of licenses, were unenforceable in the Park as the failure to grant the license would have completely precluded importation of liquor. *Id.* at 536–38. This, of course, is repugnant to the commerce clause.

53. *Id.* at 538.

54. *See North Dakota*, 856 F.2d at 1110–11.

55. 377 U.S. 324 (1964).

was upheld against New York which prevented it from interfering with Idlewild's business of selling tax free bottled wine and liquor to departing international airline travelers. The Court stated:

> We may assume that if in *Collins* California had sought to regulate or control the transportation of the liquor there involved from the time of its entry into the State until its delivery at the national park, in the interest of preventing unlawful diversion into her territory, California would have been constitutionally permitted to do so.[56]

Therefore, when the Court in *Tax II* "reach[ed] the same conclusion as to the concurrent jurisdiction bases,"[57] it must have been referring only to *taxes* on liquor. Further, the Court in *Tax II* stated that nothing in the twenty-first amendment or its history "abolished federal immunity with respect to *taxes* on sales of liquor. . . ."[58] Hence, an exercise in semantics, as the majority in *North Dakota* refers to it, is unnecessary if the language on which the court partially rests its decision is read in the context in which it was intended.

3. Alternatives

The majority's reliance on the Mississippi tax cases is misplaced. If, as this Comment suggests, the issue in *North Dakota* was whether a state may regulate liquor shipments through its territory, either under the twenty-first amendment or its police power, then *Tax I* and *Tax II* provide little guidance. Several other Supreme Court decisions more appropriately address the issue presented in *North Dakota*.

For instance, in *Carter v. Virginia*,[59] the Supreme Court recognized that "the several states in the absence of federal legislation may require regulatory licenses for through shipments of liquor in order to guard against violations of their own laws."[60] Further, in *Hostetter*,[61] the Supreme Court stated that under the twenty-first amendment "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."[62] Throughout these cases the message is clear: the importation or transportation of intoxicating liquor into a state for delivery or use therein, in violation of state law, is prohibited.

Therefore, it is inappropriate to suggest that *Tax I* and *Tax II* serve

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56. *Id.* at 333.
57. *Tax II*, 421 U.S. 599, 613 (1975).
58. *Id.* (emphasis added).
59. 321 U.S. 131 (1944).
60. *Id.* at 135. *See also* Duckworth v. Arkansas, 314 U.S. 390 (1941).
61. 377 U.S. 324 (1964).
62. *Id.* at 330. *See also* Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 346 (1964) (states are totally unconfined by commerce clause when they restrict importation of intoxicants).

as precedent for the court's conclusion.[63] *North Dakota* is not about the State's attempt to abolish federal immunity from taxes on sales of liquor to concurrent jurisdiction bases. North Dakota merely attempted to regulate the transportation of liquor destined for military bases so as to keep such liquor from reaching the state's domestic commerce. Such regulation is within a state's power, notwithstanding misplaced inclinations toward the meaning of *Tax I* and *Tax II*.

B. Supremacy Clause

The majority's puzzling reliance upon the Mississippi tax cases probably stems from a desire to follow Supreme Court precedent. In light of the general confusion surrounding preemption jurisprudence, this desire is understandable.[64] However, use of the Mississippi tax cases seems to have flawed the majority's analysis, while the very framework the court used to preempt North Dakota's regulations departs from traditional Supreme Court analysis.[65]

Apparently following the analytical framework adopted by the Fifth Circuit in a similar case, *United States v. Texas*,[66] the majority used a two-tiered approach to determine whether North Dakota's regulations should be preempted.[67] First, the court sought to deter-

63. United States v. North Dakota, 856 F.2d 1107, 1110 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

64. *See* Note, *A Framework For Preemption Analysis*, 88 YALE L.J. 363, 363 (1978) ("The decisions of the Supreme Court in cases involving preemption of state law by federal statutes have often produced considerable confusion and criticism.") (footnotes omitted); *see also* Hirsch, *Toward A New View Of Federal Preemption*, 1972 U. ILL. L. F. 515, 545–47 (1972) (Supreme Court holding in preemption case produced "bizarre" result "utterly at odds with Court's declaration of congressional purpose").

65. *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); *see also infra* notes 106–08 and accompanying text.

66. 695 F.2d 136 (5th Cir. 1983), *cert. denied*, 464 U.S. 933 (1983). In *Texas*, the Texas Alcoholic Beverage Code prohibited nonresident sellers from supplying liquor directly to the NFI within the state. The United States brought suit against the state of Texas seeking a declaratory judgment that the provision was preempted under the supremacy clause and therefore unconstitutional. The district court found that because state and federal regulations were not in conflict, the supremacy clause was not implicated. *See id.* at 138.

