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Abstract

As Constitution framer James Madison warned, special-interest politics never cease. “The latent causes of factions,” he said, are “sown in the nature of man.” Without measures to control them, overbearing majorities or politically connected minorities would trample the rights of everyone else—taking property and destroying prosperity. The key was to set up a system of checks and balances to keep factions—today known as special interests—under control. Recent efforts by beer, wine, and spirit wholesalers show that Madison’s concerns remain relevant today.

Wholesalers have a long history of leveraging their position within the industry, employing state laws to secure a guaranteed slice of the market. However, recent court cases have challenged some of these anticompetitive state laws. Accordingly, the wholesalers’ Washington, D.C., lobbyists are turning to Congress to pass federal legislation that undermines the free market and constitutional principles in order to serve their narrow special interest. Their effort is embodied in a bill offered by Rep. Jason Chaffetz (R-UT), the Community Alcohol Regulatory Effectiveness (CARE) Act (H.R. 1161).

At the heart of this debate is wholesalers’ desire to maintain a government-enforced three-tier system for distributing alcoholic beverages. This system, present in nearly all states, requires alcohol producers—wineries, distillers, brewers—and importers to sell only to wholesalers, who in turn are the only source from which retailers may purchase their inventory. Most states—with notable exceptions such as California and Washington, D.C. — also ban “vertical integration,” preventing any single company from owning and operating businesses in more than one tier.

In many states, franchise laws—which depend on a three-tier system—also play a big role in alcohol distribution. Once a producer selects a wholesaler, it must abide by terms and conditions set in state franchise laws that grant legal and competitive advantages to wholesalers. Most franchise laws are written to make it extremely difficult and expensive for a producer to

terminate the agreement. Many also require “brand exclusivity,” which prevents producers from hiring more than one firm within a designated area—either a state or local region—to compete in finding retail buyers for a product. Legally enforced brand monopolies and the inability to terminate contracts for non-performance make it extremely difficult for small-scale wineries, breweries, and distilleries to get their products to retailers, because wholesalers have little desire to market specialty products. These producers must focus on selling their products via their tasting rooms, direct-to-consumer shipping, or both, where it is allowed.

The three-tier system, along with franchise laws, promotes a highly localized, territory-based wine marketing system—which ultimately amounts to a system of fiefdoms. Accordingly, when policy change becomes a threat to the system, wholesalers turn to the government for help. The CARE Act is the wholesalers’ latest attempt to solidify their position.

To that end, 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, but only if the state can argue that the impact is not intentionally protectionist. In any case, since the limited protections in H.R. 1161 apply only to producers, the bill would unleash 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 also might 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 businesses, leaving fewer outlets through which wineries can reach consumers.

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 directly 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. The debate over the CARE Act epitomizes the concerns that Madison had about the unwieldy and dangerous threat that special interests would always pose toward liberty. It is nothing more than a special-interest attempt to game the system to advantage one segment of the alcohol industry at the expense of everyone else.

Introduction

With major fiscal, budgetary, health care, and national security issues in play on Capitol Hill, one would think Congress would have little time to focus on relatively small special-interest legislation. But, as Constitution framer James Madison warned, special-interest politics never cease. “The latent causes of factions,” he said, are “sown in the nature of man.”¹ Without measures to control them, overbearing majorities or politically connected minorities would trample the rights of everyone else—taking property and destroying prosperity. The key was to set up a system of checks and balances to keep factions—today known as special interests—under control.

Recent efforts by wine, beer, and spirit wholesalers show that Madison’s concerns remain relevant today. In fact, wholesalers have a long history of leveraging their position within the industry, employing state laws to secure a guaranteed slice of the market. But recent court cases have challenged some of these anti-competitive state laws. Accordingly, the wholesalers’ Washington, D.C., lobbyists are turning to Congress to pass federal legislation that undermines the free market and constitutional principles in order to serve their narrow special interest.

Their effort is embodied in a bill offered by Rep. Jason Chaffetz (R-UT), the Community Alcohol Regulatory Effectiveness (CARE) Act (H.R. 1161). It is similar to legislation (H.R. 5034) offered by Rep. William Delahunt (D-Mass., retired) last Congress. Support for the legislation comes primarily from alcohol wholesalers. A number of other parties have expressed strong opposition, including groups representing wine, beer, and spirits producers; individual wineries; wine retailer industry groups; nonprofits; and tens of thousands of consumers (via Facebook).²

The following provides an overview and analysis of the legislation. In particular, it demonstrates that H.R. 1161 would grant states powers that involve overriding the U.S. Constitution’s Commerce Clause. As a result, the law has far-reaching implications that undermine a free and fair marketplace. It not only jeopardizes consumer access to many specialty wines and other products via the mail, but could lead to a patchwork of expensive and counterproductive protectionist regulations across the country.

The Crux of the Issue: The Three-Tier System

At the heart of this debate is wholesalers’ desire to maintain a government enforced three-tier system for distributing alcoholic beverages. This system, present in nearly all states,³ requires alcohol producers—wineries, distillers, brewers—and importers to sell only to wholesalers, who in turn are the only source from which retailers may purchase their inventory. Most states—with notable exceptions such as California and Washington, D.C.—also ban

“vertical integration,” preventing any single company from owning and operating businesses in more than one tier.

The basic concept of a three-tier system is not itself problematic. In fact, a wholesale tier would exist, as it does in other industries, without a government mandate. Wholesalers provide a critically important linkage between producers and retailers, providing the logistical support and technical expertise necessary to aggregate and market large volumes of product. In a free market, wholesalers would also compete with anyone else interested in marketing wine within a given area, including other wholesalers, importers, producers, and even retailers from outside the state or locality. The problems emerge when the system is mandated and rigidly enforced by government.

