Louisiana Law Review

Volume 26 | Number 1
December 1965

Constitutional Law - Conflict of Twenty-First Amendment and Import-Export Clause - State Tax on Foreign Liquor

Alex Williams Rankin

CONSTITUTIONAL LAW — CONFLICT OF TWENTY-FIRST AMENDMENT AND IMPORT-EXPORT CLAUSE — STATE TAX ON FOREIGN LIQUOR

Respondent filed a claim for refund of state import tax paid, alleging that imposition of the Kentucky tax[1] violated the import-export clause of the United States Constitution. Respondent imported foreign whisky which was shipped from Scotland via Chicago and New Orleans directly to respondent's Kentucky warehouses. At the time of assessment, the foreign liquor was in its original packages in the warehouse awaiting resale. Petitioner contended that the twenty-first amendment expressly permits a state to write the provisions under which intoxicating liquor may enter its borders, regardless of whether the liquor was from other states or from foreign countries. The Kentucky Tax Commission and a lower court denied respondent's claim, but the Kentucky Court of Appeals reversed.[2] On certiorari the United States Supreme Court affirmed. *Held,* state taxation of foreign goods retaining their status as imports is prohibited by the import-export clause of the United States Constitution, and thus the twenty-first amendment does not nullify that clause with respect to liquor. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

The United States Constitution prohibits the states from levying taxes on imports and exports without the consent of Congress, except where absolutely necessary for inspection laws.[3] Since 1868 the import-export clause has been interpreted as applying to goods brought from or carried to foreign countries alone, and not to goods transported from one state to another.[4]

1. KY. REV. STAT. ch. 243, § 680(2)(a) (1942): "No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment." It appears that this Kentucky statute was designed to place liquor from without the state on an equal footing with Kentucky liquor. *Cf. id.* § 680(1).

2. James B. Beam Distilling Co. v. Department of Revenue, 367 S.W.2d 267 (Ky. App. 1963).

3. U.S. CONST. art. I, § 10, cl. 2: "No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws . . . ."

4. Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868). The Court referred to Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 437 (1827), for a definition of "imports." In that case, Marshall said that on the authority of lexicons and of usage, the word imports is defined to be articles brought into the country from a foreign country. See also Standard Oil Co. v. Graves, 249 U.S. 389 (1919); Emert v. Missouri, 156 U.S. 296 (1895); Brown v. Houston, 114 U.S. 622 (1885); *contra*, 1 CROSSKEY, POLITICS AND THE CONSTITUTION 297-304 (1953).

The twenty-first amendment gives the states the power to legislate concerning the importation of intoxicating liquor within their respective borders.[5] Since the twenty-first amendment does not distinguish between imports from abroad and imports from other states, a conflict seems to exist between the two constitutional provisions.

The manifest purpose of the import-export clause was to confer on Congress the exclusive power to tax the act of importation, and to deny this power to the states, thereby eliminating possible conflicts among the states.[6] However, when the goods lose their character as imports, they become susceptible to state taxation.[7] The original package doctrine of *Brown v. Maryland*[8] has been recently relaxed,[9] but the Supreme Court still holds that goods which have not lost their "distinctive character as imports" are within the immunity of the import-export clause.[10] To lose that "distinctive character," the goods must be put to the use for which they were imported.[11] In the case of liquor imports, the first sale in the original package by the importer cannot be taxed, as that would be taxing imports, but all subsequent sales are taxable, regardless of whether the goods are in the original package or not.[12]

In 1933 Congress proposed the twenty-first amendment, which repealed the eighteenth amendment. In repealing prohibition Congress intended to allow the states to enforce their own policies toward liquor without regard to constitutional limita-

5. U.S. CONST. amend. XXI, § 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."

6. See Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 440 (1827). Chief Justice Marshall stated that the design of the constitutional immunity of the import-export clause was to prevent the great importing states from laying a tax on the non-importing states, to which the imported goods might ultimately be destined. This situation also "would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation." *Accord*, Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946); Cook v. Pennsylvania, 97 U.S. 566 (1878).

7. Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1944).

8. 25 U.S. (12 Wheat.) 419 (1827). A concise statement of the doctrine is found in THE CONSTITUTION OF THE UNITED STATES OF AMERICA; ANALYSIS AND INTERPRETATION 210 (Small ed. 1964): "[T]he taxing power of the State does not extend in any form to imports from abroad so long as they remain 'the property of the importer, in his warehouse, in the original form or package' in which they were imported."

9. Youngstown Sheet & Tube v. Bowers, United States Plywood Corp. v. City of Algoma, 358 U.S. 534 (1959). In this consolidated opinion the Court devised the "current operational needs" test. See Note, 30 FORDHAM L. REV. 797 (1962).

10. Youngstown Sheet & Tube v. Bowers, 358 U.S. 534, 545 (1959).

11. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 657 (1944).