The Fifth Circuit reversed, finding a conflict, and further ruled that through the Code provision Texas acted beyond its regulatory powers. "Like the mark-up in *Tax Commission* [*Tax I*], there is no indication here that the Texas law under examination 'is an effort to deal with problems of diversion of liquor from out-of-state shipments destined for . . . the . . . bases.' " *Id.* at 141 (quoting *Tax I*, 412 U.S. 363, 378 (1973)).

While factually similar to *North Dakota*, *Texas* is distinguishable by virtue of the above quoted language. North Dakota's regulation was "exclusively intended to prohibit the diversion of . . . liquor into the state's domestic commerce." *North Dakota*, 856 F.2d at 1115 (Lay, C.J., dissenting). Thus, the *Texas* holding is inapposite, as North Dakota regulated within their power under the Mississippi tax cases. *See supra* notes 40–44 and accompanying text.

67. *See North Dakota*, 856 F.2d at 1112–13.

mine whether the twenty-first amendment empowers a state to regulate concurrent jurisdiction instrumentalities, i.e., whether the amendment extends jurisdiction to regulate alcohol procurement by the NFI.[68] If the state is found to have the authority to regulate, the second step under this analysis requires a balancing of state and federal interests to determine which will prevail.[69]

In examining the first question, whether the twenty-first amendment empowers a state to regulate concurrent jurisdiction enclaves, the majority searched for a dispositive rule from the Mississippi tax cases.[70] Because of the perceived ambiguity in *Tax II*,[71] the court was unable to resolve the jurisdictional question simply by applying these cases.[72] The majority then turned to an exploration of the policies underlying the supremacy clause, "since that is where the Supreme Court rested its decision" in *Tax II*.[73] Here the majority concluded that the supremacy clause precluded state regulation even of concurrent jurisdiction instrumentalities, and used the language and reasoning of *Tax II* to support this conclusion.[74]

The majority posited the need for uniformity as the underlying justification for the supremacy clause:

> Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a break down of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. *A corollary to this principle is that the activities of the Federal Government are free from regulation by any state.* No other adjustment of competing enactments or legal principles is possible.[75]

The majority used this broad "corollary principle" to support the

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68. *Id.* at 1109.

69. *See Texas*, 695 F.2d at 138; *see also North Dakota*, 856 F.2d at 1112–13. The court in *North Dakota* stated:

> The four primary considerations in weighing the state and federal interests are: (1) the pervasiveness of the federal regulatory scheme, (2) whether federal occupation of the field is necessitated by a need for national uniformity, (3) the danger of conflict between state courts and the administration of federal programs, and (4) whether the state regulation infringes upon individual constitutional guarantees.

Id. (citations omitted). The court determined that only the first three considerations were relevant in this case. *Id.* at 1113.

70. *See North Dakota*, 856 F.2d at 1110–11.

71. *Id.* at 1111. *See supra* notes 50–52 and accompanying text.

72. *North Dakota*, 856 F.2d at 1111.

73. *Id.*

74. *Id.* at 1112.

75. *Id.* at 1111 (quoting Mayo v. United States, 319 U.S. 441, 445 (1943) (citation and footnote omitted) (emphasis added)).

proposition that the twenty-first amendment provides no basis for regulating the military procurement of alcohol.[76] The court also pointed to this corollary principle in concluding that *Tax II* precludes any state regulation of concurrent jurisdiction NFI's. The court reasoned that, "it appears" that this corollary principle (that activities of the federal government are free from state regulation) is the underlying rationale of *Tax II*, and that this need for uniformity is as great, if not greater, with respect to state regulation as it is for taxation.[77] Therefore, both the supremacy clause and *Tax II* limit a state's twenty-first amendment power short of regulating the activities of the federal government.[78]

1. Criticisms

In narrowly defining a state's power under the twenty-first amendment so as to exclude the regulation of liquor procurement by an NFI, the majority employed a broad analysis which, it is charged, "eradicate[s] any real meaning to the core provisions of the twenty-first amendment."[79] Deceptive in its generality, the court's approach failed to fully address two arguments which suggest that North Dakota acted within its authority, under either the twenty-first amendment or its police power,[80] when it enacted the regulations. The court failed to address a recent pronouncement by the United States Supreme Court that a state's power to regulate the transportation or importation of liquor within its borders is "the central power reserved by § 2 of the Twenty-first Amendment. . . ."[81] Arguably, North Dakota's regulatory scheme—specifically enacted to "prevent diversion of out-of-state liquor destined for the military bases"[82]—fits within this central power.[83] A close reading of this recent Supreme Court case suggests that when a state regulates within its core power under the twenty-first amendment, the state interest may prevail in the face of federal regulation.[84] It should also be noted that even if the state regulations were not within the scope of the

76. *North Dakota*, 856 F.2d at 1111–12.
77. *Id.* at 1111.
78. *Id.* at 1112. The majority concluded that:
> [T]he twenty-first amendment provides no basis for regulating the means by which Congress has sought to order military liquor procurement and to provide for the welfare and morale activities of military personnel. Moreover, we incline to the view that *Tax Commission II* precludes state regulation notwithstanding the State's concurrent jurisdiction over the bases.

