Business Horizons (2006) **49**, 211—219

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Much more at stake than Gewürztraminer: The U.S. Supreme Court's wine decision

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KEYWORDS
E-commerce;
Wine;
Commerce Clause

Abstract The U.S. Supreme Court struck down the laws of 11 states that permitted in-state wineries to sell wine directly to customers in those states, but prevented out-of-state wineries from doing the same. While the wine decision will help wineries that serve customers via the Internet, its economic implications are much greater for markets such as real estate and automobiles. The Court's broad interpretation of the Commerce Clause has the potential to eliminate many of the protectionist practices that states have developed to shield local firms from out-of-state competition, particularly that fostered by the Internet. Consumers will save an estimated \$23.7 billion per year if these protectionist practices are eliminated.

1. The decision: Sweeter than wine

In April 2005, a U.S. Supreme Court decision invalidated the laws of 11 states that permitted in-state wineries to sell wine directly to customers in those states, but prohibited out-of-state wineries from doing the same. The "wine decision" was particularly welcomed by wineries that service customers in other states via the Internet. These firms, the Court ruled, must now be allowed to operate on the same basis as in-state firms. As a result, most of the nation's 3726 wineries will now be able to sell directly to customers in the 26 states that permit some form of direct shipments to consumers. This will be a particular boon to small wineries that otherwise have had difficulty getting attention and service from the liquor wholesalers who dominate the national distribution of all forms of alcohol.

The Supreme Court ruling addressed three lower court decisions, the keystone of which was Granholm v. Heald (2005). The Court dealt a blow to the three-tier alcohol distribution system that has held sway in the United States since the 21st Amendment was passed in 1933 (Shanker, 1999). In particular, liquor wholesalers (who act as intermediaries between wineries and retailers/liquor stores) now stand to lose much of the monopoly position they had gained through state laws that required liquor producers to distribute their products through wholesalers rather than directly market to retailers and consumers. Heretofore, it has been a sweet situation for distributors, many of whom are politically influential. They have

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doi:10.1016/j.bushor.2005.09.002

bestowed significant contributions upon lawmakers, whose appetites for restrictive legislation have increased accordingly (Weeks, 2005). Consider Ohio, where the law requires that wholesalers markup their beer by a minimum of 25% over cost, and wine by a minimum of 33%.

Such practices raise consumer prices because they involve forced intermediation rather than an efficient marketplace outcome. Although many wineries would prefer to sell directly to liquor stores and consumers, this has been prevented by law in a majority of states. Liquor distributors and wholesalers in states that forbid the direct shipment of wine from wineries to liquor stores or consumers have attained their enviable central position not because they have satisfied an unbiased market test, but because of protectionist interference. The Federal Trade Commission (2003) concluded that allowing the sale of wine over the Internet would reduce prices below "bricks-and-mortar" liquor store prices by 8—21% per bottle in Virginia, even taking delivery costs into account. This is a rough measure of the cost of forced state intermediation regulations.

The Supreme Court's decision is good news for consumers and those who believe uncoerced trade between knowledgeable individuals nearly always enhances citizen welfare. Still, it will not cause an earthshaking turnabout of affairs in the wine market. Of all wine sold in 2004, only 0.5% was sold over the Internet. Moreover, slightly more than one-half of the states already permit interstate shipment of wine.

Why, then, should we pay attention to the wine decision? Beyond the decision's impact on the wine market, it is also significant because of its potentially discouraging message for state tax collections, its much broader implications for the Court's interpretation of the Constitution's Commerce Clause, and its impact on several important markets that currently feature restrictive state laws and rules favoring in-state firms over out-of-state firms. Let us examine each of these implications in turn.

2. The tax issue

The wine case pitted plaintiff wine consumers in Michigan and Virginia against the defendant governments of those states. The plaintiffs' charge that Michigan and Virginia laws prohibiting the direct shipment of wine from wineries to consumers represented illegal restraint of trade was met by two practical arguments by the defendants. Their first assertion was that wine sales conducted via the Internet would facilitate underage consumption of alcohol, as it would be nearly impossible for distant wineries to perform valid checks of the identification and ages of purchasers. Second, the states complained that they would often be unable to collect the appropriate taxes on Internet-based sales, since the selling wineries typically would have no physical presence in Michigan or Virginia. Hence, these states might not even be aware that a wine sale had been made to one of their citizens.

