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Don't Put a Corn in *Granholt v. Heald*: New York's Ban on Interstate Direct Shipments of Wine is Unconstitutional

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**DON'T PUT A CORK IN
GRANHOLM V. HEALD:
NEW YORK'S BAN ON INTERSTATE
DIRECT SHIPMENTS OF WINE IS
UNCONSTITUTIONAL**

Andre Nance^{*}

INTRODUCTION

A new chapter is unfolding in a liquor saga seventy-five years in the making that now concerns New York's use of a state ban on interstate direct shipments of wine to grant in-state retailers exclusive access to New York's lucrative direct shipment market at the expense of out-of-state competitors.¹ Such state-level economic

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¹ This year marks the seventy-fifth anniversary of the Repeal of Prohibition by the Twenty-first Amendment to the United States Constitution on December 5, 1933. Not limited to New York, this new chapter has national dimensions and is being written both in the courthouse and the legislature, with federal district courts in New York, Michigan, and Texas differing on how to address similarly discriminatory direct shipping bans, and legislatures in Maine, Tennessee, Virginia, Rhode Island, and Alabama considering revisions to their direct shipping laws. *See* *Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401 (S.D.N.Y. 2007); *Siesta Vill. Mkt. v. Granholm*, No. 06-13041, 2007 WL 2984127 (E.D. Mich. Oct. 12, 2007); *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848 (N.D. Tex. 2008); *see generally* FEDERAL TRADE COMMISSION, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE, 6 (2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf> [hereinafter FTC REPORT]; Reuters, *Texas Judge Calls Bans on Wine Retailer Shipping*

protectionism suffered a major defeat in 2005, when out-of-state wineries challenged the interstate ban in *Granholm v. Heald* and the Supreme Court concluded that allowing in-state wineries to bypass wholesalers and retailers and to ship directly to in-state consumers but denying such rights to out-of-state wineries and shippers violated the dormant aspect of the Commerce Clause of the United States Constitution.² With this decision, the Supreme Court gave its imprimatur of approval to a balancing standard that

Unconstitutional, RUETERS, Jan. 15, 2008, available at <http://www.reuters.com/article/pressRelease/idUS21135+16-Jan-2008+BW20080116?sp=true>; Posting of Sarah Werner to SHIPCOMPLIANT BLOG, *Rhode Island and Alabama: Let My Pinot Go!*, <http://shipcompliantblog.com/blog/> (Mar. 27, 2008, 11:23 EST).

² See 544 U.S. 460, 472 (2005) (“States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate ‘reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.’”) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)). In *Granholm*, Justices Scalia, Souter, Ginsburg, and Breyer joined in Justice Kennedy’s majority opinion, while Justice Stevens, joined by Justice O’Connor, and Justice Thomas, joined by Justices Rehnquist, Stevens, and O’Connor, filed dissenting opinions. *Granholm*, 544 U.S. at 464.

U.S. CONST. art. I, § 8, cl. 3, otherwise known as the Commerce Clause, grants Congress the exclusive power “to regulate commerce . . . among the several states . . .” and is understood not only as an affirmative “grant of power to Congress to regulate interstate commerce” but also as an “implied limitation on States from regulating matters that interfere with interstate commerce—the so-called ‘Dormant’ Commerce Clause.” Michael A. Lawrence, *Toward A More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL’Y 395, 407 (1998).

The effect of *Granholm* on direct-to-consumer shipping has been profound. See Garrett Peck, *The Future of the Three-Tier System*, 84.4 BEVERAGE MEDIA METRO NEW YORK 22, 26–27 (2008) (quoting Wine America president Bill Nelson: “*Granholm* opened markets for direct-to-consumer shipping. ‘We’ve moved from 27 to 35 states because of the Supreme Court decision.’”) (quoting Free the Grapes! executive director Jeremy Benson: “Wineries have the option of shipping into states that represent 81% of U.S. wine consumption, up from 50% in January 2005.”); see also Free the Grapes! Press Releases, available at <http://www.freethegrapes.org/news.html> (last visited Apr. 4, 2008).

weighs and attempts to harmonize the federal Commerce Clause interest in free trade among the states against each state's Twenty-first Amendment interest in regulating alcohol.³ Although an exception to the interstate direct shipping ban now exists for out-of-state wineries, New York continues to engage in economic protectionism at the expense of out-of-state retailers.⁴

With the national wine retail market standing at thirty billion dollars in 2007 and New Yorkers consuming far more wine than any other market except California and Florida, the stakes are high, and the State of New York has understandably, if shortsightedly, tried to favor resident businesses by banning direct shipments to consumers by their out-of-state competitors.⁵ In September 2007,

³ Prior to the Supreme Court's decision in *Granholm*, other courts applied this balancing standard. *See, e.g., Beskind v. Easley*, 325 F.3d 506, 519 (4th Cir. 2003) ("With the elimination of the local preference statute, no interest of the Twenty-first Amendment is implicated, yet the discrimination violating the Commerce Clause is eliminated."); *see also* Elizabeth D. Lauzon, *Interplay Between Twenty-First Amendment and Commerce Clause Concerning State Regulation of Intoxicating Liquors*, 116 A.L.R. 5th 149 (2004).

⁴ This economic protectionism involves an almost textbook case of facial discrimination against interstate commerce. In *Granholm*, the Court noted that it had struck down New York laws that "directly regulate[] or discriminate[] against interstate commerce, or when [their] effect is to favor in-state economic interests over out-of-state interests." 544 U.S. at 487 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)); *see also* *Maine v. Taylor*, 477 U.S. 131, 148 (1986) ("Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually per se rule of invalidity.'") (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)); *see also* *City of Philadelphia*, 437 U.S. at 624 ("The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders."); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949); *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1949); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 525 (1935); *Buck v. Kuykendall*, 267 U.S. 307, 315-16 (1925); *Welton v. Missouri*, 91 U.S. 275 (1875).