States adopted three-tier mandates after the repeal of Prohibition to address problems—perceived or real—related to alcohol distribution in the past. Before Prohibition, saloons were often tied to alcohol producers either through contractual arrangements or direct ownership. Members of the Temperance movement believed that these economic arrangements contributed to social problems related to alcohol abuse, prostitution, and criminal activity. It is not clear that market structure was the source of such problems, which more likely have cultural roots. Nonetheless, concerns about such ties between suppliers and retailers were a key impetus for states adopting a mandatory three-tier system after Prohibition ended.⁴

In any case, American culture has changed substantially since the repeal of Prohibition, making the original justifications for the three-tier system not particularly relevant. Today, the three-tier system simply serves the economic interest of the middle tier: wholesalers. That explains why beer wholesalers requested hearings, which were held in March 2010, on the need to preserve the three-tier system.⁵

In many states, franchise laws—which depend on a three-tier system—also play a big role in alcohol distribution. In *Strange Brew: Alcohol and Government Monopoly*, economist Douglas Glen Whitman explains that nearly all states have franchise laws for beer distribution and about 20 employ such laws for wine and spirits distribution.⁶ As a result, there are no national distributors, although large, regional companies operate within each state’s separate legal system.

Producers and importers may not negotiate the terms and conditions of distribution via voluntary contracts with wholesalers. Once a producer selects a wholesaler, it must abide by terms and conditions set in state franchise laws that grant legal and competitive advantages to wholesalers. Most franchise laws are written to make it extremely difficult and expensive for a producer to terminate the agreement. For instance, most states only allow producers to terminate for “good cause,” which is defined very narrowly to include such things as fraud, bankruptcy, or

criminal activity on the part of the wholesaler. Failure for a wholesaler to find markets for a product is usually not considered adequate reason for termination.

Many franchise laws also require “brand exclusivity,” which prevents producers from hiring more than one firm within a designated area—either a state or local region—to compete in finding retail buyers for a product. A Georgia Public Policy Institute report explains how this works to advantage wholesalers in that state:

Because state franchise laws guarantee monopoly privileges within sales territories, wholesalers are completely protected from intra-brand competition. This means retail customers are not free to choose their wholesale supplier, but must instead deal with whatever firm has been designated for their sales area. In addition, Georgia’s alcohol franchise laws explicitly dictate many aspects of the distribution contracts used between suppliers and wholesalers. Some of the rules governing these contracts are heavily weighted in favor of wholesalers, making it difficult for a supplier to change or terminate their relationship with a specific wholesaler. While these regulatory protections are not *quid pro quo* for the wholesalers’ role as the state’s regulatory instrument, such issues are unavoidably intertwined.⁷

Legally enforced brand monopolies and the inability to terminate contracts for non-performance make it extremely difficult for small-scale wineries, breweries, and distilleries to get their products to retailers, because wholesalers have little desire to market specialty products. In fact, many wholesalers focus on pushing high-volume, established brands that are easier to sell and thus generate large sales. Given the legal roadblocks for producers to directly market to retailers, these producers must focus on selling their products via their tasting rooms and/or through direct-to-consumer shipping where it is allowed.

The situation has become even more difficult in recent decades, as consolidation has reduced the number of firms operating within the wholesaler tier—undermining competition even further. Beverage attorneys John Hinman and Deborah Steinthal explain: “This [wine and spirits wholesaler] tier has shrunk, from approximately 2,400 wholesalers in the mid-1980s, to approximately 250 today.”⁸ According to the business information website Hoovers, the top 50 beer wholesaler companies account for a third of all industry revenue. Consolidation is more intense on the wine and spirits distribution side, with the top 50 wine and spirits distributors accounting for more than 70 percent of revenue.⁹

The regulations also have odd and unexpected impacts by discouraging—if not outright outlawing—cooperative or professional arrangements of any kind between producers and retailers. For example, in early 2011, three-tier mandates in North Carolina stopped supermarket

chain Harris Teeter and winemaker E. & J. Gallo from offering an online service that would enable the store's shoppers to view a record of past wine purchases, rate wines, and receive recommendations that include Gallo and other wines available at the store. The plan required an exemption from the state's three-tier laws, which prevent a winery—or any alcohol producer—from having a financial stake in a retail operation. Wholesalers opposed the arrangement, arguing: “It really undermines the whole point of having separate tiers and having distance between suppliers and retailers so that you don't lead to abusive marketing practices that we had decades ago.”¹⁰ Gallo and Harris Teeter eventually withdrew their request for approval from the North Carolina Alcoholic Beverage Control Commission.

The three-tier system, along with franchise laws, promotes a very local, territory-based wine marketing system—which ultimately amounts to a system of fiefdoms. Operating under these arrangements for decades, wholesalers have developed a sense of entitlement to the security and predictability provided by anti-competitive laws. They oppose all attempts to advance any market-based, competitive arrangements, and their political lobbying reflects that bias. Accordingly, when proposed policy change becomes a threat to the larger system, wholesalers turn to the government for help. The CARE Act is their latest attempt to solidify their position. To understand how the law works, an overview of the history and legal framework is necessary.

Alcohol Policy History and Legal Framework

Federal alcohol laws in America have a long and complicated history, starting before Prohibition, when the Temperance movement gave rise to a host of state laws attempting to reduce alcohol consumption. The issue came to a boil at the end of the 19th century, when states began banning alcohol sales within their boundaries. These “dry” state policies were frustrated by imported liquor from other states. Several states attempted to regulate such imports, but their laws were overturned by the Supreme Court as a violation of the Constitution's “Dormant Commerce Clause.”