Id. (citations omitted).
79. *Id.* at 1115 (Lay, C.J., dissenting).
80. *See supra* note 43 and accompanying text.
81. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 715 (1984).
82. *North Dakota*, 856 F.2d at 1116 (Lay, C.J., dissenting).
83. *Id.*
84. *See infra* notes 109–13 and accompanying text.

state's broad twenty-first amendment power, they fit within it's police power.[85] In any event, before state and federal interests are balanced to determine whether preemption will occur, there must first be a finding that the state and federal law are in conflict.[86]

The most baffling aspect of the *North Dakota* majority's analysis is the court's treatment of the threshold issue in any preemption analysis, i.e., whether there is a conflict between state and federal law. Generally, the supremacy clause will preempt state law only when there is an actual conflict between federal and state law such that both cannot stand.[87] In *North Dakota*, however, the majority undertook a preemption analysis before determining whether a conflict existed. The court deferred the conflict determination until later, considering it as part of the balancing of interests.

The district court in *North Dakota*[88] observed that the first preemption consideration is whether the state regulations conflict with federal law.[89] The court noted that to find a conflict, the state regulation must constitute an obstacle to the accomplishment and execution of the full purposes of Congress.[90] Observing that state law must fall only if it irreconcilably conflicts with federal policy, the district court found that no conflict existed.[91]

Generally, in a preemption case, the existence of a conflict between state and federal law is considered a threshold question.[92] If a conflict is found, this triggers a full balancing analysis of the state and federal interests to determine whether the state law will be preempted.[93] In overturning the district court's finding of no conflict, the Eighth Circuit majority did not consider the conflict question as a threshold finding, but rather as part of the balancing analysis itself.[94] Aside from not using the proper analytical framework, the majority's deferral of the conflict determination diminished its significance and made federal preemption more likely.[95]

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85. *See supra* note 43 and accompanying text.

86. *See e.g.*, Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944) (where state regulation did not conflict with federal regulation, preemption analysis is curtailed); Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944) (preemption analysis ends when state regulation does not conflict with federal regulation).

87. *See* Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982).

88. United States v. North Dakota, 675 F. Supp. 555 (D.N.D. 1987), *rev'd*, 856 F.2d 1107 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

89. *Id.* at 557.

90. *Id.*

91. *Id.*

92. *See supra* note 86 and accompanying text.

93. *Id.*

94. United States v. North Dakota, 856 F.2d 1107, 1112–13 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

95. A party challenging state law on preemption grounds must first demonstrate a conflict with federal law as a threshold requirement in the usual case. *See supra* note

In addition to deferring the conflict question, the majority's interpretation of the federal interests at issue made preemption virtually inevitable. The majority, as had the district court, considered whether North Dakota's regulation stood "as an obstacle to the accomplishment and execution of the full objectives and purposes of Congress."[96] The majority found that North Dakota's regulations failed this test.[97] This conclusion is not surprising, however, in light of the broad policy objectives the majority attributed to Congress, particularly a desire for open competition between liquor distributors, which would maximize revenues for the military's recreational activities.[98]

To take the majority's analysis to its logical extreme, state regulation which has any impact, not only upon the "lowest cost" but upon the maximization of revenues for the military's recreational activities, will be preempted. The district court and the Eighth Circuit's dissenting opinion found the argument for such a broad area of protection unwarranted and "ridiculous."[99] Indeed, the absurdity of the position that the federal interest in the "lowest cost" is entitled to

86. When this requirement is deferred until later, and considered within the balancing process, as in *North Dakota*, the importance of establishing a conflict is diluted. Rather than an absolute precondition to going forward with the challenge, the establishment of a conflict in *North Dakota* was merely one factor within the court's balancing process.

96. *North Dakota*, 856 F.2d at 1112–13.

