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HR 5034: An Analysis

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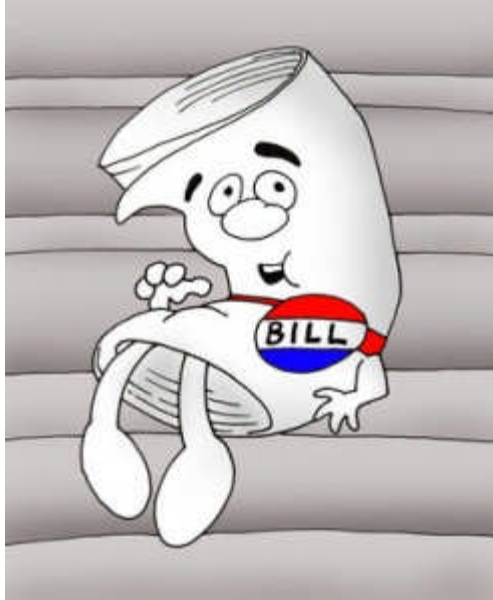
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The past week has seen a great deal of conversation—panic really—in the wine corner of the blogosphere about HR 5034. “Call your Congress-critter,” you are told, “or the wine wholesalers will eat your children!”

What has been lacking is an analysis of HR 5034, a discussion of the history that led to it, its effect if passed, and whether the Supreme Court is likely to find it constitutional. As Palate Press’s resident wine-blogging lawyer,* I will attempt to fill in those blanks. This is very rough analysis; I am far from a constitutional scholar on these issues, and what I’ve laid out here is subject to revision as I give my conclusions second- (and third-) thought, and as people wiser than I add their comments. And just to be safe, until I reach a conclusion, I will keep my children safely locked in their rooms.

The bill’s backers argue the legislation is necessary to protect a State’s ability to collect taxes, and to prevent minors from getting their hands on alcohol. The bill’s opponents argue that it is really intended to overturn a Supreme Court decision limiting States’ regulatory powers, giving power to States to bar importation of wine—something they are likely to do in response to pressure from the politically powerful alcohol wholesale industry.

What exactly is HR 5034? It is a proposed bill presently before the House Committee on the Judiciary. It says:



SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010.’

SEC. 2. PURPOSE.

It is the purpose of this Act to—

- (1) recognize that alcohol is different from other consumer products and that it should be regulated effectively by the States according to the laws thereof; and
- (2) reaffirm and protect the primary authority of States to regulate alcoholic beverages.

SEC. 3. SUPPORT FOR STATE ALCOHOL REGULATION.

The Act entitled ‘An Act divesting intoxicating liquors of their interstate character in certain cases,’ approved March 1, 1913 (27 U.S.C. 122 et seq.), commonly known as the ‘Webb-Kenyon Act’, is amended by adding at the end the following:

SEC. 3. SUPPORT FOR STATE ALCOHOL REGULATION.

- (a) Declaration of Policy—It is the policy of Congress that each State or territory shall continue to have the primary authority to regulate alcoholic beverages.
- (b) Construction of Congressional Silence—Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of section 8 of article I of the Constitution (commonly referred to as the ‘Commerce Clause’) to the regulation by a State or territory of alcoholic beverages. However, State or territorial regulations may not facially discriminate, without justification, against out-of-state producers of alcoholic beverages in favor of in-state producers.

(c) Presumption of Validity and Burden of Proof—The following shall apply in any legal action challenging, under the Commerce Clause or an Act of Congress, a State or territory law regarding the regulation of alcoholic beverages:

(1) The State or territorial law shall be accorded a strong presumption of validity.

(2) The party challenging the State or territorial law shall in all phases of any such legal action bear the burden of proving its invalidity by clear and convincing evidence.

(3) Notwithstanding that the State or territorial law may burden interstate commerce or may be inconsistent with an Act of the Congress, the State law shall be upheld unless the party challenging the State or territorial law establishes by clear and convincing evidence that the law has no effect on the promotion of temperance, the establishment or maintenance of orderly alcoholic beverage markets, the collection of alcoholic beverage taxes, the structure of the state alcoholic beverage distribution system, or the restriction of access to alcoholic beverages by those under the legal drinking age.’.

SEC. 4. AMENDMENT TO WILSON ACT.

The Act entitled ‘An Act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases’, approved August 8, 1890 (27 U.S.C. 121), commonly known as the ‘Wilson Act,’ is amended by striking ‘to the same extent’ and all that follows through ‘Territory.’