The Dormant Commerce Clause is a legal principle derived from the Commerce Clause, which is found in Article 1, Section 8 of the Constitution. The Commerce Clause grants Congress the power “to regulate commerce...among the several states.” The express authority granted to Congress implies that states may not take actions that limit commerce, unless Congress breaks its silence on an issue. The Supreme Court explained:

The power granted to Congress to regulate commerce among the states being exclusive when the subjects are national in their character or admit only of one uniform system of regulation, the failure of Congress to exercise that power in any case is an expression of

its will that the subject shall be left free from restrictions or impositions upon it by the several states.¹¹

There are some limited exceptions to the Dormant Commerce Clause, even in cases where Congress remains silent. These fall under a state's legitimate use of its constitutionally granted "police powers," which allow states to impose laws necessary to protect their citizens and industries from serious threats to public health and safety. In that case, the Supreme Court even allows state regulations that facially impede commerce if the state can show that the law has "a legitimate purpose" that it could not meet "in a less restrictive way."¹² For example, in 1986, the Supreme Court allowed the state of Maine to ban imports of live fishing bait because of the potential to introduce new parasites into the state fisheries.¹³

But what happens when Congress breaks its "silence" on an issue? It can validate state laws which the courts once ruled unconstitutional. In fact, federal insurance regulation allows states to pass insurance laws that otherwise would violate the Commerce Clause.¹⁴ The Court has noted: "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."¹⁵

When the Temperance movement began having success in getting regulations on alcohol enacted, the Court allowed states to take actions under their constitutionally derived police-powers role. States were even allowed to impose statewide alcohol prohibition, but only if they applied the laws equally to in-state and out-of-state interests. For example, states could not impose higher taxes on alcohol producers located outside the state.¹⁶

In 1890, the Supreme Court ruled that, under the Dormant Commerce Clause, "dry" states could not prevent alcohol imports that contained packages produced in other states, applying the so-called "original packaging doctrine."¹⁷ Regulating the commerce in these packages was beyond the state's police powers, which meant that states could not keep them out even if they contained liquor. To address this problem, Congress broke silence on the issue with the Wilson Act of 1890, which stated that the Court's original packaging doctrine no longer applied to liquor packages. But it also affirmed that laws should not be discriminatory, noting that state laws impacting importers must also apply "to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory."¹⁸

The Court addressed a challenge to the Wilson Act in 1913 in *Rhodes v. Iowa* (1913), which held the Wilson Act as valid, but also that the Act applied only to liquor sold to retailers, not that shipped directly to individuals.¹⁹ That "loophole" was closed by the Webb-Kenyon Act in 1913.²⁰ (Yet as the Supreme Court ruled in *Granholm v. Heald* in 2005, the Webb-Kenyon and the Wilson acts did not grant states the authority to discriminate against out-of-state entities.)

In 1920, Prohibition under the 18th Amendment made all prior federal and state alcohol laws moot until the passage of the 21st Amendment in 1933. The first section of the 21st Amendment repealed Prohibition. The second affirmed the state police-power role in regulating alcohol, stating: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

Wholesalers and some state government officials maintain that the second section of the 21st Amendment allows state policy makers to regulate alcohol any way they want. Yet that is not what the Supreme Court ruled in its 2005 *Granholm v. Heald* decision, which addressed laws in Michigan and New York that applied differential treatment to in-state and out-of-state wineries seeking to ship to state residents. Both states allowed in-state wineries to ship wine. However, the Michigan law applied a direct ban on wine shipments from other states, whereas New York’s only allowed out-of-state wineries to ship to New Yorkers if the wineries had a physical presence in the state.

The Supreme Court ruled that these state regulations violated the Commerce Clause, which grants Congress the sole authority to regulate interstate commerce. It noted:

This Court has long held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.... States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.”²¹

In addition, the Court noted that the 21st Amendment did not give states power to pass such discriminatory laws,²² but simply “restored to the States the powers they had under the Wilson and Webb-Kenyon Acts. ... It did not give States the authority to pass non-uniform laws in order to discriminate against out-of-state goods, a privilege they never enjoyed.”²³

The only other issue the Court was left to consider was whether the state law “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”²⁴ Again, the Court ruled against the states, explaining:

The States provide little evidence for their claim that purchasing wine over the Internet by minors is a problem. The 26 States now permitting direct shipments report no such problem, and the States can minimize any risk with less restrictive steps, such as requiring an adult signature on delivery. The States’ tax evasion justification is also insufficient. Increased direct shipment, whether in or out of state, brings the potential for

tax evasion. However, this argument is a diversion with regard to Michigan, which does not rely on in-state wholesalers to collect taxes on out-of-state wines. New York's tax collection objectives can be achieved without discriminating against interstate commerce, *e.g.*, by requiring a permit as a condition of direct shipping, which is what it does for in-state wineries. Both States also benefit from federal laws that supply incentives for wineries to comply with state regulations. Other rationales—facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability—can also be achieved through the alternative of an evenhanded licensing requirement.²⁵

Granholm Aftermath

The *Granholm* decision caused many states to open their doors to direct wine shipping. Richard Mendelson, wine lawyer and author of *From Demon to Darling: A Legal History of Wine in America*, notes: “Within two and half years of Granholm, 11 states had leveled up, and none had leveled down completely. . . . Those states had to open their borders to all direct shipping or close them entirely.”²⁶ In addition, retailers have begun battling to gain the freedom to provide consumers the opportunity to order a wider variety wines via direct shipping.

Alcohol wholesalers lament these trends, and want to empower states to take action against them. “Direct-to-consumer shipments will never drive a wholesaler out of business, but the deregulation it is fostering will,” Craig Wolf of the Wine and Spirit Wholesalers of America bemoaned in 2007.²⁷ Wholesalers claim that their real concern involves the uncertainty and bureaucracy associated with legal battles on the topic. The National Beer Wholesalers Association explains this position on its website:

Since 2005, more than half of the states have faced challenges in federal courts that threaten their authority to regulate alcohol and their ability to maintain a licensed system of alcohol controls. In a time of fiscal crisis and skyrocketing state budget deficits, these lawsuits put private profits ahead of the public interest and force states to spend scarce resources. . . . Unelected judges in federal courts who are unfamiliar with the needs of local communities are interpreting the same laws differently and issuing conflicting rulings, which demonstrates judicial confusion about the true intent of Congress. The CARE Act of 2011 removes this ambiguity and makes Congress' intent clear regarding the states' intended lead in alcohol regulation.²⁸

It is clear that wholesalers would like to halt legal battles that are destined to decide the constitutionality of important policies affecting consumers, entrepreneurs, and—most of all—wholesalers' competitors. Their suggestion that such cases should not go forward because judges

are unelected, uninformed, or might issue conflicting decisions is absurd. That argument is akin to suggesting that Congress should preempt judicial cases related to other constitutional issues—freedom of speech, assembly, or religion—because judges are not elected or may be confused about those issues. American jurisprudence is built on this deliberative, judicial process which wholesalers lament. It is governed by appointed judges, who are supposed to stay above electoral politics and are charged with, in the words of Alexander Hamilton, “a steady, upright, and impartial administration of the laws.”²⁹ Unlike legislators, special interests are not well positioned to influence this process with PAC money, lobbying, or political pressure.