97. *Id.*

98. The court stated:

> Because Congress has mandated that the military procure liquor on a competitive basis in order to maximize profits for the support of welfare and morale activities, we find that the State's regulations are in conflict with federal policy. The State does not dispute the military's projection of an annual increase in its annual liquor bill of $200,000.00–$250,000.00. This increase results directly from the effect that the State's regulations have in making out-of-state distillers less competitive with local wholesalers. Although nothing in the record compels us to believe that the regulations are a pretext to require in-state purchases, the effect in large part is to require the military to make purchases within the State—purchases that would not otherwise be competitive with out-of-state sources. As we have seen, this result conflicts with Congress' desire for open competition designed to maximize revenues for welfare and morale activities.

Id. at 1113–14.

99. In his dissent, Chief Judge Lay explained:

> There is nothing in the history of the amendment which states that the military shall be exempt from the effects of all types of state regulation in its procurement of liquor. In fact, such a position would be ridiculous in light of the myriad of state regulations applied to distillers and suppliers of liquor. Compliance with regulations regarding the importation of raw materials, general operations of the distillery or brewery, treatment of employees, bottling, and shipping necessarily increase the cost of liquor. The congressional mandate to purchase liquor for military personnel at the "most competitive" terms nonetheless impliedly accepts the presence of these expenses as unavoidable factors that increase the lowest available prices.

Id. at 1116 (Lay, C.J., dissenting).

absolute protection from the effect of state regulation is suggested in a tongue-in-cheek footnote within the district court's opinion: "The 'lowest cost' might also be enhanced by eliminating minimum wage, worker's compensation and payroll withholding laws from application to breweries and distilleries; or by coercing distillers and suppliers, through threat of nuclear attack, to provide alcoholic beverages at little or no cost."[100]

Even if one accepts the broad objectives which the majority attributes to Congress in the area of liquor procurement, the court's willingness to find that North Dakota's regulations posed an obstacle to the accomplishment of Congress' objectives is unwarranted in light of the Supreme Court's treatment of conflict. Relying on Supreme Court precedent, the Fifth Circuit in *United States v. Texas*[101] observed that "[s]tate regulatory schemes that merely impose upon federal regulation or activity without vitiating its impact or intent, can be valid exercises of state authority."[102] Indeed, where a state's regulation of liquor importation was challenged as preempted by federal antitrust law, the Supreme Court ruled that preemption would occur only where the state regulation, on its face, irreconcilably conflicted with federal law.[103] Clearly, the *North Dakota* majority's conflict analysis departed from prior Supreme Court treatment of the issue.

In addition to departing from Supreme Court practice in the analysis of state and federal conflict, the majority also ignored the Supreme Court's definition of a state's power under the twenty-first amendment. Several Supreme Court decisions have addressed the extent of a state's power under the twenty-first amendment.[104]

The Supreme Court has defined a state's power under the amendment broadly, focusing on its specific language:

> In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it. In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and

100. United States v. North Dakota, 675 F. Supp. 555, 557 n.3 (D.N.D. 1987), *rev'd*, United States v. North Dakota, 856 F.2d 1107 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

101. 695 F.2d 136 (5th Cir. 1983), *cert. denied*, 464 U.S. 933 (1983). *See supra* note 66.

102. *Id.* at 138 n.6 (citing Hancock v. Train, 426 U.S. 167, 179–80 (1976); Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 270–71 (1943)).

103. Rice v. Norman Williams Co., 458 U.S. 654 (1982).

104. *See, e.g.*, Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).

transporting alcohol.[105]

As recently as 1984, in *Capital Cities Cable, Inc. v. Crisp*,[106] the Court implicitly recognized that a valid exercise of state power under the twenty-first amendment occurs where the state regulatory scheme directly engages the central powers reserved by the amendment[107]—that of exercising "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."[108]

Writing for the full Court in *Capital Cities*, Justice Brennan observed that "[t]he States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders."[109] In recognizing the states' broad power, however, the Court noted that when a state acts outside of the core section two power, a conflicting execise of federal authority may prevail.[110] Indeed, in ruling that federal interests preempted the state regulation in *Capital Cities*, the Court compared two earlier cases where federal law preempted state regulations that were not aimed at preventing the unlawful use of alcoholic beverages within the state.[111] In each of these cases, the state was not acting within its

105. *Midcal Aluminum*, 445 U.S. at 106–07 (citations and footnote omitted).

106. 467 U.S. 691 (1984).

107. In *Capital Cities*, the state of Oklahoma, in the interest of discouraging alcohol consumption, prohibited the broadcasting of advertisements for alcoholic beverages, including those for beer and wine. *Id.* at 715. When an association of cable television broadcasters challenged the regulations, the state argued that even if the ban was invalid under normal preemption analysis, the fact that the ban was adopted pursuant to the twenty-first amendment would rescue the state regulation from preemption. *Id.* at 711–12.

