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Consumer Protection or Veiled Protectionism? An Overview of Recent Challenges to State Restrictions on E-Commerce

David H. Smith*

I. Introduction

The rapid growth of the Internet has permanently changed the way consumers purchase goods and services. The rise of electronic commerce (“e-commerce”) is widely viewed as a positive aspect of the Internet revolution. As Internet retailing continues to grow, more choices will be available to consumers, which, in turn, will drive down prices of consumer goods. Despite these benefits, some industries are resisting attempts to open their markets to online competition in the name of consumer protection. State regulations, which pre-date the Internet, are being used to thwart sales of some products online.¹ In some instances, legislation has been enacted to limit online retailers in a given industry. For example, the automobile industry successfully lobbied all fifty state legislatures to ban the unfettered sale of automobiles online.² The justifications for these restrictive measures vary between industries, but they are frequently

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¹ See, e.g., OKLA. STAT. tit. 59, § 396.3a(1)(c) (2003) (prohibiting the online sale of funeral merchandise).

² *State Impediments to E-Commerce: Consumer Protection or Veiled Protectionism? Hearing Before the House Subcomm. on Commerce, Trade and Consumer Protection of the Comm. on Energy and Commerce, 107th Cong. 37–38 (2002) [hereinafter Hearing]* (statement of Ted Cruz, Director, Office of Policy Planning, Federal Trade Commission) (explaining that a seller must maintain a franchise presence in a state in order to sell new automobiles to residents of that state over the Internet), available at <http://energycommerce.house.gov/107/action/107-130.pdf>.

supported by the goal of consumer protection or consumer safety.³ Many consumer advocates challenge these justifications, however, claiming that the restrictions are, for the most part, designed to protect entrenched brick-and-mortar industries.⁴

Recently, Congress and the Federal Trade Commission (“FTC”) held hearings and a workshop on the issue of government impediments to e-commerce.⁵ Although Congress did not introduce legislation to combat these impediments, a number of legislators expressed concern that state regulations would continue to hinder the potential growth of e-commerce.⁶ These hearings provide an excellent overview of how various industries confront legislative roadblocks when attempting to market products online.

In particular, one industry has not waited for Congress to act. Wineries and consumers recently brought actions challenging state statutes that prohibit the online purchase of liquor from out-of-state sources.⁷ These lawsuits allege that the liquor statutes violate the Dormant Commerce Clause.⁸ In response, state liquor control boards argue that they have an express constitutional right to regulate liquor sold within their borders under the Twenty-first Amendment.⁹

This article will first discuss the policy concerns that give rise to state regulations in various online industries, which in many instances are strikingly similar. The article will then take a closer look at the first and most significant case law to date dealing with the state regulations of the online alcohol industry.

³ See *Hearing*, *supra* note 2, at 36.

⁴ See *id.* at 9 (statement of Rob Atkinson, Vice President, Progressive Policy Institute).

⁵ See *id.* at 6 (statement of Sen. Tauzin, Chairman, Subcomm. on Commerce, Trade and Consumer Protection).

⁶ See *id.* at 3, 6 (statements of Sen. Tauzin and Rep. Stearns).

⁷ See *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (upholding constitutionality of Indiana’s alcoholic beverage statute); *Bolick v. Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002) (holding Virginia’s Alcohol Beverage Control Act unconstitutional); *Dickerson v. Bailey*, 212 F. Supp. 2d 673 (S.D. Tex. 2002) (holding unconstitutional Texas’s statutory ban on direct importation of wine by Texas residents).

⁸ See *Bolick*, 199 F. Supp. 2d at 426; *Dickerson*, 212 F. Supp. 2d at 676–77.

⁹ See *Bolick*, 199 F. Supp. 2d at 443.

