



## **No need for butter bureaucrats**

April 27, 2018

There's an old saying out there that a person who is enjoying some good fortune is sitting in a tub of butter.

That conjures up an image that's not especially pleasing in these modern times, but maybe it was back in the day. Presumably, people enjoying good fortune at least chose a pleasant butter to sit in.

These days, if you're having a good run and would like a tub of butter to sit in at the end of your day, you're even luckier, for you have a little helper on your shoulder, otherwise known as state government, to help you avoid buying nasty and musty butter.

That's right, in Wisconsin, we have the butter police, and if you're a butter maker, you had better butter them up. For they grade every single batch of butter churned, and then tell us poor ignorant slobs which butter is pleasant enough to sit in and, gasp, even eat.

God forbid people should be able to choose for themselves what butter they like and what butter they don't.

There's so many things wrong with this ludicrous government butter grading law that's it hard to know where to begin.

First things first, though, the grade has nothing to do with the safety of the butter, as one dairy company, Minerva out of Ohio, has pointed out in a legal challenge to the law. Their butter, for instance, is absolutely edible and is sold in 49 states.

It's popular in 49 states, too. But it's not popular here because it hasn't passed muster with government taste testers.

Rather than submit to butter bureaucrats, Minerva yanked its product from the shelves in the Badger state. The core of the case, as Minerva argued, is that the grading has nothing to do with ensuring that a butter is safe for consumption, or informing consumers of anything of value.

"Instead, the various butter grades are supposed to provide consumers with information about how a

butter tastes, feels, and looks," the company rightly asserted.

All of which is none of the government's business. If it's safe to sell, let consumers take it from there. Last time we checked, most people could take a stick of butter out of their refrigerator and determine how it tastes, feels, and looks.

None of this seems to have bothered a federal judge - no surprise there - who ruled there was a legitimate government interest in grading the butter; the statute, he said, withstood rational basis scrutiny, that is, the law was rationally related to Wisconsin's legitimate interest in helping its citizens make informed butter purchases and so it was constitutional.

Now there's a big problem with the rational-basis test that is so often used by judges to determine constitutionality. Most important, though rational basis review tests whether the law is rationally related to a legitimate government interest, the U.S. Supreme Court has never defined just what constitutes a legitimate government interest.

That means the judge must decide just what a legitimate government interest is. To say it another way, it requires a judge's bias to work, for whatever a judge thinks is a legitimate government interest is in fact a legitimate government interest, at least for the case before him or her.

In this case, the judge actually admitted his bias, declaring that the government has a legitimate interest in having taste testers stamp their opinions on the labels of every butter brand in Wisconsin. As the judge wrote, "More specifically, Wisconsin has a legitimate interest in ensuring that its citizens aren't duped into buying 'mealy,' 'musty,' or 'scorched' butter."

So the butter might melt in the taste tester's mouth (a pleasant experience), or it might be mealy or musty, in which case the butter bureaucrat will give you an "undergrade" rating, which tells the world that the government thinks your butter sucks.

In the judge's view, it's the government's job not merely to ensure that products are safe for public consumption but that they are pleasing to the government's taste buds. This is silly to everyone, except apparently to government officials and judges, and of course large dairies that profit from the labeling system.

To be sure, determining whether a product is safe to sell may be a legitimate government interest, whether it's poisonous butter or deathtrap cars, but it is none of the government's business to subjectively weigh in on the superiority of certain safe products over equally safe other products.

A person might like mealy or musty butter over sweeter, smoother butter, just as a person might like a smaller car over a larger one. Let consumers - the market - decide what's preferred and what's not.

The dangers in this kind of statist thinking go way beyond butter. As always, there are dangers when the government begins picking winners and losers.

For one thing, it's a slippery slope down the channel toward totalitarianism. For example, it's a short jump from telling us what butter it thinks tastes good to telling us what news media it favors for news, or which candidates it thinks are better suited for office.

Government approved labels for candidates and government credentialing of legitimate journalists wouldn't be far behind. And, believe us, those candidates and those journalists would certainly know which side their bread was buttered on.

Second, what's in the government's interest all too often aligns with what's in the special-interests' interest. Notice they are not basing the rational basis test on what's in the people's interests, but in the government's interest.

As everyone knows, that's not necessarily the same thing; in fact it often isn't, and that's just what is going on here.

The law is a protectionist prop for bigger businesses and in-state firms. Smaller firms produce butter in smaller batches, each of which must be tested by law, a much more expensive proposition than for larger firms that make fewer and larger batches, and much more logistically difficult for far-away firms.

As the Cato Institute put it recently, that directly burdens the right to participate in the state's butter market, and thus curtails economic liberty, for no sane or rational reason. It's a violation not only of the constitution's commerce clause but of small businesses' rights to due process and equal protection.

It's crony capitalism all dressed up in totalitarian clothes.

In other words, it's a mechanism by which larger firms hijack the market, while legitimizing government claims that it and it alone knows what's best for consumers. Big business and big government both win.

This is another example of government sticking its nose where it has no business. In this case, the law is a hold-over from past days when nobody much questioned the cronies among us, unaware of the serious subversion they were doing to our economy and our democracy.

These days, we have awakened to those dangers, and a Republican Legislature and governor should act immediately to dispense with this law if the courts do not strike it down. For while the law is onerous to many small firms, it is also onerous to taxpayers who must pay some of the freight for its enforcement.

It is likewise burdensome to citizens who value their constitutional freedoms.

The question here is, who shall butter our bread?

Just remember, before you answer and surrender the butter knife, the government slathers its power with a heavy hand.