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The Five Dumbest Product Bans, 2009

An Annual Review of Regulatory Absurdity

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It is often said that yesterday's luxury goods become today's necessities. Nearly all American adults can remember a time when mobile telephones, the Internet, side effect-free mental health drugs, GPS devices, digital cameras, and DVD players seemed like exotic high-tech inventions. Members of an older generation can remember the once-extraordinary attention that greeted automatic transmissions, jet planes, and home thermostats.

All of the above inventions required arduous efforts from scientists and engineers, but many great inventions come from simple insights. Over the last two decades, clever inventors have placed flip-top caps on toothpaste tubes (eliminating the problem of losing the cap), added built-in handles to trash bags (eliminating easy-to-lose twist ties), and replaced bulky bottles of home cleaners with easy-to-use pre-moistened wipes. None of these things required enormous research but all make people's lives easier. What they did require was an entrepreneur to put these new ideas into use.

However, what the free market gives, government often takes away. Myriad government regulations restrict the types of cars that Americans can buy, the foods they eat, and the life-saving drugs they can use. And sometimes, product bans can reach ridiculous lengths. This paper focuses on just such ridiculous bans. For inclusion in this brief survey, the bans included must meet four criteria:

- ***No one can present a strong case for marginal social harm from the product or service banned.*** Consumer choice alone is good enough reason to oppose product bans, but that aside, the bans included herein cannot be argued for on even the most tenuous utilitarian grounds.

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- ***The product should provide benefits to the general public.*** It should be something that almost anybody might have a theoretical interest in using.
- ***A government must have actually enforced the ban within the recent past.*** Many amusingly archaic laws remain on the books but go unenforced—but not all.
- ***The law in question must be statewide or national in scope.*** The larger the jurisdiction, the greater the harm it can cause when it bans a product. National and state bans are extremely difficult to circumvent, local bans much less so.

This list represents the second installment in what will become an annual report. It includes two “repeats” from last year—the national online poker ban and Louisiana’s restrictions on florists. One placed prominently on last year’s list—Virginia’s ban on sangria—has been repealed by that state’s legislature.¹ Another—several states’ ban on sex toys—has been ruled unconstitutional by a federal appeals court, remains on the books but will likely go unenforced.² The ban on the CardioPump remains in effect, but the widespread availability of automatic external defibrillators has rendered the product ban somewhat less important.³ Thus, based on a survey of state statutes and news from the past year, we selected five bans along with one dishonorable mention from Canada. They are as follows:

1) Using the Cancer Drug Provenge (National). Provenge, a prostate cancer drug, has shown good results in clinical trials. It could represent a breakthrough in the treatment of end-stage prostate cancer. Unlike most cancer treatments, many of which have serious side effects, Provenge acts like a vaccine by stimulating patients’ own immune systems to fight off cancerous cells. In clinical trials, it extended patients’ life by a median time of 4.5 months—twice as long as the only other comparable prostate cancer therapy. After three years, over a third of those taking Provenge remained alive, compared to barely more than one-10th of those receiving placebo. In 2007, the Food and Drug Administration’s (FDA) scientific advisors unanimously agreed that the drug was safe enough for approval, and voted 13-to-four that it was effective enough.

Nevertheless, in 2007, the agency decided to keep the drug off the market until the manufacturer could complete more clinical trials, a process that will last at least through the end of 2009, even though there is no evidence that approval would cause significant harm. Clinical tests of the drug showed that:

Treatment with Provenge was generally well tolerated. In controlled clinical trials, the most common adverse reactions associated with Provenge were chills, fever, headache, fatigue, shortness of breath, vomiting and tremor. These events were primarily low grade events, with a short duration lasting 1 to 2 days following infusion.⁴

For a product intended to treat end-stage prostate cancer, such side effects are remarkably mild. As the editors of the journal *Nature Biotechnology* note, the only other approved drug for the treatment of end-stage prostate cancer, Taxotere, is less effective and “is so toxic it kills 300 patients itself every year.”⁵ Delaying approval of Provenge will cost lives. The FDA should approve it immediately.

2) Gambling Online (National). Americans like to gamble. As of 2008, 48 states had legal gambling in some form, and today 38 allow the operation of casinos, slot parlors, or card rooms.⁶ Nearly all Americans approve of the activity—around 90 percent in one recent poll.⁷ However, a 2006 federal law, the Unlawful Internet Gambling Enforcement Act (UIGEA), places absurd restrictions on banks in an attempt to outlaw Internet gambling.⁸

The law, which the Bush administration attempted to implement through a “midnight” rulemaking effort in its waning days,⁹ essentially bars banks from engaging in or facilitating transactions to transfer money to online gambling providers outside of the United States.