II. Background

Several industries presently face substantial barriers to e-commerce.¹⁰ Online industries face significant obstacles because the state regulations involved predate the Internet.¹¹ The House of Representatives' Subcommittee on Commerce, Trade and Consumer Protection discussed these and related issues on September 26, 2002, during a hearing that was co-chaired by Senator Billy Tauzin of Louisiana and Representative Cliff Stearns of Florida.¹²

According to Ted Cruz, Director of the Office of Policy Planning at the FTC, there are two significant types of possible barriers to e-commerce.¹³ The first type involves the use of anticompetitive tactics—when suppliers or dealers band together to limit online sales, for example.¹⁴ The second type of barrier involves state and local regulations that impose occupational licensing and physical office requirements.¹⁵ Although these regulations may be pro-consumer in orientation, they may effectively restrict Internet competitors from entering a given state's market.¹⁶ The following industries provide examples where such possibility exists.

A. Replacement Contact Lenses

A number of states have restrictions prohibiting online sales of replacement contact lenses.¹⁷ The firms that sell these products do not actually contour the contact lens for the eye.¹⁸ Rather, they replace pre-existing lenses for customers who have already had their lenses fitted by professionals.¹⁹ Georgia and New Mexico are two states that require a state-licensed professional to sell all types of

¹⁰ *Hearing, supra* note 2, at 2 (statement of Rep. Stearns).

¹¹ *See id.*

¹² *See id.*

¹³ *See id.* at 35 (statement of Ted Cruz, Director, Office of Policy Planning, Federal Trade Commission).

¹⁴ *Id.*

¹⁵ *Hearing, supra* note 2, at 35.

¹⁶ *Id.*

¹⁷ *Id.* at 36.

¹⁸ *Id.*

¹⁹ *Id.*

contact lenses.²⁰ Other states, like Connecticut, are considering similar regulations.²¹

State boards of optometry contend that the online sales of contact lenses pose a risk to consumer health, and that state licensing requirements and an in-state presence is necessary to ensure the overall quality of the product.²² In addition, proponents of the regulations fear that the availability of contact lenses over the Internet will reduce the number of times a consumer visits an optometrist, thereby increasing health and safety risks.²³

Recently, the FTC opposed regulations that proposed to restrict the online sale of replacement contact lenses.²⁴ According to the FTC, requiring stand-alone sellers to obtain optician and optical establishment licenses “would likely increase consumer costs while producing no offsetting health benefits.”²⁵ Rather than improve consumer optical health, increased licensing costs could lead to higher prices, which could lead consumers to replace their contact lenses less frequently.²⁶ The FTC also stated that the current regulatory regime both at federal and state levels is sufficient to protect the health of those who wear contact lenses.²⁷

B. Funeral Casket Sales

Another industry facing restrictions on Internet sales is the funeral casket business. Specifically, Oklahoma has prohibited the sale of funeral caskets over the Internet.²⁸ The Oklahoma Funeral Services Licensing Act (“FSLA”) requires that all individuals engaged in the “sale of any funeral merchandise” be licensed

²⁰ *Hearing, supra* note 2, at 26 (statement of Joe Zeidner, General Counsel of 1-800 Contacts).

²¹ *Id.* at 36 (statement of Ted Cruz, Director, Office of Policy Planning, Federal Trade Commission).

²² *Id.*

²³ *Id.*

²⁴ Federal Trade Commission, *FTC provides Connecticut with Comments on the Sale of Contact Lenses by Out-of-State Sources* (Mar. 28, 2002), available at <http://www.ftc.gov/opa/2002/03/contactlenses.htm>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ OKLA. STAT. tit. 59, § 396.3a(1)(c).

pursuant to the FSLA.²⁹ In addition, the FSLA requires sales of funeral merchandise to be made in a licensed funeral service establishment.³⁰ To become a licensed funeral establishment, one must have a specific street address, a room for preparing dead bodies, viewing rooms, and a full-time licensed funeral director on the premises.³¹ These regulations mandate that only state-licensed funeral directors working from a state-licensed funeral establishment can sell caskets. Consequently, online sales are prohibited.

