

Time *to* Sober Up

The Constitution does let states stop cross-border alcohol sales.

BY BRANNON P. DENNING

Most Americans probably think that legal battles about Prohibition ended decades ago, with the ratification of the 21st Amendment to the Constitution. But two recent cases from federal appeals courts, now headed toward the Supreme Court, show that our legal system is still grappling with issues that it should have settled long ago. As they decide whether to review one of the cases, the justices need to realize that not just regulation of alcohol, but what the Constitution means, is on the line.

Michigan recently filed a Supreme Court petition for certiorari in *Heald v. Engler*, seeking to reverse a ruling by the U.S. Court of Appeals for the 6th Circuit overturning the state's long-standing ban on direct out-of-state alcohol sales to Michigan consumers. And earlier this month, the 2nd Circuit rejected a similar challenge to New York's direct shipment laws in *Swedenburg v. Kelly*, reversing a lower court decision that had held them to be constitutionally impermissible.

The laws at issue in both cases present an obstacle to the sale of wine, beer, and liquor over the Internet and via toll-free numbers. *Heald* may have California wine producers and oenophiles dancing in the streets. But the conflict now clearly present between the 6th and 2nd circuits should be resolved in favor of upholding the shipment bans. The 2nd Circuit in *Swedenburg* kept an eye on what other courts have overlooked: Direct shipment bans are expressly authorized by the Constitution.

NOT-SO-DORMANT DOCTRINE

Consumers and alcohol providers allege that Michigan's law (and similar ones, for instance, in Virginia and New York) are protectionist and unconstitutional, because they violate the so-called "dormant commerce clause doctrine." This judge-made

doctrine infers from the Constitution's grant of congressional power to regulate interstate commerce a corresponding set of restrictions on states. At a minimum, the Supreme Court has instructed, the doctrine prevents states from restricting interstate commerce by passing laws that explicitly discriminate against such commerce, or by passing facially neutral laws that have the same discriminatory effects.

The doctrine is rooted in the presumption that by granting such power to Congress, the Framers intended to establish a national market for goods and services free of parochial or protectionist state barriers. Since many direct-shipment bans, such as Michigan's, contain exceptions for alcohol produced in the state, those seeking to overturn the laws allege that they represent precisely the sort of blatant protectionism that the dormant commerce clause doctrine forbids. What these arguments overlook, however, is the existence of the 21st Amendment. The amendment authorizes laws like Michigan's because it was *intended*, where alcohol is involved, to disable the dormant commerce clause doctrine.

The 21st Amendment, which repealed Prohibition, states in its second section: "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 plain text suggests that recent court decisions are mistaken. Yet the courts tell us that the 21st Amendment is not to be read literally or invoked as a shield for protectionist legislation. Only laws promoting temperance, they say, are protected by the amendment.

Where have courts gotten the idea for this distinction—between "good" alcohol legislation, which furthers the state's "legitimate" core interest in temperance and related alcohol oversight and taxation, and "bad" legislation motivated by simple economic protectionism? Certainly not from the text of the amendment, which makes no such distinction.

Nor can opponents enlist the aid of the amendment's framers. The 21st Amendment was written in part to allay state concerns that they would face renewed constitutional challenges to their regulation of alcohol shipped in interstate commerce, and so constitutionalized state control over alcohol imported into states.

Before Prohibition, in the 19th century, alcohol consumers and shippers successfully invoked the dormant commerce clause doctrine against state attempts to halt the burgeoning mail-order liquor trade. The dormant commerce clause thus essentially rendered dry states powerless to enforce their liquor laws. In response, Congress passed the Wilson Act in 1890 and the Webb-Kenyon Act in 1913, which effectively disabled the dormant commerce clause doctrine as applied to interstate shipments of liquor, and permitted states to enforce their laws.

The Supreme Court upheld this legislation, thus confirming the power of Congress, by affirmatively exercising its power over interstate commerce, to lift the inferred restrictions on the states placed by the dormant commerce clause doctrine. These congressional efforts culminated in the ratification of the 18th Amendment, which inaugurated a 14-year experiment with national prohibition. When enthusiasm for Prohibition waned, state concerns about their ability to control the alcohol trade re-emerged.

