Michigan Law Review

Volume 37 | Issue 6

1939

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Recommended Citation
Benjamin G. Cox, *CONSTITUTIONAL LAW - TWENTY-FIRST AMENDMENT - VALIDITY OF STATE STATUTE DISCRIMINATING AGAINST LIQUOR IMPORTS*, 37 MICH. L. REV. 957 (1939).
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CONSTITUTIONAL LAW — TWENTY-FIRST AMENDMENT — VALIDITY OF STATE STATUTE DISCRIMINATING AGAINST LIQUOR IMPORTS — A Michigan statute [1] prohibited local dealers from selling beer manufactured in a state designated by the Michigan Liquor Control Commission, acting pursuant to statutory standards, as one which by its laws discriminated against Michigan-made beer. Because Indiana was one of ten states so designated,[2] an Indiana brewing company filed a bill in the federal court to enjoin enforcement of the Michigan statute as unconstitutional under the interstate commerce,[3] equal protection,[4] and due process [5] clauses of the Federal Constitution. *Held*, that the bill should be dismissed, since the statute, even though discriminating among importers, was a valid enactment under the Twenty-first Amendment to the Constitution.[6] *Indiana Brewing Co., Inc. v. Liquor Control Commission of Michigan*, (U. S. 1939) 59 S. Ct. 254, affirming (D. C. Mich. 1938) 21 F. Supp. 969.

Intoxicating liquor has long been recognized as a proper subject of regulation by the state in the exercise of its police power.[7] However, cutting across the admitted desirability of local state control has been the doctrine of exclusive federal control of goods in interstate commerce.[8] The Webb-Kenyon Act,[9]

[1] Mich. Pub. Acts (1937), No. 281, § 40.

[2] Indiana did not expressly discriminate against Michigan-made beer as such, but by requiring payment of an additional fee for importing beer manufactured outside Indiana, it did discriminate against all foreign-made beer in favor of domestic beer. See Ind. Acts (1935), c. 226, §§ 9, 40, p. 1056, amended by Acts (1937), c. 197, § 11, p. 995, Rev. Stat. (Burns Supp. 1938), §§ 12-508, 12-801, 12-901.

[3] U. S. Const., art. 1, § 8, clause 3.

[4] U. S. Const., art. 14, § 1.

[5] Ibid.

[6] U. S. Const., art. 21, § 2.

[7] See Crane v. Campbell, 245 U. S. 304 at 307, 38 S. Ct. 98 (1917); Eberle v. Michigan, 232 U. S. 700, 34 S. Ct. 464 (1914); Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273 (1887). See also 10 A. L. R. 1587 (1921), 11 A. L. R. 1320 (1921), 26 A. L. R. 661 (1923), 70 A. L. R. 132 (1931).

[8] At first the view was that the silence of Congress as to liquor control in interstate commerce left the states free to regulate it on the theory that this regulation was of peculiarly local interest. The License Cases, 5 How. (46 U. S.) 504 (1847). Though the Court purported to distinguish the License Cases, it next held that, since transportation of liquor from one state to another was of national concern, the control was exclusively with Congress, whose silence unequivocally meant free transportation untrammeled by state liquor regulation. Bowman v. Chicago & N. W. R. R., 125 U. S. 465, 8 S. Ct. 689 (1888). The foreign commerce doctrine of the "original package" was then adapted to this interstate situation and individual state option as to liquor prohibition was left practically inoperative. Leisy v. Hardin, 135 U. S. 100, 10 S. Ct. 681 (1890).

[9] 37 Stat. L. 669 (1913), re-enacted 49 Stat. L. 877 (1935), 27 U. S. C. (Supp. 1938), § 122. It provided that "The shipment or transportation . . . of any

along with the Reed Amendment,[10] represented the culmination of a long development of compromise between state and federal control in divesting liquor of protection under the interstate commerce clause [11] to the extent of subjecting it to control under the laws of the state wherein use was intended.[12] The Eighteenth Amendment and the legislation thereunder [13] obscured the benefits of the development resulting in the Webb-Kenyon Act,[14] but it did not blot out the memory of the unfortunate effects of the earlier interstate liquor traffic which had thrived under constitutional protection in spite of attempted state control.[15] Therefore, when the retreat from the extreme policies of the Eighteenth Amendment came in the form of the Twenty-first Amend-

spirituous . . . or other intoxicating liquor of any kind, from one State . . . into any other State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received . . . or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited." The act was upheld as valid in Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311, 37 S. Ct. 180 (1917).

[10] 39 Stat. L. 1069 (1917), re-enacted substantially 48 Stat. L. 316 (1934), 27 U. S. C. (1934), § 123, then repealed and replaced by 49 Stat. L. 1930 (1936), 27 U. S. C. (Supp. 1938), §§ 221-228. The act made it a crime against the United States to transport into a state intoxicating liquors for beverage purposes in violation of the laws of that state. See 27 U. S. C. (Supp. 1938), § 223 (a).

