

## Transcription:

Cato Podcast for May 4, 2010: "Alcohol and the Commerce Clause" featuring *Ilya Shapiro*

**CALEB BROWN:** This is the Cato daily podcast for Tuesday May 4, 2010, I'm Caleb Brown. Wine wholesalers say an "epidemic of alcohol" awaits if the U.S. allows for the deregulation of wine distribution. But there's no reason, constitutional or otherwise, for wholesalers to maintain a death-grip on the movement of booze from one place to another. Ilya Shapiro, senior fellow in Constitutional Studies at the Cato Institute, offer his thoughts:

**ILYA SHAPIRO:** Section 2 of the 21<sup>st</sup> Amendment, which repealed Prohibition, says the following: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein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." Which means that every state could regulate alcohol importation use/delivery as it wanted. This resulted in protectionist measures that mandated in-state wholesalers to take delivery of any out-of-state liquor shipments—be it wine or anything else—and thus in-state liquor, wine, beer, producers were advantaged over out-of-state producers. This naturally suggests that there is discrimination and protectionist measures by one state against another, which is not constitutional. One of the main focuses of the Constitution is to have a united country that doesn't have discriminatory regulations by one state against another—which most recently led to the case of *Granholm v. Heald* from five years ago.

**BROWN:** And the *Granholm* decision found that in-state and out-of-state producers of alcohol have to be treated equally.

**SHAPIRO:** That's right. No state—in this case, the regulations of the states of New York and Michigan were at issue—can treat in- and out-of-state wine producers differently. In other words, you can't force out-of-state producers to ship to wholesalers if you don't also require the in-state ones to do the same thing. Since this decision, there's been a slew of lawsuits by various wine, liquor, beer distributors and producers against a spate of state regulations, none of which has, as Peter Van Doren said in a podcast recently, make any economic sense but are merely protectionist measures trying to prop up this wholesale distributor business.

**BROWN:** And this is from *Wine Spectator* from mid-April, "Talk of a bill first surfaced when a congressional subcommittee held a hearing with little notice in March. During the session, wholesalers and state regulators argued that the three-tier system is under attack and the U.S. faces "an alcohol epidemic" if Congress does not intervene and prevent deregulation of alcohol sales." What is it the wholesalers want, in light of the *Granholm* decision, which would seem to rob them of some of their monopoly?

**SHAPIRO:** Well, they want protection from the government. They want the states or the federal government to step in and say, "You can't sell alcohol directly, whether it be in-state or out-of-state. We need to be there to assure the safety of the product and that kids aren't buying it over the internet *et cetera, et cetera.*" Now there's no indication that wholesalers play any sort of useful purpose. If you go to a vineyard in California, you can go the tasting room, they will ID you. and they won't sell to you if you're a minor. The same process applies if you go on the

internet to purchase alcohol: you have to have a proof of a credit card, a proof of age, and all these different things. There are rules in place to prevent whatever types of issues are there. In terms of an “alcohol epidemic,” what they are really saying is “There is this pent up demand that we don’t want to satisfy, so instead we’ll just hike up prices and take a bit of that profit. Otherwise, if you get rid of us, then it’ll be cheaper for consumers and they’ll buy more and we can’t have that.” I mean, it’s really a specious argument.

**BROWN:** And on the Commerce Clause: I know libertarians and conservatives talk about the abuses of the Commerce Clause. The *Granholm* decision itself was something that made trade more regular which, as you say, is the purpose of the clause.

**SHAPIRO:** That’s right. Article I section 8, the Commerce Clause, says that Congress has the power to regulate commerce among the several states. And there are actual legitimate uses of Congress’s Commerce Clause power. We don’t just rail against every time Congress does something. In situations like these, like so many others, Congress rightfully, as you said, makes commerce “regular.” That means that states can’t enforce different rules against their sister states. Oklahoma might like Texas more than it does Arkansas. That doesn’t mean that it can demand a tariff from all trains coming from Arkansas that it doesn’t demand from Texas. And indeed, interstate tariffs and regulations of all sorts fall under the purview of Congress. There’s a famous case from Arizona awhile back. Arizona had its own railway gauge so all trains going from Texas to the Pacific Ocean, had to hire Arizona shipping companies to put their trains onto separate types of platforms that conformed to the Arizona-only railway gauge. There was no economic purpose to that—it’s pure protectionism trying to gin-up business for the in-state railway companies. And the Supreme Court rightfully struck that down. There are plenty of places that the federal government needs to and does step in and say, “States, you can’t just do whatever. We are a national government and to protect consumers, to protect individual economic liberty, we will regulate from the center to prevent arbitrary geographical price discrimination.” The issue with this bill that’s being proposed now, the wholesale distributors are finally saying, “Okay we give up at the state level. We’re being challenged all the time. There’s all these lawsuits. They’re going to be struck down. So we’ll just have Congress intervene and make sure that we can still survive, guarantee us our monopoly profits, and really do what the Supreme Court said states individually can’t.”

**BROWN:** Ilya Shapiro is senior fellow in Constitutional Studies at the Cato Institute. You can read more about booze and the Commerce Clause at our website, [cato.org](http://cato.org).