

# The Burger Court Opinion Writing Database

*California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*  
445 U.S. 97 (1980)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

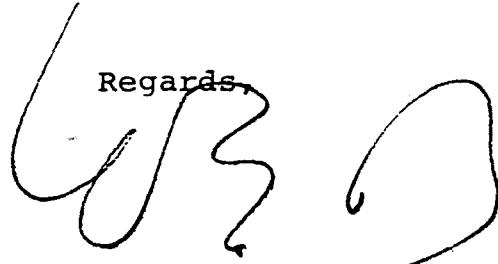
February 28, 1980

Re: 79-97 - Calif. Retail Liquor Dealers Assn. v.  
Midcal Aluminum, Inc.

Dear Lewis:

I join.

Regards,

A handwritten signature in black ink, appearing to read "J. Powell".

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

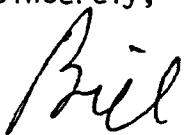
February 19, 1980

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

Dear Lewis:

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

Sincerely,



Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 20, 1980

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

Dear Lewis,

I am glad to join your opinion for  
the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 20, 1980

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

Dear Lewis,

I agree with your recommendation that counsel  
be advised that the Court is not disposed to make a  
change in its opinion.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 23, 1980

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

Dear Lewis,

Please join me.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

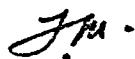
February 21, 1980

Re: No. 79-97 - Calif. Retail Liquor Dealers  
Asso. v. Midcal Aluminum

Dear Lewis:

Please join me.

Sincerely,



T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 19, 1980

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

Dear Lewis:

Please join me.

Sincerely,

*Harry*

Mr. Justice Powell  
cc: The Conference

4  
7  
12  
13

2-14-80

To:  Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: FEB 15 1980

1st DRAFT

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner,  
*v.*  
 Mideal Aluminum, Inc., et al. On Writ of Certiorari to the  
 Court of Appeal of California for the Third Appellate  
 District.

[February —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Mideal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker v. Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

### I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file with the State fair trade contracts or price schedules.<sup>1</sup> If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that

<sup>1</sup> The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers." Cal. Bus. & Prof. Code § 24866 (West 1964).

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

7  
 2-25-80

Stylistic Changes Throughout From: Mr. Justice Powell

Circulated: \_\_\_\_\_

Recirculated: FEB 25 1980

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner, v. Midcal Aluminum, Inc., et al. On Writ of Certiorari to the Court of Appeal of California for the Third Appellate District,

[February —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker v. Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

### I

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"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers." Cal. Bus. & Prof. Code § 24866 (West 1964).

Stylistic Changes 19

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

2-29-80

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

FEB 20 1980

3rd DRAFT

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

No. 79-97

California Retail Liquor Dealers Association, Petitioner, v. Midcal Aluminum, Inc., et al. } On Writ of Certiorari to the Court of Appeal of California for the Third Appellate District.

[March —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker v. Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

### I.

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file with the State fair trade contracts or price schedules.<sup>1</sup> If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 20, 1980

79-97 California Retail Liquor Dealers v. Midcal

MEMORANDUM TO THE CONFERENCE:

Counsel for the respondent in the above case, by letter of March 10, requests that we make a change in our opinion. Counsel for petitioner, in a letter dated March 17, opposes the request. I enclose copies of both letters.

Respondent invites our attention to the following sentence at page 12 of the slip opinion:

"The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." (Emphasis added.)

The critical language in the 21st Amendment uses the terms "transportation and importation" of liquor. These terms reflect an intent that the states control the methods of distributing liquor through mechanisms such as laws limiting Sunday sales, sales of liquor by the drink, licensing of liquor dealers, or the sale of liquor by the state (as in Virginia). Such regulations well may be insulated from the Sherman Act by Parker v. Brown immunity, but they also fall within the protections of the 21st Amendment. There may be a better way to make clear that the states have this sort of authority, although none has occurred to me. Moreover, I have thought that our opinion in this case was perhaps a narrower reading of the 21st Amendment than our decision in California v. LaRue.

In sum, I am not disposed to recommend that we make a change.

If there are no contrary views, I will ask Mike Rodak to advise counsel that the Court is not disposed to make a change in our opinion.