The wholesalers’ claim that Congress must resolve judicial conflicts is equally absurd. The framers of the Constitution anticipated that conflicting opinions would be a necessary part of this process. Accordingly, they organized the federal courts into a hierarchy through which conflicts would gain resolution as issues rise to higher courts, eventually reaching the Supreme Court when necessary. Moreover, the CARE Act will not remove ambiguity associated with legal challenges to state laws as wholesalers contend. Instead, it will hand an advantage to wholesaler interests within the judicial process, with the ultimate goal of limiting the expansion of market competition and consumer choice.

Deciphering the CARE Act

Wholesalers are seeking to expand state powers beyond those they already enjoy under the Wilson Act, the Webb Canyon Act, and the 21st Amendment, to allow state laws that discriminate—either directly or indirectly—against importers to their respective states. The 2010 bill (H.R. 5034) would have granted states sweeping authority to pass a wide range of discriminatory regulations, affecting nearly everyone in the alcohol industry. In fact, it was so egregious and politically untenable that the wholesalers backed away from it—despite its gaining 152 House cosponsors. This year, they drafted the seemingly more modest H.R. 1161, yet it remains highly problematic. Here is how it works.

The CARE Act amends both the Wilson Act and the Webb Kenyon Act to essentially do three things:

First, it breaks congressional silence: Section 3(b) of the legislation specifically states: Construction of Congressional Silence- Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of section 8 of article I of the Constitution (commonly referred to as the ‘Commerce Clause’) to the regulation by a State or territory of alcoholic beverages.

Second, it sets a standard to which state laws must comply that sounds remarkably similar to standards set in the *Granholm* case. Section 3(b) states further:

However, State or territorial regulations may 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.

Third, it eliminates language in the Wilson Act that demands that state laws apply equally to in-state and out-of-state entities. Section 4 reads:

“Wilson Act”, is amended by striking “to the same extent” and all that follows through “Territory.”³⁰

Because of the language that mirrors the *Granholm* opinion is included, it might appear that this bill is largely innocuous and will not affect direct wine shipping, but it will affect producers, retailers, importers, and small wholesalers each in different ways. Some entities will lose out to the wholesalers directly. Others—particularly consumers—will suffer less directly, by losing freedom and opportunity without a clear view of the cause.

Potential Impacts on Producers

The bill provides some level protection for producers against discriminatory laws that may make it difficult for wholesalers to directly attack direct-to-consumer shipping of alcohol by producers. Under Section 3(b), states could only impose discriminatory laws against out-of-state producers, *if* the state can show that the impact is not *intentionally* protectionist.

Last year’s version of the CARE Act would have allowed states to impose differential tax treatment designed to disadvantage importers to the state. Fortunately, under H.R. 1161 it would likely be difficult for states to prove that such laws are not intentionally protectionist and could not be met by another means. In fact, the *Granholm* opinion highlights a case of differential tax treatment that the court had ruled intentionally discriminatory, noting:

At issue was an excise tax enacted by Hawaii that exempted certain alcoholic beverages produced in that State. The Court rejected the argument that Hawaii’s discrimination against out of- state liquor was authorized by the Twenty-first Amendment.³¹

However, Wendell Lee of the Wine Institute, which represents California wineries, raises a potential loophole that might allow discriminatory state tax policy. He maintains that courts may decide that taxing out-of-state wines at higher rates does not discriminate against producers. Instead, it only discriminates against their *products*.³² Accordingly, in that case out-of-state wineries would have no defense against discriminatory taxes, and states could set these taxes so high so as to effectively 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 state laws which the CARE Act might make valid, depending on how the courts interpret the law. The jury is still out, for example, on state laws regulating which wineries may ship based on their volume of production, under what are known as volume caps. For example, in 2006, the Massachusetts state legislature passed a law that would only allow shipping for producers making 30,000 gallons or less of wine annually. According to Craig Wolf of the Wine and Spirits Wholesalers of America: “There is nothing facially discriminatory about that law. It was even handed, approached every player inside and outside the market the same way.”³³

In reality, Massachusetts only had 31 wineries at the time, all of which produced less than 24,000 gallons of wine per year—placing them all below the volume caps. Meanwhile, 98 percent of wine made in the United States—which is made by 11 percent of the nation’s wineries—was ineligible for direct shipment to Massachusetts. These facts were noted in the opinion from the U.S. Court of Appeals for the First Circuit, which ruled the Massachusetts law unconstitutional in January 2010, because it was in fact discriminatory.³⁴ Meanwhile, the Ninth Circuit held a similar law in Arizona to be constitutional,³⁵ raising the prospect that the issue may eventually have to be decided by the Supreme Court. Wholesalers must be hoping that the passage of the CARE Act will help them win an appeal in Massachusetts, encourage other states to pass such laws, and help wholesalers’ position should the issue ever reach the Supreme Court.

In addition to volume caps, wholesalers are battling laws that would allow some players to distribute their own products. Beer wholesalers— whose trade association is the major force behind the bill—are particularly sensitive to such changes because a large portion of their business relies on the three-tier system, as nearly all states employ franchise laws for beer distribution. If the three-tier system breaks, many of the local beer distribution fiefdoms could be substantially undermined.

