



# The Original Meaning of the 21st Amendment

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**I**N THREE HIGH-PROFILE CASES this term, the Supreme Court will decide whether States can allow in-state vendors, but not out-of-state vendors, to ship wine directly to consumers. The consolidated cases, *Swedenburg v. Kelly* and *Granholm v. Heald*, have become a sort of judicial Super Bowl. On the field are wineries and consumers versus wholesalers and States. In the stands are free-market conservatives and Netizens, rooting against social conservatives and federalists. The “skill players” include Kenneth Starr, Carter Phillips, and Clint Bolick versus Robert Bork, C. Boyden Gray, and Miguel Estrada. The regular season, which stretches back into the 19th century, ended with a cryptic opinion from Judge Frank Easterbrook, who explained the cases as pitting “the twenty-first amendment, which appears in the Constitution, against the ‘dormant commerce clause,’ which does not.” The favorite? Too close to call.

The history of the 21st Amendment, however, provides a clear edge to the free-traders. The purpose of the 21st Amendment was to reverse the 18th Amendment’s disastrous experiment with federal Prohibition, and thereby to restore the balance between state and federal power that had existed prior to the 18th Amendment. It did this in two ways. First, § 1 of the Amendment repealed Prohibition, restoring to the States their exclusive police power authority to regulate the local sale and distribution of alcohol. Second, § 2 of the Amendment constitutionalized certain federal laws that allowed any State to enforce its police power on equal terms against alcohol shipped in interstate commerce as against alcohol manufactured or sold within that State. Section 2’s purpose was to nullify a line of Supreme Court decisions that compelled some States to “reverse discriminate” in favor of out-of-state vendors. As a result, the 21st Amendment removed the

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federal government from meddling in local affairs, but did not cede a novel and unnecessary power to the States to meddle in the federal government's traditional control over interstate commerce. In other words, the 21st Amendment enabled dry States to remain dry if they so chose, but it did not empower wet states to engage in economic warfare against the products of other wet States.

## The Pre-Prohibition Constitutional Balance

In the 19th century, States could regulate alcohol production within their own borders.<sup>1</sup> In *Mugler v. Kansas*, for example, the Supreme Court held that a State could ban the manufacture of alcohol for purely personal consumption by using “the police powers of the state.” Because of the Commerce Clause, however, States could not use their police power to discriminate against alcohol made in another State. In *Walling v. Michigan*, the Court held that a “discriminating tax imposed by a state ... is a usurpation of the power conferred by the constitution upon the congress of the United States.”<sup>2</sup> Toward the end of the century, courts extended the Commerce Clause to prevent States from regulating imported alcohol until its first sale in the State, or until it was removed from its original package.<sup>3</sup> This “original package doctrine” created an anomaly, in that States could forbid domestic production of alcohol, but not importation.

Congress responded by enacting the Wil-

son Act, which empowered States to regulate imported liquor “to the same extent and in the same manner as though such liquors or liquors had been produced in such State or Territory.”<sup>4</sup> The Wilson Act eliminated the privileged status of interstate sellers, but also continued to prohibit States from discriminating against out-of-state sellers. In *Scott v. Donald*, the Court held that “the state cannot under [the Wilson Act] establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful.”<sup>5</sup>

Subsequent court decisions, however, held that under the Wilson Act dry States could not ban the interstate shipment of alcohol directly to consumers, so long as the alcohol was in its original package and intended for purely personal use.<sup>6</sup> Those decisions returned the States to the awkward position of having to allow the entry and receipt of alcohol products from outside of the State that were illegal within the State.<sup>7</sup> States could regulate alcohol sales at saloons and bars, but not the importation of liquor that remained in its original package.

To close this loophole, in 1913, Congress enacted the Webb–Kenyon Act. The Act prohibited “[t]he shipment or transportation” of alcohol into a State that “is intended ... to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State.”<sup>8</sup> As Senator William S. Kenyon (R–IA) explained, “the bill’s purpose, *and its only pur-*

1 See *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

2 116 U.S. 446, 455 (1886).

3 *Leisy v. Hardin*, 135 U.S. 100, 110 (1890); *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465, 479–80 (1888).

4 26 Stat. 313 (1890).

5 165 U.S. 58, 100 (1897). Accord *Vance v. Vandercook Co.*, 170 U.S. 438 (1898).

6 *In re Rahrer*, 140 U.S. 545 (1891); *Rhodes v. Iowa*, 170 U.S. 412 (1898).