One Internet casket retailer challenged the Oklahoma regulations in federal district court. The FTC filed an amicus brief in support of the retailer.³² In arguing for removal of the regulations, the FTC stated in its brief that the funeral industry in Oklahoma is merely insulating itself from competition that could lower prices and provide other consumer benefits.³³ Further, the FTC argued that the regulations deny Oklahoma consumers alternative avenues to purchase caskets from third-party sources, such as the Internet.³⁴ The FTC noted that third party sources offer less expensive caskets, which are typically the most expensive component of traditional funeral services offered by funeral homes.³⁵

In support of the Oklahoma funeral regulations, the Oklahoma State Board of Embalmers and Funeral Directors ("Board") contended that the regulations protect consumers from fraud.³⁶ Furthermore, the Board argued that without restriction on the sale of caskets to funeral directors, there would be no relief to consumers, "as there would be no regulatory oversight over them."³⁷ As the FTC pointed out, however, even without the Oklahoma regulations an unscrupulous funeral casket seller would still be subject to consumer

²⁹ *Id.*

³⁰ *Id.*

³¹ OKLA. ADMIN. CODE § 235:10-3-2 (2000).

³² See Memorandum of Law of Amicus Curiae Federal Trade Commission, *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002) [hereinafter FTC Amicus Brief], available at <http://www.ftc.gov/os/2002/09/okamicus.pdf> (Aug. 29, 2002).

³³ *Id.* at 17.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 14.

³⁷ *Id.*

protection statutes and a possible FTC enforcement action.³⁸

C. Auctions

One form of e-commerce that has benefited consumers is online auction sales, managed by companies such as eBay Inc. Online “auction marketplaces” like eBay provide consumers with the ability to purchase goods inexpensively, as eBay sellers set low prices to compete with other eBay sellers, as well as other online and offline retailers.³⁹ This type of price competition means that consumers need not rely solely on the selection and price offered by retailers in their local markets. As a result, local retailers must consider the price of products on eBay when charging consumers. The ability of eBay to connect sellers with buyers resulted in transactions totaling over \$10 billion in 2001.⁴⁰

Despite these benefits, a number of current and proposed state auction laws could thwart the progress of eBay and other online marketplaces.⁴¹ Tod Cohen, associate general counsel of eBay, gave a detailed analysis of these threats in his testimony before the Subcommittee on Commerce, Trade and Consumer Protection.⁴² Cohen identified the possibility that state regulators could apply state auction laws to eBay.⁴³ This would require eBay and similar companies to obtain auction licenses.⁴⁴ Some state requirements for auctioneer licenses are remarkably burdensome.⁴⁵ Not surprisingly, if a large number of states were to apply auction regulations, it would become cumbersome for online auction houses to continue to conduct business in distant states.⁴⁶

³⁸ FTC Amicus Brief, *supra* note 32, at 14.

³⁹ *Hearing*, *supra* note 2, at 15 (statement of Tod Cohen, Associate General Counsel, Global Policy, eBay, Inc.).

⁴⁰ *Id.* at 14.

⁴¹ *Id.* at 16.

⁴² *Id.* at 16–17.

⁴³ *Id.* at 16.

⁴⁴ *Id.*

⁴⁵ *Id.* For example, North Carolina requires auctioneer applicants to take an eighty-hour course on auctioneering, involving topics such as bid-calling, voice control, and cattle and livestock. N.C. ADMIN. CODE tit. 21, r. 4B.0301, 4B.0502 (June 2003).

⁴⁶ *Hearing*, *supra* note 2, at 16.

Cohen noted another problem with applying state auction law to companies like eBay.⁴⁷ Should eBay and other online marketplaces be treated as auction houses, they would be liable for any misrepresentation of the items being auctioned.⁴⁸ While appearing consumer-friendly on its face, exposing eBay to that type of liability would be unwarranted. Typically, this type of broad liability is designed for a traditional auction house—one that takes possession of the goods being sold and is able to review their condition and authenticate their origin.⁴⁹ Unlike a traditional auction house, however, eBay never takes possession of the goods sold on its site, nor does it make representations about goods that pass through its website.⁵⁰ Exposing eBay to this type of heightened liability would negatively affect its customers because it would likely have to markup the goods on its site, thereby diminishing eBay's principal benefit to consumers.⁵¹

Several states have introduced bills that could regulate eBay and eBay's sellers.⁵² The Missouri legislature introduced a bill that defined auctions so broadly that it could apply to eBay.⁵³ In addition, the California and New York legislatures proposed revisions to their current auction laws that could have applied to eBay.⁵⁴ These bills were defeated, but they provide examples of state legislatures' efforts to regulate, and potentially hinder e-commerce.