*L. F. P.*  
L.F.P., Jr.

ss

ERIC SUTCLIFFE  
 WALTER G. OLSON  
 WILLIAM D. MCKEE  
 SIDNEY E. ROBERTS  
 JAMES H. BENNEY  
 C. RICHARD WALKER  
 JAMES F. CRAFTS, JR.  
 JAMES K. HAYNES  
 RICHARD C. SALLADIN  
 RICHARD J. LUCAS  
 CARLO S. FOWLER  
 DONALD A. SLICHTER  
 PAUL A. WEBBER  
 JAMES R. MADISON  
 DILLMAN C. KINSELL, JR.  
 WILLIAM L. HOISINGTON  
 THOMAS R. SHEARER, JR.  
 CAMERON W. WOLFE, JR.  
 RALPH C. WALKER  
 M. PETER LILLEVANO  
 WILLIAM E. DONOVAN  
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W. REECE BADER  
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 E. THOMAS UNTERMAN  
 EDWARD B. ROGIN  
 JACK E. FERGUSON  
 ALVIN W. FARGO III  
 JACK B. OWENS  
 WILLIAM F. ALDERMAN  
 RICHARD E. V. HARRIS  
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 STEVEN A. BRICK  
 JOHN F. SEEGAL  
 ROBERT P. FEYER  
 NORMAN C. MILE  
 TOWER C. SNOW, JR.  
 ROGER L. DAVIS  
 ALAN K. AUSTIN  
 RALPH H. BAXTER, JR.

ORRICK, HERRINGTON, ROWLEY & SUTCLIFFE  
 COUNSELORS AND ATTORNEYS AT LAW  
 ELEVENTH FLOOR  
 600 MONTGOMERY STREET  
 SAN FRANCISCO, CALIFORNIA 94111  
 TELEPHONE (415) 392-1122

"CABLE ORRICK"  
 TELEX 34-0973

March 10, 1980

MAP 14 1980

The Honorable Lewis F. Powell, Jr.  
 Associate Justice  
 United States Supreme Court  
 1 First Street, N.E.  
 Washington, D.C. 20543

Re: California Retail Liquor Dealers Assn. v.  
Midcal Aluminum, Inc., No. 79-97 OT79

Dear Justice Powell:

This letter is written on behalf of my client, Midcal Aluminum, Inc., respondent in the above case, and concerns a brief phrase that appears at page 12 of the slip opinion. With deference, we suggest that a modification of that phrase may be appropriate to minimize any risk of misinterpretation of the scope of the ruling in the case. Mr. Rodak, the Clerk of the Court, informs me that the appropriate way to raise this matter is by letter to you, with copies to him and to the Reporter of Decisions.

At page 12, the slip opinion contains the following sentence:

"The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." (Emphasis added.)

The phrase which is emphasized in the above sentence is the source of our concern. As explained more fully below, there is a risk that the phrase might be cited to attempt to obtain results at odds with the logic of the opinion as a whole and with the basic antitrust principles upheld by the Court.

ORRICK, HERRINGTON, ROWLEY & SUTCLIFFE

The Honorable Lewis F. Powell, Jr.  
March 10, 1980  
Page Two

At page 8, footnote 9, the slip opinion distinguishes and protects "the approach of those States that completely control the distribution of liquor within their boundaries." The note goes on to cite two provisions of the Virginia Alcoholic Beverage Control Code, §§ 4-15 and 4-28. These code provisions deal with the operation of government stores for the retail sale of alcoholic beverages. Footnote 9 leaves little doubt that the States are free to engage themselves in distributing alcoholic beverages.

Judging by the logic of the opinion and the similarity of the language of footnote 9 ("the distribution of liquor within their boundaries") and of page 12 ("the liquor distribution system"), it seems to us that the language of page 12 emphasized above refers to footnote 9 type situations in which the State itself conducts various aspects of the alcoholic beverage business. However, it is possible that the language of page 12 could be read more broadly in an effort to defend situations where the cloak of state authorization is thrown over what are in essence private cartels -- particularly horizontal market division schemes -- in situations that are logically and legally indistinguishable from the price-fixing scheme struck down in the California Retail Liquor Dealers case.

