LIQUOR AND THE CONSTITUTION

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Governmental regulation of traffic in intoxicating liquor has long been a problem in American constitutional law. By the middle of the last century the states had begun to regulate, and sometimes prohibit, the transportation, sale and use of intoxicating liquor. At first these regulations were upheld by the Supreme Court even though they applied to liquor being brought in from another state.[1] In 1890 in the case of *Leisy v. Hardin*,[2] however, the Court reversed its earlier position and held that inasmuch as intoxicating liquor was a legitimate commodity of interstate commerce the commerce clause carried a negative implication to the effect that even though Congress was silent on the matter a state could not prohibit the introduction of liquor into the state nor its sale by the importer in the original package. Acting in large part upon the Court's dictum that this impotency of the states could be removed by Congressional action certain states immediately brought pressure to bear on Congress for such legislation, and within a few months Congress passed the Wilson Act.[3] This statute provided that all intoxicating liquors transported into any state or territory for use, sale or storage should upon arrival therein be subject to the laws of such state or territory, and should not be exempt therefrom by reason of being introduced in original packages or otherwise.

The force and effectiveness of the Wilson Act was seriously lessened, some eight years after its passage, when the Supreme Court held that the words "upon arrival" meant delivery by the carrier to the consignee whose right to *receive* the shipment was still protected by the Commerce Clause.[4] As a result, dealers from outside the state were able to solicit orders from individuals, and have the liquor shipped directly to them. To prevent evasion of state prohibition laws by this "mail order" business Congress passed, in 1913, the Webb-Kenyon Act.[5] This Act declared that "the shipment or transportation . . . of intoxicating liquor . . . intended . . . to be received, possessed, sold or in any manner used, either in the original package or otherwise in violation of the laws of the state . . . is hereby prohibited." It was held constitutional in a five to four decision in 1917 in the case of *Clark Distilling Co. v. Western Md.*

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[1] The License Cases, 5 Howard 513 (U. S. 1847).

[2] 135 U. S. 100 (1890).

[3] 26 STAT. 313 (1890), 27 U. S. C. §121 (Supp. 1939).

[4] Rhodes v. Iowa, 170 U. S. 412 (1897).

[5] 37 STAT. 699 (1913), 27 U. S. C. §122 (Supp. 1939).

Ry. Co.[6] But judicial interpretation again intervened and narrowed the scope of the Act. In *Adams Express Co. v. Ky.*[7] the Supreme Court held that where a state permits personal use of liquor it cannot forbid the importation of intoxicants for personal use because the Act consented to regulation only where the liquor was to be received, possessed, sold or used contrary to the law of the state. Presumably to remedy this defect the Reed Amendment[8] to the Act was added. Much more drastic, it provided for federal punishment for persons importing liquor into a state for personal use, even though the state merely prohibited the manufacture and sale of such articles and permitted importation for personal consumption. Two years after its passage the Court upheld the Reed Amendment in the case of *U. S. v. Hill.*[9] Shortly thereafter came the enactment of the Eighteenth Amendment, and for a decade the Federal Government undertook the enforcement of Prohibition upon a nationwide scale.

National Prohibition came to an end in 1933 with the adoption of the Twenty-first Amendment, and liquor control and regulation was returned to the states. The second clause of the Amendment reads:

> "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Congressional debates on Repeal indicate that this section was enacted in an effort to guarantee to the states by the Constitution the same freedom to control liquor that the Webb-Kenyon Act had given them by statute.[10] This was felt necessary first, because the Webb-Kenyon Act had been sustained by a divided Court, and there was always the possibility that the views of the minority might sometime gain the ascendency, and second, because Congress itself might modify or repeal the Webb-Kenyon Act and leave the "dry" states without protection.

Although the second section of the Amendment is substantially the same as the Webb-Kenyon Act, the raising of this statute to the status of a Constitutional provision has narrowed federal power. So long as the provision was embodied in a Congressional act Congress could determine whether liquor in interstate commerce was a subject of national concern solely within the power of the Federal Government or whether it was one of local interest and subject to prohibitions of the states in the absence of Congressional action; but when made a part of the Constitution this power of Congress to determine the status of liquor being transported or imported into a state was taken away and it was fixed once and for all by the Amendment that the state could prohibit the transportation or importation into the state in violation of its laws.