D. Wine Sales

The wine industry faces the most significant barriers to e-commerce. One winery trade representative called wineries the "poster children for state impediments to e-commerce."⁵⁵ Many consumers use the Internet to obtain unique wines that are not available at their local liquor store. Unfortunately, some states have

⁴⁷ *Hearing, supra* note 2, at 16.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 17.

⁵² *Hearing, supra* note 2, at 17.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 20 (statement of David P. Sloane, President of American Vintners Association).

regulations in place that prohibit such a practice.⁵⁶ These regulations highlight the tension between the need to protect consumer health and safety and perceived economic protectionism.

In the aftermath of Prohibition, most states adopted a mandatory three-tier system of distribution for alcoholic beverages.⁵⁷ This tiered system, which still exists in many states, requires producers of alcoholic products to sell only through wholesalers, who in turn sell to retailers, who then distribute to consumers.⁵⁸ The explosive growth of smaller independent wineries, which has increased the number of wineries to 2700 in the United States, has made it difficult for wholesalers to properly service small wineries.⁵⁹ Further, many wholesalers are reluctant to represent wineries that have small production capabilities.⁶⁰ In general, wholesalers would rather stick with larger national brands that generate more sales volume.⁶¹ As a result, small wineries have difficulty gaining access to distant markets.⁶²

To address this problem, wineries lobbied state legislatures to allow the direct interstate shipment of wine to consumers.⁶³ In response, liquor wholesaler lobbying groups pressured state legislatures to oppose such measures, and in some cases to make it a crime.⁶⁴ As a result, five states have made the direct shipment of liquor to individuals a felony.⁶⁵ Overall, more than one-half of the states still require liquor to pass through a mandatory three-tier system.⁶⁶

Those in favor of statutes prohibiting the direct shipment of

⁵⁶ See e.g., TEX. ALCO. BEV. CODE § 107.07(f) (2002).

⁵⁷ See *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000); *Beskind v. Easley*, 197 F. Supp. 2d 464, 465 (W.D.N.C. 2002).

⁵⁸ *Hearing, supra* note 2, at 20 (statement of David P. Sloane, President of American Vintners Association).

⁵⁹ *Id.* at 19–20.

⁶⁰ *Id.* at 20.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Hearing, supra* note 2, at 20.

⁶⁴ *Id.*

⁶⁵ *Id.* The five states are Florida, Georgia, Kentucky, Maryland, and Tennessee. *Id.*

⁶⁶ *Id.*

alcohol to consumers argue that the statutes are necessary to protect people from the evils of alcohol.⁶⁷ Some argue that minors will have easier access to liquor if orders can be placed over the Internet.⁶⁸ In addition, proponents of direct shipment bans contend that state excise tax revenues will be decreased as a result of allowing people to purchase wine from out-of-state sources via the Internet.⁶⁹

In contrast, those in favor of dismantling the three-tier system claim that the state restrictions are a pretext for economic protectionism.⁷⁰ This faction, typically made up of small wineries, argue that in-state wholesalers support the restrictive legislation for fear of declining revenues as a result of individuals purchasing alcohol from out-of-state sources.⁷¹ Moreover, states in which direct shipment is allowed have reported no decrease in excise tax revenues from lost wine sales.⁷²

III. Analysis of Recent Challenges to State Prohibitions on the Direct Shipment of Alcohol

Since wineries encountered difficulties when they attempted to convince state legislators to allow interstate delivery of alcohol to consumers, many wineries chose to seek relief in the courts.⁷³ Frustrated consumers who are unable to purchase the wine of their choice online joined the wineries in the lawsuits. The plaintiffs' primary claim in these cases is that state restrictions on direct shipment of alcohol violate the Dormant Commerce Clause⁷⁴ because

⁶⁷ *Id.* at 21.