The absurdity of trying to curb gambling aside, UIGEA will adversely affect activities which do not constitute gambling at all, imposing tremendous costs on the rest of the economy. The regulations will impose a sizeable burden on the already struggling banking sector. The cost, the Treasury, Office of Management and Budget, and Federal Reserve agree—will come in upwards of \$100 million a year.¹⁰

3) Buying a Coffin from an Unlicensed Dealer (Louisiana, South Carolina, Virginia, and Oklahoma).¹¹ Five states actively enforce laws that prohibit individuals from purchasing coffins from people who do not hold funeral directors’ licenses. The law does nothing to protect consumers. Instead, it pads the pockets of the funeral industry by keeping funeral costs high.

A typical American funeral costs \$6,500—a lot of money for most people.¹² As a result, many people seek to find ways to have memorable, meaningful funerals for less money. Coffins, the most expensive mass-produced items in most funerals, are an obvious route to reduce funeral costs. Typical coffins range from \$1,000 or so for a wood box to over \$5,000 for a deluxe handcrafted model.

In recent years, dozens of vendors—most prominently retail giant Costco—have begun selling coffins online and outside of funeral parlors.¹³ However, several states actively enforce laws requiring state licensure in funeral direction—a complex and arduous process—before allowing somebody to sell coffins.¹⁴ Any box can serve as a coffin and nothing other than individual taste should determine what type of coffin a person uses.

4) Selling a Flower Arrangement by an Unlicensed Florist (Louisiana).

Louisiana, alone amongst the 50 states, requires state licensing for anybody seeking to sell more than one type of flower put together or to arrange flowers in a vase.¹⁵ Louisiana’s law is so absurdly broad that it makes no exception for small-scale operations—so technically, a child selling wildflowers by the roadside could receive a ticket for “practicing floristry without a state license.”

The licensing law is blatantly protectionist, keeping new entrants out of the market to the benefit of established florists. The state florist test involves highly subjective judgments.

“Harmony,” which the state horticultural commission counts as a key principle of floral design, “occurs when all components are in agreement with each other. Textures of material, containers, foliage and flowers should all blend together.”¹⁶ The inherently artistic nature of flower arranging, however, means that some people will enjoy arrangements that others hate. Just as some people may enjoy atonal music, many may enjoy flower arrangements lacking in “harmony.”

Flower shops have faced fines and threats of fines for not having “licensed florists” on duty. The law stops many florists from practicing their chosen profession and, just as importantly, restricts consumer choice—and there is no record of anyone being injured as a result of an improperly designed bouquet.

5) Selling Horsemeat (National and Texas). Horses have a unique place in the American public imagination and remain a popular topic of painting, literature, and film. Until last year, however, horse owners could sell undesired horses to plants that would slaughter them under humane conditions and export the meat to markets in Europe and Asia.

The overwhelming majority of Americans blanch at the idea of eating horse. Nonetheless, like all other animals, horses are property that may be bought, sold, and disposed of properly. In Belgium, Germany, Italy, France and some areas of Francophone Canada many people eat horse.¹⁷ France even has a horsemeat industry association that advertises under the slogan: “Horse Meat: So Much Energy, Ever So Lean.”¹⁸ But the United States effectively bans the production and sale of horsemeat for human consumption under federal and state laws. Texas (once home to two horse processing plants) has forbidden them from operating and Congress has barred the Department of Agriculture and state authorities from spending money to inspect horsemeat—which constitutes a de facto ban.¹⁹ Since then, all three then-existing horse processing plants in the United States have shut down.

An ever-growing population of horses, cared for partly at taxpayer expense, crowds government-sponsored feed lots throughout the country.²⁰ When horses receive very severe injuries, even race horses worth millions of dollars frequently receive immediate euthanasia.²¹ Like all other animals, it remains perfectly legal to kill horses for any reason—or no reason at all—so long as it is not done with wanton cruelty.

Horse bones are still rendered into gelatin that works its way into desserts, ice cream, and soups all over the country. Likewise, they often make their way into animal feed. In addition, because horses remain private property, their owners can still export horses to Canada, Mexico, and other locations where slaughterhouses can process them into food for humans. However, since the USDA cannot inspect horsemeat, the meat cannot be imported back to the United States.