7 See *Clark Distilling Co. v. Western Md. Ry.*, 242 U.S. 311, 323 (1917).

8 37 Stat. 699.

pose, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their own borders.”<sup>9</sup> In upholding Webb–Kenyon’s constitutionality, the Court concluded that “[r]eading the Webb–Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court ... there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act.”<sup>10</sup>

In contrast, nothing in the Webb–Kenyon Act’s history indicates that Congress intended to authorize the States to *discriminate* against imported liquor. For instance, the Act does not repudiate the Supreme Court’s decision in *Scott v. Donald*, which had been on the books for a decade. Moreover, contemporaneous court decisions expressly held that Webb–Kenyon, like the Wilson Act, barred discrimination. Shortly after the Act’s passage, the South Carolina Supreme Court confirmed that the Act authorized the States to regulate evenhandedly, not to discriminate:

[T]he Webb-Kenyon Act ... does divest intoxicating liquors shipped into a state in violation of its laws of their interstate character and withdraw from them the protection of interstate commerce, [but] it evidently contemplated the violation of only *valid* state laws. *It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states which are recognized as subjects of lawful commerce by the law of the state making such discriminations, nor the power to make unjust discriminations between its own citizens.*<sup>11</sup>

In the era before the 18th Amendment,

therefore, the state and federal governments balanced the authority between the state police power and national commerce power. The States could regulate purely local affairs, such as rules governing the manufacture and consumption of alcohol, especially in saloons. The federal government retained complete control over matters involving interstate commerce. Under the Wilson and Webb–Kenyon Acts, the federal government helped States enforce their police powers by subjecting alcohol shipped in interstate commerce to the same rules as alcohol produced and sold locally – no better and no worse.

### The Demise and Return of the Constitutional Balance

The 18th Amendment, which initiated national Prohibition, upset this balance. Although the Amendment technically gave the state and federal governments concurrent power to regulate alcohol, because of the Supremacy Clause, it effectively gave the federal government absolute authority to regulate all aspects of alcohol. This authority included purely local matters traditionally regulated by the States under the police power, such as closing times of saloons. States could impose stricter regulations, but not weaker or different penalties that conflicted with the National Prohibition Act. Act of Oct. 28, 1919 (popularly known as the “Volstead Act”).<sup>12</sup>

Prohibition, of course, proved a great failure, spawning violence, bloodshed, and corruption. A fundamental problem was that national Prohibition essentially created a new police power for the federal government, one that it specifically lacks in other areas and is unsuited to exercise. As Treasury Sec-

9 49 Cong. Rec. 760 (emphasis added).

10 *Clark Distilling*, 242 U.S. at 323–24.

11 *Brennen v. Southern Express Co.*, 90 S.E. 402, 404 (1916) (emphasis added).

12 41 Stat. 305, ch. 85 (repealed 1933).

retary Andrew Mellon noted in his annual report for 1926, “This misinterpretation of jurisdiction ... proved a serious hindrance to the successful enforcement of the national prohibition law ... interference by the Federal Government with local government which could not be other than obnoxious to every right-thinking citizen.”

As the end of Prohibition approached, dry States worried about the continued constitutional viability of Webb-Kenyon, and thus the resurrection of the original package doctrine, and also shared a widespread concern regarding continued congressional support for the Act. For example, Senator William E. Borah (R-ID) explained that he was “rather uneasy about leaving the Webb-Kenyon Act to the protection of the Supreme Court”<sup>13</sup> as well as a widespread concern regarding continued congressional support for Webb-Kenyon. To remove these uncertainties, § 2 of the 21st Amendment would “incorporat[e] Webb-Kenyon] permanently in the Constitution of the United States.”<sup>14</sup> Section 2 provides that “[t]he 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.” This wording “closely follows the Webb-Kenyon and Wilson Acts, expressing the framers’ clear intention of constitutionalizing the Commerce Clause framework established under those statutes.”<sup>15</sup> By its terms, therefore, § 2 restores the States’ broad police power to regulate the “delivery or use” of alcoholic beverages within their borders. It also allows a State to bar “the transportation or importation of” intoxicating liquor within

its borders, but only when the ultimate delivery or use of that alcohol in the State would be “in violation of the laws thereof.”