For example, Anheuser-Busch, Inc. (AB Inc.) has waged a battle in court for the right to organize its business vertically by distributing its own products in Illinois. In January 2010, an AB Inc. subsidiary, Wholesaler Equity Development Corporation (WEDCO), notified the Illinois Liquor Control Commission that it planned to buy the beer distributor CITY Beverage. WEDCO already owned 30 percent of CITY, and planned to buy the remaining 70 percent so that the

company could self-distribute AB Inc. products. But in March 2010, the state alcohol commission informed the company that the purchase violated state law on the grounds that the purchase of a distributor by a non-resident dealer violated the state's three-tier-system. Anheuser-Busch challenged the state in court and prevailed in September 2010, on Commerce Clause grounds because Illinois allowed small in-state breweries to self-distribute, but banned out-of-state brewers, including AB Inc. and its subsidiaries, from distributing in Illinois.³⁶

Unfortunately for AB Inc., rather than extend the right for the large brewers to self-distribute, the court nullified the state law allowing Illinois small breweries to distribute. It then stayed implementation of that decision to give the legislature time to change the law. In May 2011, the legislature passed a bill (SB 754) allowing small breweries to self-distribute in Illinois, regardless of where they are based.³⁷ The bill represents a defeat for AB Inc., because it leaves in place a ban on self distribution by large companies. Nonetheless, such cases must concern wholesalers who perhaps fear that eventually a challenge will reach the Supreme Court that undermines these anti-competitive laws.

Small-scale breweries around the nation are fighting for exemptions for self-distribution similar to that in Illinois.³⁸ Allowing small breweries, distilleries, and wineries to escape unproductive three-tier mandates, as Illinois and many states have done, alleviates some problems for these firms in getting their products to markets. However, these laws do not offer a long-term solution to the anti-competitive three-tier mandates. Carving out special privileges for some segments fails to solve the fundamental problems: unfair treatment of some interests to benefit a few, less freedom for consumers, and market inefficiencies that lead to higher prices, reduced access, and economic sluggishness.

Potential Impacts on Retailers and Importers

The limited protections provided to producers in the CARE Act do not apply to any other parties within the industry. Accordingly, H.R. 1161 would allow for an unbridled number of state-level, protectionist and discriminatory policies aimed at retailers and importers. Already, many states ban out-of-state wine retailers from shipping to consumers, while allowing wine stores within their own borders to do so.

The bill also adversely affects the freedom of winemakers who rent facilities to make wine because some state regulations classify those businesses as retailers or distributors rather than producers. Accordingly, these winemakers could easily find themselves at the mercy of discriminatory direct-shipping laws aimed at retailers.³⁹

In addition, laws passed pursuant to the CARE Act could undermine sales of any domestic winery, brewery, distillery, or importer whose brands are marketed via online retailers. Blatantly unfair treatment of non-producers may put some small entrepreneurial retailers,

importers, and winemakers who rent facilities out of business, leaving fewer outlets through which wineries can reach consumers and severely reducing selection for consumers.

The wholesaler lobby's other concern about direct-to-consumer retail shipping likely relates to retailers that skip the wholesale tier altogether. For example, states like California allow retailers to buy direct from wineries in-state and even outside the United States. If several of the major California retailers are free to ship these wines to consumers around the nation, wholesalers do not get any profits from those sales. Interestingly, wholesalers also oppose interstate shipping even when products pass through the three-tier system before retailers ship them across state lines. Such opposition likely stems from the fact that interstate shipping upsets the system of local fiefdoms whereby all wholesaler profits are tied to local markets via state franchise laws.

Wholesalers also appear concerned about—and would like to stop—legal and legislative challenges that entrepreneurial retailers have pursued since the 2005 *Granholm* decision. After *Granholm*, retailers realized that the benefits of non-discrimination should apply to them as well. In 2006, a group of retailers formed the Specialty Wine Retailers Association (SWRA) to advance their cause. In 2007, SWRA Executive Director Tom Wark aptly described the group's position in *Wine Spectator*:

Granholm is perfectly clear ...It said a state can regulate alcohol the way it wants as long as it doesn't discriminate against in-state and out-of-state interests. If you're going to make the argument that *Granholm* only applied to wineries and not to retailers, then you're saying that *Brown v. Board of Education* only applied to black people, and that you could still discriminate against Hispanics.⁴⁰

Members of the SWRA began their battle with litigation against discriminatory state laws. Most notably, in April 2006, a group of retailers⁴¹ filed a case, *Siesta Village Market, LLC v. Perry*,⁴² challenging a Texas law that allowed in-state retailers to ship wine, but banned shipment to Texas residents from retailers outside the state. In January 2008, the court ruled that the law did violate the Dormant Commerce Clause, but its remedy made this "victory" for retailers fruitless.

The court held that the state must allow out-of-state retailers to gain Texas retailer licenses, thereby allowing them to sell to consumers. But these retailers would have to buy the wine from a Texas-based wholesaler and then ship to the consumer. At the time, *Wine Spectator* explained the absurdity, noting: "So in theory, a retailer in California would have to buy the wine in Texas, have it shipped to California, then ship it back to the customer in Texas who ordered the wine."⁴³ Of course this approach would be too expensive. The attorney arguing the case for

retailers, Tracy Genesen, noted: “Our argument is that this application is cost-prohibitive and completely unworkable for retailers and regulators.”⁴⁴

The original plaintiff, Siesta Village, dropped out of the case, but retailers appealed with Wine and Country Baskets as the lead plaintiff. The state and Texas wholesalers also appealed to address the court’s decision that the law represented a violation of the Dormant Commerce Clause. The Fifth Court of Appeals eventually ruled that the Texas law was constitutional. The opinion explained that its holding was consistent with *Granholm* because of that case’s “approval of three-tier systems” and because the court viewed “local deliveries as a constitutionally benign incident of an acceptable three-tier system.”⁴⁵ A similar case in New York also ruled laws that discriminate against retailers are constitutional on basically the same grounds.⁴⁶

However, it is worth noting that the *Granholm* opinion did not state that all laws incident to the three-tier system would supersede the Dormant Commerce Clause. Instead, it noted:

The Twenty-first Amendment’s aim was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. It did not give States the authority to pass non-uniform laws in order to discriminate against out-of-state goods, a privilege they never enjoyed.⁴⁷

Hence, the three-tier system is constitutionally valid, but only as long as it is not used for protectionist purposes.