The issue of underage consumption of alcohol merits only a few words. The Court's majority rejected Michigan and Virginia's argument that the interstate sale of wine over the Internet would lead to illegal underage consumption by minors, citing the previously mentioned study by the Federal Trade Commission (2003), which concluded this problem was minimal. On the face of it, it seems unlikely that scheming teenagers would choose to order an expensive case of Merlot over the Internet and then wait a week for it to be delivered.

The tax issue, however, is far more significant. Although the Court appeared unimpressed by the claim that Internet wine sales would lead to widespread tax evasion, diminished state tax collections realistically represent the major concern of state government regarding e-commerce. Internet-based commerce hits states directly in their pocketbooks via reduced tax collections. Further, as e-commerce continues to grow and constitutes a larger portion of total retail sales, this revenue drain will increase.

The states' problem is simple: it is difficult for them to collect sales taxes from sellers that maintain no physical presence in their states. Realizing this, many states have become quite responsive to local firms seeking protectionist legislation designed to limit or stop certain forms of e-commerce. A local retail store situated on the town square or in the area mall is likely to have more votes and political clout with local elected officials than out-of-state firms such as Amazon, Buy.com, or Lands' End. Moreover, local retailers have a plausible story to tell. They argue that they operate at a disadvantage: their customers must pay state sales taxes, but most of the customers of their Internet competitors do not. As such, there is much talk about the need to level the playing field. State governments have become much more responsive to these petitions as they have realized that their own tax collections have been suffering.

Most states already have on their books a use tax that requires individuals to remit applicable sales taxes on Internet purchases they make from firms located in other states, but those laws are widely evaded. A study by Bruce and Fox (2004) estimated that states lost $15.5 billion in sales tax revenues in 2003 due to Internet-permitted tax evasion. Exact numbers are hard to come by, however, as it is difficult for any state to know whether Internet-based transactions involving their citizen have occurred. Since these deals transpire in cyberspace, they cannot be audited in the same fashion as the purchase of a television set from a local appliance store.

This situation could change, though, with the advent of more sophisticated software that better enables cooperating firms to charge appropriate sales taxes to customers, regardless of where they are located. Additionally, 43 states have joined the Streamlined Sales Tax Project, which was designed to produce cooperative sales tax collections on Internet-based sales, and 18 of these states have agreed to implement a tax collection network that will begin in the Fall of 2005 (Krebs, 2005). Not everyone favors such action; some regard this as nothing more than a tax collectors' cartel that is bad for consumers (Greve, 2003). Although the 18-state network has yet to be implemented, it may rapidly evolve into a national Internet sales tax collection system. As it stands, the U.S. Supreme Court ruled in Quill v. North Dakota (1992) that Internet sellers are not required to collect applicable sales taxes from customers located in states where the Internet sellers do not have a physical presence. But what constitutes a physical presence? A recent California appellate court ruling, Borders v. State Board of Equalization (2005), required Borders Group (the bookstore chain with 129 stores nationwide) to begin collecting sales taxes from California customers who order books and music over the Internet. Borders clearly has a physical presence in California in the form of its bookstores, but argued that its Internet activities were part of a separate company that does not have a physical presence in the state. The state court rejected this argument, at least partially because Internet purchasers can return books and music to Borders' bricks-and-mortar locations, and concluded that the two businesses were not really separate.

Given that the facts of the Borders case are so specific, it is not apparent that the decision will have strong implications for the typical Internet seller that has no physical presence in the states in which it sells. For example, Amazon does not operate retail stores and asserts that it has no physical presence in California. Hence, the company maintains it does not need to collect sales taxes on its Internet sales to California customers, although firms such as Eddie Bauer and Wal-Mart do so voluntarily. Amazon's case is less clearly defined, however, because Amazon sometimes acts as a book intermediary. In this role, Amazon takes a book order, but a specialty bricks-and-mortar bookstore with which it is partnered will actually ship the book. Without handling any merchandise, Amazon intermediates the transaction, collects the purchase price from the customer, and remits most of that sum (minus Amazon's fee) to the bricks-and-mortar bookstore that has the book in stock and ships to the customer. In such transactions, Amazon does not ask its customers to pay a sales tax. Does this violate the spirit of the U.S. Supreme Court's 1992 decision?

