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Wine Wars: The 21st Amendment and  
Discriminatory Bans to Direct Shipment of  
Wine

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# Wine Wars: The 21st Amendment and Discriminatory Bans to Direct Shipment of Wine

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## Abstract

This essay is actually a series of posts from the Volokh Conspiracy weblog ([www.volokh.com](http://www.volokh.com)) that discusses the policy and constitutional issues surrounding a question that the Supreme Court will hear this term, whether discriminatory barriers to the interstate direct shipment of wine are constitutional. Because of the timeliness of the issue, the essay is presented in this unusual and informal format so as to be available to the public more rapidly than through the traditional law review format. This essay” reviews the historical evidence and ratification history of the 21st Amendment, and concludes that the answer is unambiguously no.

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 First, §1 of the Amendment repealed Prohibition, restoring to the States their exclusive police power authority to regulate the local sale and distribution of alcohol.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 the States to enforce their police power on equal terms against alcohol shipped in interstate commerce as against alcohol manufactured or sold within the 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 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.

# **WINE WARS: THE 21<sup>ST</sup> AMENDMENT AND DISCRIMINATORY BANS TO DIRECT SHIPMENT OF WINE**

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In other words, the 21<sup>st</sup> 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.

**JEL Classifications:** KO

**Keywords:** Commerce Clause, Twenty-First Amendment.

## 1. Effects of direct shipping

According to empirical study, the benefits to consumers from direct wine shipment can be substantial, both in terms of variety and price. A study by the FTC

<http://www.ftc.gov/opa/2003/07/wine.htm> published during my tenure found that found that 15 percent of a sample of popular wines available online were not available from retail wine stores within 10 miles of McLean. Moreover, because this was a study of the "Top 50" most popular wines the Wine and Spirits annual poll, these were not obscure wines. For smaller wineries, availability in traditional outlets would be even smaller.

In addition, depending on the wine's price, the quantity purchased, and the method of delivery, consumers can save money by purchasing wine online. Because shipping costs do not vary with the wine's price, consumers experience the greatest savings on expensive wines, while brick-and-mortar stores may offer better prices on less expensive wines. The McLean study suggests that, if consumers use the least expensive shipping method, they could save an average of 8-13 percent on wines costing more than \$20 per bottle, and an average of 20-21 percent on wines costing more than \$40 per bottle. In a recent working paper, the authors of the original paper update their research and find essentially the same findings:

<http://www.mercatus.org/regulatorystudies/article.php/790.html>

What about underage drinking? This may come as a shock to Conspiracy readers (who certainly would never have done such a thing in their younger days), but apparently some kids these days are able to buy beer and wine at the local 7-11, notwithstanding the vigilant efforts of the sleepy, hourly-wage sales clerk behind the counter at 11:00 p.m. Friday night. In fact, studies show that minors can fairly routinely purchase alcohol from traditional bricks-and-mortar sellers.

Does this mean that minors will be buying Pinor Noir over the Internet? Probably not. The FTC surveyed liquor enforcement officials in several states that permit direct shipping and they reported few, if any, problems with direct shipping leading to increased underage access. This is not surprising, of course, as intuition tells us that minors are not likely to get a hankering for a perky Merlot, swipe their parent's credit card, order wine on-line, and have it shipped to them for arrival several days later, and to make sure that there is some adult at home to sign for the package when it arrives.

In fact, the actual experience of state liquor officials confirm this intuition. They point to several reasons why minors are unlikely to buy wine over the Internet. First, Gallo, Blue Nun, and other cheap perennial favorites of 20 year olds are cheaper and easier to get at 7-11; because of shipping costs, only more expensive wines are cheaper on-line. Second, there are substantial inconveniences associated with obtaining alcohol on-line as opposed to a traditional seller, such as needing a credit card and being forced to wait several days for delivery of the product. Finally, many states have implemented safeguards that can reduce the danger of underage access to alcohol, such as clearly labeling the package and requiring an adult signature upon delivery.

Also, in the Supreme Court cases, there are already 200 New York wineries shipping directly to consumers. The issue is not whether or not to allow direct shipping--that bridge has already been crossed. The issue whether to allow Virginia and Oregon wineries to ship to consumers on the

same basis as the 200 New York wineries that are already shipping. Consumers can get just as drunk on New York wines as California or Washington wines, thus it is doubtful that temperance is the real justification for these laws. Indeed, the legislative history of the states' enactments indicate that it was protectionism, not temperance, that animated them.

Proffered concerns about underage drinking are thus merely a stalking horse for the financial interests at stake in these cases. Allowing direct shipping of wine isn't going to cause minors to start getting loaded on Sonoma Cutrer. It's just a question of whether consumers will be allowed to take advantage of the greater selection and lower prices available from direct shipping.

### **Update:**

A few other thoughts prompted by reader inquiries:

First, it is clear from the legislative history of the state regulatory regimes that the purpose of the discrimination in NY and Michigan is to protect and encourage their in-state wine industries, not to further consumer protection goals.

Second, in the testimony at the FTC hearings on the topic, the states that permit direct shipping testified that to the extent that they get complaints about supposed shipments to underage drinkers, those complaints have almost uniformly come from competitors and wholesalers--they almost never receive any complaints from parents saying that their kids bought wine off the Internet.

Third, to the extent that there is some generic consumer protection goal furthered by the regulatory regimes here (such as food purity, etc.), there is no distinction between wine, grapes, grape juice, etc. In fact, one of the leading dormant Commerce Clause cases on point is the *Hunt* case, which dealt with a discriminatory ban imposed by North Carolina against Washington apples. Moreover, the question is not whether California wineries can sell wine in New York, it is whether California wineries can ship directly to consumers for personal use, rather than having to pay the wholesaler's mark-up. Thus, the product is going to get directly to consumers in the same form in a sealed package and the question is whether it will be done so in the most efficient manner possible.

## **2. The twenty-first amendment: its text**

There is no persuasive policy goal to justify discriminatory bans that permit direct shipment by in-state wineries but prohibit out-of-state wineries. New York, for instance, has 200 farm wineries shipping directly to consumers and has not proffered any evidence that consumers can only get drunk on California wines but not New York wines. Given the absence of any reasonable justification for these laws, the next question is whether the 21st Amendment nonetheless permits states to engage in this arbitrary discrimination, notwithstanding the dormant commerce clause.

An essential purpose of the Commerce Clause was to eliminate the protectionist barriers erected by the states under the Articles of Confederation. As Justice Johnson wrote in *Gibbons*, "If there was any one object riding over every other in the adoption of the constitution, it was to keep the

commercial intercourse among the States free from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. 1 (1824) (Johnson, J., concurring). The 21st Amendment, as we will see, was intended to deal with the narrow but difficult problem of transitioning from the federal prohibition regime under the 18th Amendment to the post-Prohibition world after the 21st Amendment repealed prohibition. The 21st Amendment restored the constitutional balance that had been upset by the 18th Amendment, but was not intended to give the states power to engage in economic warfare against each others' products. Indeed, the reciprocal protectionist barriers and economic Balkanization that the states have erected in recent years is exactly the behavior that the Commerce Clause was intended to prevent. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

But what of the 21st Amendment? Section 1 of the 21st Amendment repealed the 18th Amendment, thereby ending Prohibition. Section 2 of the 21st Amendment 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." It is argued that by its plain language this provision gives the states plenary power over interstate commerce in alcohol, to regulate "importation or transportation" in any way the state sees fit, including imposing discriminatory bans on importation. But this plain language interpretation is clearly wrong.

Section 2 by its own terms neither specifically mentions the Commerce Clause nor is it specifically limited only to the Commerce Clause. Thus, there is no distinguishing principle in the text of §2 of the 21st Amendment that would justify its application to a partial repeal of the Commerce Clause with no modification of any other provision of the Constitution, such as the First Amendment, Equal Protection Clause, or Due Process Clause. Still less is there any reason to believe that it repeals only the dormant Commerce Clause, while leaving all other provisions of the Constitution intact.

Early interpretations of §2 in fact did point to its plain language to interpret the 21st Amendment as a blanket exception to the Constitution. In upholding a state liquor regulation in *State Bd. of Equalization of California v. Young's Mkt.*, the first Supreme Court case addressing §2, the Court stated, "The claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth." 299 U.S. 59, 64 (1936).

The rationale for limiting the text of §2 is evident. Otherwise, a state could pass a law that prohibited the importation of kosher or sacramental wine. Or could permit the importation or transportation of alcohol to white people or to those who sign a pledge not to criticize the government. Indeed, if the expansive interpretation of the plain language is adopted, it seems that the state government could enslave members of the population and make them drive beer trucks. Given the absurd consequences that would flow from an expansive interpretation of the 21st Amendment, it is reasonable to assume that contrary to the interpretation imposed in *Young's Mkt.*, the framers of the 21st Amendment did not intend to eliminate all constitutional limits on the states' regulatory authority. In other words, whereas the final clause of the provision refers to "in violation of the laws thereof," it clearly should be read as in violation of otherwise valid laws thereof. And, in fact, in a whole stream of subsequent cases, the Supreme Court has correctly

held that the 21st Amendment does not nullify the application of the 1st Amendment Freedom of Speech, 1st Amendment Establishment Clause, Due Process Clause, or Equal Protection Clause. Clearly, therefore, state authority is not untrammelled under the 21st Amendment.

But perhaps the 21st Amendment repeals commercial provisions of the Constitution, and not individual liberties protections. Note first, however, that this distinction is not found anywhere in the text of §2--so much for the unambiguous language of that provision. So that the distinction must be found in some extra-textual source (which will be discussed in upcoming entries). But assuming somehow the phrase "importation or transportation" somehow magically gets converted into a selective repeal of only commercial clauses, does this authorize states to engage in economic warfare against the products of other states with no justifiable basis?