An example may help to illustrate our concern. If the States have "virtually complete control over . . . how to structure the liquor distribution system" (in the literal language of page 12), could they simply authorize suppliers and wholesalers, under the guise of a franchise system, to divide the state up into territories in which the wholesalers would not compete with each other? This would harm someone in Midcal's position, if the effect was to prevent it from selling in new areas. Such a system would be a per se illegal market division conspiracy if engaged in without a "gauzy cloak of state involvement," and the analysis should be identical to the analysis of the conduct at issue in the California Retail Liquor Dealers case. Yet the language of page 12 of the opinion, referred to above, might suggest that such a market division scheme, if authorized by state statute, would be immune from antitrust inquiry. This would be a result that presumably was not intended, would impinge upon legitimate federal antitrust interests, and in any event was not an issue before the Court in our case.

ORRICK, HERRINGTON, ROWLEY & SUTCLIFFE

The Honorable Lewis F. Powell, Jr.  
March 10, 1980  
Page Three

One alternative to clear up the problem discussed above would be to change the phrase "how to structure the liquor distribution system" to read: "over those aspects of liquor distribution within their boundaries which the States conduct themselves." Another alternative, although one I think might be less clear, would be simply to append a footnote to the end of the current phrase. Such a footnote might read: "See note 9, supra."

Needless to say, I am very pleased with the outcome of the case and with your opinion for a unanimous Court. I consider it a great privilege to have been able to argue the case before you.

Respectfully submitted,

*Jack B. Owens*

Jack B. Owens  
An Attorney for Respondent,  
Midcal Aluminum, Inc.

JBO/ljj

cc: Honorable Michael Rodak  
Clerk, United States Supreme Court

Henry Lind, Esq.  
Reporter of Decisions  
United States Supreme Court

William T. Chidlaw, Esq.  
Counsel for Petitioner

Lawrence G. Wallace, Esq.  
Deputy Solicitor General

George J. Roth, Esq.  
Deputy Attorney General  
State of California

LAW OFFICES OF  
WILLIAM T. CHIDLAW  
A PROFESSIONAL CORPORATION

March 17, 1980

POINT WEST EXECUTIVE CENTRE  
1455 RESPONSE ROAD, SUITE 191  
SACRAMENTO, CALIFORNIA 95815  
(916) 920-0202

Honorable Lewis F. Powell, Jr.  
Associate Justice  
United States Supreme Court  
1 First Street, N.E.  
Washington, D. C. 20543

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

Dear Justice Powell:

This letter to you is prompted by and in reply to a letter dated March 10, 1980, directed to you on behalf of Respondent Midcal Aluminum, Inc. by its attorney. Upon inquiry to the Office of the Clerk of the Court, I was advised that Mr. Rodak had stated that a reply to that letter, directed to you, would be appropriate. The Clerk's office further referred me to your secretary to whom I relayed my intention of replying to the Midcal letter.

Midcal seeks a substantive change in the language of the opinion which would have the effect of adopting the position argued by Midcal that the Twenty-first Amendment simply authorizes a state to prohibit or restrict the importation of liquor into its territory. This limited effect of the Twenty-first Amendment was effectively rejected in your opinion both by language in the text at page 9 of the slip opinion and the reference to legislative history, contained in footnote 10 also at page 9. The refusal to overrule earlier cases of this Court (e.g., Ziffrin, Inc. v. Reeves) and the rejection of an interpretation that would virtually emasculate the effect of the Twenty-first Amendment on the power of the states to regulate liquor was made clear in that language on page 9 where your opinion analyzed the language of Section 2 of the Amendment in the following manner:

"... In terms, the Amendment gives the States control over the 'transportation or importation'

Honorable Lewis F. Powell, Jr. March 17, 1980  
Re: California Retail Liquor Dealers Assn. Page Two  
vs. Midcal Aluminum, Inc.; No. 79-97

of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." (Citing Ziffrin case with approval.) (Emphasis added)

It is the position of the California Retail Liquor Dealers Association that although disappointed in the outcome of the case insofar as it specifically affects its members, nevertheless the opinion is clearly written, is consistent within itself, and is not subject to misinterpretation or confusion. The mere fact of change in the opinion in the manner suggested by Midcal would itself be misconstrued and misapplied and undoubtedly the significance of the change itself would be greatly exaggerated in any future applications of the Midcal decision to state court cases involving state liquor statutes or regulations. The purpose of this letter is not to presume to tell you, as the author of the Midcal opinion what you meant, but to simply support the proposition that the meaning is in fact clear, it was carefully thought out and it does not require interpretation.