Because retail Internet sales are growing in financial importance, it is unlikely that the issue of Internet sales tax collections will go away any time soon. The U.S. Supreme Court brushed aside the tax collection concerns of Michigan and Virginia in the wine decision, probably deferring until a later date another showdown over the collection of Internet sales taxes. It is worth noting that the Court's 1992 sales tax decision came at a time when retail Internet sales were merely a blip on the radar. In the *Wall Street Journal*, Mangalindan (2005) reported that the Internet is expected to account for $172 billion in retail sales in 2005, up 22% from 2004. These are attention-getting numbers. Times have changed, and it is possible the Court's view might change, as well.

3. The commerce clause

Sections 9 and 10 of Article I of the United States Constitution contain several provisions that limit the economic powers of both the federal government and state governments. With respect to economic relationships among the states, Section 9 declares that:

"*No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another*" (U.S. House of Representatives, 2005).

Section 10 further enjoins the states:

"*No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws...*" (U.S. House of Representatives, 2005).

Together, these provisions comprise what has become known as the "Commerce Clause," one of the most important limitations placed upon the power of the states by the Constitution. In a series of decisions made over the course of more than 200 years, the U.S. Supreme Court has refined the meaning of the Commerce Clause. The resulting interpretation, in turn, profoundly influences the meaning of federalism (i.e., the distribution of power between the federal government and the states).

What constitutional authority do the states have relative to the federal government? The 10th Amendment, adopted in 1791, says:

"*The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people*" (U.S. Constitution—Amendment 10, n.d.).

Hence, an individual state might conclude that, save actions expressly forbidden it by the Constitution (e.g., tariffs on interstate trade), it is free to act in the economic arena. The U.S. Supreme Court, however, has discouraged this notion by adopting an increasingly broad view of the Commerce Clause, though this development has occurred in fits and starts. The latter years of the New Deal were a time when the Court expanded the notion of what activities constituted "interstate commerce." In doing so, it gave a constitutional blessing to a variety of federal regulatory policies and economic interventions, such as a federal minimum wage. Decades later, the Commerce Clause was used as the basis for public accommodation laws, which struck down segregation.

Despite the public stances of several of the Justices in favor of federalism and the language of the 10th Amendment, the current Supreme Court generally has extended federal power at the expense of the states. Most recently, in Gonzalez v. Raich (2005), the Court upheld the power of Congress to ban the possession and use of marijuana for medical purposes, even though nine state laws allowed it. The Court opined, "(We) need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." Such expansive language also formed a legal basis for the wine decision.

Gibbons v. Ogden (1824), a seminal Commerce Clause case, dealt with the issue of whether carrying passengers (as opposed to commodities) on a ferry between New York and New Jersey qualified as interstate commerce and was hence subject to the Commerce Clause. The *Gibbons v. Ogden* ruling made it difficult for states to impose on out-of-state firms any taxes, tariffs, and restrictions they do not also impose on in-state firms. For example, in Indiana, the same sales tax rate applies to computers assembled in the Hoosier state as those assembled in Texas. Nevertheless, clever states have often devised laws that primarily impact out-of-state interests. Hawaii, for example, is especially skilled at finding ways to tax malahini (out-of-state and foreign) land owners that kamaaina (residents) can often avoid. However, the state has been thwarted on occasion. In Bacchus v. Dias (1984), the U.S. Supreme Court invalidated a 20% exemption on alcohol taxes that the 50th state gave Hawaiian firms.

Taking a broad view, there is little doubt that the typical American is much better off because of *Gibbons v. Ogden*. Relying upon the Commerce Clause, the 19th century Court created a shared, tariff-free common market that spanned the continent. Contemplate a world in which the sentiments of *Gibbons v. Ogden* did not hold sway. Suppose nonresidents had to pay a tax every time they entered New York City, or imagine the California sales tax being applied only to items produced outside of California. This would discourage commerce just as surely as castle walls, moats, and ubiquitous toll bridges did in the Middle Ages, or as the Smoot—Hawley Tariff choked international trade in the 1930s.