There we go. Do you feel more informed? Do you have a better sense of what all the hullabaloo is about? No? Hmm—I guess I will need to work a little harder.

The proposed statute, as you can see, does not operate alone. Instead, it amends existing statutes. We now need to understand which statutes, and why.

I’m going to take the two statutes it amends out of order. Section Four of HR 5034 amends the Wilson Act, which is actually the older of the two statutes amended. We need to look at the Wilson Act first, because the second, the Webb-Kenyon Act, was actually a subsequent fix to the Wilson act. Both statutes pre-date Prohibition.

The Wilson Act, 27 U.S.C. 121, was originally passed on August 8, 1890. That is not a typo, I really did mean *eighteen-ninety*. It says:

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall 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 shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

It was a pretty straightforward law. It said, in effect, “once alcohol gets into a State it is subject to the State’s laws.” It also said “you can’t discriminate against alcohol from another State.”

There was a problem with the Wilson Act, though. It only applied to liquor once it was transported into the State. States were not able to prohibit shipment directly to a consumer. A Supreme Court ruling making that finding led directly to the Webb-Kenyon Act, 27 U.S.C. 122, originally passed in 1913, which states:

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor 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, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited.

Webb-Kenyon was the fix for the hole in the Wilson Act. Together, the two statutes say alcohol from another State is subject to all the same restrictions as alcohol from within the State, but all remain subject to the Commerce Clause, prohibiting one State from discriminating against alcohol from another. That lasted until January 16, 1919, when the 18th Amendment was ratified. Prohibition was the law of the land, superseding both the Wilson Act and the Webb-Kenyon Act.



On December 5, 1933, the 21st Amendment was ratified, putting an end to Prohibition. The Wilson Act and the Webb-Kenyon Act were once again the law of the land, but they had to deal with the section 2 of the 21st Amendment, which said:

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.

How did the statutes and the Amendment interact?

That is what the Court most recently determined, in 2005, in *Granholm v. Heald*.

The Court in *Granholm* looked at a Michigan statute and a New York statute. These both treated out-of-state wineries in a more restrictive manner than domestic wineries. In Michigan, foreign wineries could not ship directly to consumers, but were required instead to go through wholesalers. In New York, foreign wineries could ship directly to consumers, but only after creating an in-state distribution system—a requirement that does not apply to domestic wineries. The question the Court considered was:

“Does a State’s regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of §2 of the Twenty-first Amendment?”

The Court began with the basic rule of the Commerce Clause:

Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”

The two States argued that Section 2 of the 21st Amendment created an exception to the Commerce Clause. The Court rejected that argument out of hand, stating:

The States’ position is inconsistent with our precedents and with the Twenty-first Amendment’s history. Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.

The reasoning behind the Court’s conclusion, though, needs to be our focus, for it was based upon the history of the Wilson Act and the Webb-Kenyon Act. First, the Court’s comments about the Wilson Act:

By its own terms, the Wilson Act did not allow States to discriminate against out-of-state liquor; rather, it allowed States to regulate imported liquor only “to the same extent and in the same manner” as domestic liquor.

Next, the Webb-Kenyon Act:

States were now empowered to forbid shipments of alcohol to consumers for personal use, **provided that the States treated in-state and out-of-state liquor on the same terms** [*emphasis mine*].

The States asked the Court to find more in the Webb-Kenyon Act: to find that it removed any barrier to discriminatory state liquor regulations. The Court rejected the argument for two reasons. First, it was inconsistent with prior Court rulings that Webb-Kenyon just filled a hole in the Wilson Act. Second, the Webb-Kenyon Act did not repeal the Wilson Act, which specifically prohibited discrimination against out-of-state liquor. The Court made three rulings that not only describe the interaction of the Wilson Act and Webb-Kenyon Act with the 21st Amendment, but also how the 21st Amendment interacts with the Commerce Clause:

“The wording of §2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers’ clear intention of constitutionalizing the Commerce Clause framework established under those statutes.”

“The Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers.”

“State regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.”

Now it becomes obvious that HR 5034 is a reaction to *Granholm*, and is specifically formulated to reverse the Court’s ruling based upon its reading of the Wilson Act and the Webb-Kenyon Act. Remember—those are the two statutes HR 5034 would amend. How would they look if HR 5034 were to pass?

The *new* Wilson Act:

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall 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 shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Do you see what it does? It takes away the anti-discrimination language. It directly addresses the Court’s observation that the Webb-Kenyon Act did not repeal the Wilson Act, which specifically prohibited discrimination against out of state liquor.