Well, no. First, the Supreme Court has held that §2 does not repeal the "Import-Export" Clause of the original Constitution. In *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court stated, "This Court has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids. . . . Nothing in the language of the Amendment nor in its history leads to such an extraordinary conclusion." *Id.* at 344-45. Then, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), the Court observed, "To [conclude] that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification. If the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

So the Court has held that notwithstanding the specific mention of "importation" in the 21st Amendment, it does not repeal the "Import-Export" Clause, and notwithstanding the mention of "transportation" it does not prohibit the transportation through New York for delivery to a duty-free shop at the airport (the facts of *Hostetter*). In short, notwithstanding the initial impression that the plain language of the 21st Amendment gives the states the power to do whatever they want to, the Supreme Court has not interpreted it that way and it is absurd to think that Congress intended that meaning.

Whatever the 21st Amendment does, therefore, there is no evidence that it was intended to overturn one of the fundamental purposes of the Constitution, which was to eliminate internal trade barriers that plagued the country under the Articles of Confederation. As James Madison stated, the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves."

### **3. The Dormant Commerce Clause**

Nothing in the text of the 21st Amendment specifically repeals the dormant Commerce Clause, nor does it specifically repeal only the dormant Commerce Clause and no other provision of the Constitution. Nonetheless, some conservatives have argued that the dormant Commerce Clause is not "in" the Constitution but is rather a figment of the judicial imagination made up by the



Supreme Court. So as a result, all the 21st Amendment supposedly does is make this judicial gloss inapplicable in the context of the 21st Amendment. This view is hinted at in the opening line of Judge Easterbrook's opinion in *Bridenbaugh v. Freeman-Wilson*, "This case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not."

Moreover, I have heard many conservatives insist that Justices Scalia and Thomas do not believe in the dormant commerce clause, so that all the 21st Amendment supposedly does is repeal this illegitimate judicial usurpation of state authority. This view is incorrect on many grounds. First, it proves too much, in that it would repeal any supposedly nontextual right or power, regardless of its history or foundation in the structure of the Constitution. Second, it conflates two different prongs of the dormant Commerce Clause, the well-established nondiscrimination principle and more controversial balancing test of *Pike v. Bruce Church*.

First, a primary purpose of the Constitution was to prohibit the states from engaging in the type of protectionism and economic warfare the prevailed under the Articles of Confederation. "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. 1 (1824) (Johnson, J., concurring). Indeed, concerns about state protectionism were "the immediate cause, that led to the forming of a [constitutional] convention." *Gibbons*, 22 U.S. at 224. Madison himself justified the grant of Commerce Clause authority to the federal government as, "[growing] out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves."

Moreover, it is not sufficient simply to argue that ambiguous textual commands (such as section 2 of the 21st Amendment) should trump constitutional constructions just because they are nontextual. If this were so, then it would mean, for instance, that the 21st Amendment would repeal the incorporation doctrine, or the so-called "reverse incorporation" doctrine of *Bolling v. Sharpe*. Indeed, this would mean that the 21st Amendment would also repeal cases such as *McCullough v. Maryland* in the context of alcohol. Indeed, this rationale would render the unwritten doctrine of *Marbury v. Madison* itself invalid in cases involving the 21st Amendment. There is no indication that the framers of the 21st Amendment intended these absurd result, and it would be contrary to all accepted principles of constitutional interpretation to infer such absurd results absent some congressional indication to the contrary. In fact, as Justice Brennan observed in *North Dakota*, the Court has "never held" that regulations affecting the importation and transportation of alcohol "are insulated from review under the federal immunity doctrine [as established in *McCullough*] or any other constitutional ground, including the dormant Commerce Clause."

Second, the hostility of some conservatives to the dormant Commerce Clause is based on a confusion between two different prongs of the dormant Commerce Clause, the nondiscrimination principle on one hand, and the balancing test of *Pike v. Bruce Church* on the other. Under *Pike*, the Court weighs the benefits of the state regulation against the costs it imposes on interstate commerce. Scalia has properly criticized this doctrine as lacking intellectual coherence and of turning the court into a super-legislature weighing the policy wisdom of state enactments.

Although Justice Scalia has consistently criticized the Pike balancing test, he has consistently recognized the nondiscrimination principle. Writing the opinion for the Court in *New Energy v. Limbach*, for instance, he wrote, "It has long been accepted that the Commerce Clause ... directly limits the power of the States to discriminate against interstate commerce. This 'negative' aspect of the Commerce Clause prohibits economic protectionism - that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988).

More precisely, Scalia concurred in *Healy*, noting that even though the price scheme there dealt with alcoholic beverages, the 21st Amendment did not save it, "since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment."

Justice Thomas has also questioned the textual foundation of the dormant Commerce Clause, but he has not questioned the constitutional foundation of the nondiscrimination principle. In *Camps Newfound*, for instance, he trashes the dormant Commerce Clause, but makes clear that he would still apply the dormant Commerce Clause, just doing so under the Import-Export Clause, which he would apply to interstate commerce as well foreign trade. Thus, he says, "our rule that state taxes that discriminate against interstate commerce are virtually per se invalid under the negative Commerce Clause may well approximate the apparent prohibition of the Import-Export Clause itself." 520 U.S. at 636.

Thus, although Scalia and Thomas would both abandon the balancing test of Pike, it is clear that they both believe that the ban on protectionism is well-grounded in the Constitution, although Thomas would anchor it in the Import-Export Clause instead of the dormant Commerce Clause. (As an aside, Cass Sunstein offers an interesting and persuasive defense of the Pike test, rooted in the nondiscrimination principle. Sunstein argues that where the burden on interstate commerce of a regulation manifestly outweigh the benefits, this supports an inference that the real intent of the law is protectionism and thus unconstitutional. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689-92 (1984)).

#### **4. Purpose of the 21st amendment**

There is no reasonable policy defense for discriminatory bans on interstate direct shipment of wine, the plain language of the 21st Amendment does not authorize discriminatory bans, and the dormant Commerce Clause does not automatically yield to other constitutional provisions, such as the 21st Amendment. This means that the effect of the 21st Amendment on the wine direct shipping debate must be found in the historical context of the 21st Amendment, which will be the focus of the next several postings on the topic.

The purpose of the 21st Amendment was to restore the constitutional and legal balance that was interrupted by the enactment of the 18th Amendment imposing federal prohibition. Under that regime, the states had the power under their general police power to regulate the distribution and sale of alcohol within their boundaries and Congress had used its Commerce power to enact several laws that eliminated a peculiar "reverse discrimination" that had been caused by several Supreme Court decisions that had forced dry states to admit imports of alcohol produced in other

states. The states' police power, however, did not extend to interference with interstate commerce--as it was expressly well-established that the states' power to regulate alcohol under their police power authority did not authorize them to erect discriminatory barriers to interstate commerce. Thus, the states could impose restrictions on the manufacture, sale, and consumption of alcohol, but these rules were required to be imposed in an even-handed manner on all products regardless of state of origin.

This state police power was buttressed by the Wilson Act and Webb-Kenyon Act, which were enacted by Congress pursuant to its police power to enable dry states from being forced to accept imports from out-of-state, as was the case under the then-prevailing Commerce Clause jurisprudence of the Supreme Court. Thus, the purpose of the 21st Amendment was intended to prevent dry states from being forced to discriminate in favor of interstate commerce, not to authorize wet states to erect protectionist barriers against the products of other wet states. The 21st Amendment, in turn, constitutionalized this legal regime and restored the pre-18th Amendment constitutional balance. First, it withdrew the federal government from the field of local police power regulation into which it had essentially strayed under the 18th Amendment regime. Second, it restored to the states exclusive police power authority. Third, it constitutionalized the Wilson and Webb-Kenyon Acts, which as will be seen, permitted the states to exclude the sale of out-of-state alcohol on the same terms as in-state alcohol, essentially subjecting out-of-state alcohol to the same police power regulations applied to in-state. Fourth, it retained the long-standing ban on using the police power to erect protectionist barriers against out-of-state products.

It is absurd to think that the framers of the 21st Amendment intended to grant wet states the power to unilaterally block the importation and sale by out-of-state producers on the same terms as in-state producers of the identical products. Not only is it absurd, but the historical context that culminated in the ratification of the 21st Amendment, as well as the overwhelming body of legislative history on point leads to this conclusion.

Incidentally, it is often argued that the purpose of the 21st Amendment was to allow "dry states to stay dry." I personally don't think this fully captures the intent of the Amendment, because it appears to me that it would allow wet states to regulate other aspects of alcohol pursuant to its police power and to impose those same requirements on out-of-state sellers as well. Thus, for instance, the state could establish a minimum age for purchasing alcohol and apply that in an even-handed fashion to both in-state and out-of-state sellers. Thus, the 21st Amendment probably reaches regulation beyond the mere binary decision whether to stay dry completely, but instead permits an even-handed exercise of the state's police powers to extend to products shipped in interstate commerce.

## **5. Nineteenth-century alcohol jurisprudence**

During the Nineteenth Century it was recognized that the states could exercise their police power to regulate alcoholic beverages within their borders and to prohibit the in-state manufacture and sale of alcohol. *License Cases*, 46 U.S. (5 How.) 504 (1847); *Mugler v. Kansas*, 123 U.S. 623 (1887). In the *License Cases*, Chief Justice Taney wrote, "If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice,

or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper." Several similar cases followed over the next 40 years, such that the Court in *Mugler* wrote, "These cases rest upon the acknowledged right of the states of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the constitution of the United States." *Mugler* dealt with the peculiar situation of whether the state could ban the manufacture of alcohol for purely personal use, as opposed to manufacture for sale or commerce. The court said that this was a valid exercise of the state's police power: "But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." (I will leave for another day as to what implications *Lawrence v. Texas* may have for this view of the police power.)

States could not, however, exercise their police power in a discriminatory manner. As the Supreme Court wrote in *Walling v. Michigan*, 116 U.S. 446, 460 (1886):

"The single question, therefore, is whether the statute of 1875 is repugnant to the constitution of the United States. Taken by itself, and without having reference to the act of 1881, it is very difficult to find a plausible reason for holding that it is not repugnant to the constitution. It certainly does impose a tax or duty on persons who, not having their principal place of business within the state, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the state. If this is not a discriminating tax leveled against persons for selling goods brought into the state from other states or countries, it is difficult to conceive of a tax that would be discriminating. It is clearly within the decision of *Welton v. Missouri*, 91 U. S. 275, where we held a law of the state of Missouri to be void which laid a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares, or merchandise, not the growth, product, or manufacture of that state, and which did not lay a like tax upon the sale of similar articles, the growth, product, or manufacture of Missouri. The same principle is announced in *Hinson v. Lott*, 8 Wall. 148; *Ward v. Maryland*, 12 Wall. 418; *Guy v. Baltimore*, 100 U. S. 438; *County of Mobile v. Kimball*, 102 U. S. 691, 697; *Webber v. Virginia*, 103 U. S. 344.