The retailers appealed the Fifth Circuit ruling to the Supreme Court in the fall of 2010, but the Court denied a hearing. Denial of a hearing does not constitute rejection of a plaintiff’s arguments. The Court decides which cases to hear based on a variety of factors, including such things as the number of appeals and cases being heard in various states. Alcohol attorney R. Corbin Houchins explains on ShipCompliant’s blog: “[T]he Court’s denying review carries no implication that the decision in question was correct. ... I suspect it will require inconsistent rulings among the appellate circuits to drag the Court into confronting the internal contradictions of *Granholm*.”⁴⁸

In a similar case, *Siesta Village Market, LLC v. Granholm*, the district court in Michigan came to a different conclusion, holding that the validity of the three-tier system does not justify discrimination against retailers in the state of Michigan. The opinion noted:

Defendants cite case law which supports their argument that the Twenty-First Amendment gives the state “virtually complete control” over liquor distribution. ...

However, there is a marked difference between “virtually complete control” and absolute control. State law that “directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,” has generally been struck down by the Supreme Court.⁴⁹

In response to this ruling, the Michigan assembly passed a law (HB 6644) in 2008 that banned shipping of wine from interstate commercial carriers like Federal Express and UPS.⁵⁰ Wine retailers can only ship wine to Michigan residents in their own vehicles, effectively preventing any out-of-state retailers from shipping to Michigan residents.

The state of Illinois has also addressed the issue of wine retailer shipping. In 2005, lawmakers there were forced to reconsider the state’s wine shipping law after *Granholm* struck it down as unconstitutional. To address this issue, the Illinois legislature passed and then-Governor Rod Blagojevich (D) signed legislation that allowed both in-state and out-of-state wineries to ship to Illinois residents and it allowed Illinois retailers to ship as well, but it denied out-of-state retailers the right to ship into the state. Rep. Julie Hamos (D-Evanston) introduced H.B. 2462, which would have reversed the ban on retailer shipping into Illinois, but it failed to gain passage.⁵¹

One of the biggest retailer challenges to the three-tier system was waged by one of the nation’s largest retailers, the Washington State-based Costco Wholesale Corporation. A number of state laws prevented Costco from effectively implementing its wholesale model, which involves purchasing large volumes of product at discounted prices, central warehousing, and eventually delivering to its retail outlets where cost savings are passed on to members of its wholesale club. Costco’s battle involved two general areas: a law that Costco maintained violated the U.S. Constitution’s Commerce Clause and a number of other liquor-control regulations which Costco said violated federal antitrust laws.

Costco’s legal challenge at the district court level proved successful. In 2006, the retailer prevailed in its challenge to a Washington State law that allowed in-state wine and beer producers to sell directly to retailers, but banned direct sales between out of state-wineries and Washington State retailers.⁵² To comply with the ruling, the Washington State legislature passed a law allowing out-of-state producers to sell direct to retailers in Washington State.⁵³ Costco also succeeded in getting eight of nine liquor control board regulations overturned on the grounds that they violated federal antitrust law. But the victory was fleeting. In 2008, the Ninth Circuit Court of Appeals reversed all but two of Costco’s antitrust victories. The two victories included:

- 1. Price Posting.** State regulations required that wholesalers post—i.e., report—to the Liquor Control Board prices of their products before listing them for sale.

- 2. Holding.** A state law mandated that distributors maintain or “hold” prices for 30 days after “posting.”

The Ninth Circuit reversed Costco’s victories challenging to the following laws district court level:

- 1. Uniform Pricing Regulations.** A state law requires that producers and distributors all market products at the same price to retailers regardless of size or terms of the deal (i.e., no volume discounts allowed).
- 2. Minimum Markup.** This regulation mandates that distributors and retailers mark up beer and wine prices at least 10 percent, preventing significant discounting or products.
- 3. Ban on Volume Discounts.** This rule mandates that distributors offer products at one price to all retailers.
- 4. Credit Sales Banned.** Distributors may not extend a line of credit to retailers.
- 5. Cost of Delivery.** This regulation mandates that all retailers pay price of delivery even if they decline delivery.
- 6. No Warehousing.** Regulations ban retailers from warehousing wine at a central location.
- 7. Retailer to Retailer Sales.** Wine and beer regulations ban retailers from selling to other retailers.

It should be obvious how these state regulations impede basic market processes related to the negotiation of terms of sale, prices, voluntary contract, and pricing discounts for consumers. Rather than appeal to the Supreme Court, Costco took its battle to the voters with an initiative that gained enough signatures at Costco stores to get on the ballot in Washington State in 2010.⁵⁴ In addition to addressing the anti-trust related issues, the initiative would have privatized liquor sales in the state. On the same ballot was another initiative that would have simply privatized liquor sales without changing the other anti-free-market regulations, a fact that probably confused voters.⁵⁵

Unfortunately, consumers rejected both initiatives, after being bombarded by advertising campaigns that were mostly funded by wholesalers. According to *Wine Spectator*, opponents of

the initiative outspent its supporters by nearly a three-to-one margin.⁵⁶ The campaign supporting the ballot initiative collected donations from Costco, supermarkets, and others amounting to a total of \$2.28 million.⁵⁷ Initiative opponents, organized under the so-called Protect Our Communities/Say No campaign, collected a total of \$6.1 million—\$1.1 million from the Washington Beer and Wine Wholesalers, \$2 million from the National Beer Wholesalers Association, and \$2 million from the Beer Institute, as well as contributions from wholesaler organizations in other states.⁵⁸ In addition, some wineries opposed the initiative; perhaps because they feared change or feared competition should liquor be allowed in supermarkets along with beer and wine.⁵⁹

Despite recent setbacks, retailers are unlikely to give up their quest to gain access to key market opportunities via the mail and direct buying. Costco continues to lobby the state legislature on the issue.⁶⁰ In addition, other retailer cases could eventually reach the Supreme Court—a possibility that wholesalers hope to thwart.