Horse meat does not appeal to most Americans, but it being a minority taste is no reason to ban it—or any other meat. For example, in the Washington, D.C., area at least two

Mexican restaurants serve grasshopper tacos and one Korean eatery offers a soup made with dog meat.

Dishonorable Mention: Selling Bottled Water (Toronto, Ontario, Canada).

One product ban has not yet reached the United States, but may do so in the near future. As a result, it receives a “dishonorable mention.” It also only exists currently at the local level, but could just as easily be adopted at the state level. In Toronto, Ontario’s capital and Canada’s largest city, consumers may no longer purchase bottled water on city-owned property.²² Many American cities including San Francisco, Ann Arbor, and Albuquerque have placed narrower restrictions on bottled water, so wider bans are possible in the United States.²³

Toronto’s ban restricts access to a product many consumers want, potentially harms many vulnerable people, and does nothing to forward its supposed purpose of protecting the environment. Consumers obviously want to buy bottled water and, by all accounts, consuming the product does no harm. Bottled water has no calories and many consumers enjoy its flavor or the simple convenience of having portable water. Bottled water is extremely safe in terms of health, especially when compared to tap water.

In fact, a number of vulnerable groups appear to benefit from bottled water. The Centers for Disease Control and Prevention, for example, says that people with HIV/AIDS “may wish to avoid tap water...boil or filter...water, or drink bottled water.”²⁴ At least one major hospital has advised its patients to drink only bottled water.²⁵ In addition, bottled water can prove a lifesaver during natural disasters when municipal water systems become inoperable or rescue workers simply need convenient, portable water.²⁶

Finally, bottled water is not an environmental problem. Even if one accepts all of the most severe predictions of the consequences of human-caused climate change, bottled water simply does not measurably contribute to climate change and may actually prove a rather efficient use of energy.²⁷ Likewise, bottled water does not add much to the nation’s production of solid waste (and, it is worth noting, the nation has plenty of storage space for the solid waste it does produce).²⁸

Efforts to ban bottled water represent little more than an attempt to restrict trade on a product that people want and desire. They harm vulnerable segments of the population and do nothing to protect the environment.

Conclusion. This catalog of America’s absurd product bans may seem amusing, but any clearly absurd product ban can have serious negative consequences for freedom and consumer welfare. Nobody can legitimately contend that a society that retracted all of the product bans discussed above would find itself less safe, secure, or moral. These bans simply intrude on the freedom of individuals to live their lives as they please. While the freedom to drink bottled water, buy wildflowers a child has picked, or play cards online might appear inconsequential in the grand context of economic and personal liberty, the sheer absurdity of these product bans makes them all the more insidious. In total, they add to a litany of such laws that, quite simply, ought to go.

Notes

¹ “Editorial: New Virginia Laws Take Effect,” *Roanoke Times*, July 1, 2008.

² Associated Press, “Federal Appeals Court Overturns Sex Toy Ban,” February 13, 2008. A law theoretically remains in force on Alabama—which is not covered by the Fifth Circuit, which made the ruling—but there were no media reports of enforcement action during 2008.

³ See Eli Lehrer, “The Five Dumbest Product Bans: An Overview of Regulatory Absurdity,” *OnPoint* No. 130, CEI, February 26, 2008, <http://cei.org/pdf/6430.pdf>.

⁴ Dendreon Corporation Press Release, “Dendreon Announces New Data Analysis Presented at Chemotherapy Foundation Symposium,” November 10, 2006, <http://www.psa-rising.com/wiredbird/dendreon-provence-taxotere06.html>. See also Patrick A. Burch, Gary A. Croghan, Dennis A. Gastineau, Lori A. Jones, Judith S. Kaur, Jelle W. Kylstra, Ronald L. Richardson, Frank H. Valone, and Stanimir Vuk-Pavlovi, “Immunotherapy (APC8015, Provenge®) targeting prostatic acid phosphatase can induce durable remission of metastatic androgen-independent prostate cancer: A phase 2 trial,” *The Prostate*, Vol. 60, No. 3, February 2004, pp. 197-204.

⁵ Editorial, “The regulator disapproves,” *Nature Biotechnology*, Vol. 26, No. 1, January 2008, p. 1.