"A discriminating tax imposed by a state, operating to the disadvantage of the products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the constitution upon the congress of the United States. \*\*\*\*\* We have also repeatedly held that so long as congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that such commerce shall be free and untrammelled, and that any regulation of

the subject by the states, except in matters of local concern only, is repugnant to such freedom."

Thus, the states could under the police power regulate the local manufacture and sale of alcohol, but could not use this power to discriminate in favor of in-state products.

But the Commerce Clause jurisprudence of the time also prevented the states from prohibiting shipments from outside the state that were resold within the state in their original package. See *Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890). This created an anomaly, in that states could forbid domestic production of alcoholic beverages but could not stop imports; the Constitution effectively favored out-of-state sellers." *Bridenbaugh*, 227 F.3d at 852.

At this time, therefore, the proposition was well-established that it was a valid use of states' police power to enact prohibition within the state, or to allow for the "local option" for counties or towns to become dry. But, the states' exercise of their police power did not extend to erecting discriminatory bans against interstate commerce. But this created a conflict between the states police power and judicial interpretations of the Commerce Clause that effectively discriminated in favor of out-of-state suppliers.

The next several posts review the legislative efforts to respond to this anomaly, culminating in the ratification of the 21st Amendment. Throughout this entire process it will be seen that the consistent purpose of these enactments was to allow states to better effectuate their police power by eliminating the peculiar discrimination in favor of out-of-state alcohol, not to provide states with new tools to engage in economic warfare against their neighbors.

## **6. The Wilson Act**

The alcohol jurisprudence of the 19th Century had the peculiar effect of discriminating in favor of out-of-state alcohol production. The Supreme Court had blessed the power of states to exercise their police power over local affairs to enact state prohibition or to allow local jurisdictions to exercise a "local option" to ban the production and consumption of alcohol, including even the production for personal use. On the other hand, the Supreme Court held that under the "Original Package" doctrine interpretation of the Commerce Clause, dry states could not prohibit the delivery of alcohol in its original package from out-of-state sellers and manufacturers. Because of the Original Package doctrine, the States were unable to regulate imported alcohol until the first sale in the State or until it was removed from its original package. As a result, states could regulate saloons and bars, but could not regulate even the resale of liquor that remained in its original package.

Congress responded to this anomaly by passing the Wilson Act, 26 Stat. 313 (1890), which provides that intoxicating liquors or liquids transported into any State or remaining therein for use, consumption, sale or storage, shall, upon arrival, be subject to the laws of the State "enacted in the exercise of its police power to the same extent and in the same manner as though such liquids or liquors had been produced in such State \* \* \*, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The language permitting States to regulate imported liquor "to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory," thereby eliminated the privileged status of interstate sellers under the Leisy and Bowman decisions. But the Wilson Act also retained the long-standing prohibition on state discrimination against interstate commerce that was laid down in [Walling v. Michigan](#); the Act was intended only to empower the States to impose the same regulation on imported alcohol as domestic products, not to discriminate against out-of-state products.

In *Scott v. Donald*, 165 U.S. 58, 100 (1897), the Supreme Court held that the purpose of the Wilson Act was to resolve the conflict between the federal Commerce Clause and the state's police power by closing the gap in the state's police power created by the original package doctrine. Thus the Wilson Act built upon the foundation of the state's police power to regulate alcohol – both the state's power to regulate local affairs under the police power was unaffected and the traditional limitations on the police power that were recognized in *Walling* remained. Thus, the Court noted in *Donald* that the courts must first determine whether a given state law is a lawful "exercise of its police power," but even if it is, it must still comport with the Constitution. "We cheerfully concede that the law in question was passed in the bona fide exercise of the police power. \*\*\* But, as we have had more than one occasion to observe, our willingness to believe that this statute was enacted in good faith, and to protect the people of the state from the evils of unrestricted importation, manufacture, and sale of ardent spirits, cannot control the final determination, whether the statute, in some of its provisions, is not repugnant to the constitution of the United States." The court also noted that the law did not completely prohibit the manufacture or sale of alcohol, it simply discriminated against interstate sellers.

As to the effect of the Wilson Act, the Court observed, "That law was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are, therefore, the subjects of legitimate commerce. When that law provided that 'all fermented, distilled or intoxicating liquors transported into any state or territory, remaining therein for use, consumption, sale or storage therein, should, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise,' evidently equality or uniformity of treatment under state laws was intended."

The Court continued, "The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid; or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the state cannot, under the congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

As *Scott v. Donald* indicated, therefore, the power to regulate alcohol remained grounded in the state police power, and the Wilson Act was intended to plug a hole that had been caused by the Original Package doctrine. Nothing in the Wilson Act suggested that Congress intended to

overturn the longstanding principle recognized in *Walling* or to create a new and unprecedented power for the states to erect discriminatory barriers to interstate commerce or to treat out-of-state alcohol worse than in-state.

Subsequent court decisions, however, undermined the Wilson Act by barring dry states from prohibiting the interstate shipment of alcohol directly to consumers, so long as the alcohol was in its original package and was intended for purely personal use and not for resale. In *re Rahrer*, 140 U.S. 545 (1891); *Rhodes v. Iowa*, 170 U.S. 412 (1898). This led to the enactment of the Webb-Kenyon Act, which will be reviewed in the next post.

Incidentally, the Wilson Act remains in effect today, and *Scott v. Donald* has never been overturned or questioned. Presumably, therefore, if the nondiscrimination principle of the Wilson Act and *Scott* was intended to have been overturned by Webb-Kenyon or the 21st Amendment, one would expect to find some reference to it in those enactments.

## **7. Webb-Kenyon Act**

The enactment of the Webb-Kenyon Act is consistent with the history that came before it in reconciling the state's police power over local affairs with the federal government's power over interstate commerce. As noted in Part 5, under the traditional balance of power, the states had essentially plenary power to regulate the manufacture and consumption of alcohol pursuant to its police power (including imposing state-wide prohibition), but did not have the power to discriminate against interstate commerce (*Walling v. Michigan*). But under the prevailing interstate commerce clause jurisprudence of the 19th century, states could prohibit internal manufacture and sale of alcohol, but could not prohibit its importation and resale in its "original package." This effected a perverse discrimination in favor of interstate commerce. As noted in Part 6, the Wilson Act attempted to correct this problem by providing that alcohol imported into the state for sale would be treated the same as local liquor. Moreover, the Supreme Court held in *Scott v. Donald* that the Wilson Act did not authorize states to discriminate against out-of-state sellers of alcohol. But the Wilson Act also left a loophole, in that it did not allow dry states to prohibit the importation of alcohol for personal use.

The Webb-Kenyon Act was passed in 1913 to enable the states to close this remaining loophole that essentially discriminated in favor of out-of-state sellers of alcohol and undermined the states' ability to enforce their laws in dry states. Webb-Kenyon prohibited, as a matter of federal law, "[t]he shipment or transportation" of alcohol into a State of intoxicating liquor that "is intended, by any person interested therein, 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." Webb-Kenyon, therefore, was an enforcement law, not a substantive law ... the substance of Webb-Kenyon was grounded in state laws enacted pursuant to their police power. Thus, state laws first had to be a valid substantive exercise of the state's police power before it was incorporated into Webb-Kenyon and could be applied to interstate shipments of liquor. Thus, there was no indication that Webb-Kenyon was intended to modify the traditional limits on the state police power that forbade states from using the police power to discriminate against interstate commerce. Instead, the initial law that the state sought to enforce against interstate commerce must itself be an externally valid exercise of the state's police power. *McCormick v. Brown*, 286 US 131 (1932).

As Senator Kenyon himself stated about the Act, its purpose was to enable the states to better effectuate their police powers by eliminating the discrimination in favor of out-of-state sellers. He said: "This bill, if enacted would not be a law to bring about prohibition. It would not be a law to stop personal use of intoxicating liquors .... Its purpose, and its only purpose, 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." 49 Cong. Rec. 760.

Kenyon also stated, "Every State in which the traffic of liquors has been prohibited by law is deluged with whisky sent in by people from other States under the shelter of the interstate-commerce law. There are daily trainloads of liquors in bottles, jugs, and other packages sent into the State consigned to persons, real and fictitious, and every railway station and every express company office in the State are converted into the most extensive and active whisky shops, from which whisky is openly distributed in great quantities. Liquor dealers in other States secure the names of all persons in a community, and through the mails flood them with advertisements of whisky, with the most liberal and attractive propositions for the sale and shipment of the same.... It is evident that under such circumstances the prohibition law of a State is practically nullified, and intoxicating liquors are imposed upon its people against the will of the majority." 49 Cong. Rec. 761 (1912) (Statement of Sen. Kenyon).

Other supporters of the Act echoed Senator Kenyon's views. Senator Sanders, for instance, indicated that the Act was designed to avoid the Court's precedents holding that a "State [could] regulate the quality of liquor sold within the State, but it [could] not regulate the quality of liquor sold from outside the State." The only effect he added, was that "It only stops the business of selling liquor within dry territory by persons outside that territory in violation of law."

Webb-Kenyon, therefore, was intended to be a shield to protect dry states from being forced to receive imports in violation of its state laws, not to be a sword for wet states to engage in economic warfare against the products of other states.

The Supreme Court also recognized that Webb-Kenyon was merely an effort to extend the Wilson Act to reach this remaining hole in the states' enforcement power. As the Supreme Court noted in upholding the constitutionality of Webb-Kenyon, "Reading 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." *Clark Distilling Co. v. W. Maryland Ry. Co.*, 242 U.S. 311, 323-24 (1917). In particular, the court held, the purpose of the Webb-Kenyon Act was "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." *Clark Distilling Co.*, 242 U.S. at 323-324. In contrast, nothing in the legislative history or elsewhere suggests that Congress intended to modify or repeal the non-discrimination principle of the Wilson Act recognized in *Donald*, which is particularly noteworthy in that the Court had decided *Donald* more than a decade beforehand.