The wine decision was quite consistent with the Rehnquist Court's broad view of the Commerce Clause and its general tendency (despite some language to the contrary) to regard federal power and rights as superior to state power and rights. As the fifth edition of the American Bar Association's *Antitrust Law Developments* (Pearlstein, 2002, p. 815) puts it, "federal laws preempt state laws or regulation" if:

(1) Congress specifically provides for preemption;
(2) Congressional intent is to "occupy the field" in question; or
(3) There is "actual conflict" between federal and state provisions.

The wine decision underlined once again that state taxes and trade restrictions must apply equally to all American firms, regardless of location. This is a critical interpretation because of the rise of the Internet, which has introduced vibrant new competition into numerous markets ranging from clothing and air tickets to real estate and automobiles. According to Mangalindan (2005), Internet travel sales alone will exceed $62 billion in 2005. It was absolutely essential to the future development of e-commerce that the Court side with the plaintiff wine consumers who sued the states of Michigan and Virginia. While the Internet does not always reduce the prices consumers pay, it has the potential to do so. This is especially true in "commoditized" markets such as microcomputers, in which numerous firms are producing substantially the same standardized product.

The Internet excels as a means for consumers to acquire information about the prices and characteristics of goods and services and can aid discriminating buyers in finding the best price for anything from a Lincoln LS automobile to a Carlos Santana music CD to a pair of New Balance running shoes. Alas, all of this would be for naught if states could, at their whim, prohibit citizen consumers from taking advantage of lower prices offered by firms in other states. Not everyone agrees with this point of view, however. For example, Goldsmith and Sykes (2001) and Ribstein and Kobayashi (2002) argue that state regulation of Internet-based commerce is both plausible and desirable.

The wine decision reaffirmed the power and breadth of the Constitution's Commerce Clause and, in doing so, set a powerful precedent for the future. The decision was particularly significant because it required the Justices to give greater weight to the Commerce Clause than the 21st Amendment, which gives each state the right to regulate the "delivery and use therein of intoxicating liquors" (U.S. Constitution—Amendment 21, n.d.). As a consequence, the decision was not as easy a call as it might have first seemed, as the two constitutional provisions conflicted directly. The Court's decision, however, could have a profound effect on several specific non-wine markets. Let us look at these.

4. Implications for other markets

Several markets likely to be affected by the wine decision include real estate, automobiles, beer and spirits, caskets, and auctions. What common threads unite these markets? Each has been invaded by e-commerce, and the Internet has served as the major vehicle for this infiltration. In the fashion of the wine market, intermediaries dominate the relationships between manufacturers and customers served by bricks-and-mortar retailers. Further, each of these markets has been characterized by substantial barriers to entry for new competitors, often the result of state and local laws analogous to the wine shipping laws that excluded new competitors, particularly those from other states (State Impediments, 2002).

As such, each of these five markets is ripe for invasion by Internet-based sellers or existing bricks-and-mortar firms that wish to use the Internet as a means to streamline their activities and lower their costs. The wine decision dramatically increases new entrant firms' prospects for success if they mount legal challenges to restrictive state laws and regulations. The Progressive Policy Institute estimated that consumers annually pay at least $15 billion more for goods and services because of laws designed to prevent consumers from interfacing directly with producers (Atkinson, 2003). Upon closer inspection, $15 billion may be a low estimate.

4.1. Real estate

Most real estate markets throughout the United States are semi-cartelized as a result of numerous output, price, advertising, and service restrictions. The analogy to wine markets is apparent. A half-dozen states, including California, have laws that require real estate firms and mortgage brokers to maintain offices in their states if they want to do business there. At least one court has struck down such a law as it applies to real estate brokers on the grounds that it restricts competition and drives up both housing prices and commissions. Another half-dozen states require real estate agents to provide a minimum set of services, even if consumers do not want them. This demand is aimed at Internet-based real estate firms and agents that may offer minimal or no services beyond those found on the Internet.

Organizations that represent conventional bricks-and-mortar real estate agents make no bones about their desire to restrict competition. Referring to Internet-based real estate services such as Lending Tree, Martin Lee, head of the Iowa Association of Realtors, outlined his organization's goal in a straightforward fashion: "We're going to get very aggressive about knocking them out of the state" (Hagerty, 2005, p. A2).