The Court distinguished the interests asserted by Oklahoma to justify the ban from those which directly engaged the central power of section two of the twenty-first amendment. Oklahoma's limited interests—outside the central power of the amendment, were outweighed by the significant interference with the federal objective of ensuring the widespread availability of diverse cable television services throughout the United States. *Id.* at 715–16.

108. *Midcal Aluminum*, 445 U.S. at 110.

109. *Capital Cities*, 467 U.S. at 712.

110. *Id.* at 713.

111. *Id.* at 713–14. The Court discussed Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 333–34 (1964) and *Midcal Aluminum*, 445 U.S. at 114. In *Hostetter*, a corporation sold bottled wines and liquor tax-free to departing international airline travelers at a New York airport for delivery to the travelers upon their arrival at foreign destinations. When the New York State Liquor Authority declared the practice illegal, the corporation brought suit, contending that the state regulation was preempted by federal law which allowed the practice.

The Supreme Court agreed that the state law was preempted as the state acted outside its twenty-first amendment power. "The State has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their diversion into the internal commerce of the State." *Hostetter*, 377 U.S. at 333. Rather, the Court stated, New York was merely attempting to prevent transactions

twenty-first amendment powers, and consequently, the state interest was viewed as insubstantial when measured against the conflicting federal interest.[112] Therefore, it is crucial to a preemption analysis involving a state's twenty-first amendment powers to determine whether the state regulations fit within the core powers of the amendment.

The Court's decision in *Capital Cities* suggests that when a state regulates the sale or use of liquor *within its borders* (presumably including its "transportation or importation" in the words of the amendment), the state is acting within the core of its twenty-first amendment jurisdiction.[113] No court has specifically held that regulations designed to prevent the unlawful diversion of alcohol into a state's domestic commerce are within the core powers of the twenty-first amendment. However, North Dakota's labeling regulations appear to fit within the language of the amendment, which prohibits the transportation or importation of liquor into any state in violation of that state's laws.

The Eighth Circuit's conclusion that federal interests preempted North Dakota's regulatory scheme appears to be based solely upon the court's conclusion that the twenty-first amendment provides no

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authorized under Congress' constitutional power "to regulate commerce with foreign nations. This New York cannot constitutionally do." *Id.* at 334.

In *Midcal Aluminum*, California's wine pricing scheme was found to constitute resale price maintenance in violation of the Sherman Antitrust Act. Under the scheme, no state-licensed wine merchant could sell wine to a retailer other than for a scheduled price. The Retailers Association contended that the scheme promoted the State's interests in temperance and in orderly market conditions, and that the twenty-first amendment provided California with the authority to protect these interests. In this situation, it was contended, the twenty-first amendment barred application of the Sherman Antitrust Act.

The Court recognized that a state's control over the transportation or importation of liquor under the amendment "logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." *Midcal Aluminum*, 445 U.S. at 107 (citation omitted). This regulatory power, however, is still subject to a balancing of state and federal interests. Because the state's interests were unsubstantiated, and thus of lesser stature than the federal interests behind the Sherman Act, the Court held that "the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine-pricing program." *Id.* at 114 (footnote omitted).

112. *See Capital Cities*, 467 U.S. at 713–14. In *Capital Cities*, the Court recognized the importance in a preemption analysis of the relationship between the state's interest and its powers under the twenty-first amendment.

> [T]he central question presented in those cases is essentially the same as the one before us here: whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.

Id. at 714.

113. *Id.* at 715–16.

basis for the state's regulation.[114] Thus, since North Dakota could not regulate the NFI procurement of liquor under the twenty-first amendment, the state was without *any* authority to regulate in the area, and, therefore, federal law preempted the regulations. While the soundness of the majority's conclusion that the amendment provides no authority in this area appears questionable,[115] it is clear that the twenty-first amendment is not the only basis for a state's authority to prevent the illegal diversion of liquor.[116]

Whether the authority to regulate arises under the twenty-first amendment or under the state's police power is of little importance; under either authority, the state's interest must be examined under a preemption analysis.[117] By failing to thoroughly analyze North Dakota's authority to regulate here, however, the majority upset the balance of comity between the state and federal systems.