In fact, contemporaneous court decisions applying Webb-Kenyon expressly held that the nondiscrimination principle of the Wilson Act was preserved in Webb-Kenyon. Interpreting



Webb-Kenyon in 1916, for instance, the South Carolina Supreme Court held: "The act of Congress of March 1, 1913, known as the 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." *Brennen v. Southern Express Co.*, 106 S.C. 102, 90 S.E. 402, 404 (1916).

Indeed, it was well-understood for decades (based on cases such as *Brennen* and other similar cases of the era) that Webb-Kenyon did not permit discrimination against interstate commerce. See Note, 85 U. Pa. L. Rev. 322 (1946-1937) ("The aim of the legislation, culminating in the Webb-Kenyon Act, which preceded the Twenty-First Amendment was to prevent the exclusive power of Congress over interstate commerce from rendering nugatory state police regulation of the liquor traffic."); Rogers, *Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act*, 4 Va L. Rev. 174 (1916); Howard S. Friedman, 21 Cornell L.Q. 504 (1935-1936) ("The cases under the Webb-Kenyon Act uphold state prohibition and regulation in the exercise of the police power yet they clearly forbid laws which discriminate arbitrarily and unreasonably against liquor produced outside of the state.") Note, 55 Yale L.J. 817 (1945-1946) (noting that under the Act "it was successively reiterated that only uses specifically forbidden by state law were prohibited, that interference with interstate commerce was permissible only in the exercise of valid state police power, and that discriminatory state statutes did not represent proper exercises of such power."). *Brennen* and similar cases simply evidenced the prevailing consensus that Webb-Kenyon did not create a new power for states to discriminate against interstate commerce.

Following Prohibition and its repeal, there was some concern that the enactment of the National Prohibition Act (which had implemented the 18th Amendment) had implicitly repealed Webb-Kenyon. In particular, it was thought that the National Prohibition Act may have eliminated the states' authority to define the term "liquor" pursuant to their state police power. Indeed, this challenge was raised expressly in *McCormick v. Brown*. In order to quiet this objection, in 1935 Congress reenacted Webb-Kenyon. As one commentator observed in 1938, "Most congressmen seem to have believed that the Webb-Kenyon Act was still in effect, but to make certain, it was reenacted in 1935." 7 Geo. Wash. L. Rev. 406 (1938-1939).

This is where things stood at the time of the enactment of national prohibition by the 18th Amendment.

### **Update:**

In reviewing the legislative history of the 21st Amendment in connection with preparing more recent posts, I noticed the following colloquy that nicely demonstrates that the purpose of Webb-Kenyon expressly was not to delegate Congress's interstate commerce power to the states. Cong. Rec. p. 4140 (Feb. 15, 1933):

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 regulation 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."

## **Supplemental material on Webb-Kenyon**

Given the primacy of Webb-Kenyon to the understanding of the 21st Amendment, I thought it might be useful to post some additional excerpts from the legislative history of Webb-Kenyon to illustrate the point that the purpose of that Act was to enable the states to enforce their police powers against interstate liquor, not to give them a new power to engage in protectionism:

### **Senate Judiciary Sub-Committee**

Senator Nelson:

\* "The police power of the State does not extend to all of these subjects [such as clothing and wheat]. It is only those that are considered detrimental to health and morals. There the police power of the State is complete; but the police power of the State would not extend to prevent the sale of flour or any wholesome commodity .... In the Mugler case ... they passed upon the question of whether this commodity was within the police power of the State, and the question back of it all is the question that has not been discussed according to my mind, and that is this question: The Supreme Court has held that the State has complete police power over the sale and manufacture of liquor .... Now, if the people of Oklahoma have no right to engage in the manufacture and sale of intoxicating liquors in your State, why should I, as a citizen of Minnesota, have a greater right in your State than your own citizens?"

Hon. Fred S. Caldwell (the speaker before the Sub-Committee):

\* "[T]ake the Mugler case. There the Supreme Court of the United States held this: That Mugler had no right as a citizen of the United States to maintain and operate his brewery in the State of Kansas in violation of the laws of the State of Kansas, even though he intended the product for his own personal use and interstate commerce to points outside of the State. That, I think, is what was held in that case. Now, then, in my judgment, they could not say that that would be the law if Mugler has been operating a gristmill. If the State of Kansas had passed a law providing that all gristmills, even though operated in a way that could not offend on any ground of public policy ... in my judgment the Kansas law would have been clearly unconstitutional and void .... And in that sense I say that whisky stands on a different basis from flour."

\* "[In the lottery case, Champion v. Ames 188 U.S. 321 (1903), the Court said:] `As a State may,

for the purposes of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the widespread pestilence of lotteries and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another....' The Court says there that Congress has the right to regulate interstate commerce so as not to defeat the police powers of the State."

\* "Remember that the police power of the State is inferior to the power of Congress over interstate commerce. At any rate, if it is not inferior, where the two come in conflict the commerce power of the Constitution is supreme. So that if the State can in the exercise of its police powers prohibit a certain use of a thing or prohibit the sale of a thing, or prohibit its manufacture, what is there in the Constitution of the United States to prohibit Congress from saying that there shall be no interstate commerce in things so intended for use in violation of the laws of the States. I see no reason. But I think you would have to discriminate between flour and whisky. I do not think you could put them on the same basis. I think the Supreme Court would hold this, that as to whisky, as Senator Rayner has suggested, it might be absolutely taken out of interstate commerce, but flour could not be."

Senate Floor:

Senator McCumber:

\* "Having power to prohibit interstate commerce in intoxicating liquors [Congress] has the lesser power, which must be included in the greater, of allowing interstate commerce in intoxicating liquors under certain conditions, and those conditions may be that the commodities shall be subjected to the police powers of a State the moment they cross the State line; not that the State law shall be the effective law and be approved by Congress, but Congress shall relinquish its hold upon the articles upon certain conditions when they arrive within a State." [Which seems to be why the Act is entitled: An Act divesting intoxicating liquors of their interstate character in certain cases - the certain cases language seems to refer to those cases when the state police power operates]

\* "Has Congress the right to prohibit intoxicating liquors from entering into interstate commerce? If it has no such power, then I am willing to concede that it has no power to subject that liquor to the condition sought in the bill. If intoxicating liquors as a commodity have inherently all of the rights that clothing or bread could have, then we may well doubt the constitutionality of this law."

Senator Borah:

\* "That having a right to prohibit interstate commerce in intoxicating liquors it has the lesser right, which is included in the greater, of declaring a condition for the allowance of the article to enter into interstate commerce that it shall be divested of its Federal protection as a commodity in interstate commerce whenever conditions arise, and that the condition which will so divest it may be that it is intended to be used in violation of the police powers of the State."

## **8. The failure of national prohibition and the 18th amendment**

In the era before the 18th Amendment, the state and federal governments had thus reached a general accommodation on the balance of authority between the state police power and national

commerce power. The states had the authority to regulate purely local affairs, such as rules governing the manufacture and consumption of alcohol, especially with respect to bars and saloons, where alcohol was sold and consumed on the premises. The federal government retained complete control over matters involving interstate commerce. Under the Wilson Act and Webb-Kenyon, the federal government assisted the states in the enforcement of their police powers by making alcohol that was shipped in interstate commerce subject to the same rules as locally produced and sold alcohol—no better and no worse.

The ratification of the 18th Amendment and the enactment of the National Prohibition Act upset this balance. Although the 18th Amendment technically gave the state and federal governments concurrent power to regulate the manufacture, sale, and consumption of alcohol, because of the Supremacy Clause, it essentially gave the federal government absolute authority to regulate all aspects of alcohol, including purely local matters traditionally regulated by the states pursuant to their police powers, such as closing times of saloons, conditions of sale of alcohol, and the like. Stated more precisely, the states could impose stricter regulations pertaining to alcohol, but not weaker or different penalties that conflicted with the Volstead Act.

As Sidney Spaeth wrote in the *California Law Review*, "The enforcement of Prohibition represented the nadir of government regulation of liquor." 79 *Calif. L. Rev.* 161, 162 (1991). Local communities that were wet prior to the imposition of Prohibition resisted national efforts to impose Prohibition. As one Congressman noted, "If prohibition can only be enforced by the use of sawed-off shotguns in the hands of irresponsible Government agents, then indeed, we have reached the high tide of fanaticism and bigotry in this matter. We have reached a point where responsible citizens have not only the right but the duty to replace prohibition with some method of Government control under which law and order will prevail." 71 *Cong. Rec.* 2671 (1929) (Rep. Pittenger). During the era of Prohibition, the efforts of the federal government to enforce Prohibition where it was not wanted spawned violence, bloodshed, and corruption. This is precisely why police power issues involving moral issues was traditionally held to be a local matter—because of the divergence of views among different communities, it was thought that the exercise of police power authority was uniquely well-suited to state and local governments rather than the federal government. Indeed, the peculiarly local nature of alcohol regulation may be best exemplified by the fact that even in those areas that imposed prohibition, this was usually not even done on a statewide basis, but rather by permitting communities the "local option" to go dry—thus, local prohibition was rooted in truly local morals and authority. As Spaeth writes, "The United States learned a hard lesson from Prohibition."

The fundamental problem of national Prohibition, therefore, was that it essentially created a new police power for the federal government, one that it specifically lacks in any other area and which it is peculiarly unsuited to exercise, as the Supreme Court noted in the *Lopez* case. As will be seen, the purpose of the 21st Amendment is to rectify this aspect of Prohibition by removing the federal government from its unwise intervention into local police power regulation and thereby to reestablish the constitutional balance that prevailed prior to the 18th Amendment. The problem of Prohibition, which the 21st Amendment sought to correct, was federal overreaching into local police power matters—and crucially, had nothing whatsoever to do with the states' inability to regulate interstate commerce, and especially, to erect protectionist barriers to interstate commerce.