[11] On the heels of Leisy v. Hardin, 135 U. S. 100, 10 S. Ct. 681 (1890), came the Wilson Act, 26 Stat. L. 313 (1890), 27 U. S. C. (Supp. 1938), § 121, upheld in In re Rahrer, 140 U. S. 545, 11 S. Ct. 865 (1891). The scope of this act was limited to permitting state police power to regulate the liquor in the "original package" but only after delivery in the state to the consignee as if the liquor had been produced there. Rhodes v. Iowa, 170 U. S. 412, 18 S. Ct. 664 (1898). Because the Wilson Act did not remedy the difficulties of the Bowman case, 125 U. S. 465, 8 S. Ct. 689 (1888), there followed the Webb-Kenyon Act, supra note 8, which took away the protection of the interstate commerce clause from even receipt and possession prohibited by state law. Clark Distilling Co. v. Western Maryland R. R., 242 U. S. 311, 37 S. Ct. 180 (1917). See also note in 110 A. L. R. 931 (1937).

[12] The Wilson Act did not allow discrimination against liquor in interstate commerce. Scott v. Donald, 165 U. S. 58 at 91, 17 S. Ct. 265 (1896); Evansville Brewing Assn. v. Excise Commission, (D. C. Ala. 1915) 225 F. 204 at 208. But the Webb-Kenyon Act did. McCormick & Co. v. Brown, 286 U. S. 131, 52 S. Ct. 522 (1932). However, in all the cases discovered [see Premier-Pabst Sales Co. v. State Board of Equalization, (D. C. Cal. 1935) 13 F. Supp. 90 for a collection], the discriminations were in a reasonable exercise of the police power, and though "an act of Congress such as the Webb-Kenyon Act can remove the protection of the commerce clause from intoxicating liquors because of Congress' power over interstate commerce, Congress has no such power to remove other constitutional provisions such as those found in the Fourteenth Amendment." See 25 CAL. L. REV. 718 at 727-728 (1937). See also Scott v. Donald, supra.

[13] National Prohibition Act, 41 Stat. L. 305-319 (1919).

[14] The Webb-Kenyon Act had been in effect less than seven years when national prohibition came in. National prohibition did not repeal the Webb-Kenyon Act, though. McCormick v. Brown, 286 U. S. 131, 52 S. Ct. 522 (1932).

[15] Leisy v. Hardin, 135 U. S. 100, 10 S. Ct. 681 (1890), left the "dry states" helpless and incapable of preventing an influx of liquor by way of free-flowing interstate commerce.

ment, the drafters of the amendment paraphrased the Webb-Kenyon Act by providing that "importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." [16] In a sweeping construction of this language, the Court found the states' power to regulate liquor importation to be free of limitations derived from the interstate commerce clause.[17] In this first case there was discrimination by the state against foreign liquor in favor of domestic liquor, but the Court found the classification to be a reasonable one though at the same time alluding to the proposition that the equal protection clause did not apply.[18] The next important case dealt with a discrimination among foreign liquors, and the Court categorically stated that the equal protection clause did not apply, but here too the classification might be rationalized as a reasonable one.[19] However, in the principal case, on a state of facts presenting a probably unreasonable classification among foreign beers, the Court unequivocally stated the proposition that the equal protection clause no longer limits state power to regulate liquor importation, and refused to consider the question of reasonableness.[20] It is submitted that this categorical argument derived from the Twenty-first Amendment gives greater effect to the amendment than is necessary or desirable in attaining efficient local liquor control, because it invites retaliatory interstate trade barriers. The recent popular antipathy to these retaliatory trade walls [21] is not without judicial support.[22]

[16] U. S. Const., art. 21, § 2; 76 CONG. REC. 4140-4141, 4170-4172 (1933). See also 25 CAL. L. REV. 718 at 725 (1937).

[17] State Board of Equalization v. Young's Market, 299 U. S. 59, 57 S. Ct. 77 (1936). The Court reiterated its proposition in Mahoney v. Joseph Triner Corp., 304 U. S. 401, 58 S. Ct. 952 (1938); and Indianapolis Brewing Co. v. Liquor Control Commission, (U. S. 1939) 59 S. Ct. 254.

[18] State Board of Equalization v. Young's Market, 299 U. S. 59 at 64, 57 S. Ct. 77 (1936). The discrimination in this case was of the same type practiced by Indiana, and counsel in the principal case argued that the Young's Market case justified the Indiana practice of discriminating impartially against all foreign-made beer and so rendered inexcusable Michigan's retaliation on the basis of that practice.

[19] Mahoney v. Joseph Triner Corp., 304 U. S. 401 at 404, 58 S. Ct. 952 (1938). The state regulation required that liquors manufactured out of the state be registered by brands at United States patent offices before importation.