⁶ American Gaming Association, “State of the States 2008: The American Gaming Association Survey of the Casino Environment,” p. 4. Hawaii, one of the two states that technically outlaw gambling, allows the docking of cruise ships with on-board casinos. The other state without legal gambling, Utah, has nearly all of its population within an hour-and-a-half drive of the border of Nevada’s gambling Mecca. Some states, including West Virginia and Kansas, even own the gambling devices themselves.

⁷ Frank Fahrenkopf, “Growing up,” the Challenges and Opportunities of Gaming Expansion,”

http://www.americangaming.org/Press/speeches/speeches_detail.cfv?ID=325.

⁸ 31 U.S.C. § 5361–5367. The law outlaws games “predominantly subject to chance,” but, in its implementing regulations outlaws games which do not actually appear to be games of chance at all. Poker stands as the single best example of a game of skill. People all over the world make a living off simply by playing the game. An unskilled poker player would lose to one of these champions at the same rate that an unskilled golfer would lose to Tiger Woods—100 percent of the time.

⁹ Haley Hintze, “U.S. Treasury, Federal Reserve Publish UIGEA Rules,” *Poker News*, November 12, 2008, <http://www.pokernews.com/news/2008/11/us-treasury-federal-reserve-publish-uigea-rules.htm>.

¹⁰ Federal Reserve System and Department of the Treasury, “Prohibition on the Funding of Unlawful Internet Gambling,” November 19, 2008,

<http://www.ustreas.gov/press/releases/reports/noticeofproposedrule.pdf>.

¹¹ Laws requiring licensure to sell coffins are also on the books in Alabama, Delaware, Idaho, Maine, Minnesota, Mississippi, and Vermont but, according to Valerie Bayham of the Institute for Justice (who has handled several court cases involving coffin sales), these laws typically go unenforced.

¹² National Funeral Director’s Association. “What are Some Basic Funeral Service Facts?”

<http://www.nfda.org/nfdafactsheets.php#facts>. The number is as of 2004. The figure does not include the price of a burial plot.

¹³ Costco.com. “Coffins,” <http://www.costco.com/Common/Category.aspx?cat=20595>

¹⁴ For a review of the laws see: Institute for Justice, *Litigation Backgrounder: The Right to Urn an Honest Living: Challenging Tennessee’s Casket Monopoly*,

http://www.ij.org/index.php?option=com_content&task=view&id=767&Itemid=165.

¹⁵ Louisiana. Review of Statistics 3:3808(I).

¹⁶ Louisiana Horticulture Commission handbook, *Flower Arranging* at 3 as cited in, Institute for Justice.

“Let a Thousand Florists Bloom: Uprooting Outrageous Licensing Laws In Louisiana,”

http://www.ij.org/economic_liberty/la_florists/backgrounder.html. The state manual also defines “unity” thus: “All parts must be related and unified so that the whole composition will be of good design.”

¹⁷ Joel Stein, “Horse—It’s What’s For Dinner,” *Time*, February 8, 2007. Horsemeat frequently appears on breakfast buffets throughout Europe (usually labeled with its French name *viande chevaline*).

¹⁸ Translation by the authors. The French slogan is *La Vivand Chevalie: Autant d'energie et pourtant si maigre*.

¹⁹ Texas Code 16, § 2.01(a). The U.S. prohibition, done through appropriations rather than statute, is found in H.R. 3161 (2007). Of course, since then a one-year ban on inspection closed down all three remaining horse plants.

²⁰ Ibid.

²¹ For one recent well-known case see: Associated Press, “Runner-up Eight Belles breaks front ankles, euthanized on track,” May 3, 2008.

²² CBC News, “Toronto council approves plastic bag charge, bottle ban,” December 3, 2008, <http://www.cbc.ca/consumer/story/2008/12/03/plastic-bags.html>.

²³ Angela Logomasini, “Crazy Bans,” September 4, 2008, enjoybottledwater.org, <http://enjoybottledwater.org/?p=37>.

²⁴ Centers for Disease Control and Prevention, “HIV: Safe Food and Water,” June 21, 2007, <http://www.cdc.gov/hiv/resources/brochures/food.htm> via enjoybottledwater.org.

²⁵ Jim Dwyer, “Bottled Water Paradox: Banned, and Required,” *The New York Times*, May 14, 2008.

²⁶ Logomasini, “Emergencies,” September 4, 2008, enjoybottledwater.org <http://enjoybottledwater.org/?p=96>.

²⁷ Logomasini. “Footprints,” September 4, 2008, at enjoybottledwater.org <http://enjoybottledwater.org/?p=55>.

²⁸ Ibid.