12. See Waring v. Mayor of Mobile, 75 U.S. (8 Wall.) 110 (1868).

tions on state action.[13] Since adoption of the amendment, the states' right to prohibit or regulate the importation of intoxicating liquor has been held not limited by the commerce clause[14] or the equal protection[15] and due process[16] clauses of the fourteenth amendment. In addition to recognizing the right to regulate and prohibit liquor, the Court has held that the states may tax national liquor,[17] as there is no constitutional limitation on the taxation of interstate liquor for the reason that the commerce clause restrictions have been held not applicable.[18]

Prior to the instant case there was little jurisprudence concerning the apparent conflict between the import-export clause and the twenty-first amendment. The first time the question arose was in California, where an intermediate appellate court held that the twenty-first amendment did not remove foreign liquor from the traditional protection of the import-export clause.[19] A few years later the Wisconsin Supreme Court reached a similar conclusion.[20]

The instant case presented to the Supreme Court for the first time the question of the effect of the twenty-first amendment on the import-export clause. The Court held that the tax on the imported foreign liquor was prohibited by the import-export clause, and that the twenty-first amendment did not repeal that clause with respect to liquor. The majority reasoned that although the twenty-first amendment had been held in prior cases to have freed the states from the general limitations of the commerce clause, the due process clause, and the equal protection clause, this did not mean that the general language of the amendment could be said to have impliedly repealed the specific prohibition on state action found in the import-export clause.[21] Moreover, nothing in the history of the amendment

13. See Ziffrin v. Reeves, 308 U.S. 132, 138 (1939): "Without doubt a State may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced."

14. Indianapolis Brewing Co. v. Liquor Comm'n, 305 U.S. 391 (1939); State Bd. of Equalization v. Young's Market, 299 U.S. 59 (1937).

15. Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).

16. Ziffrin v. Reeves, 308 U.S. 132 (1939).

17. See, *e.g.*, Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Comm'n, 305 U.S. 391 (1939); State Bd. of Equalization v. Young's Market, 299 U.S. 59 (1937).

18. See, *e.g.*, cases cited in note 17 *supra*.

19. Parrott & Co. v. San Francisco, 131 Cal. App.2d 332, 280 P.2d 881 (1955).

20. State *ex rel.* H. A. Morton Co. v. Board of Review, 15 Wis.2d 330, 112 N.W.2d 914 (1962).

21. The dissent took the position that the import-export clause was also

indicated an intent to do away with all constitutional prohibitions against state action with respect to liquor. The Court declared that approval of the Kentucky tax would require holding that the import-export clause had been completely repealed by the twenty-first amendment. Because such a result would be manifestly incongruous with the purpose of the import-export clause, the Court concluded that the imported liquor, since it had not lost its status as an import, was still immune from state taxation.

It is submitted that the decision in the instant case is sound and that it has placed the states in appropriate relationship to the national government as was intended by both the Constitutional Convention of 1787 and the Congress of 1933. Taxing imports involves our international trade policies, and for that reason alone should be in the hands of the national government.[22] There is a valid distinction between the revenue power and power to regulate. The power to regulate or even exclude national and foreign liquor was evidently intended for the states by the 1933 Congress, but the Court concluded in the instant case that Congress had not intended for states to tax foreign liquor. The basic purpose was to give the dry states some power of self-protection from liquor interests outside those states.[23] A revenue tax provision is not necessary to this purpose, and is not permissible because the terms of the import-export clause make only one exception to the rule prohibiting state taxation of imports without congressional consent, that being "those imposts or duties . . . absolutely necessary for executing its inspection laws."[24]

As a result of the instant case the states are allowed a wide latitude in the exercise of their police power to prohibit or regulate liquor traffic. The line beyond which the state power may not extend is drawn at the level of state interference with the exclusively federal right to control taxation of imports.[25]

general in its prohibition, just as the commerce clause, and that one should not be regarded as more inviolable than the other. 377 U.S. at 347.

22. See United States v. Belmont, 301 U.S. 324 (1937).

23. See 76 CONG. REC. 4172 (1933) (remarks of Senator Borah).

24. See U.S. CONST. art. I, § 10, cl. 2: "[T]he net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States . . . ." This supports the argument that the Congress cannot be deemed to have consented to the States' having the power to derive revenue by means of an import tax.

25. See Note, 6 B.C. IND. & COM. L. REV. 336 (1965).

The Court correctly held that the two provisions were complementary rather than inconsistent, and that the more general amendment did not repeal the nearly absolute terms of the import-export clause insofar as intoxicating liquors are concerned.[26]

Alex Williams Rankin

CONSTITUTIONAL LAW—DISCRIMINATION IN PUBLIC ACCOMMODATIONS

The constitutionality of the public accommodations section of the Civil Rights Act of 1964[1] as applied to a motel and a restaurant was attacked in two recent Supreme Court cases. In the first case, plaintiff, owner of a motel serving out-of-state guests but refusing to rent rooms to Negroes, asked for declaratory and injunctive relief and contended that in passing the act Congress exceeded its power to regulate commerce and that the act resulted in a taking of liberty and property without the due process of law guaranteed by the fifth amendment in that plaintiff was deprived of the right to choose his customers and operate his business as he wished. The defendant counterclaimed for enforcement. The district court sustained this section of the act and issued a permanent injunction restraining plaintiff from further violation of the act. On appeal, the Supreme Court affirmed. *Held,* there was a rational basis for Congress to conclude that discrimination in lodging establishments has such an adverse effect on interstate commerce as to make it a proper object of congressional regulation under the commerce clause. *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964).

In the second case, plaintiff, operator of a family-owned restaurant catering to local family and white-collar trade, refused to serve Negroes. The restaurant did not serve transient guests, but forty-six percent of food purchased had been procured from out of state. Plaintiff asked for injunctive relief and attacked the constitutionality of the public accommodations section as applied to his restaurant on the ground that

26. Since judicial interpretation appears settled at the present, it seems that those states that wish to constitutionally tax foreign liquor should attempt to obtain congressional consent for such an imposition. Under the import-export clause, a statute by Congress would be sufficient.

1. 78 Stat. 243 (1964), 42 U.S.C. § 2000a (1965).