



October 2019 Newsletter

Protectionism or Protection?

By Pamela S. Erickson

The US Supreme Court recently invalidated a Tennessee law that required a lengthy period of state residency for persons and companies that wanted a license to operate a liquor store. The Court determined the law constituted "protectionism" which means it was "aimed at giving a competitive advantage to in-state businesses." Further, the Court found that protectionism is not a legitimate state interest that would shield alcohol laws from a commerce clause challenge--unless it can be established that the laws further public health and safety or "some other legitimate nonprotectionist ground."

But this analysis ignores the historical experience with "absentee owners" and their aggressive business practices which spawned severe alcohol problems before Prohibition.

"I ask especially that no state shall by law or otherwise, authorize the return of the saloon, either in its old form or in some modern guise." President Franklin Roosevelt. 1933

When the Prohibition measure was repealed, President Franklin Roosevelt called on the people to see that "this return of individual freedom shall not be accompanied by the repugnant conditions that obtained prior to the adoption of the Eighteenth Amendment and those that have existed since its adoption." And, "I ask especially that no state shall by law or otherwise,

"The 'tied house' system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales. He saw none of the abuses, and as a non-resident he was beyond local social influence." Fossdick and Scott, Toward Liquor Control

authorize the return of the saloon, either in its old form or in some modern guise."

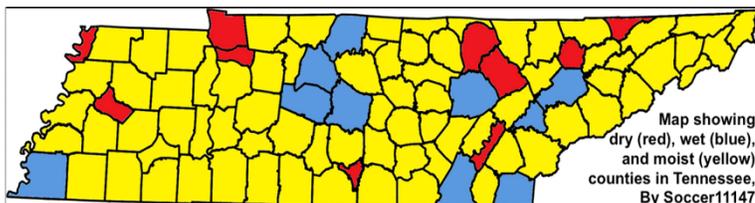
It seems that Tennessee lawmakers were responding to the President's words when they opted to require those who want to sell alcohol to be residents of the state. **This suggests a desire to be protected from the business practices used by large, out-of-state alcohol companies prior to Prohibition.** Some of those companies survived Prohibition and were eager to begin selling alcohol again. Therefore, it was reasonable to be concerned that conditions existing before Prohibition would return.

It is logical to assume that Tennessee law makers thought they were operating within the special provisions of the 21st Amendment for the sale of a unique product that can cause great harm. After all, this Constitutional amendment only applied to alcohol not other commodities. While the Court detailed many historical instances where protectionism was a problem, the Court did not suggest that Tennessee generally practiced "protectionism" with other products. The 21st Amendment, which prohibits the transportation or importation of alcohol into any state in violation of their laws, seems well justified by the fact that alcohol causes great harm if misused. Such harm cannot be ignored as today it results in annual deaths of 88,000 and costs taxpayers \$249 billion according to the Centers for Disease Control and Prevention.

The Court failed to detail the economic and political power of large corporations and how they can create a very uneven playing field. Small, local companies have great difficulty competing in such environments which eventually become dominated by the larger

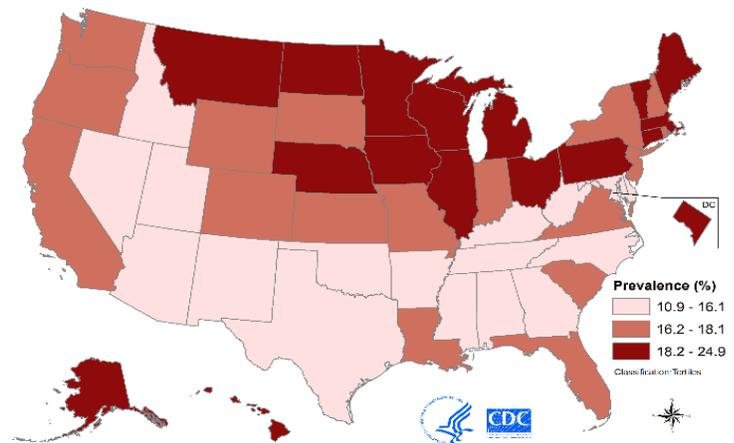
companies. Many of today's large alcohol suppliers and retailers are global corporations with vast resources that can be applied to change state and local regulations and fight regulators when violations are found. It is also relevant that large off-premise retailers' business model is to make money by selling in high volume, not on profit margins. This means they are dedicated to ever increasing sales and consumption. To sell in high volume profitably, large companies use their buying power to negotiate volume discounts and other benefits from suppliers. That enables them to lure customers to their store by offering "loss leaders" or products on sale such as alcohol. And, because they sell thousands of products, they can make up any loss on products which are not on sale. Large quantities of cheap alcohol widely available is exactly the market scenario which states try to avoid and public health shuns. By requiring residency, Tennessee was able to avoid this scenario in a simple way.

Tennessee has a strong history of temperance that continues to this day. In 1838, they enacted the nation's first prohibition law. Since that time, they repealed and enacted various laws designed to curb alcohol consumption. In 1909, the manufacture of liquor was outlawed. In 1917, "bone dry" Prohibition was passed. After the national law was repealed, Tennessee continued its statewide prohibition until a series of laws were passed in 1937-1939 which gave local government jurisdictions the ability to vote themselves "wet" or "moist" (some localities only ban liquor by the drink, others prohibit sales from package stores, and some do both). To this day, many local governments are dry or moist. As the map below indicates, red counties are dry, blue are wet and yellow are mixed.



Given this cultural and political history, it is unlikely that the motivation behind a residency law was merely to grant local businesses a competitive advantage.

Today Tennessee enjoys some of the lowest alcohol consumption rates in the country including low rates of underage drinking. According to a report by the federal government, only Utah had a lower rate of underage binge drinking. And Tennessee's binge drinking is in the lowest category nation-wide. (See Map below of states' binge drinking rates.) That will likely change as large alcohol companies come to dominate local markets and low-priced alcohol becomes much more available.



Sources:

[Tennessee Wine & Spirits Association v. Thomas](#)

https://www.samhsa.gov/data/sites/default/files/report_3185/S hortReport-3185.html

[National Archives, Presidential Proclamation 2065 of December 5, 1933, in which President Franklin D. Roosevelt announces the Repeal of Prohibition.](#)

"Toward Liquor Control," by Fosdick, R.D. and Scott, A.L. 1933, London: Harper & Brothers.

["Competition and Profit," Food Marketing Institute,](#)

[Map showing dry \(red\), wet \(blue\), and moist \(yellow\) counties in Tennessee](#)

[Center for Disease Control and Prevention Fact Sheet on Binge Drinking](#)