⁶⁸ *Hearing, supra* note 2, at 21.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* See also Ben Lieberman, *Prohibition's Last Gasp*, MIAMI DAILY BUS. REV., Jan. 13, 2003, at A8 (discussing some of these arguments).

⁷² *Hearing, supra* note 2, at 21.

⁷³ See, e.g., *Bolick v. Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002).

⁷⁴ The "Dormant Commerce Clause" is the judicially-created doctrine prohibiting state regulation from unduly burdening interstate commerce, even where the federal government can but has not acted. See Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 877-79 (2002).

the statutes favor in-state producers of alcohol.⁷⁵ Below is an analysis of the first and most significant decisions that have dealt with this issue.

A. *Bridenbaugh v. Freeman-Wilson*

In *Bridenbaugh v. Freeman-Wilson*, the Seventh Circuit was the first Circuit Court of Appeals in the Internet age to decide whether a state statutory regime regulating direct alcohol shipments was unconstitutional.⁷⁶ The Indiana statute at issue prohibited all direct shipments by any “person in the business of selling alcoholic beverages in another state or country,” however, it allowed “local wineries, but not wineries ‘in the business of selling . . . in another state or country,’ to ship directly to Indiana consumers.”⁷⁷ The plaintiffs in *Bridenbaugh* were consumers who argued that the statute violated the Dormant Commerce Clause because it prohibited only out-of-state sellers of wine from delivering directly to Indiana consumers.⁷⁸ In an opinion written by Judge Easterbrook, however, the Seventh Circuit held that the statute was constitutional under the Twenty-first Amendment.⁷⁹

In finding for the defendants, the Seventh Circuit relied heavily on Section 2 of the Twenty-first Amendment, which provides that “[t]he 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.”⁸⁰ This provision gives state legislatures the right to establish the common three-tiered system that many state use to regulate the consumption of alcohol. As the court noted, “[I]ike the Wilson Act and the Webb-Kenyon Act before Prohibition, [Section] 2 enables a state to do to importation of liquor—including direct deliveries to consumers in original packages—what it chooses to do to internal sales of liquor, but nothing more.”⁸¹

⁷⁵ See e.g., *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000); *Bolick*, 199 F. Supp. 2d at 422.

⁷⁶ *Bridenbaugh*, 227 F.3d 848.

⁷⁷ *Id.* at 849, 851.

⁷⁸ *Id.* at 849.

⁷⁹ *Id.* at 854.

⁸⁰ U.S. CONST. amend. XXI, § 2.

⁸¹ *Bridenbaugh*, 227 F.3d at 853.

This interpretation of Section 2 effectively elevated a state government power over the Dormant Commerce Clause. In fact, the court alluded to the fact that Section 2 actually appears in the Constitution, whereas the Dormant Commerce Clause does not.⁸² In addition, the court found that “[n]o decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the [D]ormant [C]ommerce [C]ause.”⁸³

The Seventh Circuit further pointed out that if consumers were able to order liquor from out-of-state sources, Indiana state excise taxes would not get paid.⁸⁴ One of the original purposes of the enactment of Section 2 of the Twenty-first Amendment was to remedy problems states had in collecting taxes from the direct shipment of alcohol.⁸⁵ The court noted that by “enabling Indiana to collect its excise tax equally from in-state and out-of-state sellers,” the Indiana statute fulfilled the purpose of Section 2.⁸⁶ As a result, the Seventh Circuit upheld the statute, finding that it comported with the objectives of the Twenty-first Amendment and did not violate the Dormant Commerce Clause.⁸⁷

B. *Bolick v. Roberts*

In *Bolick v. Roberts*, the United States District Court for the Eastern District of Virginia considered a challenge by plaintiffs—consumers and out-of-state wineries—that Virginia’s alcohol regulatory scheme violated the Dormant Commerce Clause.⁸⁸ Virginia’s alcohol regulation law prohibited the out-of-state shipment of any beer, wine, or distilled spirit directly to a Virginia consumer without it passing through a licensed Virginia wholesaler or retailer.⁸⁹ Producers from within Virginia, however, were allowed to ship beer and wine directly to consumers within the state.⁹⁰

⁸² *Id.* at 849.