C. Balancing Test

After analyzing the Mississippi cases and the supremacy clause and thereby holding that the twenty-first amendment provided no basis for North Dakota's regulation, the court made an alternative finding. The court stated: "Even assuming that the twenty-first amendment [applies], . . . we find that the balancing of state and federal interests would lead us to conclude that [North Dakota's] regulations are preempted by federal law."[118] According to the court, there were three primary considerations in weighing the respective interests:[119] "1) the pervasiveness of the federal regulatory scheme, 2) whether federal occupation of the field is necessitated by a need for national uniformity, [and] 3) the danger of conflict between state laws and the administration of federal programs. . . ."[120]

The court analyzed each of these factors. First, the court noted that "pervasiveness of the federal program, is essentially a vehicle for

114. *See* United States v. North Dakota, 856 F.2d 1107, 1112–13 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

115. *See supra* notes 104–13 and accompanying text.

116. *See supra* note 43. Although the language from *Tax I* appears to have been incorrectly interpreted by the dissenting opinion in *North Dakota* as granting the States the authority to prohibit the unlawful diversion of liquor within its borders under the twenty-first amendment, it clearly authorizes, under the police power, state regulation of liquor shipments within its borders to prevent the unlawful diversion.

117. *See, e.g.*, Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) (regulation adopted under state's twenty-first amendment power weighed against federal interest in preemption analysis); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939) (regulation by state under its police power weighed in preemption analysis).

118. *North Dakota*, 856 F.2d at 1112.

119. *Id.* at 1112–13.

120. *Id.* (quoting United States v. Texas, 695 F.2d 136, 138–39 (5th Cir. 1983), *cert. denied*, 464 U.S. 933 (1983)).

determining congressional intent to occupy the field."[121] The court found that the Department of Defense regulation expressed a desire to completely occupy the field because it specifically prohibited the military from submitting to local control over liquor procurement.[122] Second, the court felt that the need for uniformity also weighed in the United States' favor.[123] As the court put it: "Given the national scale and characteristics of the military, 'Congress might validly conclude that such uniformity is desirable.' "[124]

Finally, the court analyzed the danger of conflict between the state and the federal law.[125] The court thought this consideration was "perhaps the most decisive in the case."[126] The court explained that state law is preempted when it *actually* conflicts with federal law.[127] An actual conflict exists "when 'compliance with both federal and state regulations is a physical impossibility' "[128] or "when state law 'stands as an obstacle to the accomplishment and execution of the full objectives and purposes of Congress.' "[129] As mentioned earlier, the court viewed the state's regulation as failing at least the latter test.[130] In other words, Congress had required that the military purchase liquor in a competitive manner in order to maximize profits for the support of welfare and morale activities.[131] The state's regulation conflicted with this objective because the regulation increased the military's annual liquor bill.[132]

1. Criticisms

Ironically, the court's purported balancing of state and federal interests never addressed the state interest.[133] North Dakota's regulatory scheme was designed to prevent unlawful diversion of alcoholic beverages into North Dakota's domestic commerce. As the lower court explained, this is a *significant* state interest not of the same stat-

121. *North Dakota*, 856 F.2d at 1113 (citing Pennsylvania v. Nelson, 350 U.S. 497, 502–04 (1956)).
122. *North Dakota*, 856 F.2d at 1113.
123. *Id.*
124. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 73 (1941)).
125. *North Dakota*, 856 F.2d at 1113.
126. *Id.*
127. *Id.*
128. *Id.* (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).
129. *North Dakota*, 856 F.2d at 1113 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
130. *North Dakota*, 856 F.2d at 1113.
131. *Id.*
132. *Id.*
133. *See id.* at 1112–13. The court's balancing analysis takes up a full page, but never addresses the state's interest in preventing the unlawful diversion of alcohol into the domestic commerce.

ure as the asserted federal interest.[134] Nonetheless, the Eighth Circuit's balancing analysis is conspicuously devoid of any mention of the state's interest.

Moreover, when fully examined, the court's three-pronged analysis carries little weight. First, the court suggested that the Department of Defense regulation, by prohibiting submission to local control, expresses a desire to completely occupy the "alcohol procurement" field.[135] That conclusion completely ignores language from the very regulation whose preemptive force the court seeks to invoke. The defense regulation is entitled: "Cooperation."[136] Its first sentence reads: "[t]he Department of Defense shall cooperate with local, state, and federal officials to the degree that their duties relate to the provisions of this chapter."[137] In light of this language, it seems disingenuous to suggest that the defense regulation expresses any desire to completely occupy the field. Indeed, by its own title, the defense regulation recognizes the need for cooperation because of the inevitable interrelationships in this procurement field.

Moreover, the regulation prohibits local control over *procurement*. North Dakota's law was simply and solely an attempt to prevent unlawful diversion of liquor into the domestic commerce. The regulation did not prescribe or attempt to prescribe the price to be paid for the liquor, from whom it was to be purchased, or any other such control over actual procurement.