THE 21ST AND THE STATES

Both proponents and opponents of repeal agreed that the power to regulate alcohol rightly belonged to the states. They made sure to eliminate a provision from an early version of the amendment that empowered both the federal and state governments to regulate "saloons." Both wet and dry senators objected, noting the provision would undermine the key purpose of the amendment: to return control over liquor regulation to the states.

With that important change, the "drys" were assured that the dormant commerce clause doctrine would not be revived to strike down state regulatory efforts; the "wets," too, were provided with constitutional assurances that dry forces could not use federal power to re-establish some form of prohibition in the future. As the participants understood it, the main question regarding alcohol regulation was one of power. The 21st Amendment settled it in favor of the states.

Early Supreme Court cases clearly reflected that understanding. In *State Board of Equalization of California v. Young's Market*, decided in 1936, Justice Louis Brandeis rejected arguments that the 21st Amendment required a state, if it chose to permit the sale of alcohol at all, to treat all alcohol the same. The plaintiffs in *Young's Market* were asking the Court to strike down a \$500 license fee imposed on importers of out-of-state beer. Brandeis wrote that to adopt the plaintiffs' arguments "would involve not a construction of the [21st Amendment], but a rewriting of it." In three later cases—*Mahoney v. Joseph Triner Corp.* (1938), *Joseph S. Finch & Co. v. McKittrick* (1939), and *Indianapolis Brewing Co. v. Liquor Control Commission* (1939)—the Supreme Court subsequently applied the core holding of *Young's Market*.

However, since a 1965 case, *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, suggested that the 21st Amendment had not repealed the commerce clause despite the holding in *Young's Market*, the Supreme Court has not vigorously defended the power reserved to the states by the amendment. In 1984, the Court in *Bacchus Imports Ltd. v. Dias* applied to a state law tax-

ing alcohol the very dormant commerce clause analysis that the amendment was intended to foreclose. At no time has the Court made a convincing case for the correctness of its more recent decisions, and it also has failed to expressly overrule *Young's Market*.

Recent lower court decisions, like the 6th Circuit's *Engler* and the District Court's opinion in *Swedenburg v. Kelly*, have indulged in still broader applications of the Supreme Court's relatively small encroachments on the 21st Amendment, and erroneously concluded that those high court decisions dictate the wholesale invalidation of state liquor importation laws. The growing market for interstate shipment of alcohol, and the near unanimity of federal courts in their continued assertions of the 21st Amendment's irrelevance, makes this an appropriate time for a re-examination of the amendment and the Supreme Court's interpretation of it. Without a reaffirmance of the agreement behind it, the amendment will become a dead letter.

Were the issue simply one of cheap liquor vs. expensive liquor, or whether states ought to protect local economic interests as a matter of policy, one might applaud the actions of the lower courts. After all, the dormant commerce clause doctrine is a powerful judicial weapon designed to enforce the common market vision of the Constitution—and so much the better for the nation.

But, as is often the case when means are subordinated to ends in fashioning constitutional law, there are real costs to the approach the lower courts have adopted. Those costs could amount to de facto alcohol deregulation, which would quite possibly allow for elimination of longstanding, state-based safeguards against underage access, as well as states' ability to track and tax alcohol sales and ensure product purity.

PAYING THE CONSTITUTIONAL PRICE

But there is an even more serious cost to judicial abnegation of the 21st Amendment, a cost to the integrity of the amending process itself. If members of Congress who propose amendments, and those in the states who are called upon to ratify them, cannot be assured that the judiciary will respect the "constitutional politics" of an amendment when interpreting it, then one might forgive them for asking whether it is worth going to the trouble of proposing Article V amendments at all. This would leave the process of constitutional change entirely in the hands of the judiciary and remove an important popular check on the court decisions.

Not only would the denigration of our amending process be a loss for our constitutional regime, but it might have more ominous consequences for constitutionalism in general. If the judiciary is not bound to respect the words and intent animating a relatively young amendment, then why should the Constitution's other, older textual boundaries command observance? Thus, when contemplating the fate of the 21st Amendment, it hardly seems alarmist to wonder whether other parts of the Constitution are similarly vulnerable to judicial repeal.

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