⁸³ *Id.* at 853.

⁸⁴ *Id.* at 854.

⁸⁵ *Id.*

⁸⁶ *Bridenbaugh*, 227 F.3d at 854.

⁸⁷ *Id.*

⁸⁸ *Bolick*, 199 F. Supp. 2d at 417, 422.

⁸⁹ *Id.* at 417.

⁹⁰ *Id.*

In contrast to the Seventh Circuit's approach in *Bridenbaugh*, the Eastern District of Virginia emphasized the Dormant Commerce Clause in its analysis of the state statute.⁹¹ As noted by the court, the Dormant Commerce Clause prevents state legislatures from enacting and implementing isolationist trade policies as they hinder a national free market.⁹² In analyzing statutes under the Dormant Commerce Clause, courts must apply strict scrutiny.⁹³ Further, if the statute in question is facially discriminatory against interstate commerce, in its practical effect or in its purpose, a virtual *per se* rule of invalidity applies.⁹⁴ The court found that part of Virginia's statutory scheme constituted a *per se* invalid restriction on commerce, but other parts of the scheme were neutral.⁹⁵

Next, the court analyzed whether Virginia's statutory scheme was exempt from violating the Dormant Commerce Clause under the Twenty-first Amendment.⁹⁶ While the court acknowledged that states "enjoy constitutional protection for no other article of commerce like the authority it has under the Twenty-first Amendment," this protection has limits.⁹⁷ According to the court, when a state law "regulates the sale of alcoholic beverages . . . its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment."⁹⁸

The court then examined the Seventh Circuit's analysis in *Bridenbaugh* of the tension between the Twenty-first Amendment and the Dormant Commerce Clause.⁹⁹ According to the Eastern District of Virginia, the Seventh Circuit departed from existing case law regarding the Twenty-first Amendment and the Dormant Commerce Clause.¹⁰⁰ The court further recognized that it was bound

⁹¹ *Bolick*, 199 F. Supp. 2d at 423.

⁹² *Id.*

⁹³ *Id.* at 424 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624-27 (1918); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984)).

⁹⁴ *Id.*

⁹⁵ *Id.* at 425.

⁹⁶ *Id.* at 428.

⁹⁷ *Bolick*, 199 F. Supp. 2d at 428.

⁹⁸ *Id.* (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring)).

⁹⁹ *Id.* at 429.

¹⁰⁰ *Id.* at 433.

by prior Fourth Circuit and United States Supreme Court decisions that have included the Dormant Commerce Clause in its analysis of state law restrictions on alcohol shipments.¹⁰¹ In addition, the court had the following to say about the *Bridenbaugh* decision:

To accept the *Bridenbaugh* court's decision as dispositive would require explicit rejection of the applicability of the [D]ormant Commerce Clause. Such a result would constitutionally marginalize and dismiss the [D]ormant Commerce Clause on the basis that because it does not appear in the Constitution, it is only an inference that must be discarded. That conclusion is unacceptable in light of the Supreme Court's decisions resolving the conflict between the Twenty-first Amendment and the rest of the Constitution.¹⁰²

Given the court's finding that Virginia's statutory scheme was *per se* valid, Virginia had the burden of demonstrating that there was no other means of fulfilling the state's objective of promoting temperance and protecting minors from alcohol.¹⁰³ Virginia's Alcoholic Beverage Control Board argued that out-of-state sources would not be subject to monitoring by agents.¹⁰⁴ However, the court found that this was a hollow argument since in-state entities that directly ship to consumers were subject to significantly less supervision than the three-tier system that applied to out-of-state sources.¹⁰⁵ Thus, the court found that the state had failed to create a genuine issue of material fact regarding any justification for the discriminatory policy.¹⁰⁶ Stating that Virginia "cannot claim with a 'straight face' that its ban on direct shipment is for any reason other than economic protectionism," the court held the statute unconstitutional under the Dormant Commerce Clause.¹⁰⁷

¹⁰¹ *Id.*

¹⁰² *Bolick*, 199 F. Supp. 2d at 434 (citation omitted).