The problem with Prohibition was thus federal meddling in state and local affairs. As Secretary of the Treasury Andrew Mellon noted in its annual report for 1926: "The Treasury felt with respect to local law enforcement that too much responsibility had been placed upon the Federal Government. Even in those States which already had satisfactory State laws, and in which local machinery for enforcement had been provided, citizens and officials were looking to the Federal forces for the performance of police duties which were purely local. This misinterpretation of jurisdiction, while perhaps natural and for that reason excusable, proved a serious hindrance to the successful enforcement of the national prohibition law. Were the Federal Government to accept this responsibility, it must organize large police forces in the various communities, and, in addition, must provide adequate judicial machinery for the disposition of the local cases—and interference by the Federal Government with local government which could not be other than obnoxious to every right-thinking citizen." Quoted in Spaeth at 176.

The failure of Prohibition that prompted its repeal was an improper meddling of the federal government into a matter that traditionally fell under the states' police power. There is nothing in the history of Prohibition or its repeal to suggest that—after the enactment of the Wilson Act and Webb-Kenyon—the states needed additional interstate commerce powers to effectuate their local prohibition regimes.

As noted previously, one other effect of national prohibition was to cast doubt on the continued legal validity of the Webb-Kenyon Act, which prompted Congress to later reenact Webb-Kenyon after the 21st Amendment to ensure its effectiveness.

## **9. The 21st amendment, Section 2**

At last, we get to the 21st Amendment.

Section 1 simply repeals the 18th Amendment ("Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

Section 2 of the 21st Amendment provides, "Section 2. 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."

As noted in [Part 8](#), the problem with Prohibition was that it tried to nationalize alcohol prohibition by imposing it on communities that didn't want it. In other words, not only was alcohol regulation traditionally a local affair, but there were good reasons why. The 21st Amendment essentially amounted to a "do over"—it was intended to restore the constitutional and political balance that had been upset by the 18th Amendment by removing the federal government from interfering in local affairs regarding alcohol and reinstating state police power authority over alcohol regulation.

In addition, the 21st Amendment also constitutionalized the Wilson and Webb-Kenyon Acts, thereby assuring dry states that the public sentiment that led to the repeal of Prohibition wouldn't sweep within it a repeal of the Wilson and Webb-Kenyon Acts which had provided assurance to

dry states that they wouldn't be forced to accept interstate alcohol shipments. By contrast, there is nothing in the history that led up to the ratification of the 21st Amendment to suggest that there would have been any reason to give the states plenary power over interstate commerce regarding alcohol. This Part will discuss §2, which was intended to reinstate the regime that prevailed prior to the 18th Amendment. The next entry will discuss proposed but never enacted §3, which as will be seen, was rejected because it was inconsistent with the purpose of the 21st Amendment to restore the constitutional balance that had been interrupted by national prohibition.

Section 2, therefore, was designed aid dry states in the valid exercise of their police power "constitutionalizing" the statutory protections previously afforded by the national government to the states. "The wording of §2 ... closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." Craig, 429 U.S. at 205-06. In particular, dry states were concerned about the continued political and constitutional validity of Webb-Kenyon following the repeal of Prohibition, so dry states desired that their ability to remain dry be written into the Constitution to prevent against backsliding by Congress or the Supreme Court.

Although the constitutionality of Webb-Kenyon was upheld in *Clark Distilling*, at the time of its enactment there were serious questions about its validity. Indeed, President Taft initially vetoed the law because he considered it unconstitutional, 49 Cong. Rec. 4291 (1913) a view that was shared by Attorney General Wickersham at the time, 30 Op. Att'y Gen. 88 (1913). It was also noted that the Supreme Court's opinion in *Clark Distilling* was a "divided opinion," that there had been changes in the membership of the Court that cast further doubt on the vitality of *Clark Distilling*, in that Justice Sutherland had been in the Senate when Webb-Kenyon was passed and had argued against its constitutionality at that time. 76 Cong. Rec. 4170 (Statement of Sen. Borah), and that there was continuing debate about the constitutionality of Webb-Kenyon, see *id.* (expressing dry states' fear that Webb-Kenyon "might very well be held unconstitutional upon a re-presentation of it"). Senator Borah also noted that from its very inception, there had been aggressive legislative and litigation efforts to overturn Webb-Kenyon.

Senator Blaine expressed nearly identical sentiments in his remarks: "In [*Clark*] there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line." 76 Cong. Rec. 4141 (Statement of Sen. Blaine).

Senator Borah similarly explained that he was "rather uneasy about leaving the Webb-Kenyon Act to the protection of the Supreme Court of the United States," *Id.* at 4171, nor was he comfortable "rely[ing] upon the Congress ... to maintain indefinitely the Webb-Kenyon law " 76 Cong. Rec. 4170 (Statement of Sen Borah). To remove these constitutional and political uncertainties, the Amendment's sponsor Senator Borah explained that §2 would "incorporate Webb-Kenyon] permanently in the Constitution of the United States." 76 Cong. Rec. 4172 (statement of Sen. Borah). As Judge Easterbrook wrote in *Bridenbaugh*, "Like the Wilson Act and the Webb-Kenyon Act before Prohibition, §2 enables a state to do to importation of liquor-including direct deliveries to consumers in original packages-what it chooses to do to internal

sales of liquor, but nothing more." Bridenbaugh, 227 F.3d at 853.

Finally, the legislative history is rife with references to the fact that what this was about was the power of the states to effectuate their police power. Borah states, for instance, "We hear a great deal in these days about the eighteenth Amendment destroying the police powers of the states. I venture to say that anyone who has taken the trouble to familiarize himself with the destruction of the police powers of the States relative to the liquor question will have to conclude that the police powers had been destroyed prior to the adoption of the eighteenth amendment, taken away from the States prior to that time through the decisions of the Supreme Court of the United States and the constant and persistent attack of the liquor interests upon the rights of the States to be dry and to exercise their police powers to the end that they might be dry."

There is no indication that §2 was intended to anything more than assist dry states in the exercise of their police powers by treating interstate liquor the same as in-state. It was well-established by this time that the state police powers did not provide a license to discriminate, and there is no indication that §2 was intended to give wet states new, unprecedented, unmentioned, and illogical powers to erect protectionist barriers against other states' products.

## **10. Proposed but not enacted §3 of the 21st amendment**

The contemporaneous debates in Congress over the proposed but never enacted §3 of the 21st Amendment further indicate that the purpose of §2 was to restore the constitutional balance disrupted by the 18th Amendment by returning local police power authority to the states, but not to grant to the states new powers to interfere with federal authority over interstate commerce. Defenders of state alcohol protectionism have relied heavily on the defeat of this section as well as the debates surrounding it to suggest that it evidences an intent of Congress to give wet states a sword to engage in economic warfare against one another, as opposed to simply giving dry states a shield to protect themselves against being forced to tolerate evasions of their alcohol regimes. As a result, even though it was never enacted, it is an important part of the 21st Amendment debate.

Again, the entire thrust of the debate over §3 was whether the states would have sole control over local affairs governing alcohol, neither §3 itself nor the debates over it pertain to whether the states would be given new unprecedented, unjustified, and unnecessary powers to regulate interstate commerce, but merely to constitutionalize the Wilson Act and Webb-Kenyon, thereby enabling the states to apply their police power regulations on the same terms to alcohol shipped in interstate commerce equally as to alcohol produced inside the state.

Proposed §3 of the 21st Amendment read: "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4141. This provision would have given the federal government concurrent power with the states to regulate saloons. *Id.* (Statement of Sen. Blaine). Notwithstanding this enumeration of "concurrent" power, however, the operation of the Supremacy Clause meant that federal law would prevail in the event of conflict. *Id.* at 4143 (Statement of Sen. Wagner). Critics of §3 objected that this intermingling of state and national authority was precisely the source of the problems that plagued effective enforcement of national Prohibition under the 18th Amendment

in that it encouraged federal meddling in wholly local police power affairs governing alcohol. See [Part 8](#). Senator Wagner similarly observed, "The real cause of the failure of the eighteenth amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits. Section 3 of the pending joint resolution proposes to condemn the new amendment to a similar fate of failure and futility. No law can live unless it finds lodgment in the public conscience and is nourished by public support."

As Senator Wagner observed in his criticism of proposed §3, the purpose of the 21st Amendment was to "restore the constitutional balance of power and authority in our Federal system which [had] been upset by national prohibition. That equilibrium which prior to the eighteenth amendment was one of the functional marvels of our system of government is not restored by the pending resolution." Cong. Rec. at 4144 (Statement of Sen. Wagner). By contrast, §3 would give to the federal government a new power that it lacked prior to the enactment of Prohibition—what would amount to a general police power authority to regulate in the area of saloons, an intrastate transaction that Congress otherwise would have been unable to reach under the prevailing interpretation of the Commerce Clause during that era. The federal government has no independent police power authority (as most recently noted in *Lopez*), and could not likely have regulated the purely local transactions described in §3 under the prevailing interpretation of the Commerce Clause at that time, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542-548 (1935). As a result, the deletion of §3 was sufficient to remove the federal government from conflict with the states' intrastate police power.

Senator Wagner noted that while the 21st Amendment as proposed "pretends to restore to the States responsibility for their local liquor problems," because of proposed §3, it "does not in fact repeal the inherently false philosophy of the eighteenth amendment. It does not 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 ...." Cong. Rec. at 4144 (Statement of Sen. Wagner); see also *id.* at 4147 (noting that §3 could enable Congress to comprehensively regulate local issues related to saloons). As a result of §3, the 21st Amendment would "expel[] the system of national control through the front door of section 1 and readmit[] it forthwith through the back door of section 3." *Id.* at 4147. Because proposed §3 was inconsistent with the goal of restoring the pre-18th Amendment constitutional balance, it was deleted. Just as the grant of a new power to Congress to effectively engage in police power regulation of saloons was considered an undesirable departure from the pre-Prohibition constitutional balance, so too would an unprecedented plenary power of the states to impose discriminatory barriers to interstate commerce.