The wine decision puts protectionist market restrictions such as these in the antitrust spotlight and highlights their substantial cost. Wilke and Hagerty (2005) reported that sales of new and occupied homes exceeded $61 billion in 2004. Had the consumers who purchased these homes paid a commission of 5% rather than 6%, they would have saved $.61 billion.

Echoing the rationale of wine wholesalers and distributors, established in-state real estate firms argue vociferously that they provide home purchasers with vital services that cannot be supplied via the Internet. Further, they claim to protect consumers from potentially nefarious hit-and-run practices of out-of-state firms. While these arguments may sound reasonable enough, the competitive economic reality is this: if Internet firms do not supply the services that home purchasers demand and if they do not perform well, they will be driven out of the market. Competition and consumers alone should make that determination. Regardless of the markets to which they pertain, we would be well advised to regard protectionist rules with skepticism. Although established real estate firms are likely to lose some of their lucrative grip on local real estate markets, consumers will benefit as a result.

4.2. Automobiles

Virtually every state has a law that prohibits automobile manufacturers from selling their cars directly to consumers without utilizing local automobile dealerships as intermediaries. These restrictions provide dealerships with a lock on most new car purchases, an advantage that has traditionally been fully exploited. Recently, however, dealers' power has been diluted by legal consumer use of Internet search engines, and perhaps by Ford's decision to begin selling its Mercury Mariner Hybrid SUV to consumers directly via the Internet. Although these consumers still must pick up their automobiles from dealerships, Ford won't send any of the expensive, high-demand SUVs to dealers until they've already been sold. The automaker believes the customers who purchase this model are Internet-savvy and that this practice will appeal to them.

The new Ford sales model does not appear to violate state laws, but does represent a significant departure from existing practices. Much of whether this experiment turns out to be a paradigm for the future depends upon how well Internet searches work for prospective SUV purchasers. Prior to the advent of the Internet, it was difficult for consumers to gain reliable information regarding automobile characteristics, prices, quality, and most importantly, how much dealers pay manufacturers for cars. The latter information, now generally available to consumers willing to spend a bit of time searching the Internet, is particularly crucial for those who wish to bargain effectively.

From a financial standpoint, state restrictions on automobile sales are hardly trivial. Several rigorous studies have demonstrated that consumers who use the Internet to browse and investigate new cars pay substantially lower prices for the cars they eventually purchase from dealers. For example, a study by Martin, Zettlemeyer, and Silva-Risso (2001) found that consumers who use the Internet as a research tool before purchasing cars from dealers pay prices that are, on average, 2% lower. If all purchasers in 2003 had conserved this 2%, they collectively would have saved $13.98 billion of the $699.2 billion they spent on new cars and light trucks (Plunkett Research, 2005).

Not surprisingly, dealerships argue that the demise of restrictive state laws prohibiting manufacturers from selling directly to consumers would make them vulnerable to "free riding" behavior. They fear customers would come into their showrooms, kick the tires, and perhaps take test drives, but then make their purchases via the Internet. On the other hand, free riding in the opposite direction already occurs whereby consumers acquire information about a car through the Internet and then travel to a dealer to make the purchase. Hence, free riding can occur in both directions. Adding to their argument, dealers also claim new car purchasers require reliable preparatory and orientation services and contend they are best situated to provide such assistance.

Automobile dealers are classic intermediaries who bring manufacturers and customers together. Some markets function better when intermediaries are present. For example, consider the business of book selling, where firms such as Amazon and Barnes and Noble reign alongside local bookstores. Relatively few consumers purchase books directly from publishers. Still, other markets (e.g., airline tickets and personal computers) differ and do not appear to require intermediaries. Rather than being dictated by law, intelligent public policy should allow economic efficiency and market demand to determine whether intermediaries are needed. The wine decision will make this possible as it relates to the automobile market if the lower courts now run with the ball the Supreme Court's ruling has thrown them.