The restoration of the States’ police power, however, did not confer a new, and quite different, power to bar out-of-state alcohol vendors from participating equally in the activities that the State chooses to permit. In that instance, the delivery or use of imported liquors would not, in itself, be “in violation of the laws thereof” and thus would not trigger § 2’s bar on the “transportation or importation” of those liquors. Moreover, no historical facts suggest that the States needed plenary power over interstate commerce in alcohol, that Congress had any reason to cede its interstate commerce power over alcohol to the States, or that Congress intended to lift the traditional ban on protectionist state barriers to interstate commerce. That ban had been in place for at least half a century, when the Court decided *Walling v. Michigan*, and reinforced consistently and repeatedly.<sup>16</sup>

This conclusion also comports with the Senate debate over a proposed § 3 of the 21st Amendment. Proposed § 3, which ultimately failed to pass, provided that “Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.” At the time of the debates, it was unclear whether Congress’s Commerce Clause power extended to intrastate retail sales of liquor.<sup>17</sup> Unlike §§ 1 and 2, which restored the constitutional balance of the pre-Prohibition world, proposed § 3 would have granted the federal government, anew, constitutional authority to regulate local alcohol consumption. Indeed, because § 3 could have been construed to authorize

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13 76 Cong. Rec. 4171.

14 *Id.* at 4172.

15 *Craig v. Boren*, 429 U.S. 190, 205–06 (1976).

16 E.g., *Scott*, *supra*.

17 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542–48 (1935).

Congress to regulate the “transportation and manufacture” of liquor in order to “promote the purposes” of § 3, Senators feared that it would “have expelled the system of national control through the front door of section 1 and readmitted it forthwith through the back door of Section 3.”<sup>18</sup>

Justice Sandra Day O’Connor, however, has used the failure of proposed § 3 to argue that the 21st Amendment gives States plenary or “absolute” authority over alcohol, presumably including the power to discriminate. In her dissenting opinion in *324 Liquor Corp. v. Duffy*,<sup>19</sup> she relies primarily on a single statement by Senator John Blaine (R-WI), the floor manager of the 21st Amendment, during the debate over proposed § 3. In arguing against proposed § 3, Blaine suggested that “[t]he purpose of section 2 is to restore to the States by constitutional amendment *absolute control*, in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States.” Senator Blaine continues, however, by saying that “[t]he State under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. Thus the States are granted larger powers in effect and are given greater protection, while under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment.”<sup>20</sup> Read in context, Senator Blaine’s comments comport with the general view that the 21st Amendment restored the pre-18th Amendment constitutional balance, thereby enabling the States to regulate alcohol locally and to apply those same rules to imported alcohol in a non-discriminatory fashion.

Although Justice O’Connor’s dissent cites other isolated snippets of legislative history, she again strips those statements of both their historical and speaking context. For example, she quotes Senator Robert Wagner (D-NY) as saying that the proposed § 3 failed to “correct the central error of national prohibition. It does not restore to the States responsibility for their local liquor problems. It does not withdraw the Federal Government from the field of local police regulation into which it has trespassed.”<sup>21</sup> Senator Wagner’s statement indicates that he opposed § 3 because it would have given Congress the power to meddle with the States’ exercise of their police power, not because he wanted the federal government to “withdraw from the field” by giving the States Congress’s power to regulate interstate commerce. For example, Wagner also states that “the question which has troubled the American people since the eighteenth amendment was added to the Constitution was not at all concerned with liquor. It was a question of government: how to restore the constitutional balance of power and authority in our Federal system which had been upset by national prohibition.”<sup>22</sup>

As further demonstrated by a colloquy between Blaine and Wagner, both senators believed that the Amendment restored the pre-Prohibition constitutional balance, not that the Webb–Kenyon Act, constitutionalized by § 2, delegated Congress’s interstate commerce power to the States:

SEN. BLAINE: Then came an amendment of the Wilson Act known as the Webb–Kenyon Act. . . . The language of the Webb–Kenyon Act was designed to give the State in effect power of regula-

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18 76 Cong. Rec. at 4147.

19 479 U.S. 335, 354–56 (1987).

20 See 76 Cong. Rec. at 4143 (emphasis added).

21 *Id.* at 4144.

22 *Ibid.*

tion over intoxicating liquor from the time it actually entered the confines of the State. ...

SEN. WAGNER: Mr. President, will the Senator yield?

SEN. BLAINE: I see my able friend from New York shaking his head. I yield to him.

SEN. WAGNER: I do not want to enter into a controversy, because it really is not very important, but I do not think the Senator meant to say that by this act [Webb–Kenyon] Congress delegated to the States the power to regulate interstate commerce; Congress itself regulated interstate commerce to the point of removing all immunities of liquor in interstate commerce.