Thus, §3 would not merely have been a minor incursion on absolute state power over all aspects of liquor sales and importation. Rather, it was an incursion of a specific kind—it would have retained the de facto federal police power of the 18th Amendment that had proven so disastrous as both a policy and a constitutional principle.

Note that if it were true that §2 gives the states plenary power over interstate commerce in alcohol, then if §3 had been enacted it would have created a regime where the states regulated



interstate commerce in alcohol and the federal government would have regulated the local operations of saloons (due to its primacy under the supremacy clause). It is a far more plausible interpretation of §2 and §3 together that the former provision meant to restore the traditional constitutional balance and the latter was inconsistent with this goal.

## **11. Subsequent legislative enactments**

An alternative argument that has been offered is that even if the 21st Amendment does not transfer Congress's commerce clause authority to the states, Congress essentially reconveyed its commerce clause power to the states legislatively through the Webb-Kenyon Act. Thus, the dormant Commerce Clause is said to be irrelevant to this case, because protectionist state laws have been enacted pursuant to an affirmative exercise of Congress's Commerce Clause power, not in contravention of the dormant Commerce Clause.

First, as noted earlier, this is clearly not what was initially done through the Webb-Kenyon Act, as the previously quoted colloquy between Sen. Wagner and Sen. Blaine made clear that Congress was affirmatively exercising its Commerce Clause authority to allow the states to apply their police powers to liquor shipped in interstate commerce on the same basis as domestically-produced liquor.

It is argued that the enactment of the Twenty-First Amendment Enforcement Act in 2000, 27 U.S.C. §122a, as an amendment to the Webb-Kenyon law, further evidenced this reconveyance of power. By its own terms, however, the Twenty-First Amendment Enforcement Act applies only to a state law "that is a valid exercise of power vested in the States" under the 21st Amendment, and further provides that the act "shall not be construed to grant the States any additional power." 27 U.S.C. §122a(e).

This language was designed precisely to preclude the argument now advanced that the Act could be used to enforce discriminatory state laws. This language was a more general statement of the original "Goodlatte" amendment which had passed the House, and which provided, "No State may enforce under this Act a law regulating the importation or transportation of any intoxicating liquor that unconstitutionally discriminates against interstate commerce by out-of-State sellers by favoring local industries, thus erecting barriers to competition and constituting mere economic protectionism." 145 Cong. Rec. 6868; see also 145 Cong. Rec. 6869.

Legislative history makes clear that the purpose of the Goodlatte Amendment and the language eventually enacted, was designed specifically to reject the idea that protectionist state laws are consistent with Webb-Kenyon and the 21st Amendment. Congressman Cox for instance stated, "In vindicating the purposes of the 21st Amendment, a State cannot discriminate as mere economic protectionism against other sellers, other producers in the rest of the United States." Id. at 6871. Similarly Congressman Conyers stated, "[The amendment] will make it clear that neither this act nor Webb Kenyon are in anyway designed to supersede any other provision of the Constitution, such as the first amendment or the Commerce clause (including the so-called 'dormant' Commerce clause. Id. at 6873. Congressman Kolbe added, "The 21st Amendment was designed to give States the power to regulate alcohol sales within their States, and to ban it altogether, if they choose. It was not designed to give States the power to keep the wine sales of

some distributors out while allowing others in." Similar comments were offered by Senate supporters of the language that was finally enacted. Statement of Sen. Feinstein, S. Hrg. 106-141 (March 9, 1999).

Indeed, if the states' interpretation of the 21st Amendment were adopted, it would cast into doubt all of Congress's power to regulate interstate commerce in alcohol. Among other things, this could interfere with federal efforts to combat terrorism. For example, a federal provision, passed after the attacks on September 11, 2001, to reduce the number of bulky packages on airlines, permits wineries to ship wine directly to consumers if the wine purchaser "was physically present at the winery" at the time of purchase, is "of legal age to purchase alcohol," and "could have carried the wine lawfully into the State \* \* \* to which the wine is shipped." 27 U.S.C. 124. Consistent with a proper interpretation 21st Amendment, this law respects state laws governing purely local alcohol issues, but regulates the manner in which otherwise lawful alcohol imports can be shipped through interstate commerce in the interest of national security. If the Supreme Court adopts the expansive definition of the 21st Amendment as a tender of plenary power over interstate commerce to the states, however, this anti-terrorism law would likely be unconstitutional.

It is remarkable to me, that given the importance of the War on Terrorism, federal officials have not been more alert to recognizing an adverse decision in the wine cases could potentially interfere with the federal government's war on terror.

## **12. JUSTICE O'CONNOR'S MISUSE OF LEGISLATIVE HISTORY:**

Over the past few weeks (see August archives) I have explained why it thus seems clear to me that the Wilson Act, then the Webb-Kenyon Act, then the 21st Amendment, and still more recently the 21st Amendment enforcement act all manifest the same purpose—the enable the states to better enforce their long-standing police powers regarding the regulation of alcohol by allowing them to apply their police powers to alcohol shipped in interstate commerce the same as alcohol produced within the state. As a piece of history, this is a powerful narrative, that makes sense within the context in which these legislative enactments arose. By contrast, there is nothing in this historical narrative to suggest that the states would have needed plenary power over interstate commerce in alcohol or that Congress would have had any good reason to cede its interstate commerce power to the states. There is no indication that Congress intended to remove the traditional limitation—in place since at least *Walling v. Michigan* in the 19th Century—that the state police power to regulate or even ban alcohol does not enable the states to erect protectionist barriers to interstate commerce.

Nonetheless, Justice O'Connor claims that the legislative history of the 21st Amendment does exactly that. In her dissenting opinion in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), she concludes that the 21st Amendment was intended to give the states plenary power over alcohol, a position to which she has tenaciously clung notwithstanding repeated Supreme Court rulings to the contrary. Chief Justice Rehnquist also signed onto her dissenting opinion. Put bluntly, Justice O'Connor's use of legislative history in *324 Liquor* is a "how-to" lesson in the misuse of legislative history—exactly the sort of sloppy cherry-picking that discredits the use of legislative history generally. A good use of legislative history would look at particular statements within the

general historical context of the time, the legislative context in which the statements arose (i.e., what problem were they trying to solve), and finally and most elementary, the particular sentences should be read within the context of the actual speech that was being given, as isolated sentences are obviously given context by the surrounding sentences and paragraphs. Instead, in 324 Liquor, Justice O'Connor takes a few isolated snippets out some floor speeches on the 21st Amendment and strips them of both their historical and speaking context, ignores qualifications attached to them, and then concludes that these bits manifest the will of Congress at the time. In this Part of Wine Wars I will go through each of the statements on which she relies and show why they do not support the inference that Justice O'Connor wants to draw from them—indeed, in some cases, it will be seen that they actually demonstrate the opposite from what she wants to say they do. This will take several entries, so I will try to break these down into bite-sized arguments.

First, one thing that is interesting about O'Connor's dalliance into legislative history in 324 Liquor is that I had a research assistant go back and look at all the briefs that were filed in that case, and it appears that none of the legislative history arguments that O'Connor makes were actually briefed in that case. This doesn't mean that she is right or wrong, of course, but it does mean that the issue does not appear to have been fully briefed before her, including pointing on the problems with her reliance on legislative history that I will describe below. So the issue should be ripe for de novo consideration by the Supreme Court.

What is ironic, of course, is that Justice O'Connor begins her dissent by criticizing the court for its failure to fully consider the legislative history of the 21st Amendment in its cases on the topic. She writes, "Because the Court has seen fit in recent years to dismiss this legislative history without analysis as 'obscure,' *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274, 104 S.Ct. 3049, 3057, 82 L.Ed.2d 200 (1984); ante, at 727, n. 10, a fresh examination of the origins of the Twenty-first Amendment is in order and long overdue." I agree that a fresh examination of the origins of the 21st Amendment is long overdue as well—I'm just not sure that Justice O'Connor will like where it leads.

### **13. CONGRESSMAN LEA'S STATEMENTS:**

The first mention of legislative history that O'Connor points to is a floor statement by Rep. Lea of California. O'Connor writes, "Although neither the House of Representatives nor the state ratifying conventions deliberated long on the powers conferred on the States by § 2, but see 76 Cong.Rec. 2776 (1933) (statement of Rep. Lea of Cal. that the section was "the extreme of State rights" because it obligated the Federal Government to assist the enforcement of state laws "however unwise or improvident")." Note a few things about Rep. Lea's statement. It is part of the Congressional Record of January 28, 1933. If the statement in question was actually uttered on the floor of the House, it was done so not during the general debate over the 21st Amendment (which occurred primarily during February of that year) but rather is inserted into the middle of the debates over the "Departments of State, Justice, Commerce, and Labor Appropriate Bill, Fiscal Year 1934" in a Section of the Congressional Record entitled "Extension of Remarks" (which may suggest that either the words were neither spoken nor heard by anyone but merely inserted into the record, although it is not clear).

Rep. Lea's statement thus occurs immediately after Congressman Kerr gave remarks on the

funding request of the Department of Commerce as it concerned the commodity division of the Department, praising the commodity division for its efforts in promoting peanut and tobacco growers. The final sentence before Congressman Lea's remarks by Congressman Kerr were, "To destroy the tobacco industry or even neglect it would imperil the greatest tax-producing commodity of this nation." Then, with no warning or context, Lea takes the floor and utters the remarks in question (to which we will return in a moment). Immediately following Lea's remarks, Mr. Gibson took to the floor to address the question of the funding request of the Labor Department covering the Bureau of Immigration and the financial difficulties of the Immigration Bureau caused by an unusually large number of alien deportations during the prior year.

I go into this discussion of context in order to demonstrate an obvious point—Lea's comments, if uttered at all, were done at a completely incongruous time, when Congress was not even specifically debating the 21st Amendment. They are quite obviously one man's view, uttered at a time when no one was paying attention, and given that the 21st Amendment wasn't even under discussion at the time, there is no indication that anyone heard or considered Lea's comments as shedding any light on the 21st Amendment at all. Um, I mean, no one except Justice O'Connor.