Second, the need for uniformity diminishes in the absence of a showing that federal law intended to completely occupy the alcohol procurement field. Again, the call for cooperation implies that national uniformity is not necessarily desired. The court's brief analysis on this point cites *Hines v. Davidowitz*[138] as authority for its argument in favor of uniformity.[139] However, *Hines* involved state infringement upon the Federal Alien Registration Act, a broad and comprehensive scheme for the immigration, naturalization and deportation of aliens.[140] Thus, in *Hines*, the regulated field was foreign affairs which gave compelling force to the argument in favor of national uniformity, and therefore preemption.[141] In contrast, the case's relevance and application to the facts in *North Dakota* are questionable.

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134. United States v. North Dakota, 675 F. Supp. 555, 559 (D.N.D. 1987), *rev'd*, 856 F.2d 1107 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

135. *North Dakota*, 856 F.2d at 1113.

136. *See* 32 C.F.R. § 261.4 (1988); *see also supra* note 25.

137. *Id.*

138. 312 U.S. 52 (1941).

139. *North Dakota*, 856 F.2d at 1113.

140. *See Hines*, 312 U.S. at 52–54.

141. *See infra* note 158 and accompanying text.

Finally, the court's analysis of the third consideration— danger of conflict between state law and federal law—is overreaching. There simply was no discernible conflict between the state law and the federal regulation or statute so as to require preemption. The controlling federal statute only required that the government purchase liquor for military bases "from the most competitive source, price and other factors considered."[142] On all such purchases the state's regulation required labels stating that the liquor was exclusively for consumption on the military base.[143] The majority conceded that this regulation was passed in good faith to prevent diversion of out-of-state liquor destined for military installations.[144] On the surface, no conflict is apparent.

However, even deeper scrutiny reveals weakness in the majority's finding of conflict. First, the majority's finding of conflict was fueled by the military's projection that its annual liquor bill would increase by $200,000.00.[145] The majority held that this increase[146] conflicted with the federal objective of purchasing liquor on a competitive basis in order to maximize profits for the support of recreational activities.[147] The majority did not explain, and it was not clear, how

142. *See* 10 U.S.C. § 2488(a)(1) (Supp. 1988).

143. *See* N.D. ADMIN. CODE § 84-02-01-05(7) (1987).

144. *See* United States v. North Dakota, 856 F.2d 1107, 1113 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989) ("nothing in the record compels us to believe that the regulations are a pretext to require in-state purchases. . . ."); *see also id.* at 1115 (Lay, C.J., dissenting) ("To urge federal preemption of this state regulation, which the majority concedes was passed in good faith to prevent diversion of out-of-state sales to military installations, . . . is to eradicate any real meaning to the core provisions of the twenty-first amendment.")

145. *Id.* at 1113.

146. *See id.* at 1113 n.9. The majority explains, in footnote nine, the lack of evidence regarding the monetary increase in the military's annual liquor bill:

> We are somewhat troubled by the lack of evidence in the record regarding how much of its distilled spirits the military will have to buy from sources in North Dakota. The affidavit of Mr. Hanson, the State Treasurer, states that some distillers did not object to the regulations and would continue to supply the military. The United States does not explain why it will have to purchase all of its liquor in-state, and thereby incur the $200,000.00–$250,000.00 figure, if these sources are still available. Nor can we tell what percentage of the military's suppliers have either increased their prices or refused to deal. However, the State makes no argument on this point, and seems to acquiesce in the assertions of the United States. Moreover, the loss of six suppliers will have a more significant financial impact in requiring the military to buy at least a substantial portion of its distilled spirits from within North Dakota, which it would otherwise have bought elsewhere.

Id.

Since the government was alleging conflict, then it should have had the burden of presenting more precise evidence regarding the price increase. It should not be the court's job to suggest what the financial impact will be. The lack of evidence should have weighed against preemption.

147. *Id.* at 1113–14.

the price increase would affect the military's profits from the sale of liquor in the NFI. It is more likely that the increased cost of purchasing the liquor would be passed along to the military consumer the same way most price increases are passed along in a free market.[148] Presumably this would be the effect of any situation where distillers or suppliers raised their prices. There has been no contention that military consumers should be immune from price increases at the NFI. Hence, the state scheme does not *actually* conflict with the federal directive aimed at maximizing profits. The finding of conflict is further unwarranted in light of the speculative and incomplete evidence regarding price increase.[149] This admittedly troubled the majority, but did not prevent it from striking down the state regulations.[150]

Second, in finding conflict, and ultimately preemption, the court ignored language from prior United State Supreme Court precedent. In considering the validity of state laws in light of federal law touching the same subject, the Court has used expressions like "conflicting," "occupying the field," "repugnance," "irreconcilability," "inconsistency," "violation," "curtailment" and "interference."[151] These adjectives do not describe the relationship between state and federal law in *North Dakota*. Also, if the field Congress is said to have preempted has traditionally been occupied by the states (as is the case here),[152] the assumption is that the state power is not to be superceded by federal law unless that was the clear and manifest purpose of Congress.[153] Notwithstanding the majority's strained conclusion, no such purpose, express or implied, was evident in *North Dakota*.