SEN. BLAINE: I thank the Senator. I think he has given the correct statement of the doctrine. My understanding of the question was identically the same – that it was the action of the Congress of the United States in regulating intoxicating liquor that protected the dry State within the terms of the law passed by the Congress.<sup>23</sup>

In any event, Justice O'Connor's analysis would lead to an absurd view of the 21st Amendment. To interpret Senator Blaine's words literally, as meaning that States exercise "absolute control" over alcohol, would mean that a State could pass any law that violated any other provision of the Constitution. In this extreme view, a State could enact a law that prohibited the import of kosher or sacramental wine, or allow alcohol imports only to a certain race or sex. Given these absurdities, the framers of the 21st Amendment simply could not have intended to eliminate all constitutional limits on the States' regulatory authority. The final clause of the provi-

sion refers to "in violation of the laws thereof," and that clause should be read as in violation of *otherwise valid* laws thereof.<sup>24</sup> Indeed, in a stream of subsequent cases, the Court has correctly held that the 21st Amendment does not nullify the freedom of speech, establishment, due process, or equal protection clauses.

Some may argue, as the Second Circuit suggested in *Swedenburg*, that the 21st Amendment repeals only the commercial provisions of the Constitution, and not individual liberties protections, as applied to alcohol. In fact, shortly after the 21st Amendment's passage, the Court upheld facially discriminatory state liquor laws against various Commerce Clause and Equal Protection challenges, concluding that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."<sup>25</sup>

These and other early cases, however, contain no analysis of the 21st Amendment's intent or history, which is necessary because the Amendment's text contains no basis for distinguishing commercial affairs from individual liberties. Moreover, the Court has since clarified that the 21st Amendment is constrained by other structural provisions of the Constitution, including the Commerce Clause and the Export-Import Clause. For example, just months after *Young's Market* declared that States were "not limited by the commerce clause" when enacting liquor laws, the Court upheld federal liquor laws enacted pursuant to the Commerce Clause, rejecting the argument that the 21st Amendment gives States control over alcohol "unlimited by the Commerce Clause."<sup>26</sup>

More recently, the Court has explained

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23 *Id.* at 4140.

24 Cf. *Brennen*, *supra*.

25 E.g., *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 64 (1936).

26 See *William Jameson & Co., Inc. v. Morgenthau*, 307 U.S. 171, 173 (1939).

that “the Twenty-first Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision ‘be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.’”<sup>27</sup> Similarly, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Court characterized the argument that § 2 repealed the Commerce Clause as “an absurd oversimplification” that is both “patently bizarre and ... demonstrably incorrect.”<sup>28</sup> Moreover, in both *Bacchus Imports, Ltd. v. Dias*<sup>29</sup> and *Healy v. Beer Institute*,<sup>30</sup> the Court struck down discriminatory state alcohol laws under the Commerce Clause, rejecting the argument that those laws were saved by the 21st Amendment.

### The Current Balance

These recent decisions comport with the text, history, and purpose of the 21st Amendment – to restore the constitutional balance that existed prior to Prohibition, not to allow States to engage in rank protectionism. In this regard, *Swedenburg* is particularly troubling because the court suggested that a State may require an out-of-state vendor to “establish a physical presence in the state” to receive equal treatment under state law. In upholding New York’s statutory scheme, the court held that “we find no indication, based

on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests. All wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state.”<sup>31</sup>

State physical presence requirements, however, have the potential to seriously impair the flow of interstate commerce.<sup>32</sup> Such requirements are a particular threat to the present-day economy, given the importance of mail order and Internet commerce. The primary efficiency of modern e-commerce is that it permits merchants to provide their goods and services across the Nation without establishing a presence in every State.<sup>33</sup> If physical presence requirements were extended to industries other than wine,<sup>34</sup> those requirements could force online companies such as Amazon.com, or catalogue retailers like L.L. Bean, to establish and maintain offices in all 50 States. Indeed, the idea that States have to enact physical presence laws to exercise adequate regulatory oversight over out-of-state companies admits of no end. It could apply to *any* out-of-state company that ships a product to a state resident. If accepted, this idea would allow States to discriminate against vendors based solely on their residence, contrary to a central purpose of both the 21st Amendment and the Commerce Clause. *GB*

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27 See *Craig v. Boren*, 429 U.S. 190, 206 (1976) (citation omitted).

28 377 U.S. 324, 331–32 (1964).

29 468 U.S. 263 (1984).

30 491 U.S. 324 (1989).

31 *Swedenburg v. Kelly*, 358 F.3d 223, 237 (2d Cir. 2004).

32 E.g., *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 73 (1962); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951).

33 See FTC Staff, *Possible Anticompetitive Barriers to E-Commerce: Wine* 14–16 (July 2003); see also Alan E. Wiseman & Jerry Ellig, *Market and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia*, 6 BUSINESS AND POLITICS (2004).

34 Cf. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003) (tobacco).