

Francisco Franco Still Dead, Naked Alcohol Protectionism Still Unconstitutional

By: Jerry Ellig | July 3, 2019

From 1975-1977, a running gag on Saturday Night Live was Chevy Chase's repeated announcement on Weekend Update that "[Generalissimo Francisco Franco is still dead!](#)"

The US Supreme Court made a similar announcement last week with its 7-2 decision in [Tennessee Wine and Spirits Retailers Association v. Thomas](#). A Tennessee law said no one could get a retail license to sell alcohol without spending two years as a resident of Tennessee. [Tennessee's attorney general](#) actually authored two opinions saying the law violated the US Constitution's Commerce Clause. The high court upheld a Sixth Circuit Court of Appeals ruling that this law is unconstitutional under the Commerce Clause.

The Commerce Clause prevents states from erecting interstate trade barriers for purely protectionist purposes. And the 2-year residency requirement was clearly nothing but protectionism. As an amicus [brief](#) by law and economics scholars noted, "[A] state seeking to combat the ills associated with retail alcohol sales might use taxes, direct regulation, or enforcement to change retailers' and consumers' behavior; duration of residency is not even on the list of potential public policy levers mainstream economics would consider."

(For more background on the special interest dynamics of this law, see my earlier [commentary](#). A disclaimer: I was one of the scholars signing the amicus [brief](#), which represents my views and is not a position of the Regulatory Studies Center or The George Washington University. But I can't help but think that our first president would be pleased with this decision, given that his Mt. Vernon estate became [one of the largest whiskey producers](#) in the U.S. after he retired from the presidency.)

Under [Granholm v. Heald](#), a 2005 Supreme Court decision dealing with state laws affecting direct-to-consumer wine shipments, a state cannot discriminate against out-of-state sellers unless it has evidence that the discrimination accomplishes a clear public purpose that cannot be accomplished through less restrictive means. Thanks to the [21st Amendment](#), states can still regulate alcohol sales extensively; they just aren't allowed to violate other parts of the Constitution (such as the Commerce Clause) when they do so.

The ruling in the Tennessee case makes it clear that the principle enunciated in Granholm applies to all state alcohol protectionism, not just protectionism that affects wine, wineries, or direct shipment to consumers. The Court confirmed that Section 2 of the 21st Amendment, which returned regulation of alcohol to the states,

In brief...

The Supreme Court ruling in *Tennessee Wine & Spirits Retailers Association v. Thomas* confirms that the U.S. Constitution does not allow states to engage in naked economic protectionism just because the product is alcohol.

“is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages. Because Tennessee’s 2-year residency requirement for retail license applicants blatantly favors the State’s residents and has little relationship to public health and safety, it is unconstitutional.”

Supreme Court watchers who regularly fret about the effects of new judicial appointments should note that the 7-2 decision was a model of bipartisan comity. Justices Alito, Roberts, Ginsburg, Breyer, Sotomayor, Kagan, and Kavanaugh voted together in the majority; Justices Thomas and Gorsuch dissented. Alcohol made for similarly strange bedfellows in the *Granholm* case, with Justices Kennedy, Scalia, Ginsburg, Souter and Breyer in the majority and Justices Thomas, Rehnquist, Stevens, and O’Connor dissenting.

This most recent decision makes the constitutional principle enunciated in [Granholm](#) as clear and obvious as Generalissimo Franco’s death. The 21st Amendment does not allow states to engage in naked economic protectionism. The state must prove that the protectionism accomplishes a legitimate state purpose that cannot be achieved by other less restrictive means.