University of Minnesota Law School
Scholarship Repository

Constitutional Commentary

1995

How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment.

Laurence H. Tribe

Follow this and additional works at: https://scholarship.law.umn.edu/concomm

 Part of the Law Commons

Recommended Citation

Tribe, Laurence H., "How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment." (1995). *Constitutional Commentary*. 618.
https://scholarship.law.umn.edu/concomm/618

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

HOW TO VIOLATE THE CONSTITUTION WITHOUT REALLY TRYING: LESSONS FROM THE REPEAL OF PROHIBITION TO THE BALANCED BUDGET AMENDMENT

*Laurence H. Tribe**

Shortly before the proposed Balanced Budget Amendment went down to defeat by a single vote in March 1995,[1] Kansas Senator Nancy Kassebaum explained her reason for dropping her previous opposition to that much-debated but still-undelivered change in the United States Constitution.[2] It wasn't that the Senator had overcome her doubts about the ability of the Balanced Budget Amendment actually to curb the evils of an ever-increasing deficit. No, the reason was more subtle: "It may be like the Prohibition Amendment," she explained. "We may just have to get it out of our system." It was true that "[p]rohibition didn't stop drinking," but then it didn't really wreck, or even permanently mar, the Constitution either.[3] After all, we repealed the Eighteenth Amendment when we ratified the Twenty-first, a little over a decade later.

The Eighteenth Amendment, it should be said, is nearly everybody's prime example of a constitutionally dumb idea. Dean John Hart Ely, for instance, uses it as Exhibit A in his case against constitutionalizing social or economic policies.[4] To my knowledge, however, few people have focused on how silly the Prohibition *Repeal* Amendment—the Twenty-First—was. Not that the *idea* it represented was silly. It wasn't. What could be sounder then getting rid of the Prohibition Amendment? The problem wasn't the idea, but its implementation.

---

* Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard University.

1. *Senate Rejects Amendment on Balancing the Budget*, N.Y. Times at A1 (March 3, 1995) (vote of 66-34, which became 65-35 when Majority Leader Robert Dole switched his vote so that he could bring up the measure again at any time).

2. Alan McConagha, *Inside Politics*, Washington Times, at 5 (Jan. 17, 1995).

3. Id.

4. John Hart Ely, *Democracy and Distrust: a Theory of Judicial Review* 99-100 (Harvard U. Press, 1980).

Before getting to the punchline—all right, what was so dumb about the *way* the Twenty-First Amendment went about repealing the Eighteenth?—let me say why the point seems worth pursuing. Lots of ideas make constitutional sense in the abstract. Protecting future generations from our own short-sighted proclivities to heap on a mountain of debt through a sort of taxation without representation—that's actually a pretty good idea.[5] But between the rhetoric and the reality, as they say, falls the shadow. Otherwise put, in constitutional matters, as in others, the devil is in the details. So one must look closely at the details before signing on to the whole package.

Consider, then, the details of the Twenty-First Amendment. Its opening section (Section 1) repealed the Eighteenth Amendment. So far so good. Its closing section (Section 3) set a seven-year time limit on ratification. Again, a fine idea. In fact, the practice of setting such limits in advance actually dated back to the Eighteenth Amendment (before whose advent Congress had neglected to set any time limits at all, leading to such peculiar episodes as the ratification of the Twenty-Seventh Amendment over two centuries after its proposal to the States[6]). But consider Section 2, the inside of this constitutional sandwich. Here's the relevant baloney:

> 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.[7]

Now there's one for the books! Notice that this language doesn't merely empower the States, notwithstanding the inhibitions of the Dormant Commerce Clause,[8] to bar transporting or importing intoxicants for local delivery or consumption. That was its evident objective.[9] In fact, reading the Supreme Court's

---

5. Constitutional Amendment to Balance the Budget: Hearings on S.J. Res. 9, S.J. Res. 18, S.J. 182, and Related Proposals Before the Senate Committee on the Budget, 102d Cong., 2d Sess., 3 (June 4, 1992) (testimony of Prof. Laurence H. Tribe).

6. Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 Const. Comm. 101, 102-07 (1994).

7. U.S. Const. Amendment XXI, § 2.

8. The Constitution does not explicitly limit the States' ability to regulate matters affecting interstate commerce; rather, the requirement that state laws not discriminate against or unduly burden interstate commerce flows from the "negative implications" of the affirmative grant to Congress of power over this subject area in Article I, § 8. Laurence H. Tribe, *American Constitutional Law* §§ 6-1 to 6-14 (Foundation Press, 2d ed.1988) (explaining the doctrine).

9. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 218 (1987) (O'Connor, J., dissenting) ("history of Amendment" supports view that it was intended to restore absolute state

decisions purporting to describe the Twenty-First Amendment,[10] one would get the distinct impression that it was rather ordinary—just a constitutional embodiment of the proposition that, provided the States not use their control over beer, wine, and spirits to violate unrelated constitutional provisions, they are free to erect barriers to the influx of alcohol notwithstanding the principles of federalism that would normally tell the States that they must sink or swim together.[11]

Now this wasn't the first time an amendment's text missed its mark.[12] But this miss is a doozy. The text actually forbids the private conduct it identifies, rather than conferring power on the States as such. This has the singular effect of putting the Twenty-First Amendment on a pedestal most observers have always assumed was reserved for the rather more august Thirteenth Amendment, which is typically described as the *only* exception to the principle that our Constitution's provisions, even when they don't say so expressly,[13] limit only some appropriate level of *government.*

To repeat, Section 2 of the Twenty-first Amendment directly prohibits—talk about *prohibition!!*—the conduct that it was apparently meant to authorize the States to prohibit, freeing them of some (but not all) otherwise applicable limits derived from the rest of the Constitution. As a result, not only does the Amendment do more than its purpose required, it also does less. That is, it fails to specify that the States are authorized by it to do anything at all; that conclusion is evidently thought to follow by some sort of logical necessity. And just what it is they *are* au-

---

control over liquor and that "the Federal Government could not use its Commerce Clause powers to interfere in any manner with the States' exercise [of this power]") (internal quotations omitted); *Healy v. Beer Inst.*, 491 U.S. 324, 349 (1989) (Rehnquist, C.J., dissenting) (Amendment gave state "virtually complete control" over liquor importation and distribution, a "special power" that "primarily created an exception to the normal operation of the Commerce Clause") (internal citations and quotations omitted).

10. See, e.g., *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984); *Craig v. Boren*, 429 U.S. 190, 206 (1976); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964).

11. See, e.g., *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

12. Take the Eleventh Amendment, for example. Read literally, it says nothing to limit federal jurisdiction over suits against a State by the State's *own* citizens, the typical context in which the amendment is invoked. Moreover, a powerful argument can be made that its text was intended only to restrict party identity as a basis for federal court jurisdiction. Tribe, *American Constitutional Law* § 3-25, at 175 n.8 (cited in note 8) (collecting commentary). To give sovereign immunity some life, however, the Supreme Court has basically ignored the Amendment's language and construed the Amendment as embodying or exemplifying the *concept* of state sovereign immunity. *Hans v. Louisiana*, 134 U.S. 1 (1890); *Pennhurst State Sch. & Hosp. v. Halderman (II)*, 465 U.S. 89, 98 (1984) (construing *Hans*).

13. See, e.g., U.S. Const. Amends. II, III, V.

thorized to do—to prohibit importation of liquor, yes; to use their liquor authority to distort the national liquor market, no[14]—is left largely to the constitutional imagination. Moreover, the two statutes enforcing the Twenty-First Amendment[15] necessarily rest for their underlying authority[16] not on anything added to the Constitution by the Twenty-first Amendment[17] but on the good old Commerce Clause of Article I, Section 8.

The upshot is that there are two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under color of no law, can violate the United States Constitution. One is to enslave somebody, a suitably hellish act. The other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws—an act that might have been thought juvenile, and perhaps even lawless, but *unconstitutional*?

The moral of my story is simple. Senator Kassebaum, if you are listening, before voting for *any* amendment on the premise that we can always repeal it later, make sure you've got your exit strategy—and, come to think of it, your entry strategy—mapped out in some detail. The Constitution may not be ruined by repeated hit-and-run attacks of the sort that Prohibition and its repeal entailed, but it might not emerge intact either. The cost-benefit calculus of each new adventure in constitutional tinkering had better include honest attention first to the details of what sort of enforcement the effort will entail[18] and, failing effective

---

14. See *Healy v. Beer Inst.*, 491 U.S. 324, 337, 341-42 (1989); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-76 (1984).

15. The first, the Federal Alcohol Administration Act, was adopted to "enforce the Twenty-first Amendment" by imposing licensing requirements on liquor distributors, as well as penalties for violating these requirements. 49 Stat. 978, ch. 814, § 3-4 (1935) (currently codified at 27 U.S.C. §§ 203-04 (1994)). The second imposes criminal penalties for violations of state liquor importation and distribution laws. See 62 Stat. 761, ch. 645, § 1 (1948) (currently codified, as amended, at 18 U.S.C. § 1262 (1994)).

16. See U.S. Const. Amend. X (requiring such authority).

17. A draft version of the Twenty-first Amendment had actually included an additional clause providing that "Congress shall have concurrent authority to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." S.J. Res. 211, 72d Cong., 2d Sess., 76 Cong. Rec. 4138, 4139 (1933). Despite certain judicial statements to the contrary, see *Arrow Distilleries, Inc. v. Alexander*, 109 F.2d 397, 401 (7th Cir. 1940), cert. denied, 310 U.S. 646 (1940), in its final version the Amendment included nothing that could possibly serve as any source of authority for Congress to enact enforcing legislation.

18. For example, by stripping the federal courts of their power to hear any case or controversy arising under the Balanced Budget Amendment, the Nunn Amendment almost enabled the former amendment to pass, despite its rather strange (and dangerous) consequence for the balance of powers: the President would have been its sole enforcer, without fear of judicial intervention. Tony Mauro, *Nunn's Provision May Have Killed Amendment's Muscle, Experts Say*, USA Today, at 4 (Mar. 1, 1995) (quoting L. Tribe).

enforcement, what glide path we can follow for leaving the new toy behind, if not for making it fly. In particular, when an amendment is proposed that conspicuously lacks any effective means of enforcement—as both Prohibition and the Balanced Budget Amendment did—think hard, before embarking on the flight, about how you plan to land. How, precisely, can the Nation gracefully shut down those constitutional experiments that fizzle? And, perhaps a trickier matter, how can it safely unplug those that threaten to blow up the lab altogether?