

TENNESSEE v BLAIR: DISCRIMINATION AT THE RETAIL TIER

With a short detour through the history of booze in America

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18th

Amendment

... the manufacture, sale, or transportation of intoxicating liquors within ... the United States ... for beverage purposes is hereby prohibited.







"None of the great boons and usufructs that were to follow the passage of the Eighteenth Amendment has come to pass. There is not less drunkenness... but more; not less crime, but more; not less insanity, but more. The cost of government is not smaller, but greater. Respect for law has not increased, but diminished.





“What America
needs now is
a drink.



21st

Amendment

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The right of a State to prohibit the importation of liquor
is not limited by the commerce clause."

State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936)

Hostetter v. Idlewild Bon Voyage Liquor Corp

- To draw a conclusion ... that the 21st Amendment has somehow operated to "repeal" the Commerce Clause wherever [liquor] is concerned would... be an absurd oversimplification.....
- Both the 21st Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.





Liquor-by-the-drink passes in Oklahoma statewide vote

OKLAHOMA CITY (AP) — Oklahoma has become the last state in the nation to legalize liquor by the drink as wet forces in the cities finally overcame the vote-getting power of the dries in the rural areas.

Voters in this Bible Belt state, which did not repeal Prohibition until 1959, turned out in record numbers Tuesday and passed a constitutional amendment to allow liquor by the drink on a county-option basis.

"Oklahoma has grown up and is ready to join the rest of the United States," said John Kilpatrick, Oklahoma City leader of the pro-liquor drive. "It's time. It's 1984. We're ready to join up."

Kansas, which repealed prohibition in 1949, 10 years before Oklahoma did, still technically does not have liquor-by-the-drink and the Kansas Constitution still bars the "open saloon."

Kansas has a private club law under which club members can buy

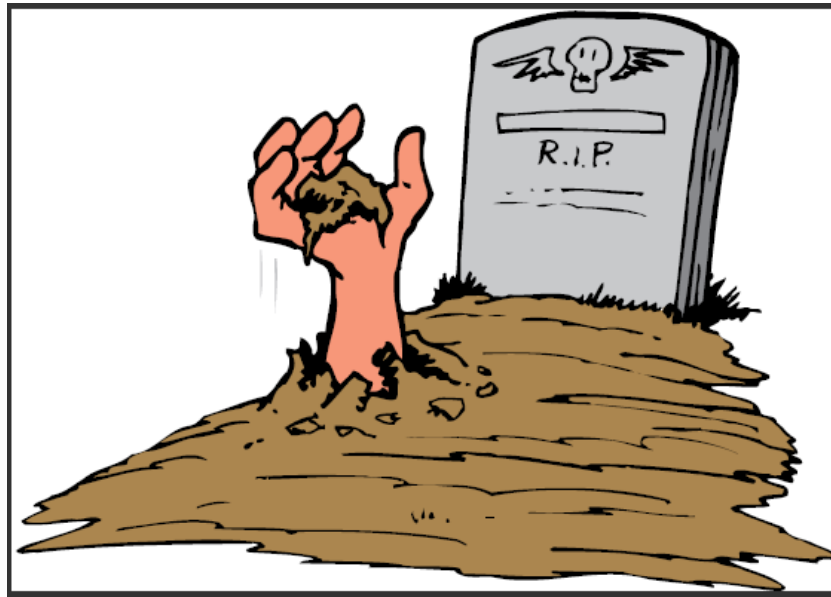
buy a drink in any other club with which his club has a reciprocal agreement.

But one cannot open a bar in Kansas and serve liquor by the drink to the general public as the term implies.

Kansas has voted just once to remove the ban on the open saloon. It failed by 11,000 votes out of 686,000 cast in 1970.

Gov. John Carlin and the Kansas Chamber of Commerce and Industry both recently endorsed a proposed constitutional amendment to remove the ban on the open saloon from the state Constitution.

A renewed effort is expected in the 1985 session to put the issue on the 1986 Kansas general election ballot, if not sooner. However, legislative leaders have been skeptical whether a resolution to put the issue on the ballot could be successful. It takes two-thirds majorities in both houses, with informal polling in recent sessions showing far fewer votes than



The 21st Amendment did not empower States to favor local liquor industries by erecting barriers to competition.... State laws that constitute mere economic protectionism are not entitled to the same deference those to promote temperance.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)



State liquor laws that promote temperance **or ensure orderly market conditions** are protected by the 21st Amendment; therefore the State's comprehensive three-tier system for the distribution of liquor is unquestionably legitimate....

North Dakota v. United States, 495 U.S. 423 (1990) (plurality/dissenters in *Bacchus*)

1990-2004

- 7000 new wineries.
- Five big wholesalers corner market, won't carry new wines.
- Start-up wineries need to be able to sell directly to consumers or go out of business.
- Farm wineries are good places to hold political fund-raisers
- States pass laws allowing in-state wineries to by-pass wholesalers and act as producer, wholesaler and retailer all at once.

Local wineries



Consumer

Out-of-state wineries



Wholesaler



Retailer / restaurant



Consumer

All wineries

OR

Consumer



All wineries

Wholesaler

Retailer / restaurant

Consumer



Granholm v. Heald

- "Time and again, the Supreme Court has held that state laws -- including liquor laws -- violate the Commerce Clause if they treat out-of-state and in-state economic interests differently, burden the former, and give a competitive advantage to the latter."
- "[D]iscrimination is neither authorized nor permitted by the Twenty-first Amendment."
- "[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."
- "States cannot require an out-of-state firm to become a resident in order to compete on equal terms."

Wholesalers – retailers - importers - license applicants?

1. *Granholm & Bacchus* apply; state retailer and licensing laws may not discriminate against out-of-state entities
2. *Granholm & Bacchus* do not apply to retailer laws because:
 - A retailer is not a producer.
 - The state has not created an exception to the 3-tier system
 - Retailing is an inherent part of the 3-tier system
 - Retailers need to be located in-state for regulatory purposes

Byrd v.

Tennessee

- Two residency rules: 2 years before applying, 10 years to renew
- 6th Circuit struck down both residency rules as to residence of owner. Called them arbitrary.
- Rejected the opinions of *Arnold's Wine* and *Southern Wine* that no retailer laws were subject to Commerce Clause scrutiny.
- Also rejected the argument that all retailer laws were limited by the nondiscrimination principle.
- Took middle ground that some retailer laws were limited by nondiscrimination principle, but those regulating inherent aspects of the 3-tier system were exempt
- Speculated that requiring a retailer to be physically located in the state “might be” sufficiently inherent to survive Commerce Clause scrutiny