[20] In answer to the contention that the retaliatory nature of the Michigan act indicated unreasonable classification, the Court said: "Whether the Michigan law should not more properly be described as a protective measure, we have no occasion to consider. For whatever its character, the law is valid." Indianapolis Brewing Co. v. Liquor Control Commission, (U. S. 1939) 59 S. Ct. 254 at 255. Before the principal case was decided the lower courts disagreed on this point. Accord: Zukaitis v. Fitzgerald, (D. C. Mich. 1936) 18 F. Supp. 1000. Contra: Joseph Triner Corp. v. Mahoney, (D. C. Minn. 1937) 20 F. Supp. 1019. Cf. Premier-Pabst Sales Corp. v. Grosscup, (D. C. Pa. 1935) 12 F. Supp. 970.

[21] Buell, "Death by Tariff," 18 FORTUNE 32 (August 1938); "Divided We Fall [Editorial]," 102 COLLIERS 50 (Sept. 17, 1938); Rogers, "From State Rights to State Autarchy," 177 HARPERS 646 (1938); Flynn, "Shove Thy Neighbor," 101 COLLIERS 14 (April 30, 1938).

[22] See Baldwin v. Seelig, 294 U. S. 511 at 523, 527, 528, 55 S. Ct. 497 (1935). Here the Court held invalid a state statute prohibiting the sale of milk produced in another state unless the producer's price was up to the prescribed minimum.

Conceding that the Twenty-first Amendment, by setting up a classification,[23] contemplates a discrimination against liquor in interstate commerce even by a "wet state," as well as by a "dry state" trying to prevent an influx of liquor via interstate commerce,[24] it does not follow that the new powers granted to the states by the Twenty-first Amendment are not subject to the equal protection clause.[25] By utilization of the tests of reasonable classification developed under the Fourteenth Amendment, the "national solidarity," to use the language of the late Justice Cardozo,[26] could be protected without jeopardizing the efficacy of the desired state control. It is hoped that the Court will see fit to recognize the Fourteenth Amendment as a limitation when occasion arises for a further interpretation of the power of the states under the Twenty-first Amendment.[27]

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The Court denied that economic self-protection of the state justified predicating the statute on police power and denied a state's right to isolate itself economically. The Court expressly referred to state liquor control as presenting a different situation because "In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin." The economic self-protection of the state here denied was hinted at in Scott v. Donald, 165 U. S. 58 at 101, 17 S. Ct. 265 (1896). Cf. Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412, 57 S. Ct. 772 (1937); and Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 55 S. Ct. 525 (1935). See also the very recent decisions in Milk Control Board of Pennsylvania v. Eisenberg Farm Products, (U. S. 1939) 59 S. Ct. 229, and Hale v. Bunco Trading Inc., (U. S. 1939) 59 S. Ct. 460.

[23] U. S. Const., art. 21, § 2; State Board of Equalization v. Young's Market, 299 U. S. 59 at 64, 57 S. Ct. 77 (1936): "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."

[24] The Congressional Record indicates that section 2 of the Twenty-first Amendment was to protect the so-called "dry states" from an influx of liquor under the guise of interstate commerce. 76 CONG. REC. 4003, 4141, 4143, 4168, 4170-4172 (1933). But it has been construed to permit discrimination against interstate liquor by a state in favor of legalized domestic liquor. State Board of Equalization v. Young's Market, 299 U. S. 59, 57 S. Ct. 77 (1936). The Webb-Kenyon Act allowed discrimination against interstate alcohol though it was legalized domestically. McCormick & Co. v. Brown, 286 U. S. 131, 52 S. Ct. 522 (1932).

[25] Compare Edwards v. Cuba R. R., 268 U. S. 628, 45 S. Ct. 614 (1925), and Burk-Waggoner Oil Assn. v. Hopkins, 269 U. S. 110, 46 S. Ct. 48 (1925), with this point. The Income Amendment, U.S. Const., art. 16, does not extend congressional power to tax income it had no power to tax before the amendment; it merely removed the requirement of apportionment. See also United States v. Hudson, 299 U. S. 498, 57 S. Ct. 309 (1937) (Fifth Amendment applies to income tax act).

[26] Baldwin v. Seelig, 294 U. S. 511 at 523, 55 S. Ct. 497 (1935). The cases recognizing the use of the police power to control economic competition or business are of the types of Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412, 57 S. Ct. 772 (1937) and Liggett Co. v. Lee, 288 U. S. 517, 53 S. Ct. 481 (1932), where the regulations are on the basis of distinct business types instead of on the basis of residence and there is not the patent purpose of fostering economic benefit of domestic business at the expense of foreign business. See Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 55 S. Ct. 525 (1935).

[27] Perhaps the Court could resort to the doctrine of "unconstitutional conditions" to resolve the fallacy that the right to prohibit carries the right to admit on any

condition. This doctrine is successfully employed to protect foreign corporations seeking admittance to do business. Western Union v. Kansas, 216 U. S. 1 at 54, 30 S. Ct. 190 (1910). See 37 COL. L. REV. 307 (1937), where this theory is presented. See also Oppenheim, "Unconstitutional Conditions and State Powers," 26. MICH. L. REV. 176 (1927).