The *new* Webb-Kenyon Act:

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor 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, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited.

Support for State Alcohol Regulation

(a) Declaration of Policy—It is the policy of Congress that each State or territory shall continue to have the primary authority to regulate alcoholic beverages.

(b) Construction of Congressional Silence—Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of section 8 of article I of the Constitution (commonly referred to as the ‘Commerce Clause’) to the regulation by a State or territory of alcoholic beverages. However, State or territorial regulations may not facially discriminate, without justification, against out-of-state producers of alcoholic beverages in favor of in-state producers.

(c) Presumption of Validity and Burden of Proof—The following shall apply in any legal action challenging, under the Commerce Clause or an Act of Congress, a State or territory law regarding the regulation of alcoholic beverages:

(1) The State or territorial law shall be accorded a strong presumption of validity.

(2) The party challenging the State or territorial law shall in all phases of any such legal action bear the burden of proving its invalidity by clear and convincing evidence.

(3) Notwithstanding that the State or territorial law may burden interstate commerce or may be inconsistent with an Act of the Congress, the State law shall be upheld unless the party challenging the State or territorial law establishes by clear and convincing evidence that the law has no effect on the promotion of temperance, the establishment or maintenance of orderly alcoholic beverage markets, the collection of alcoholic beverage taxes, the structure of the state alcoholic beverage distribution system, or the restriction of access to alcoholic beverages by those under the legal drinking age.

Now this is where it gets interesting. Note first that HR 5034 removed the anti-discrimination language in the Wilson Act. Why wasn't that enough? Why do they also need the changes to Webb-Kenyon? It's because the Granholm case is not just about the statutory language; it is, ultimately, a case about the Constitution, the interplay between the Commerce Clause and the 21st Amendment. The Court did not say the laws of Michigan and New York were invalid because of the two statutes. Rather, it said they were invalid because they were *unconstitutional*. The analysis of the statutes was really an analysis of the 21st Amendment. The Court determined that the 21st Amendment put the interpretations of Wilson and Webb-Kenyon, as they existed at the time the Amendment was ratified, directly into the Constitution. Amending those statutes now would not do anything to alter the Court's finding of the meaning of the Constitutional Amendment, which is interpreted *as written*. That is why HR 5034 does not merely take away the anti-discrimination language of the Wilson Act.

In addition to removing the Wilson Act's anti-discrimination language, HR 5034 also fiddles with the Webb-Kenyon Act. What it is really intended to do is not to amend Wilson, because that would have no effect all by itself. What it is really intended to do is shift the ground rules for the Supreme Court's constitutional analysis of discriminatory laws, and to remove State regulation of alcohol from the Commerce Clause limitations. We need to break down those new ground rules one at a time. Let's start out of order, going from easiest to hardest.

The State or territorial law shall be accorded a strong presumption of validity.

Statutes always come before the Court with a presumption of validity. This is of very little import.

The party challenging the State or territorial law shall in all phases of any such legal action bear the burden of proving its invalidity by clear and convincing evidence.

This is more interesting. When a State passes a statute that is discriminatory, once the plaintiff shows its discriminatory nature the State has the burden to show "that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." HR 5034 purports to shift that burden from the State to the person challenging the statute. But can it? The answer, simply stated, is probably not. The Constitution trumps a statute. The Court is very jealous of its authority to interpret the Constitution and is not required to bow to the dictates of Congress. That is why HR 5034 talks about "support" and "the policy of Congress." Congress knows that what it proposes is beyond its power. It is doing two things. First, doing the bidding of the wholesalers to make them happy, and second, effectively filing a "friend of the Court" brief by way of statute, telling the Supreme Court how it would like the Court to rule.

The dormant Commerce Clause

I apologize up front, but I'm going to dive a little more deeply into law and the Constitution to explain the import of the following two sentence:

(a) Declaration of Policy—It is the policy of Congress that each State or territory shall continue to have the primary authority to regulate alcoholic beverages.

(b) Construction of Congressional Silence—Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of section 8 of article I of the Constitution (commonly referred to as the 'Commerce Clause') to the regulation by a State or territory of alcoholic beverages. However, State or territorial regulations may not facially discriminate, without justification, against out-of-state producers of alcoholic beverages in favor of in-state producers.

