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Regulating Beverage Alcohol-Past Practices and Current Perceptions

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Regulating Beverage Alcohol

Past Practices and
Current Perceptions

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Alcohol is a special commodity regulated by the federal and state(s) governments

- Historically, the legislative process surrounding alcohol beverage, pitted the federal governments role in regulating commerce amongst the several states and;
- Regulating a specific commodity in order to:
 - Control abuse and overconsumption
 - Tax (in the form of excise tax)
 - Protect the public from adulterated product
 - Ensure a licensing scheme that secures government oversight of the industry and limits illegal activities.

Pre 21st Amendment- Wilson and Webb-Kenyon Act

- Passed by Congress in 1913.
- Prohibited interstate "shipment or transportation" of alcoholic beverages "in violation of any law of State, Territory, or District of the United States.
- Permitted state prohibition laws to regulate interstate commerce in alcoholic beverages. US Supreme Court upheld the Webb-Keyon Act in Clark Distilling Company v. Western Maryland Railway Co. (1917).
- A precursor to section 2 of the 21st the act paved the way for state regulation of beverage alcohol within their borders.

Volstead Act and
the 18th
Amendment-
Ratified 1919-
Prohibition

- Section 1

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

- Section 2

The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

- Section 3

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

The 21st
Amendment
to the US
Constitution
The Repeal of
Prohibition-
1933

- Section 1

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

- *Section 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.

Section 3

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

Congress Confronts Pre- Prohibition Problems Through Implementing the FAA

- Federal Alcohol Administration Act (FAA)-1935 - 27 U.S.C. 201 et seq.
 - Objectives:
 - Prevent organized crime and criminal activities within the alcohol beverage industry and assist in the collection of federal excise tax through the establishment of a permitting system.
 - Protecting consumers from misbranding and adulterated alcohol by regulating formulation and label matters.
 - Regulate trade practice matters to avoid tied-house issues and unfair competition. *Tied House Evil is an overarching theme of past and current alcohol Beverage Law.*
 - The FAA finds its grant of authority in the Article 1, Section 8, Clause 3, the Commerce Clause.

Tied House Evil In Federal and State Law

- In federal law tied house prohibits industry members from inducing, directly or indirectly, a retailer to purchase beverage alcohol from the industry member to the exclusion of alcoholic beverages offered for sale by other persons. 27 U.S.C 205 (b).
- State law definitions vary but only to a limited degree. Florida Statute 561.42 exemplifies the concept; Financial assistance to a vendor (retailer) by a manufacturer, distributor, importer, primary American source of supply, brand owner or registrant or any broker, sales agent or sales person thereof is prohibited.

The
Commerce
Clause
Article 1,
Section 8,
Clause 3

- Congress shall have the power to “regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.”

The Dormant or Negative Commerce Clause

Of Paramount Importance to the Current State of the Beverage Law

- Implicit in the Commerce Clause; states shall not pass legislation that discriminates against or excessively burdens interstate commerce.

Title 27
Chapter 1,
Code of
Federal
Regulations
(27 CFR
Chapter 1)

Administered by the
Alcohol and Tobacco Tax
and Trade Bureau
(TTB)

Parts 1-13

- [Part 1](#) Basic Permit Requirements under the FAA Act
- [Part 4](#) Labeling and Advertising of Wine
- [Part 5](#) Labeling and Advertising of Distilled Spirits
- [Part 6](#) Tied House
- [Part 7](#) Labeling and Advertising of Malt Beverages
- [Part 8](#) Exclusive Outlets
- [Part 9](#) Approved American Viticultural Areas
- [Part 10](#) Commercial Bribery
- [Part 11](#) Consignment Sales
- [Part 12](#) Foreign Nongeneric Names of Geographical Significance Use in the Designation of Wine
- [Part 13](#) Labeling Proceedings

Parts 14-31

- [Part 16](#) Alcoholic Beverage Health Warning Statement
- [Part 17](#) Drawback on Taxpaid Distilled Spirits Used in Manufacturing Nonbeverage Products
- [Part 18](#) Production of Volatile Fruit-Flavor Concentrate
- [Part 19](#) Distilled Spirits Plants
- [Part 20](#) Distribution and Use of Denatured Alcohol and Rum
- [Part 21](#) Formulas for Denatured Alcohol and Rum
- [Part 22](#) Distribution and Use of Tax-free Alcohol
- [Part 24](#) Wine
- [Part 25](#) Beer
- [Part 26](#) Liquors and Products from Puerto Rico and Virgin Islands
- [Part 27](#) Importation of Distilled Spirits, Wines and Beer
- [Part 28](#) Exportation of Alcohol
- [Part 29](#) Stills and Miscellaneous Regulations
- [Part 30](#) Gauging Manual
- [Part 31](#) Alcohol Beverage Dealers

Presenter to read NY Code

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Please notate it carefully

The presenter will only be able to read the code twice and will not be able to repeat it or email it to you.

Thank you!