From the history of the Amendment it appears that its purpose, like that of the Webb-Kenyon Act, was to protect "dry" states.[11] The language of the Amendment,

[6] 242 U. S. 311 (1916).
[7] 238 U. S. 190 (1914).
[8] 39 STAT. 1069 (repealed 1936).
[9] 248 U. S. 420 (1918).
[10] 76 CONG. REC. 4170 (1933).
[11] *Ibid.*

however, is subject to a literal interpretation which is much broader, and the Supreme Court, in a series of decisions written by Mr. Justice Brandeis, has taken this broader view.

The first of this series was *State Board of Equalization v. Young's Market Co.*[12] The state of California had imposed a license fee of $500 for the privilege of importing out-of-state beers. The Young's Market Co. imported beer from Missouri and Wisconsin and sold it at wholesale in California. They claimed that the requirement of an importer's license was a violation of the commerce clause and a discrimination contrary to the equal protection clause of the Fourteenth Amendment. The Court, while admitting that the statute would have been an unconstitutional burden on interstate commerce prior to the Twenty-first Amendment, held that the words used in the second clause were appropriate to give the state "the power to forbid all importations which did not comply with the conditions which it prescribes."[13]

The plaintiff's contention that limitation of the broad language of the Amendment is sanctioned by its history and by the decisions of the Court on the Wilson Act, the Webb-Kenyon Act and the Reed Amendment was dismissed by the Court with the observation: "As we think the language of the Amendment is clear, we do not discuss these matters."[14] The plaintiff's claim that the statute was void under the equal protection clause was disposed of by the Court by the statement: "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[15] The Court then went on to point out that in fact there was no discrimination because California brewers were subject to a fee of $750 on another basis.

While there was little doubt but that the *Young's Market* case had removed the check on state powers formerly contained in the commerce clause, it could be contended that the decision did not have the same consequence with respect to the equal protection clause because the Court had in fact found no discrimination and thus its comments in regard to the equal protection clause were *obiter dicta*. The Court's decision in *Mahoney v. The Joseph Triner Corp.*[16] took away the basis for this contention. A Minnesota statute prohibited the importation of liquor where the brands were not registered in the United States Patent Office. Identical liquors which were so registered were admitted. The corporation contended that the statute violated the equal protection clause. The Court held that since the adoption of the Twenty-first Amendment the equal protection clause is not applicable to imported intoxicating liquor, and that discrimination either in favor of domestic over imported liquor, or between various imported liquors is permissible even though it is not an incident of reasonable regulation of the liquor traffic.

Two recent decisions, handed down on the same day, give added force to the conclusion that the commerce clause and equal protection clause are no longer checks upon state power. In the first of these cases, *Indianapolis Brewing Co. v. The Liquor*

[12] 299 U. S. 59 (1936).
[13] *Id.* at 62.
[14] *Id.* at 63.
[15] *Id.* at 64.
[16] 304 U. S. 401 (1937)

Control Commission of the State of Michigan,[17] an Indiana corporation manufacturing beer in that state was prevented from selling its products in Michigan by a Michigan statute prohibiting its dealers from selling any beer manufactured in a state which discriminated against Michigan. Indiana was such a discriminating state. The plantiff sought to enjoin enforcement of the statute, contending that the law should be held void as a violation of the commerce clause, and the due process and equal protection clauses of the Fourteenth Amendment; and asserted that the law was "retaliatory" in punishing Indiana for doing what she was allowed to do under the *Young's Market* decision, that is, to impose regulations and a fee upon importers. The Court denied the injunction and held the statute to be valid, whether retaliatory or not.

