A Case of Wine for the Supreme Court

by Ben Lieberman

On December 7, the United States Supreme Court heard the first major case dealing with Internet commerce, a Constitutional challenge to state laws restricting direct-to-consumer sales of wine and other alcoholic beverages. The Court's decision, expected this spring, will very likely impact e-commerce in many other goods in addition to wine.

Imagine that you want to shop for wine online and have the purchase shipped to your home. Many wineries now have websites for this purpose—but in 24 states this transaction would be illegal. These states require all alcoholic beverages to pass through state-licensed wholesalers, distributors, and retailers before they reach the public. Therefore, consumers bypassing these middlemen by purchasing directly from the web would be violating the law. The Supreme Court is now deliberating on challenges to two such laws, from Michigan and New York.

The Supreme Court decided to hear this case partly because the lower federal courts have split on the matter, striking down Michigan's direct shipping statute but upholding New York's. Why the different findings? Because two seemingly contradictory Constitutional provisions are at issue.

On the one hand, courts have interpreted the commerce clause to forbid states from discriminating against out-of-state products to protect in-state economic interests. Both the Michigan and New York laws allow in-state wineries to engage in direct-to-consumer sales but restrict out-of-state wineries from doing the same. This appears to be a clear violation of the commerce clause. Indeed, the Sixth Circuit U.S. Court of Appeals struck down Michigan's law for precisely this reason.

But, on the other hand, the 21st Amendment, although best known for repealing prohibition, also granted states broad authority to regulate alcoholic beverages, and would seem to provide Constitutional support for these state restrictions. The Second Circuit upheld the New York law on these grounds.

Both Michigan and New York claim to have a legitimate purpose for their direct shipping restrictions. As the judge in the New York case concluded, requiring sellers to have an in-state presence "ensures accountability" for such things as collection of excise taxes and prevention of sales to minors. But in truth, these problems can be dealt with by means less burdensome than an all-out ban on all but in-state direct sales. In fact, those states that have allowed direct shipments for years report no serious problems.

The real reason behind these laws is economic—Internet sales may be a great way for consumers to save money by cutting out the middleman, but the middlemen are not too happy about it and are fighting back. The liquor wholesalers and distributors claim to be concerned about illegal alcoholic beverage transactions, but are really interested in holding onto their local monopoly status and high product markups. They have prevailed upon these states to restrict direct-to-consumer competition.

Purchasing wine online not only saves consumers money, it also expands consumers' product choice and opens new opportunities to entrepreneurs. Of the thousands of wines produced, only a small fraction are available in liquor stores. And many small wineries see Internet sales as their last best hope of survival, because the big wholesalers rarely bother to carry their low volume vintages. Indeed, several small wineries, along with wine consumers unable to make these purchases, have brought the court challenges.

If the Court interprets these laws as truly necessary to prevent minors from gaining access to alcohol via online sales, ensure payment of excise taxes, or both, then it is likely to uphold them. But if the Court sees them as thinly veiled protection of

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in-state alcoholic beverage industries' economic interests, then it will likely strike them down. Judging by the oral arguments, the latter argument seems to have won the day.

Justice Antonin Scalia expressed doubt that requiring "an in-state office somehow prevents wineries from shipping to minors or prevents them from evading taxes," and added that the experience from the 26 states that allow direct shipping from other states "suggest it's not a problem." Justice Ruth Bader Ginsburg noted that the purpose of the 21st Amendment "was not to empower states to favor local liquor industries by erecting barriers to competition."

Although the 21st Amendment applies solely to alcoholic beverages, a Supreme Court ruling in favor of protecting interstate direct wine sales under the commerce clause could clear away other potential barriers. Beyond wine, middlemen for a wide variety of goods and services—including motor vehicles, real estate and mortgages, contact lenses, medical supplies, and pharmaceuticals—are also exerting in-state political clout to restrict Internet competition. Federal Trade Commission (FTC) Chairman Timothy Muris, commenting on a FTC report advocating an end to state restrictions on wine e-commerce, noted that, "our findings in the wine industry suggest that anti-competitive state regulations may significantly harm consumers in many of these industries." This being the first such case to reach the Supreme Court, a decision allowing direct Internet wine sales will set a powerful precedent, and could go a long way in shaping the future of Internet commerce.

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results by using implausible scientific and economic assumptions. And even if global warming occurs as predicted, the alleged adverse impacts have been exaggerated or simply made up.

At the same events and in an appearance on Argentine television, I discussed the costs that the Kyoto Protocol would impose on developing countries like Argentina. Although developing nations don't have to make cuts in Kyoto's first round, they would have to be included in further rounds if global emissions are going to be slowed significantly. But, unlike western Europe and Japan, countries like India, China, and Brazil are still increasing in population. Greater population means greater energy demand. Thus, Kyoto, by leading to energy rationing, would be a disaster

for the developing world.

Fortunately, many major developing country leaders seem to understand this. China, whose rapid economic growth has made it the world's second largest producer of greenhouse gases, stated emphatically in Buenos Aires that as a developing nation it will not accept any curbs on emissions now or for at least 50 years. The resistance of major developing countries to sign on to energy rationing, plus the fact that the European Union, Japan, and Canada probably won't meet their initial targets means that Kyoto has probably reached a dead end. But that won't keep its supporters from trying to resurrect it. They'll be coming soon to a courtroom near you.

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violated.

Potential plaintiffs are placing great value in a ruling—even one by the IACH—that anthropogenic climate change violates human rights. Such a determination could qualify plaintiffs to sue for money—and thus possibly a non-subsistence lifestyle—under the 1789 Alien Tort Claims Act. That Act gives any foreigner with a tort claim access to the U.S. federal courts, so long as they allege violation of a treaty or "the law of nations."

Therefore, whatever its weaknesses, this approach should be taken seriously. Substantively, of course, many other difficulties impede an effort to assign responsibility for some portion of climate change—particularly since earlier climate changes have occurred naturally, without calamity (or lawsuits), and which even many alarmists admit cannot be distinguished from alleged man-made climate changes.

Assisting such plaintiffs, however, is the Bush Administration's biggest environmental policy blunder: the Climate Action Report 2002. The report—submitted to the United Nations as America's official "policy and position" on climate change—"admits" U.S. complicity in climate change, albeit with some watery qualifications. Presumably, its authors assumed that this, like so much else in the diplomatic arena, is a consequence-free feel-good project. Jurists increasingly disagree.

All of this begs for the opportunity to put climate alarmism on trial. To date, grandstanding lawsuits, like that of New York Attorney General Eliot Spitzer, et al. against select utilities, are not likely to yield substantive debate but only settlements for windmill quotas. Depending on how the Inuits proceed, they might surprise the world through altering their ages-old culture—by adopting litigiousness.

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