The Commerce Clause says Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." But there's also an implied corollary of the explicit language of the Commerce Clause, called simply "the dormant Commerce Clause." It states that only Congress has the power to regulate commerce between the States, and unless it explicitly grants that power to the States, a State may not pass a regulation

that improperly burdens or discriminates against interstate commerce. Hence, where Congress is silent on the power to regulate, the power is retained by Congress.

The dormant Commerce Clause is the target of subsections (a) and (b). Subsection (a) grants authority to the States, and subsection (b) says ‘do not read the dormant Commerce Clause into any silence on any issue relating to alcohol, but instead look at subsection (a).’ Together, these two phrases are formulated to take the presumption that States may not regulate alcohol away, nullifying the dormant Commerce Clause.

Note however that some of the anti-discrimination language removed from the Wilson Act is put back in the Webb-Kenyon Act, but with limitations:

However, State or territorial regulations may not facially discriminate, without justification, against out-of-state producers of alcoholic beverages in favor of in-state producers.

This has to be done. Once the statute takes States out of the dormant Commerce Clause, they run directly into the explicit language of the Commerce Clause and still must not discriminate unreasonably. The key phrase here is “without justification.” The possible justifications are listed in the next section:

the promotion of temperance, the establishment or maintenance of orderly alcoholic beverage markets, the collection of alcoholic beverage taxes, the structure of the state alcoholic beverage distribution system, or the restriction of access to alcoholic beverages by those under the legal drinking age

Many readers will recognize those as the different justifications given by alcohol wholesalers for their role in the three-tier system. They argue that States lose control over the alcohol market if just anybody can bring alcohol into the State and distribute it to consumers.

What is in it for the wholesalers? Control. Simply stated, the wholesalers believe, and with good reason, that through their lobbying power in State legislatures, they can keep their monopolies in many States, prohibiting direct sales from wineries to consumers. They are less confident that they will prevail if the arguments are decided in courts.

With this proposed statute, the wholesalers are swinging for the fences. Remember, *Granholm* considered a very limited question: whether States can have different rules for direct delivery of wine for foreign and domestic wineries. That is important because the only time wholesalers run into conflict in their lobbying efforts is when they run up against local wineries. Those wineries have their own local lobbying power, as well as individual personal relationships with State legislators. However, if the State can write a protectionist law that benefits both the local wineries and the wholesalers, absent a loud and well-funded outcry from individual consumers, they will have smooth sailing through local legislatures.

Wineries know this is the purpose. They know that the idea of HR 5034 is to turn over the decision about who gets to buy which wine to the lobbyists for wholesalers, working in concert with an individual State’s domestic wine industry. If the bill passes, consumers will be limited to

locally-produced wine, plus whatever the wholesalers choose to buy. Unfortunately, wholesalers tend to buy very large-production wines—the type they can buy by the pallet, rather than the case. Both the consumer and the small and mid-size wineries will suffer as a result.

Whether HR 5034 will achieve its stated purpose is less certain, because the proposed statute is attempting to change the Court's interpretation of the Constitution, a matter outside Congress' power. The statute's real effect would be in its power to persuade. The Court will still determine whether any limitations set by a State are so unreasonable that they violate the Commerce Clause. The Supreme Court is, after all, just nine people, and its rulings are not always Constitutional perfection—they're simply whatever ruling can garner five or more votes. The Court has also made quite clear that it is willing to ignore its prior rulings if it wants to go in another direction.



What does this mean for wine lovers? Do not rest comfortably in the above analysis that HR 5034 might not really overturn *Granholm*. By the time a new case reaches the Supreme Court, the Court might find the “policy of Congress” persuasive.

An interesting historical tidbit not everyone knows is that Justice Harry Blackmun, the author of the Court's opinion in *Roe v. Wade*, was chief counsel for the Mayo Clinic before joining the Court. The opinion he authored, breaking down a Constitutional issue into medically-defined and easily identified trimesters, was almost certainly informed by his prior experience. So by the time a case based upon HR 5034 reached the Court, who knows who might be hearing it? It might even be somebody who will eat your children. Act now and let your voice be heard. You can [contact your Congress-critter here](#).

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** Nothing herein is legal advice, merely analysis, and it is purely the opinion of the individual author.*

Cases and Statutes

- Wilson Act, 27 U.S.C. 121
- Rhodes v. Iowa, 170 U.S. 412 (1898)
- Webb-Kenyon Act, 27 U.S.C. 122
- Scott v. Donald, 165 U.S. 58 (1897)
- Granholm v. Heald, 544 U.S. 460 (2005)