In the companion decision of *Finch & Co. v. McKittrick*[18] the Court completely closed the door to any limitation by the commerce clause upon the right of the state to prohibit or regulate the importation of intoxicating liquor. The state of Missouri had enacted an "Anti-Discrimination Act" which prohibited the purchase, sale, receipt or possession by any licensee of liquor manufactured in a "state in which discrimination exists" against Missouri products and declared unlawful the transportation or importation of such liquor into Missouri. Four distillers and an importer, whose products were denied admittance to the state of Missouri, attacked the validity of the statute, urging that the law did not relate to the police powers of the state but was clearly "an economic weapon of retaliation," and that in such an extreme situation the Twenty-first Amendment should not be allowed to render inoperative the power of the commerce clause. The Court said: ". . . since the Amendment the right of the state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause."[19]

It is in connection with, and in light of, this background of the Twenty-first Amendment—its historical development, the intention of its framers, and the broad interpretation given to it by the Supreme Court—that we should approach the problems which arise today in connection with liquor and the Constitution.

One such problem arises in connection with the transportation of liquor *through* a state. Suppose a manufacturer in Kentucky wishes to ship liquor across Virginia for delivery in Maryland. The question arises as to who has power to regulate the shipment in transit across Virginia? Since such a shipment is obviously not for "delivery or use" in Virginia and thus not within the purview of the Twenty-first Amendment it would appear that the state would have no power to prohibit or regulate such an interstate shipment. This was, in fact, the holding of the Supreme Court of Appeals of Virginia in such a case.[20] On the other hand, the shipment is clearly in interstate commerce and since the Twenty-first Amendment is inoperative the Federal Government should have the same power over it as it possessed prior to the Amendment.

[17] 305 U. S. 391 (1938) [18] 305 U. S. 395 (1938). [19] *Id.* at 398.
[20] Williams v. Commonwealth, 169 Va. 857, 192 S. E. 795 (1937).

Closely akin to the problem of the power to regulate transportation through a state is that of state and federal power over the *exportation* of intoxicants from a state. The only case thus far to reach the Supreme Court touching upon this problem is *Ziffrin, Inc. v. Reeves.*[21] In this case the plaintiff, an Indiana corporation, engaged in transporting whisky from Kentucky to Illinois, sought to restrain enforcement of a Kentucky statute requiring that all transporters of liquor be licensed, and that licenses be granted only to common carriers. The plaintiff, a contract carrier, was thus unable to obtain a license, and challenged the validity of the statute under the commerce, due process and equal protection clauses.

The opinion of Mr. Justice McReynolds upholding the statute is not altogether clear, but apparently the Court reasoned about as follows: The state has always had power to regulate the manufacture, transportation and sale of intoxicants within the state and to adopt appropriate measures to effectuate such inhibitions. Here Kentucky seeks by its regulation to minimize the evils attending the liquor traffic and to enforce its revenue measures. The licensing of transporters within the state is a reasonable and appropriate means of accomplishing these ends, and although such licensing will necessarily affect the exportation of liquor insofar as the transportation is within the borders of Kentucky it is better to interfere with interstate commerce to this limited degree than to render ineffective the whole regulatory system.

If instead of licensing *all* transportation within the state, Kentucky had imposed a license fee or a tax upon exports alone it is almost certain that the Court would have declared it invalid. In an early case the Court said that where liquor could be legally manufactured within the state it was beyond the power of the state either to forbid or impede its exportation.[22] In predicting future decisions one must distinguish, therefore, between statutes that aim directly at the exportation of liquor, and those which are directed toward the regulation of the liquor traffic within the state but incidentally affect interstate commerce.

Although the Twenty-first Amendment was brought into the decision in the *Ziffrin* case, it has, in fact, no application to the exportation of liquor from a state because by its very language it is limited to transportation or importation into a state. It would seem clear, therefore, that the respective powers of state and Federal Government over such exports remain the same as before the Twenty-first Amendment.

A third problem is raised by shipments into a state which are not in violation of any laws thereof, and which consequently do not fall within the prohibition of the Twenty-first Amendment. In such a situation does federal power over interstate shipments remain unimpaired? On the basis of the background of the Twenty-first Amendment the answer would seem to be that since it restricts federal commerce power only as to "transportation or importation into a state for delivery or use therein *in violation of the laws* thereof," if the state has not legislated upon the subject of liquor, federal power under the commerce clause remains as before the Amendment.