¹⁰³ *Id.* at 446.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* In April 2003, Virginia's legislature enacted several bills, which the governor signed into law, that alter the statutory regime analyzed in *Bolick v. Roberts*. See 2003 Va. Acts. ch. 1029-30. On appeal, the Fourth Circuit Court of Appeals vacated and remanded the case to the Eastern District of Virginia in light

C. *Dickerson v. Bailey*

In *Dickerson v. Bailey*, the plaintiffs alleged that Section 107.12 and 107.07(f) of the Texas Alcoholic Beverage Code violated the Dormant Commerce Clause.¹⁰⁸ Section 107.07(f) prohibited the direct shipment of alcohol from out-of-state sources to Texas residents.¹⁰⁹ Section 107.12, on the other hand, expressly permitted the shipment of wine from Texas wineries to Texas residents.¹¹⁰

According to the United States District Court for the Southern District of Texas, there are two basic approaches to addressing the tension between the Dormant Commerce Clause and the Twenty-first Amendment.¹¹¹ The first approach, endorsed by the Seventh Circuit in *Bridenbaugh*, interprets Section 2 of the Twenty-first Amendment as providing nearly absolute plenary power to the states in regulating alcohol.¹¹² The other approach, demonstrated by the Eastern District of Virginia in *Bolick*, attempts to harmonize the relationship between Section 2 and the Dormant Commerce Clause by recognizing the state's right to protect the health of its citizens along with the federal interest in nationwide competition.¹¹³

The *Dickerson* court found that section 107.07(f) was facially unconstitutional, as it placed unequal burdens on in-state and out-of-state wine-sellers.¹¹⁴ The court held that requiring out-of-state wine sellers to go through Texas wholesalers was impermissible since in-state wineries were not subject to the same requirements.¹¹⁵

of these new laws. *Bolick v. Danielson*, 330 F.3d 274, 277 (4th Cir. 2003) (per curiam), *vacating as moot*, *Bolick v. Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002). Because the new enactments modify portions of some statutes that are the subject of this case, they render portions of this case moot for purposes of appeal. For the purposes of discussing recent decisions regarding the regulation of online liquor sales, however, the Eastern District of Virginia's decision in *Bolick v. Roberts* is still relevant as one of the first attempts by an appellate court to analyze such state regulations.

¹⁰⁸ *Dickerson v. Bailey*, 212 F. Supp. 2d 673, 676–77 (S.D. Tex. 2002), *aff'd*, 336 F.3d 388 (5th Cir. 2003).

¹⁰⁹ TEX. ALCO. BEV. CODE § 107.07(f) (2002).

¹¹⁰ *Id.* § 107.12.

¹¹¹ *Dickerson*, 212 F. Supp. 2d at 678–79.

¹¹² *Id.* at 678–79.

¹¹³ *Id.* at 679.

¹¹⁴ *Id.* at 694.

¹¹⁵ *Id.* at 695.