This Court has furnished guidelines for future application of this opinion in the language contained on page 12 of the slip opinion, and that complete paragraph, from which the sentence quoted in the Midcal letter is taken, is clear in its meaning. The complete paragraph reads:

"These decisions demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" (Citing Hostetter v. Idlewild Liquor Corp., 377 U.S., at 332.)

That the opinion as a whole is consistent with the

Honorable Lewis F. Powell, Jr.

March 17, 1980

Re: California Retail Liquor Dealers Assn. Page Three  
vs. Midcal Aluminum, Inc.; No. 79-97

above quoted paragraph regarding the states' control over "how to structure the liquor distribution system ..." is illustrated by the quotation from page 9 cited earlier. The opinion correctly recognizes that the states' control over the liquor distribution system cannot logically be separated from its control over importation and transportation of liquor. This is exactly what the opinion plainly recognizes in the above quotation from page 12 in connection with the reference to "the liquor distribution system."

Midcal argues that the phrase "the liquor distribution system" refers only to those states that themselves "control the distribution of liquor within their boundaries" and cites the example of the state government retail stores in Virginia. It is implicit in Midcal's argument that the suggested change will "protect" those states which themselves conduct various aspects of the liquor business. The illogic of the contention is manifest when the whole opinion is considered. The opinion, in the first section on the meaning and effect of the "state action" antitrust immunity makes it abundantly clear that a state, like Virginia, which itself engages in the liquor business, is not affected by the decision. The earlier language of the opinion shows that the Court was well aware of the situation in states like Virginia and therefore the only reasonable conclusion is that the language toward which Midcal directs its suggestion is not the result of careless draftsmanship, but rather clearly defines the boundaries between areas to which the Twenty-first Amendment applies with full force and those to which the Amendment's role has been reduced consistent with the holding of the opinion.

It is clear from your opinion that the Twenty-first Amendment retains vitality, especially in matters involving importation and/or restrictions or prohibitions relating to the sale, and in matters involving the liquor distribution system within a state. It is equally clear that in other matters, the Twenty-first Amendment still has viability insofar as bestowing upon a state the power to regulate liquor but that a state has a lesser degree of power than under the importation, transportation, and distribution categories.

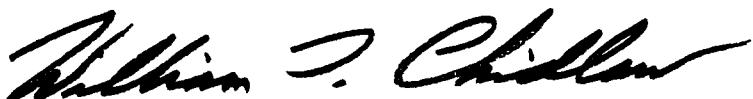
If there is any question, in a specific case, about the

Honorable Lewis F. Powell, Jr. March 17, 1980  
Re: California Retail Liquor Dealers Assn. Page Four  
vs. Midcal Aluminum, Inc.; No. 79-97

effect of the Twenty-first Amendment on a state's power to regulate liquor it can better be resolved in a future "concrete case" than by the use of a hypothetical example of an alleged potential situation that has no relevance to the opinion in this case and as stated by Midcal at page two of its letter "was not an issue before the Court in our case."

We would respectfully urge that this suggestion by Midcal for a substantive change in language be rejected and the paragraph referred to, on page 12 of the slip opinion, be left in its original form as one which artfully, carefully and accurately describes the future effect to be given the Twenty-first Amendment.

Respectfully submitted,



William T. Chidlaw  
Attorney for California Retail  
Liquor Dealers Association

WTC:bc

cc: Jack B. Owens, Esq.  
Orrick, Herrington, Rowley & Sutcliffe  
Eleventh Floor  
600 Montgomery Street  
San Francisco, CA 94111

Honorable Michael Rodak  
Clerk, United States Supreme Court

Henry Lind, Esq.  
Reporter of Decisions  
United States Supreme Court

Lawrence G. Wallace, Esq.  
Deputy Solicitor General

George J. Roth, Esq.  
Deputy Attorney General  
State of California

Baxter Rice, Director  
Department of Alcoholic Beverage Control  
State of California

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

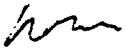
February 20, 1980

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

Dear Lewis:

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

Sincerely,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

February 15, 1980

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

Dear Lewis:

Please join me.

Respectfully,



Mr. Justice Powell

Copies to the Conference