4.3. Beer and spirits

What is good for the goose is likely to be good for the gander, as well. Markets for beer and spirits should be transformed in a fashion similar to the wine market. Large firms such as Wal-Mart and Costco will immediately benefit from dealing with breweries and distillers directly, bypassing wholesalers and distributors. In Ohio, for example, these firms should be able to avoid the significant 25—33% markup that state law grants wholesalers. As barriers to efficiency are eliminated across the country, millions of consumers will be the beneficiaries of lower prices. *Modern Brewery Age* (Datamonitor Says, 2005) reported that American beer sales totaled $73.8 billion in 2004. If retailers are able to bypass intermediaries and this lowers prices by 5% nationally, consumers will save $3.69 billion annually.

Due to the increased popularity of "crossover beverages" (i.e., mixed combinations of beer, wine, spirits, and soft drinks), the definition of "distilled spirits" has become difficult to pin down. Nonetheless, it appears that approximately $40 billion is spent annually in the United States on whiskey and other distilled spirits (Distilled Spirits, 2005). If the introduction of competition reduces prices by 10%, consumers could conservatively expect to save at least $4 billion annually. This gain will come at the cost of breweries, distilleries, and liquor stores, the least efficient of which may be driven out of business.

4.4. Caskets

To some, caskets may seem a lugubrious market inhabited by well-meaning, comforting funeral homes that assist families in coping with their grief. In fact, multiple states prohibit the sale of caskets by any business other than licensed funeral homes, most of which are local to the consumer. Casket markups are notoriously high (up to 600% over cost, according to Hopkins, 2005) because the demand of grief-stricken purchasers is highly price inelastic. Though this demand condition may be inevitable, it is not written in stone that consumers should be unable to shop for caskets over the Internet.

The state of Oklahoma provides an instructive example. Its laws forbid anyone other than licensed funeral directors from selling caskets in the Sooner State. However, to become licensed, an individual must spend at least 2 years in college-level instruction and complete a 1-year internship. Such requirements may make sense regarding funeral director responsibilities such as embalming and cremation, but have nothing to do with the sale of a casket, which "is essentially a box" (Forbes, 2005, p. 31). Costco sells plain metal caskets for as little as $925, which is only about one-third of the price of a typical casket sold by a funeral home (Hopkins, 2005).

The same competition that the Federal Trade Commission (2003) suggested would reduce wine prices by 8—21% would also reduce casket prices. In the case of caskets, though, the prospective total savings are much larger. In 2005, 1.7 million caskets will be sold in the United States (Hopkins, 2005). The average amount spent on each casket will approximate $2500, which is 38% of the average cost of a traditional, non-cremation funeral (Hopkins, 2005; Virginia Funeral Directors Association, 2005). Thus, $4.25 billion will be spent on caskets in 2005. If competition reduces the price of these caskets by one-third (a conservative estimate in light of markups as high as 600%), consumers will save $1.42 billion as a result. Once again, this amount is substantially larger than the consumer savings that will result from the direct sale of wine over the Internet.

Ironically, the exercise of market power in funeral home-sold caskets has resulted in vastly increased popularity for a substitute good: cremations. According to the National Funeral Directors Association (2005), 28.6% of all recently deceased were cremated in 2003, up from only 9% in 1980. Those who have their loved ones cremated avoid the purchase of a casket. Markets work, even the realm of funerals. The introduction of competition may slow the increase in cremations and may also hasten the departure of less efficient funeral homes that have come to rely upon localized monopoly power.

4.5. Auctions

In contrast to the four industries just analyzed, the auction industry already benefits from Internet competition and is subject to only minor protectionist restrictions. This, however, could change for the worse. Faced with strenuous new competition from the likes of eBay and Amazon, firms in several states have petitioned their regulators to force the companies to obtain licenses in their states and perhaps even maintain a physical presence. Nonetheless, a firm such as eBay is unlikely ever to maintain a physical presence in most states. If it did so, this would destroy one of the very cost efficiencies that has enabled it to assemble 150 million users around the globe and sell items worth more than $40 billion (Anniversary Lessons, 2005). Interestingly, it is not usually conventional auctioneers that most strongly advocate restrictions, but local retail firms that have been stung by Internet auction competition.