Ok, so let's look at the substance of the remark. Justice O'Connor says it evidences that section 2 of the 21st Amendment was, "'the extreme of State rights' because it obligated the Federal Government to assist the enforcement of state laws `however unwise or improvident.'" But is that what Lea really meant?

Lea—like all the others discussed in earlier posts—believed that the actual purpose of the 21st Amendment was to restore the pre-21st Amendment constitutional balance. It is true that he thought that §2 would force the federal government to help enforce state laws, no matter how "unwise or improvident." But as noted in earlier posts, the purpose of all preceding legislation was to help the states to enforce their laws against interstate alcohol, which is clearly different from enabling states to flaunt the nondiscrimination principle of the dormant commerce clause. There is no indication that Lea thought that the 21st Amendment would make valid state laws that were otherwise constitutionally invalid.

He then states: "No one could anticipate the many varied, and perhaps unwise, provisions that might be written by the various States of the country. In this way their mere legislative action would compel this action of the Federal Government without the approval and even against the will of Congress. That proposal, on principle, is the extreme of State rights." Note, however, that is saying the final phrase that O'Connor quotes, he is not endorsing the 21st Amendment on this ground—he is criticizing it! The problem with §2 is that it might be read to embody the "extreme of State rights" which is why he is opposed to it. Justice O'Connor, of course, reads out the context that Lea is criticizing §2 on this ground, suggesting that he was endorsing this reading. He notes, however, that this provision although illogical, is "unimportant in its practical effects." Why? Because even with §2, Congress retained its power over interstate Commerce in alcohol.

Lea then goes on to add his criticisms of proposed §3 (discussed in earlier posts). He states, "The proposal that Congress shall have concurrent power with the States to regulate and prohibit the sale of intoxicating liquors to be drunk on the premises where sold, is the extreme of centralized power or Federal interference in State affairs. This provision would give the Congress power to

enforce prohibition on a State against its will and also to provide regulatory provisions in favor of the liquor traffic in opposition to the laws of dry or semidry States." He then adds the criticism I rehearsed earlier, "If there is anything to be learned from our experiences with Federal prohibition, it is the unwisdom of the Federal Government interfering in State affairs and forcing on unwilling States obnoxious sumptuary legislation. The Senate amendment in effect proposes to continue Federal interference with State affairs, injects new questions of Federal regulation, and retains the liquor problem in national politics for a generation to come."

Overall, then, Lea's comments make no mention of granting the states any new substantive constitutional powers to erect protectionist barriers against interstate commerce, but rather criticize §2 for giving federal power to enforce otherwise valid state laws. And like others, he criticizes §3 for retaining the real problem with Prohibition—the federal intervention in local affairs. Section 3, he observes, would essentially give the federal government a de facto police power to regulate all aspects of liquor sales. Under proposed §3, "This provision would give the Congress power to enforce prohibition on a State against its will and also to provide regulatory provisions in favor of the liquor traffic in opposition to the laws of dry or semidry States. The wildest friend of centralized government could scarcely approve of Congress enforcing the sale of liquors on dry States over the opposition of their laws and perhaps of their Constitution. I do not anticipate that this provision, if enacted, would in practice be so applied. The fact that such a power is seriously proposed to be placed in the Constitution should excite the opposition of all." He adds, "It seems especially designed to preserve the obnoxious and unworkable features of Federal prohibition."

#### **14. SENATOR BLAINE AND PROPOSED §3:**

Amazingly, Justice O'Connor next turns to proposed §3, and states that the decision to delete proposed §3 demonstrates that §2 was intended to give plenary power to the states over interstate commerce. I have explained previously why this reading of proposed §3 is incorrect. Here, therefore, I will limit myself to explaining why Justice O'Connor's interpretation of the relevant legislative history doesn't support her view.

She writes, "When the Senate began its deliberations on the Twenty-first Amendment, the proposed Amendment included a § 3 not present in the adopted Amendment. This section granted the Federal Government concurrent authority over some limited aspects of the commerce of liquor." As noted previously, her characterization of §3 as giving the federal government control over "some limited aspects of the commerce of liquor" is blatantly incorrect. As Congressman Lea himself states—in the paragraph of his speech immediately following the "extreme of State rights" passage—§3 was NOT thought to be a "limited" provision. Instead, §3 struck at the very heart of the problem with Prohibition—the unworkable system of concurrent authority over local affairs governing liquor, and the fear that the federal government could actually reimpose Prohibition or otherwise meddle in local affairs. The purpose of the 21st Amendment, to refresh the reader's memory, was to reinstate to the states their local police power regarding alcohol, not to give them new powers over interstate commerce. So §3 was not by any means a minor or limited power, it undermined the central purpose of §2.

We then turn to Justice O'Connor's key argument, the comments of Senator Blaine. "Even Senator Blaine, the Chairman of the Senate Subcommittee that had held hearings on the

proposed Amendment, opposed the limited grant of authority to the Federal Government in § 3. According to Senator Blaine, when the Federal Government was organized by the Constitution the States had `surrendered control over and regulation of interstate commerce.' 76 Cong.Rec. 4141 (1933). He viewed § 2 of the Amendment as a restoration of the power surrendered by the States when they joined the Union. Section 2 `restor[ed] to the States, in effect, the right to regulate commerce respecting a single commodity--namely, intoxicating liquor.' Ibid. In his view, the grant of authority to Congress in § 3 undercut the import of § 2: `Mr. President, my own personal viewpoint upon section 3 is that it is contrary to section 2 of the resolution. I am now endeavoring to give my personal views. The 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. The 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 power 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.' Id., at 4143."

Note several points here. First, although Justice O'Connor introduces Senator Blaine as the Chair of the Senate Subcommittee that had held hearings on the Amendment, he specifically notes in the moving to his interpretation of §3 that he is giving his "own personal viewpoint," not that of the Subcommittee. It seems obvious and under normal circumstances one would think it need not be expressly stated, but if Blaine is expressly and clearly drawing a distinction between his "personal viewpoint" and that of the committee—doesn't that mean it is obvious that his "personal viewpoint" is different from that of the committee. Oddly, Justice O'Connor seems to believe that in distinguishing his personal viewpoint from that of the committee, somehow he is actually speaking for the committee.

More importantly, Justice O'Connor again loses the context of Blaine's remarks. A key exchange between Blaine and Wagner, which I quoted in an earlier post, color's the whole tenor of Blaine's remarks. Again to quote it: SEN. BLAINE: "Then came an amendment to 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 regulation 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 think 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."

As this clarifying exchange indicates, Blaine did not intend to state that the states were being given the power to regulate interstate commerce, although his loose phrasing suggests that. Rather, Congress retained the power over interstate Commerce, and §2 simply constitutionalized

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Congress's exercise of its Commerce Clause authority to allow states to treat domestic and interstate liquor equally.

Moreover, Blaine places this entire debate over the 21st Amendment as the culmination of the long history that I have described in earlier posts. He summarizes the history starting with the Wilson Act, and the problem with *Rhodes v. Iowa*, where the Supreme Court held that the law did not prohibit interstate importation for personal use. Then Webb-Kenyon and the experience with Clark distilling. Then further modifications to Webb-Kenyon to tighten other minor holes in the law, leading to the present day of political and constitutional uncertainty of the states in enforcing their powers to remain dry. As he makes clear, the 21st Amendment is merely the culmination of this process, and an effort to reassure dry states by constitutionalizing this prior history.

Following his recitation of all of this historical progress Blaine then goes on to note the tenuous constitutional and political foundation of Webb-Kenyon (described in an earlier post) and adds, "In the case of *Clark against Maryland Railway Co.* there was a divided opinion. There has been a divided opinion in respect to the earlier cases and that division of opinion seems to have come down to a very late day. So to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line. Mr. President, the pending proposal will give the State that guarantee." He then states the passage that O'Connor quotes about restoring liquor to its pre-Constitutional status, but in so doing he uses the same language that Wagner clarified a moment ago, that §2 would "in effect" give the States power over interstate commerce in liquor—which, as he explained then, "in effect" meant that Congress was exercising its power to help the states enforce their laws.

And note his concluding passage, "I am opposed to the dry States interfering with the so-called wet States in connection with this question of intoxicating liquors; and so, by the same token, I am willing to grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors." This is the key passage—as Blaine clearly states, §2 relates to returning to the states control over the "internal affairs."

Finally, Blaine's his "personal viewpoint" on which O'Connor relies seems consistent with what has been said so far. He states, "Mr. President, my own personal viewpoint upon section 3 is that it is contrary to section 2 of the resolution. I am now endeavoring to give my personal views. The 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. The 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 power 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."

But O'Connor ignores the remainder of Blaine's remarks on this point. Blaine states, "The eighteenth amendment is an inflexible police regulation which might be appropriate in a municipal ordinance in those sections of our country where the people desire a bone-dry local

regime. The eighteenth amendment does not give the Congress a general grant of power to regulate. It is strictly a prohibition, a mandate. It is specifically a prohibitive provision of the Constitution. Surely, Mr. President, it was never designed that our Constitution would be a compilation of local ordinances regulating the lives the customs, and the habits of our people. But that is exactly the character of the eighteenth amendment. It has no place in the Constitution." He then goes on to add that he would support any and all versions of sections 2 or 3 of the Constitution, so long as the final result was the repeal of Prohibition. "My object is to take the eighteenth amendment out of the Constitution." 76 Cong. Rec. 4143-44.

It is thus clear from Blaine's remarks considered in context that he, like everyone else, understood the purpose of the 21st Amendment to be to repeal the 18th Amendment and thereby to restore the pre-18th Amendment constitutional balance, while constitutionalizing the Wilson and Webb-Kenyon Acts to provide assurance to the dry states. There is no indication that he specifically meant to repeal the nondiscrimination principle that was included in the Wilson and Webb-Kenyon Acts in enacting the 21st Amendment. Indeed, as Wagner clarified with Blaine, Blaine recognized that those acts were an act of the Congressional commerce clause authority, not a ceding of that authority to the states.

