What’s New – U.S. Constitutional Law Developments

Marc Sorini
AIDV Conference 2018
October 2, 2018
The Constitution (Article I, Section 8, Clause 3[3]) states:

- [The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

The “dormant” Commerce Clause is a judge-made doctrine that permits private litigants to challenge state laws that

- Discriminate in favor of in-state interests at the expense of out-of-state interests;
- Place an unreasonable burden on interstate commerce; or
- Have the effect of regulating conduct outside the state’s borders

In the case of state laws involving alcohol, the 21st Amendment operates as a partial limitation on normal Commerce Clause principles.
The Commerce Clause – *Granholm v. Heald*

- In the **2005 *Granholm v. Heald* decision**, the Supreme Court invoked the dormant Commerce Clause’s non-discrimination principle to strike down state laws that permitted in-state wineries to sell and ship directly to consumers, but denied out-of-state wineries that same privilege
  - While acknowledging the partial limitation of the 21st Amendment, the Court held that the Amendment would rarely shield a facially-discriminatory law from challenge – such laws are virtually *per se* invalid
  - Nothing in the discriminatory treatment of out-of-state wines implicated the core purposes of the 21st Amendment to justify upholding the law

- Notably, the *Granholm* opinion, quoting a concurring opinion from an earlier non-Commerce Clause case, labeled the three-tier system “unquestionably legitimate”
The Commerce Clause – Today

- Since the decision, Circuit Courts (courts of appeal below the Supreme Court) have struggled to reconcile Granholm’s holding with the “unquestionably legitimate” reference to three-tier

- A number of decisions have concluded that in the context of state laws concerning alcohol, Granholm’s non-discrimination principle must be limited to discrimination by states against out-of-state producers and products
  - See, e.g., Southern Wine & Spirits v. Div. of Alc. Bev. Control (8th Cir. 2013); Arnold’s Wine v. Boyle (2nd Cir. 2009)

- To date these cases have stymied attempts to use Granholm to extend interstate direct-to-consumer wine shipping rights to importers, retailers, and other players besides U.S. wineries
Now several recent residency cases have demonstrated that different U.S. Courts of Appeals disagree with one another – a so-called “Circuit split”

- **Cooper v. Texas Alc. Bev. Comm’n** (“Cooper II”) (5th Cir. 2016) – Texas residency requirements for retail licenses remain unconstitutional, notwithstanding **Siesta Village Market v. Steen** (5th Cir. 2010)

- **Byrd v. Tenn. Wine & Spirits Retailers** (6th Cir. 2018) – Tennessee residency requirements for retail licensees is unconstitutional; detailed opinion recognizes and highlights the Circuit split, eventually rejecting the limitation on **Granholm** to producers and products

In circumstances like this (where U.S. Courts of Appeals disagree), the Supreme Court is likely to step in and decide a case in order to restore uniformity of legal interpretations

Meanwhile, **pending litigation** seeks to take the issue of retailer interstate direct-to-consumer rights to Courts of Appeal, and eventually the Supreme Court

- NAWR-supported lawsuit in Illinois (**Lebamoff**)
- Other cases pending in Indiana and Michigan
Topic 2 – The First Amendment

- The First Amendment states (emphasis supplied):
  - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

- The Amendment empowers courts to invalidate laws deemed to violate its command.

- Originally directed only at federal law (“Congress shall . . .”), but today applies to state laws as well.
First Amendment – Central Hudson Test

1. Speech must concern **lawful activity** and **not be misleading**
   - Threshold for determining if First Amendment applies at all

2. Speech restriction in question must advance a **substantial governmental interest**

3. Speech restriction in question must **directly advance** the substantial governmental interest(s) asserted

4. Speech restriction in question must **not be more extensive than necessary** to serve the substantial governmental interest
   - Later cases elaborate that the state must show a “**reasonable fit**” between the interest and the means chosen to advance it
First Amendment – Laws Regulating Alcohol Not Safe

- **Rubin v. Coors** (1995) – Court struck down the Federal Alcohol Administration Act’s ban on alcohol content labeling for malt beverages (beer)

- **44 Liquormart, Inc. v. Rhode Island** (1996)
  - Overturned state ban on truthful price advertising of alcohol beverages
  - Plurality squarely rejected the suggestion that earlier cases (*Posadas* and *Edge*) created a different standard for “sin” products/ “vice” activities
  - What constitutes a “sin” would require endless line drawing
  - Would create a perverse incentive for legislatures to put a “vice” or “sin” label on anything whose advertisement they wish to suppress

- “We now hold that the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech”
**First Amendment – Recent Case Law**

- **Retail Digital Network v. Prieto** (9th Circuit *en banc*, 2017) – California’s tied-house prohibitions on suppliers or wholesalers providing retailers with anything of value in exchange for advertising upheld (relying on *Actmedia v. Stroh*, 1986)

- **Missouri Broadcasters v. Lacy** (8th Circuit, 2017) – Missouri statute and regulations prohibiting (1) advertising price discounts; (2) advertising below-cost pricing; and (3) requiring listing of multiple retailers in supplier-paid advertising (equiv. to TTB “retailer advertising services” regulation), potentially unconstitutional under the First Amendment – On remand, District Court (in June 2018) enjoined enforcement of the statutes and regulations at issue

- **Texas ABC v. Mark Anthony Brewing** (Tex. Ct. App., 2017) – Texas’ ban on private-label malt beverages does not violate First Amendment because underlying conduct – a trademark licensing agreement between a supplier and a retailer – is illegal and thus not protected under the First Amendment
Thank you for your time and attention

Marc Sorini