Finally, the cases cited by the *North Dakota* majority, in its analysis of conflict, are of questionable application. In stating that the state law is nullified when it "stands as an obstacle to the accomplishment and execution of the full objectives and purposes of Congress,"[154] the court cites *Hines*[155] and *Hillsborough County v. Automated Medical Laboratories, Inc.*[156] However, in the factually dissimilar *Hillsborough*,

148. *See* United States v. North Dakota, 675 F. Supp. 555, 559 (D.N.D. 1987), *rev'd*, 856 F.2d 1107 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

149. *North Dakota*, 856 F.2d at 1109. *See also supra* note 146.

150. *Id.*

151. *See* Pennsylvania v. Nelson, 350 U.S. 497, 502 (1956) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

152. *See Reconsidered, supra* note 12, at 1134 ("States historically had possessed a broad right to regulate the liquor trade within their borders. . . .").

153. *See* Hillsborough County v. Automated Med. Laboratories, Inc., 471 U.S. 707, 715 (1985) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1979)).

154. *North Dakota*, 856 F.2d at 1113.

155. 312 U.S. 52 (1941).

156. 471 U.S. 707 (1985).

state law was held not preempted by federal law.[157] And as explained earlier, *Hines* involved state interference of Congressional action in a field that affected international relations. In fact, in the sentence immediately following the sentence cited by the *North Dakota* majority, the *Hines* court explained: "And in [this preemption] determination it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority."[158] Hence, the *North Dakota* majority's analysis of the third consideration—danger of conflict—is not strengthened by the citation of these two inapposite cases.

In sum, the majority's purported balancing analysis falls well short of justifying the holding of preemption. First, the state interest wasn't even addressed. Second, the court's analysis of each factor was not sufficiently persuasive when one considers the issue at stake. Indeed, as the majority explained: "[w]hile this is a case in which the parties may appear simply to bicker over liquor stickers, it implicates important constitutional considerations."[159] Apparently, important constitutional considerations of state sovereignty and federalism were not what the majority was referring to.

CONCLUSION

The *North Dakota* decision is troubling in two respects. First, guidance and predictability are necessarily desired by-products of judicial decisions. The *North Dakota* decision did not produce either one. In fact, it erased the guidance produced from cases before *North Dakota*. Prior case law represented that the states could institute measures to prevent the unlawful diversion of out-of-state alcohol into their domestic commerce. Accordingly, North Dakota enacted a regulatory scheme that sought to accomplish that purpose, only to have

157. In *Hillsborough*, Hillsborough County had adopted ordinances and promulgated implementing regulations governing blood plasma centers within the county. The Food and Drug Administration (FDA) had promulgated federal regulations establishing minimum standards for the collection of blood plasma. Appellee operator of a blood plasma center located in appellant county filed suit in Federal District Court, challenging the constitutionality of the ordinances and implementing regulations on the ground, *inter alia*, that they violated the Supremacy Clause. The District Court upheld the county's ordinances and regulations. The Eleventh Circuit Court of Appeals reversed, holding that the FDA's regulations preempted all provisions of the county's ordinances and implementing regulations. The United States Supreme Court reversed, holding that the county's regulations were not preempted by the federal regulations. *Id.* at 716.

158. *Hines*, 312 U.S. at 67–68.

159. United States v. North Dakota, 856 F.2d 1107, 1108 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 1567 (1989).

the sweeping hand of the federal government wipe it out. North Dakota is now left in a quandary as to what valid measures it can take to satisfy what the District Court viewed as a *significant* state interest.[160]

Second, *North Dakota* represents a defeat for federalism. The *North Dakota* majority ignored state sovereignty and unhesitantly struck down a state law. The analysis provided was no stronger than the sum of its three parts and thus fell well short of what should be expected when state law is struck down. Regardless of ones feelings about the factual significance of *North Dakota*, our system of federalism can survive and be trusted only when the reasons for ignoring state sovereignty are cogently explained.

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160. *See supra* note 134.