All 50 States Regulate Alcohol within their Borders.

- State laws and regulations are administered by Alcohol Beverage Control Divisions (ABC's).
- Example-Division of Alcohol Beverage and Tobacco (DABT) in Florida.
 - Title 34, Chapters 561-569 administered by DABT in the state.
 - Florida Administrative Code states the rules for execution of the Beverage Law and establishes rules of compliance. Fla. Admin. Code R. 61A-1-61A-5.

Title XXXIV

- Chapter 561 Beverage Law: Administration
- Chapter 562 Enforcement
- Chapter 563 Beer and Malt Beverage
- Chapter 564 Wine
- Chapter 565 Liquor

Conflicting Constitutional Provisions

- State governments have attempted to use section 2 of the 21st Amendment as a tool to create broad legislation within their borders to control the transport, sale, and service of alcoholic beverages.

- *Section 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.

The Negative Commerce Clause

- Implicit in the Commerce Clause, the negative or dormant commerce clause implies that states shall not pass legislation that discriminates against or excessively burdens interstate commerce.
- In the realm of alcohol beverage law perceived protectionist state legislation has been attacked under this theory by a variety of plaintiffs.

Perceived
Protectionist
Measure(s)
Challenges

Brief Survey of Important Cases

Granholm v.
Heald, 544
U.S. 460 (2005)

Facts:

- The States of Michigan and New York allowed in-state wineries to direct ship to consumers (as an exception to the three-tier system) but prohibited out of state wineries from doing the same. Various plaintiffs sued arguing that the laws were protections and in violation of the dormant commerce clause.
- The states argued that under section 2 of the 21st Amendment they were permitted to regulate alcohol importation into the states.
- The question presented was whether the prohibition against out-of-state winery shipments was a violation of the dormant commerce clause or did section 2 of the 21st Amendment grant states the broad authority to impose such a regulation within its border.

Courts Opinion

- The Court held that both New York and Michigan laws violated the commerce clause by favoring in-state wineries over out-of-state wineries. The 21st Amendment did not grant the state authority to discriminate against out-of-state actors.
- State authority to engage in economic discrimination was not the purpose of the 21st Amendment.
- From a practical standpoint the case opened the door for direct shipment of wine from manufactures to consumers (if the consumers home state permitted its in-state wineries to do the same).

Tennessee
Wine & Spirits
Retailers Ass'n
v. Thomas, 139
S. Ct. 2449,
(2019).

Facts:

- Tennessee Alcohol Beverage Commission had a two year residency requirement, requiring that an applicant for an alcohol beverage license must have lived in the state for the two years preceding the submission of the application to the state. Further, there was a ten year residency requirement mandated by law for the renewal of an alcohol beverage license.
- Total Wine and Spirits, the applicant entity, was a resident of the State of Maryland and Tennessee refused licensure based on the above stated residency requirement.
- Tennessee relied on its authority under section 2 of the 21st Amendment to regulate the transportation and importation of alcohol.

Court's Opinion

- The dormant commerce clause forbids states from regulating alcohol sales by granting licenses to in-state residents at the exclusion of out-of-state residents.
- A state law of this type can only be upheld by a showing that it is narrowly tailored to advance a “legitimate local interest.” The Tennessee law clearly favors in-state residents over out-of-state residents.
- The Court concluded that protectionism is not a “legitimate local purpose” and that at best residency requirements “have an attenuated relationship with health and safety.”

Wal-Mart Inc. et al. v. Texas Alcoholic Beverage Commission et al

Facts:

- The case concerned a specific type of retail license, called P licenses, which permit package liquor sales. The permit is offered to privately corporations only - public companies are explicitly prohibited from holding P licenses.
- Wal-Mart brought an action against Texas Alcohol Beverage Commission (TABC) claiming that Texas law 22.16 (the P license stature) violated the commerce clause and the equal protection clause of the US Constitution.
- TABC relied on its authority under section 2 of the 21st Amendment claiming that the state had the authority to regulate the transport, sale and service of alcohol beverage within its borders.

- The lower court ruled that the ban against public corporations had a discriminatory purpose and was a burden on interstate commerce. TABC and Texas Package Store Association appealed to the 5th Circuit.

5th Circuits Opinion

- The 5th Circuit, after rigorous analysis determined that even though Texas had a history of past discriminatory measures applied to beverage alcohol, because the ban prohibited in-state and out of state public companies from holding P licenses, the ban, on its face, is not violative of the commerce clause and remanded the case for further consideration under a *Pike* analysis (as well as other areas)(*Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970). The circuit court suggests that under *Pike*, the lower court should consider whether the law burdens interstate commerce, whether there is a legitimate local interest, and when both are present, if the extent of the burden should be tolerated based on the local interest involved.

- The final outcome of this case is difficult to predict. On its face, it does stand for the proposition that perceived protectionist beverage alcohol legislation will be increasingly confronted by stakeholders both on the legislative floor and in the Federal Courts.



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