Not a States' Rights Issue

Despite its obvious special interest angle, wholesalers have gained some momentum for their cause because many members of Congress bought the wholesalers' arguments that the bill protects states' rights. "I want to preserve states' rights to decide the appropriate regulation of alcohol within their borders," Rep. Jason Chaffetz said in a press release on the CARE Act.⁶¹

But the concept of states' rights does not include the facilitation of state policies that impede the free exchange of goods. The founders wanted the opposite: to form a union that would facilitate the unfettered exchange of goods and services across state lines—a freedom critical to the nation's prosperity. They wanted to put an end to interstate protectionism and resultant trade wars that were all too common under the Articles of Confederation. The only issue remaining was the extent of federal power vis-à-vis the states.

Madison explained in *Federalist 45* that the powers reserved for the states would remain "numerous," and enumerated federal powers would be "few and defined."⁶² The commerce power—as embodied in the 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."⁶³

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 it is the subject of two constitutional amendments: the 18th, which imposed alcohol prohibition, and the 21st, which repealed it. But the *Granholm*

decision was clear on the point that, “the Twenty-first Amendment does not supersede other provisions of the Constitution.”⁶⁴

The wholesalers’ use of constitutional arguments is particularly ironic because Madison specifically designed the Constitution to ward off such special-interest politics. In *Federalist 10*, Madison explained that “the principle task” of government is to control “factions”—which we know today as special interest groups.⁶⁵

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. It is not an excuse to empower states to pass protectionist laws to serve special interests.

Conclusion

The debate over the CARE Act epitomizes the concerns that Madison had about the unwieldy and dangerous threat that special interests would always pose toward liberty. James Madison and his contemporaries understood the critical role that freedom—including free commerce—plays in the advancement of human well being. Accordingly, the framers developed a constitutional system that could ward off such dangers, employing various levels of power and a host of checks and balances. The system includes limited, enumerated federal powers to ensure a stable union and reduce interstate disputes, while leaving the balance of powers to the states.

The CARE Act runs blatantly counter to that purpose. The bill is nothing more than a special-interest attempt to game the system to advantage one segment of the alcohol industry at the expense of everyone else. It will undermine freedom and prosperity by creating perverse market arrangements that preempt voluntary contract, consumer choice, efficient market organization, entrepreneurship, and ultimately, economic growth and human well being.

Notes

1. James Madison, “Federalist No. 10,” *The Federalist Papers*, ed. Clinton Rossiter, New York: A Mentor Book, 1961, p. 79.
2. See, e.g., Bill Nelson, “Wine America Statement on HR 5034,” WineBusiness.com, April 21, 2010, <http://www.winebusiness.com/news/?go=getArticle&dataid=73375>.
3. California and the District of Columbia do not impose this system allowing retailers and restaurants to buy direct and allowing all liquor to be sold by private parties. In some states, governments are vertically integrated to sell liquor, such as in Pennsylvania where all liquor is sold via the Pennsylvania Liquor Control Board. Other states employ various combinations of regulation, but most have regulations protecting some sort of tiered system.

4. For a history of the politics surrounding the repeal of Prohibition, see Garrett Peck, *The Prohibition Hangover: Alcohol in America from Demon Rum to Cult Cabernet*, Piscataway, N.J.: Rutgers University Press, 2009.
5. "Hearing on Legal Issues Concerning State Alcohol Regulation," Subcommittee on Courts and Competition Policy, Judiciary Committee, U.S. House of Representatives, March 18, 2010, http://judiciary.house.gov/hearings/hear_100318.html.
6. Douglas Glen Whitman, *Strange Brew: Alcohol and Government Monopoly*, Oakland, Calif.: Independent Institute, 2003, p. 8.
7. Morgan Smith, "Alcohol Distribution Laws Bottle Up Options for Consumers and Retailers," *Issue Analysis*, Georgia Public Policy Foundation, October 16, 2002, <http://www.gppf.org/article.asp?RT=13&p=pub/Regulation/alcohol.htm>.
8. John Hinman and Deborah Steinthal, "U.S. wine market liberalization by 2015: Perfect storm forming," *Practical Winery & Vineyard*, November/December 2005, pp. 2-8, <http://www.beveragelaw.com/archives/wine%20vision%202015%20-%20pwv%20article%20nov%202005.pdf>.
9. "Beer, Wine & Distilled Spirits Wholesalers, Industry Description," *Industry Overviews*, Hoovers Directories, accessed May 31, 2011, <http://www.hoovers.com/industry/beer-wine-distilled-spirits-wholesalers/1820-1.html>.
10. Sue Stock, "Gallo seeks a favor of ABC," *Raleigh News & Observer*, March 1, 2011, <http://www.newsobserver.com/2011/03/01/1020956/gallo-seeks-a-favor-of-abc.html>.
11. *Robbins v. Shelby County Taxes District*, 120 U.S. 489 (1887).
12. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).
13. *Maine v. Taylor*, 477 U.S. 131 (1986).
14. *W. & S. Life Ins. Co. v. Board of Equalization*, 451 U.S. 648 (1981).
15. *Northeast Bancorp v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985).
16. For more details, see Richard Mendelson, *From Demon to Darling: A Legal History of Wine in America*, Berkeley, Calif.: University of California Press, 2009, pp. 35-49.
17. *Leisy v. Hardin*, 135 U.S. 100 (1890); this and other cases are discussed in *Granholt v. Heald* 544 US 460 (2005). For a more detailed historical overview, see Richard Mendelson, *From Demon to Darling*, pp. 33-49.
18. Wilson Act of 1890 (codified at 27 USC § 121). The full text of the Wilson Act reads: "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt there from by reason of being introduced therein in original packages or otherwise."
19. *Rhodes v. Iowa*, 170 U.S. 412 (1898).
20. Webb-Kenyon Act of 1913 (codified at 27 USC § 122) The full text of the Webb-Kenyon Act reads: "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited."
21. *Granholt v. Heald*, 544 U.S. 460 (2005).
22. Section 1 of the amendment repealed the 18th Amendment (Prohibition) and Section 2 reads: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."
23. *Granholt v. Heald*, 544 U.S. 460 (2005).
24. Quote in *Granholt* citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988).
25. *Granholt v. Heald*, 544 U.S. 460 (2005).
26. Richard Mendelson, *From Demon to Darling*, p. 177.