It has been suggested, however, that there exists here a negative implication com-

[21] 308 U. S. 132 (1939).

[22] Kidd v. Pearson, 128 U. S. 1 (1888).

parable to the negative implication of the commerce clause.[23] To apply such a doctrine in the field of liquor control would mean that the power of the states in the areas set forth in the Twenty-first Amendment negatives by implication the possibility of federal action even when the state is silent unless a foothold of national interest is found.[24] Such an analysis seems inconsistent either with the literal or historical interpretation of the Twenty-first Amendment. It disregards the fact that the Twenty-first Amendment does not operate as an affirmative grant of power to the states, but rather as a limitation upon federal power in that Congress cannot authorize the "transportation or importation of liquor into a state for delivery or use therein in violation of the laws of such state." When not subject to this restriction, federal power over liquor in interstate commerce is in all respects the same as before the Amendment.

In the case of *Collins v. The Yosemite Park & Curry Co.*[25] the problem of who has the power to regulate liquor within a federal territory was first raised. California had ceded to the United States the territory which is included in Yosemite National Park, reserving the power to tax in this area. The Yosemite Park Company, engaged in the sale of liquor in the Park, refused to obtain a California license or comply with California regulations. The state contended that the Twenty-first Amendment gave it the right to regulate the sale and use of alcoholic beverages within the Park. The Supreme Court held that although the state had the power to tax, the federal power of regulating intoxicating liquor in federal territory is not affected by the Twenty-first Amendment. Such a conclusion seems inevitable in light of the background of the Twenty-first Amendment.

It has already been pointed out that the Twenty-first Amendment is substantially the same as the Webb-Kenyon Act. There is one principal difference in the wording of the two. The Webb-Kenyon Act uses the phrase "shipment and transportation" while the Twenty-first Amendment employs the words "transportation or importation." It is not certain what the framers intended by the term "importation." It may have been that the words "transportation or importation" were used in order to deal effectively both with the transporter, the one actually carrying the liquor across state lines, and the importer, the person having the liquor brought from one state to another. If, however, "importation" is taken in its more technical constitutional meaning, conflicts may arise between state regulation and the power of the Federal Government to conduct foreign affairs and regulate foreign commerce. Suppose, for example, that the Federal Government agrees by treaty with a foreign nation that citizens of that country residing in the United States shall be permitted to import liquor into this country. One of the states then passes a law forbidding the licensing of aliens to import or sell liquor within the state. Obviously, to uphold the state law would be to allow it to thwart the Federal Government in its sovereign power to make agreements and treaties with foreign powers. It would, in reality, amount to

[23] de Ganahl, *The Scope of Federal Power Over Alcoholic Beverages since the Twenty-first Amendment* (1940) 8 GEO. WASH. L. REV. 819, 875.

[24] Reconsider in this connection the first paragraph of this article.

[25] 304 U. S. 518 (1938).

a surrender of sovereignty in this field to the state. Should such a case arise the Court might advert to any one of three possible approaches:

First, it might hold that under the Twenty-first Amendment the state has power to prohibit the bringing of liquor into the state under whatever conditions it chooses without regard to the effect of such prohibition upon the federal power over foreign commerce and international relations.

Second, it might interpret the Twenty-first Amendment so as to preclude the state from thwarting the Federal Government in the exercise of these sovereign powers by limiting the application of the Amendment to interstate commerce.

Finally, the Court might follow its decision in the case of *U. S. v. Curtiss-Wright Export Co.*,[26] that the powers of the Federal Government in respect to foreign affairs do not rest exclusively upon the Constitution but were derived directly from the crown and inhere in the nation as a sovereign. It would be but a short step to hold that this sovereign power had not been surrendered to the states by the Twenty-first Amendment.

While there is good reason for believing that the Court, if faced with such a situation, would take the second or third approach, the literal interpretation given the Amendment in the series of decisions by Mr. Justice Brandeis suggests that the first approach is not wholly out of the question.