Furthermore, the language accompanying section 107.12 explicitly reflected a protective concern for the growing wine industry in Texas and the legislature's desire to help Texas wineries compete with established wine growers.¹¹⁶

D. Other Recent Decisions

Other jurisdictions in the past year have weighed in on the constitutionality of liquor laws that restrict out-of-state direct shipment to consumers. In *Beskind v. Easley*, the United States District Court for the Western District of North Carolina found that certain provisions of the North Carolina alcoholic beverage control laws discriminated against out-of-state wine manufacturers.¹¹⁷ The North Carolina statutory scheme prohibited out-of-state wineries to direct ship to state residents, but North Carolina wineries that were licensed to do business in the state were exempt from this rule.¹¹⁸ The court held the statute unconstitutional because its preference for in-state wineries represented economic protectionism and was therefore barred by the Dormant Commerce Clause.¹¹⁹ On appeal, the Fourth Circuit Court of Appeals affirmed the finding that the in-state preferences were unconstitutionally discriminatory¹²⁰ and that it was not saved by the Twenty-first Amendment.¹²¹ The Fourth Circuit, however, held that the appropriate remedy was to strike down the statute creating the preference for local wineries, rather than the provisions regulating shipments of wine by out-of-state entities.¹²²

In *Swedenburg v. Kelly*, the United States District Court for the Southern District of New York invalidated a New York ban on the direct shipment of out-of-state wine.¹²³ New York's statute was similar to other state statutes, as it prohibited the direct shipment of alcoholic beverages to consumers, but had exceptions for in-state

¹¹⁶ *Id.*

¹¹⁷ *Beskind v. Easley*, 197 F. Supp. 2d 464, 476 (W.D.N.C. 2002).

¹¹⁸ *Id.* at 467.

¹¹⁹ *Id.* at 473.

¹²⁰ *Beskind v. Easley*, 325 F.3d 506, 515 (4th Cir. 2003).

¹²¹ *Id.* at 517.

¹²² *Id.* at 519-20.

¹²³ *Swedenburg v. Kelly*, 232 F. Supp. 2d 135, 153 (S.D.N.Y. 2002).

wineries.¹²⁴ The court noted that the exceptions were enacted to provide an economic benefit for local farmers, and as a result found the statute discriminatory.¹²⁵

Finally, in *Bainbridge v. Turner*, the Eleventh Circuit Court of Appeals recently vacated a district court ruling that upheld Florida's direct shipping ban and remanded the case for determination as to whether the "regulatory scheme [was] so closely related to the core concern of raising revenue as to escape Commerce Clause scrutiny."¹²⁶

IV. Conclusion

Representative Cliff Stearns, chairman of the Subcommittee hearings on state regulation of e-commerce, observed: "[T]here seems to be a trend where new state laws are enacted and old ones are reinterpreted with the distinct objective of protecting parochial, local commercial interests from out of State on-line competitors."¹²⁷ That assessment clearly appears to be the case. E-commerce has threatened a number of entrenched brick-and-mortar industries, and these industries have responded by lobbying state legislatures to pass new legislation and by defending statutes favorable to their particular industry. While advocates supporting current restrictions on e-commerce purport to be pro-consumer, many of the statutes they defend, particularly those regulating interstate shipment of alcohol, have been dismissed as protectionist by many courts.

Historically, as new technologies emerge, those entities representing the established practice often get displaced. A current example of this phenomenon is occurring with intermediaries, such as liquor wholesalers, who find their industries threatened by the growth of e-commerce. This growth is reflected in the fact that online commercial transactions are expanding at a rate of double-digit increases every year.¹²⁸ With new people familiarizing themselves with the Internet every day, it is unlikely that this trend is going to be reversed.

These attempted barriers to e-commerce have an anticompetitive effect on the marketplace. Therefore, it is necessary

¹²⁴ *Swedenburg*, 232 F. Supp. 2d at 144.

¹²⁵ *Id.* at 148.

¹²⁶ *Bainbridge v. Turner*, 311 F.3d 1104, 1115 (11th Cir. 2002).

¹²⁷ *Hearing*, *supra* note 2, at 3 (statement of Rep. Stearns).

¹²⁸ *Id.*

to analyze the purpose and content of existing and proposed state statutes. The statutes that claim to provide consumer protection through the restriction of e-commerce need to be reviewed in light of the potential of the Internet to revolutionize business and provide consumers with a variety of choices. When the purpose of these statutes is actually the protection of local interests, at the expense of out-of-state retailers, the resulting harmful lack of competition clearly outweighs the perceived benefits of such legislation.
