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Supreme Court to Hear Arguments on State Alcohol Protectionism This Month

By: Jerry Ellig | January 9, 2019

If you popped a few corks to celebrate the holidays, it's now time to face the sober reality of state laws that erect barriers to competition in alcohol sales. That's precisely what the US Supreme Court will do on January 16, when it hears oral arguments in the case of [Tennessee Wine and Spirits Retailers Association v. Blair](#). Just before Christmas, I happily signed onto an [amicus brief](#) by law and economics scholars explaining to the Court how concentrated economic interests frequently influence alcohol sales regulations to the detriment of competition and consumers.¹

At issue is a Tennessee law that says no one can get a retail license to sell alcohol without spending two years as a resident of Tennessee. The license must be renewed annually, but no one can get a license renewed without having been a resident for ten years. If a corporation wants a license, all owners, directors, and officers must satisfy the residency requirement.

First, here's a little background that explains where this case came from. [Legislation](#) adopted in 2014 allowed local voters to decide whether grocery stores can sell wine in Tennessee. This high-stakes political battle pitted consumers and retailers against the state's powerful liquor store lobby and some evangelical Christian leaders—a literal example of [Bruce Yandle's](#) theory that durable social regulation occurs due to alliances of economic interests seeking protection (“bootleggers”) with moral authorities who provide a patina of public interest justification (“Baptists”). Consistent with Yandle's theory, when I [testified](#) before a special committee of the Tennessee legislature established to study the issue in 2009, the preceding witness was a Baptist minister. At another hearing, the committee chair asked all Tennessee wine and spirits retailers to stand up and be recognized, and virtually the entire audience stood up. The law provides such blatant protectionism for in-state store owners that the [Tennessee attorney general](#) authored two opinions saying it violated the US Constitution's Commerce Clause.

The Tennessee Liquor Control Board followed the attorney general's advice and issued licenses to chains like [Kroger, Walmart, and Food City](#). But when Total Wine and the recently arrived [Ketchum family](#), who moved from Utah and bought a boutique wine shop, applied for licenses, the retail trade association threatened to sue the state liquor board if the licenses were granted. The liquor board went to court seeking a judgment on whether the law is constitutional. Federal district

¹ These views are my own and do not represent a position of the GW Regulatory Studies Center, which does not take positions on policy or legal matters.

and appeals courts said no, but the Tennessee Wine and Spirits Retailers Association (NOT the state of Tennessee!) appealed the decision to the Supreme Court.

The amicus brief by law and economics scholars explains succinctly why Tennessee's residency requirement is a paradigmatic example of protectionism motivated by concentrated benefits and dispersed costs. There are about 600 liquor stores in Tennessee, organized into a trade association to advance their interests, versus approximately 3 million Tennesseans who regularly consume alcohol, plus millions of tourists who drink in Tennessee but do not vote in the state. The [brief](#) explains the dynamics of this protectionism:

...it is little surprise that the bloc of 600 or so retailers was able to band together to lobby successfully to exclude out-of-state retailers from setting up shop, competing against them, and driving down prices. The benefit to those retailers individually and as a group is great, while the cost to individual consumers is small, reducing their incentive to organize.

Moreover, the [brief](#) points out that the residency requirement serves no legitimate government purpose:

...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.

The US Constitution's Commerce Clause prevents states from erecting interstate trade barriers for purely protectionist purposes. 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.

Imagine how quickly the rule of law would be undermined if the Supreme Court interpreted the 21st Amendment to mean that states could violate other parts of the Constitution as long as alcohol is involved. For example, notwithstanding the [4th Amendment](#), police could break down a 20-year-old's apartment door without a warrant if they thought he was sipping an illicitly obtained beer. But they'd still need a warrant if they thought he was cooking meth. Clearly, the 21st Amendment was not meant to create such perverse results. The rest of the Constitution, including the Commerce Clause, places limits on how far states can go. And that is why Tennessee's attorney general and two levels of federal courts have said the residency requirement is unconstitutional.

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