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WHOLESALE ABUSE

of the Constitution

BY Angela Logomasini, Director of Risk and Environmental Policy, Competitive Enterprise Institute, Washington, D.C.

Republican Congressman Jason Chaffez of Utah is leading the charge on federal alcohol legislation during the 112th Congress on behalf of the National Beer Wholesalers Association. Chaffez introduced H.R. 1161, the so-called "Community Alcohol Regulatory Effectiveness Act," which he says safeguards the constitutional principle of states' rights. In reality, Constitutional framer James Madison would be appalled by such claims.

The legislation is similar to the bill that Rep. William Delahunt (D-Mass., retired) introduced in 2010, which garnered more than 150 sponsors. Thus far, the Chaffez bill has 57 cosponsors.

H.R. 1161 would allow states to pass laws that impede commerce as long as they do not: "intentionally or facially discriminate against out-of-state or out-of-territory producers of alcoholic beverages in favor of in-state or in-territory producers unless the State or territory can demonstrate that the challenged law advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."

Should H.R. 1161 be approved, the courts might allow states to impose discriminatory laws against out-of-state wineries, if the state can argue that the impact is not *intentionally* protectionist.

Some opponents contend that H.R. 1161 would allow states to discriminate against wineries with regulations that indirectly have protectionist effects, such as differential tax treatment.

Yet the bill's language barring intentional discrimination against producers would be hard for whole-

salers to overcome. For example, the *Granholm v. Heald* opinion notes that the court had, in the past, ruled that differential tax treatment is not only unnecessary and discriminatory.

Wendell Lee (Wine Institute) noted a potential loophole on the ShipCompliant blog. The courts may decide that taxing out-of-state wines at higher rates does not discriminate against producers, per se. Instead it discriminates against their products. Since H.R. 1161 only grants protection to producers, out-of-state wineries would have no defense against discriminatory taxes and states would set these taxes so high that they would eliminate direct shipping. Whether the court would actually accept such logic is unknown, but it raises a frightful possibility.

There are a number of other protectionist state laws that H.R. 1161 might make valid. The jury is still out, for example, on state laws regulating which wineries may ship based on their volume of production – so called "volume caps."

In any case, the limited protections provided to producers in H.R. 1161 apply only to producers, allowing for an unbridled number of state-level protectionist policies affecting anyone else in the industry.

Such laws will undermine sales of any domestic winery or importer whose brands are marketed via online retailers. It might also prevent direct shipping from producers who rent winemaking facilities, because many states classify them as either retailers or distributors, rather than producers.

This blatantly unfair treatment may destroy many small entrepreneurial retailers, leaving fewer outlets through which wineries can reach consumers.

"If successful, [wholesalers] stand



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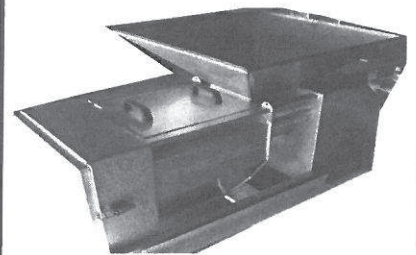
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FREE RUN

to monopolize the alcohol market at the expense of other industry members and American consumers," notes Rep. Mike Thompson (CA-1), co-chair of the bipartisan, bicameral Congressional Wine Caucus.

The wholesalers' ultimate goal with such legislation is to limit the amount of wine and spirit sales that skip the wholesaler tier and deprive them of profits.

For example, states like California allow retailers to buy direct from wineries in-state and even outside the U.S. If California retailers are free to ship these wines to consumers around the nation, wholesalers do not earn profits from those sales.

By tying the hands of retailers and importers to ship interstate, wholesalers can block such competition. But the desire to avoid competition does not make a compelling political argument, which is why wholesalers claim to be guardians of the Constitution and states' rights.

The wholesalers' use of constitutional arguments is particularly ironic because James Madison specifically designed the Constitution to ward off such special-interest politics. In *Federalist Number 10*, Madison explained that the "principal task" of government is to control "factions" such as special-interest groups from trampling the rights of others.

Accordingly, Madison and the other framers advocated a form of government that would balance powers and employ checks and balances to limit opportunities for overbearing special interests to undermine liberty. The federal commerce power — which wholesalers want to overcome — is one of the many checks in the system. Madison argued in favor of this clause to facilitate the unfettered exchange of goods and services across state lines, a freedom critical to the nation's prosperity.

At the time, conflicts between the states — then joined in a relatively

loose alliance under the Articles of Confederation — jeopardized both freedom and security. The goal was to form a stronger, more stable union, in which individuals could prosper in both liberty and security. The only issue remaining was the extent of federal power vis-à-vis the states.

Madison explained in *Federalist No. 45* that the powers reserved for the states would remain "numerous," and enumerated federal powers would be "few and defined." The commerce power — as embodied in the federal Commerce Clause — is among the few enumerated federal powers, but Madison did not think this one was all that controversial.

He further commented, "The regulation of Commerce, it is true, is a new power; but that seems to be an addition which few oppose and from which no apprehensions are entertained."

A federal law granting states the power to impede alcohol trade upsets this balance of power and runs contrary to basic constitutional principles. Still, wholesalers maintain that alcohol trade is somehow different because the 21st Amendment grants states the power to regulate alcohol.

As nine U.S. Senators recently communicated in a letter to their colleagues: "[T]he Founding Fathers included the Commerce Clause in the Constitution to protect against just this kind of trade barrier between the states." The nine Senators are: Barbara Boxer (D-CA), Richard Burr (R-NC), Maria Cantwell (D-WA), Dianne Feinstein (D-CA), Kay Hagan (D-NC), Tim Johnson (R-W), Jeff Merkley (D-OR), Patty Murray (D-WA), and Ron Wyden (D-OR).

The Supreme Court opinion in *Granholm v. Heald* explicitly states: "[T]he Twenty-first Amendment does not supersede other provisions of the Constitution."

This reality is exactly why wholesalers are back at the federal trough. They want the federal government to delegate its commerce power to states — validating state laws that serve wholesalers and trample the freedoms of everyone else. ■

Angela Logomasini has a Ph.D. in American Government and is senior fellow at the Competitive Enterprise Institute.



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