Proponents of the restrictions believe that the wine decision should not impact them because their states will apply the same licensing and location rules to both in-state and out-of-state firms. However, such restrictions are the exception rather than the rule in American markets. In a typical industry (e.g., clothing or books), firms are not required to acquire a license or develop a physical presence in a state in order to do business. Lands' End, for example, does not have to purchase a license in Colorado to sell to customers there. Hence, states that wish to impose such restrictions must be prepared to make the case that public safety and welfare require them to protect consumers, as when California and Hawaii place restrictions on agricultural products that transit their states. In the case of auctions, there are no obvious health concerns. Further, eBay's huge customer base makes it abundantly clear that protectionism is being granted to local firms and not to consumers, who typically prefer freedom of choice.

The auction industry circumstance is further differentiated in that the demise of eBay auctions might not result in many consumers paying higher prices for good and services. Evidence suggests that prices on eBay often tend to favor sellers over buyers. A substantial number of buyers pay more for goods purchased on eBay than they would for identical items from a bricks-and-mortar location (Koch, 2003; Koch & Cebula, 2002). Hence, were state restrictions to eliminate eBay transactions because the company refused to develop a physical presence in each state, it is sellers who would likely lose the most. Consumers, on the other hand, would suffer from a reduced set of choices, as they would no longer be able to access the auctions. Although it is not clear how much sellers would lose, it could be a hefty slice of the $40 billion spent annually on eBay goods. Similarly, it is not possible to estimate the financial loss consumers will experience because of reduced choices, but choice and variety do have economic value.

5. The bottom line

The analysis here reveals that the Progressive Policy Institute's 2002 estimate that consumers lose $15 billion annually due to protectionist intermediaries (Atkinson, 2003) is a low approximation. While I did not derive an estimated loss for consumers in the auction industry, the losses in the other four industries total $23.7 billion annually. This breaks down to more than $80 per citizen. Permitting competition to reign, then, would directly benefit consumers. It would also stimulate the restructuring of four of the five industries and ensure that the fifth (auctions) will not be restructured in a retrograde fashion to suit protectionist sentiments.

What is needed for this to occur? First, however the membership of the Supreme Court is refashioned in the years ahead, it must continue to see wisdom in striking down protectionist economic practices analogous to those that existed in the wine market. Since the Court's wine ruling was based on a 5—4 vote, it is by no means a certainty that the Court will choose to defend competition similarly in the future. Second, antitrust enforcement agencies such as the Bureau of Economics of the Federal Trade Commission and the Antitrust Division of the Department of Justice must maintain their interest in reducing protectionist rules and structures within the economy. Left to their own devices, it seems likely both agencies will do so; however, political pressures could easily intervene and push such crusades to the back burner, particularly if an influential industry such as real estate or automobiles is the ox being gored.

Over the long term, tax issues may turn out to be even more significant for public policy. In the wine case, the State of Michigan revealed that it had collected more than $168 million from liquor taxes in 2003 (Lane, 2004). Protecting this revenue source was Michigan's major concern. However, these collections, which relate to all forms of alcoholic beverages, would not diminish substantially if Michigan consumers were able to purchase wine over the Internet. The important Internet tax issue relates to the collection of sales taxes on the many other items that can be sold by out-of-state firms to Michiganders via the Internet. I estimate that Michigan currently fails to collect an estimated $.54 billion in annual sales tax revenue due to largely invisible sales completed via the Internet. This number is based upon the study by Bruce and Fox (2004), which projected that, because of the Internet, all states would lose about $16 billion in sales tax collections in 2005. If Michigan's share of those sales tax collections mirrors its share of total U.S. gross domestic product (3.35%), then it stands to lose $.54 billion in sales tax collections. This is where the real tax action is, not with wineries.

Permitting Internet-based competition in the five markets noted above is a decision logically separate from whether sales taxes should be collected on Internet sales. One can easily imagine a world in which Internet-based competition is encouraged, but sales taxes on Internet-based sales are collected rather than evaded. The technical means are now available for states and localities to collect sales taxes on Internet-based sales, and this issue should not become a protectionist club against new competition.

The bottom line is this: if markets are allowed to restructure because of new competition via the Internet, consumers could benefit immensely. As such, there is much more at issue regarding the wine decision than a pleasant glass of Gewürztraminer. Public policy should reflect this reality and permit the Internet to open these markets to the winds of competition.

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