27. Amy Cortese, "Grapes in Chains," *The American*, January/February 2007, <http://www.american.com/archive/2007/january-february-magazine-contents/0116-grapes-in-chains>.
28. "Real Threats to State Regulatory Authority and Local Decision Making Abound," thecareact.org, sponsored by the National Beer Wholesalers Association, accessed June 1, 2011, <http://thecareact.org/real-threats/>.
29. Alexander Hamilton, "Federalist No. 78," *The Federalist Papers*, ed. Clinton Rossiter, p. 465.
30. This provision of H.R. 1161 would eliminate the text of the Wilson Act accordingly: "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, and shall not be exempt there from by reason of being introduced therein in original packages or otherwise."
31. *Granholt v. Heald*, 544 U.S. 460 (2005).
32. Wendell Lee, "HR 1161: The Great Constitutional Head Fake," ShipCompliant Blog, April 12, 2011, <http://shipcompliantblog.com/blog/2011/04/12/hr-1161-the-great-constitutional-head-fake/>.
33. "Craig Wolf Speaks on HR 5034," *Wine and Spirits Daily*, July 16, 2010, http://www.winespiritsdaily.com/publications_daily.php?id=1256.
34. *Family Winemakers of Ca. v. Jenkins*, 592 F.3d 1 (2010).
35. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (2010).
36. *Anheuser Busch, et al. v. Schnorf, et al.*, United States District Court for the Northern District of Illinois, Eastern Division, Case No. 10-cv-1601, September 3, 2010.
37. An Act concerning liquor, SB0754, 97th Illinois General Assembly (2011), <http://ilga.gov/legislation/fulltext.asp?DocName=&SessionId=84&GA=97&DocTypeId=SB&DocNum=0754&GAID=11&LegID=55583&SpecSess=&Session=>
38. For a list of states with laws allowing small breweries to self distribute, see the Brewers Association website: <http://www.brewersassociation.org/pages/government-affairs/self-distribution-laws>.
39. "Hundreds of California Winemakers Set To Lose Wine Shipping Rights to Illinois," Press Release, Specialty Wine Retailers Association, June 27, 2007, <http://www.specialtywineretailers.org/pressreleases/WineMakersLoseShipping.pdf>.
40. Eric Arnold, "Battle Over Retail Wine Shipping Comes to a Head in the Courts," *Wine Spectator*, posted online November 19, 2007, http://www.winespectator.com/webfeature/show/id/Battle-Over-Retail-Wine-Shipping-Comes-to-a-Head-in-the-Courts_3882.
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42. 530 F. Supp. 2d 848 (N.D. Tex. 2008).
43. Eric Arnold, "Federal Judge Favors Retailer-to-Consumer Wine Shipping in Texas Case," *Wine Spectator*, posted online January 17, 2008, http://www.winespectator.com/webfeature/show/id/Federal-Judge-Favors-Retailer-to-Consumer-Wine-Shipping-in-Texas-Case_3971.
44. *Ibid.*
45. *Siesta Village Market LLC v. Steen*, 595 F.3d 249 (5th Cir. 2010).
46. *Arnold's Wines v. Boyle*, 573 F.3d 185 (2nd Cir. 2009).
47. *Granholt v. Heald*, 544 U.S. 460 (2005).
48. R. Corbin Houchins, "The Meaning of Silence," Ship Compliant Blog, March 10, 2011, <http://shipcompliantblog.com/blog/2011/03/10/the-meaning-of-silence>.
49. 596 F. Supp. 2d 1035 (Dist. Court, E.D. Mich. 2008)
50. Michigan Legislature, House Bill 6644 (2008), <http://www.legislature.mi.gov/%28S%28sal2k555i3p2nkmh1lll4ny1%29%29/mileg.aspx?page=GetObject&objectname=2008-HB-6644>.
51. For text and status of the bill see, "Bill Status of HB2462," 97th Illinois General Assembly, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2462&GAID=10&DocTypeId=HB&LegId=44641&SessionID=76>.
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55. See, e.g., “Washington Revise State Liquor Laws, Initiative 1105 (2010),” Ballotpedia,
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 56. Robert Taylor and Harris Meyer, “The Battle of Washington State,” *Wine Spectator*, posted online September 27, 2010, <http://www.winespectator.com/webfeature/show/id/43651>.
 57. *Ibid.*
 58. *Ibid.*
 59. *Ibid.*
 60. Austin Jenkins, “Despite Initiative Defeat, Costco Still Pushing Liquor Privatization,” National Public Radio, February 16, 2011, <http://www.npr.org/templates/story/story.php?storyId=133822840>.
 61. “Chaffetz Introduces the CARE Act,” Press Release, Office of Representative Jason Chaffetz, March 23, 2011, <http://chaffetz.house.gov/in-the-news/2011/03/chaffetz-introduces-the-care-act.shtml>.
 62. James Madison, “Federalist No. 45,” *The Federalist Papers*, ed. Clinton Rossiter, p. 292.
 63. *Ibid.*, p. 293.
 64. *Granholm v. Heald*, 544 U.S. 460 (2005).
 65. James Madison, “Federalist No. 10,” *The Federalist Papers*, ed. Clinton Rossiter, p. 79.