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

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Topic 1 – The Commerce Clause

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- 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*

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- 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

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- 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

The Commerce Clause – Coming of the "Son of *Granholm*"

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- 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. Stee*n (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

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- 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

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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

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- ***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

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- ***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

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Thank you for your time and attention

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