#### **15. O'CONNOR ON SENATOR WAGNER AND PROPOSED §3:**

So that brings us to Justice O'Connor's last major figure, Senator Wagner. She quotes him at length: Senator Wagner was an especially vigorous opponent of the proposed § 3. In his view, it 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." *Id.*, at 4144. In Senator Wagner's view, the danger of § 3 was that even this limited grant of authority to the Federal Government would result in federal control of the liquor trade:

"If Congress may regulate the sale of intoxicating liquors where they are to be drunk on premises where sold, then we shall probably see Congress attempt to declare during what hours such premises may be open, where they shall be located, how they shall be operated, the sex and age of the purchasers, the price at which the beverages are to be sold....

\* \* \*

"It is entirely conceivable that in order to protect such a prohibition the courts might sustain the prohibition or regulation of all sales of beverages whether intended to be drunk on the premises or not. And if sales may be regulated, so may transportation and manufacture.... If that is to be the history of the proposed amendment--and there is every reason to expect it--then obviously we 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." *Id.*, at 4147.

At this point it is not clear whether I even need to elaborate on why this speech proves the opposite of what Justice O'Connor believes. The quote from Wagner quite clearly indicates that Congressman Wagener opposed §3 because it would have given Congress the power to meddle in local affairs and to thereby interfere with the state's exercise of their police power, and indeed, there was the fear that Congress might use this power to reimpose prohibition on the states. In expressing his desire to restore to the states their control over these local affairs by deleting §3, there is nothing here to suggest that he thought that §2 gave to the states Congress's power to regulate interstate commerce. It should be equally obvious that unlike O'Connor, Wagner did not



consider this to be a "limited grant of authority," but rather undermined the essential purpose of the 21st Amendment.

Wagner quite clearly believed that the purpose of the 21st Amendment was to restore the pre-18th Amendment constitutional and legal regime. Immediately before the above-quoted passage, Wagner states, "Mr. President, the pending joint resolution tendered to the Senate and the country is called a proposal to repeal the eighteenth amendment, and because artfully it employs the word 'repeal' in its first section, it pretends to fulfill the wish overwhelmingly expressed by the American people in the last election. But I submit that the pending resolution does not in fact repeal the inherently false philosophy of the eighteenth amendment. It does not correct the central error of national prohibition. It does not restore to the States responsibility for their local liquor problems." Cong. Rec. at 4144. As Wagner makes clear, the 21st Amendment did not embody the bizarre theory adopted by Justice O'Connor that the 21st Amendment restored the pre-Constitutional balance where the states controlled interstate commerce. Rather, Wagner plainly states that it was intended to restore to the states control over their LOCAL affairs governing liquor.

Wagner elaborates on this point even more plainly, "I have many times declared and I now repeat 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. That equilibrium which prior to the eighteenth amendment was one of the functional marvels of our system of government is not restored by the pending resolution. On the contrary, it perpetuates the lack of balance, the absence of symmetry, the confusion and overlapping of Federal and local authority." Id. at 4144. Elsewhere he elaborates on the problems that this concurrent authority inevitably would cause, in that the operation of the Supremacy Clause would inevitably mean that local regulation would be overridden by federal legislation. "The real cause of the failure of the eighteenth amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits. Section 3 of the pending joint resolution proposes to condemn the new amendment to a similar fate of failure and futility."

Now, I don't know how Wagner could be any more clear in expressing his intent that the purpose of the 21st Amendment was to restore the pre-18th Amendment constitutional balance. Recall also, that it was Wagner who clarified Blaine's "in effect" language by making it clear that Webb-Kenyon did not give the states control over interstate commerce, but rather was an exercise of congressional power to allow states to enforce their legitimate police powers against interstate alcohol. Somehow, Justice O'Connor draws from this that Wagner's criticism of §3 illustrates his belief that §2 gave the states plenary power. With respect to Lea and Blaine, O'Connor's argument may be reasonable, but is wrong. With respect to Wagner's statements, however, O'Connor's interpretation cannot be taken seriously. This is pure sloppiness or a fundamental misunderstanding of what the framers of the 21st Amendment were trying to do. Regardless, read in context, it is clear that Wagner was arguing for a restoration of the pre-18th Amendment legal and constitutional regime.

## **16. O'CONNOR ON OTHER SENATORS AND PROPOSED §3:**

Justice O'Connor cites a litany of other Senators who she believes support her interpretation. Rather than beating a dead horse still further I will just offer a brief comment on each of these. "Still others emphasized the plenary power granted the States by § 2. Senator Walsh, a member of the Subcommittee that had held hearings on the Amendment, said: 'The purpose of the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter.' Id., at 4219." Obviously, this specific mention of the "consignee as well as thereafter," refers to the precise language used in the Supreme Court's earlier commerce clause decisions in *Rhodes*, etc., so this is quite clearly narrowly targeted at that interpretation of the commerce clause and suggests nothing about giving the states power to enact discriminatory regulations.

She also adds comments by Senator Robinson, "In response to a question from Senator Swanson, Senator Robinson of Arkansas affirmed that 'it is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported.' Id., at 4225. Thus, upon the motion of Senator Robinson, the Senate voted to strike § 3 from the proposed Amendment. Id., at 4179." Again, the import of this is quite clear and quite the opposite of what Justice O'Connor believes it means. Under the 21st Amendment, as with *Webb-Kenyon*, under their police power the states had the authority define what constituted intoxicating liquors and how they were to be sold and transported within a state. The federal authority incorporated these state laws into the *Webb-Kenyon Act* for purposes of enforcement. Senator Robinson makes clear that his criticism is again that the problem with §3 is that it does not withdraw the federal government from local activities. "The issue here is whether the federal Government is going to take away from the States all power after repealing the eighteenth amendment, in the even the repeal shall be ratified." Cong. Rec. 4226. He then goes on to discuss his desire to prevent the return of the saloon, but that proposed §3 was not the way to do it. There is nothing in this effort to withdraw the federal government from local affairs that implies that §2 was intended to allow the states to invade the federal government's commerce power.

Speaking immediately after Senator Robinson, Senator Tydings elaborated on the point. After reciting the abysmal failure of federal prohibition he stated, "I say that we never should have taken this question [regulation of the saloon] from the States. It is not a national question. It is a local question, and it can be solved best in the communities that have to deal with it. This government never was conceived with the idea that we would reach out into every community and govern the habits and the morals and the religion of people in those communities. We were to deal with national questions only—the Army and the Navy, interstate and foreign commerce, post offices and post roads, and the rest of the 18 powers govern to us by the Constitution. We had no right at all except by turning our backs upon the philosophy of the Constitution, to go out in the States and assume this power and this control. The sooner we give it back to the States the sooner we shall establish law and order and decency and some respect for government."

Senator Bingham immediately followed Senator Tydings. His remarks were focused on the fact that the framers of the original Constitution specifically considered and chose not give to the federal government a general police power authority to enact "sumptuary legislation," which would deal with the habits of the people, with what they ate, drank, and wore," but that they recognized that this moral regulation was properly a matter for the local communities. He then

added, "In adopting the eighteenth amendment we interfered with the growth of temperance" by trying to impose a uniform national standard of morality on the country. Again, his remarks make no reference to giving the states new powers to regulate interstate commerce, but focus solely on the failure of national prohibition.

I will spare the reader further prolonged recitation of statements on this point. In an earlier post I went through the real legislative history of the 21st Amendment in some detail, but the discussion here is designed to show that even those few snippets that Justice O'Connor points to do not support her interpretation.

#### **17. ANALYSIS OF JUSTICE O'CONNOR'S MISUSE OF LEGISLATIVE HISTORY:**

Justice O'Connor's error here is quite profound. It is clear that she has simply failed to grasp the context within which the 21st Amendment was enacted. She has completely ignored that the 21st Amendment was enacted to effectuate the repeal of the 18th Amendment. The problem the 21st Amendment sought to address, therefore, was that the 18th Amendment unwisely gave to the federal government the power to regulate wholly local affairs regarding alcohol in order to impose national prohibition. Thus, it meant to restore to the states the power to exercise their police power over local affairs, and restored the Wilson Act and Webb-Kenyon in order to allow the states to apply their police power to imported alcohol as well.

Justice O'Connor, by contrast, reads all of these statements in isolation from this historical context. She seems to believe that the problem that the framers of the 21st Amendment sought to correct was the states' lack of power over interstate commerce, rather than the federal government's overreaching power to regulate local affairs. This simply is not correct. Moreover, it is completely illogical—giving the states a new power over interstate commerce would have done nothing to correct the real problem, which was the federal government's power under the 18th Amendment over local affairs. Thus, under her interpretation, if the purpose of §2 was to give the states plenary power over interstate commerce, that remedy of giving the states power over interstate commerce is not even aimed at the problem of federal overreaching into local affairs.

Moreover, as illustrated by Wagner's remarks, there was a consensus that the interstate commerce problem of discrimination in favor of interstate liquor had been solved by the Wilson and Webb-Kenyon Acts. Thus, there simply was no reason to give the states a new power to regulate interstate commerce, because the Wilson and Webb-Kenyon Acts were constitutionalized by §2. Similarly, the imposition of Prohibition by the 18th Amendment had nothing to do with issues involving interstate commerce, but rather to impose federal regulation of local liquor sales—i.e., saloons. In turn, this is why the proponents of §3 favored its inclusion, so as to prevent the reestablishment of the saloon, and why Wagner and others opposed it, because it would retain the federal intervention into local liquor regulation.

In other words, because Justice O'Connor has failed to understand the historical context in which the 21st Amendment was enacted, she has essentially turned the entire debate backwards and upside down. The debates are about **WITHDRAWING** the federal government from the regulation of local liquor affairs, **NOT** about giving the states new power to regulate interstate commerce. To put it another way, the purpose of the 21st Amendment was to **END** the federal

invasion of local liquor regulation, rather than to BEGIN state invasion of the federal interstate commerce power.

Justice O'Connor is really profoundly confused about the purpose of the 21st Amendment. In many ways, her misuse of legislative history here is a useful cautionary tale of the problems with trying to do legislative history when one is not willing to actually try to understand the context in which the relevant words are spoken. In this case, her sloppy use of legislative history has colored almost two decades of Supreme Court jurisprudence and academic thinking on the intent of the 21st Amendment. It is efforts like hers that provide ammunition to those who would reject legislative history in all contexts.



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