To date the actual litigation in respect to matters of foreign commerce seem to have arisen in connection with the enforcement of the Federal Alcohol Administration Act,[27] under which the Federal Government has entered a broad field of liquor control and regulation. The Act requires that each distiller, rectifier, wine manufacturer or importer secure a federal permit. Through the exercise of discretion in granting, denying, suspending and revoking permits the federal administrative agency can exclude undesirable elements from the industry and enforce the prohibitions of other sections of the Act.

Section 5 relates to abuses and evils which were prevalent in the pre-Prohibition era. Exclusive sales agreements, the "tied-house," commercial bribery and consignment sales are all defined and made unlawful. It fixes the kinds of labels to be used on the various types of liquors, and designates the matters which must appear on the label to inform consumers as to the identity and quality of the contents. It precludes all liquor advertising unless it conforms to prescribed standards. Section 8 forbids interlocking directorates and similar practices which might result in a recurrance of the notorious "whiskey trust."

In light of the corruption, political interference and tax evasion of part of the liquor industry before Prohibition, the regulations of the Act seem reasonable and expedient. It has been contended, however, that the labeling provisions of the Act are unconstitutional. In *Jameson & Co. v. Morgenthau*[28] the plaintiff was denied entry of liquor from England which was not labeled according to federal require-

[26] 299 U. S. 304 (1936).

[27] 49 STAT. 977, 27 U. S. C. §§201-212 (Supp. 1939). While the F. A. A. has been abolished its functions in the enforcement of this Act are carried on by the Alcohol Tax Unit. See O'Neill, *supra* p. 58 *et seq.*

[28] 307 U. S. 171 (1938).

ments. The importer brought injunction proceedings alleging that the Twenty-first Amendment gives the states complete and exclusive control over commerce in intoxicating liquors and hence that Congress no longer has authority to control the importation of these commodities into the United States. Here again is evidenced the misconception that the Twenty-first Amendment is an affirmative grant to the state of exclusive power over interstate commerce in liquor. We have already observed that such an analysis is inconsistent with either a literal or a historical interpretation of the Amendment. Congressional power over liquor is derived from its constitutional authority to tax, regulate commerce, establish and operate a postal system, and from its war and treaty powers. The sole effect of the Twenty-first Amendment is to take away from Congress the power to authorize the transportation or importation of liquor into a state in violation of its laws. With this one exception the power which Congress had over liquor before the Twenty-first Amendment remains unimpaired. In the *Jameson* case there was no attempt on the part of the Federal Government to authorize a shipment into a state in violation of its laws. On the contrary, a shipment was being excluded before reaching state borders and the power of the Federal Government in such an instance seems clear.

We have observed how the Supreme Court has upheld state barriers and discriminations against out-of-state liquors. That such a policy of state protectionism in respect to the liquor industry is injurious seems clear. It restricts production in areas where it can be more advantageously carried on and fosters it in areas less favorably situated, thus increasing costs to the consumer. It necessitates an elaborate administrative machinery in each state to enforce its provisions for exclusion and discrimination. It will probably lead to further trade barrier legislation of much more serious consequence. It is likely that of all the problems raised by the adoption and broad interpretation of the Twenty-first Amendment, that of stemming the rising tide of state barriers in the interstate liquor sphere is the most pressing.

Barring Constitutional Amendment or the reversal by the Court of its present position three possible lines of remedial action are open:

First, although the possibility of direct Congressional intervention to halt the abuse of state power seems to have been precluded by the Supreme Court's decisions interpreting the Twenty-first Amendment, it would appear that Congress could indirectly discourage the development of state barriers by such methods as the conditional grant-in-aid, or by refusing federal cooperation to states which have discriminatory laws and regulations.

Second, the Supreme Court, without being inconsistent with its present position that a state can exclude out-of-state liquor introduced in violation of its laws, can prevent a certain amount of discrimination by resort to the doctrine of unconstitutional conditions. Thus if State X permitted a distiller of another state to do business within the state only upon condition that he forego his right to sue in a federal court, such a provision could be invalidated as an unconstitutional condition.

Finally, of course, the states may, after cooperative investigation like that undertaken by the Council of State Governments, adopt appropriate remedial measures and follow a policy of self-restraint and cooperation.