⁵ In 2003, New Yorkers consumed 20,336,000 cases of wine behind California's 46,067,000 and Florida's 20,588,000 but well ahead of Texas's fourth-place 12,791,000. *See* ANDERSON ECONOMIC GROUP, CONSUMPTION OF TOTAL WINE RANKED BY STATE, 1993-2003 (TOP 12), *available at*

the United States District Court for the Southern District of New York determined in *Arnold's Wines, Inc. v. Boyle* that New York's interest in using its ban on interstate shipping to favor in-state retailers so outweighed the federal interest in free trade that the court declined "to undertake a dormant Commerce Clause analysis" and simply assessed New York's use of the ban as "within the authority granted to New York by the Twenty-first Amendment."⁶ Using suspect logic, the court held that New York's use of the direct shipping ban to favor in-state retailers was "integral" to New York's three-tier system of regulating the importation and sale of wine.⁷ The reality, however, is more complex, and requires a more nuanced and measured approach than that found in *Arnold's Wines*.

Under a basic three-tier liquoring licensing and distribution system, a state issues licenses to producers, wholesalers, and retailers, who must operate separately.⁸ In the case of wine, wineries licensed as producers make it, wholesalers distribute it,

http://www.andersoneconomicgroup.com/modules.php?name=Content&pa=display_aeg&doc_ID=1825 (last visited Apr. 6, 2008) (citing ADAMS BEVERAGE GROUP, 2004 WINE HANDBOOK (2004)); *see also* The Wine Institute, 2007 California Wine Sales: Up 2 Percent in U.S. As Wine Continues to Gain Popularity Among Americans, available at <http://www.wineinstitute.org/resources/statistics/article122> (last visited Apr. 4, 2008) (listing the national retail market at 30 billion dollars); MKF RESEARCH, THE IMPACT OF WINE, GRAPES AND GRAPE PRODUCTS ON THE AMERICAN ECONOMY 2007: FAMILY BUSINESSES BUILDING VALUE 3 (2007), available at http://www.house.gov/radanovich/wine/documents/Economic_Impact_on_National_Economy_2007.pdf.

⁶ 515 F. Supp. 2d 401, 413–14 (S.D.N.Y. 2007); *contra* *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 867 n.19 (N.D. Tex. 2008).

⁷ *See Arnold's Wines, Inc.*, 515 F. Supp. 2d at 413–14.

⁸ *See Granholm*, 544 U.S. at 466 (citing FTC REPORT, *supra* note 1, at 5–7). Federal and state laws limit vertical overlap between tiers of licensees. *Id.* (citing FTC REPORT, *supra* note 1, at 5; 27 U.S.C. § 205 (2007); *Bainbridge v. Turner*, 311 F.3d 1104, 1106 (11th Cir. 2002)); *see also Arnold's Wines, Inc.*, 515 F. Supp. 2d at 403 ("The three-tiers refer to: (1) the producer; (2) the distributor or wholesaler; and (3) the retailer. Under the three-tier system, a producer sells its wine to a licensed in-state wholesaler, who pays excise taxes and delivers the wine to a licensed in-state retailer. The retailer, in turn, sells the wine to consumers and, where applicable, collects sales taxes.").

and retailers sell it to the public.⁹ Focusing on the Supreme Court's general approval of this system, the *Arnold's Wines* court interpreted *Granholm* as addressing only an exception to the three-tier system—shipping laws that allow wineries to bypass wholesalers and retailers by shipping directly to the public—and not other aspects of the three-tier system that discriminate against out-of-state businesses.¹⁰

Subsequent decisions in two nearly identical Michigan and Texas cases have differed from the outcome in New York, and the Texas court even criticized the *Arnold's Wines* decision as “a misreading of *Granholm* . . . [that] elevates a state's rights under the Twenty-first Amendment to a level that improperly supersedes the dormant Commerce Clause.”¹¹ These courts rightly disagreed with the *Arnold's Wines* assertion that the Twenty-first Amendment completely shields New York's discriminatory shipping laws from Commerce Clause analysis.¹² Though a final district court decision in Michigan is pending, bans on direct shipments from out-of-state retailers are now unconstitutional in Texas, and the New York decision, in declining to balance fully the federal interest in free trade against New York's interest in

⁹ See N.Y. ALCO. BEV. CONT. LAW §§ 3(20), (26), (35), 103–05 (Gould 2007).

¹⁰ See *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 411. In doing so, the *Arnold's Wines* decision tried to isolate wineries from retailers, two of the three tiers of licensees New York, Michigan, and Texas use to regulate alcohol, a regulatory scheme “under which alcohol producers must go through wholesalers and distributors, who must in turn go through retailers, who can then sell to consumers.” Vijay Shanker, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 353 (1999).

¹¹ *Perry*, 530 F. Supp. 2d at 867 n.19; see also *Siesta Vill. Mkt. v. Granholm*, No. 06-13041, 2007 WL 2984127, at *4–5 (E.D. Mich. Oct. 12, 2007).

¹² The Twenty-first Amendment granted states the power to regulate alcohol. See U.S. CONST. amend. XXI. In particular, Section 2 of the amendment states: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use there in of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST. amend. XXI, § 2.

regulating alcohol, is deeply flawed.¹³

If the Second, Fifth, and Sixth Circuits uphold these district court opinions, the Supreme Court itself will soon have to resolve the conflicting interpretations of *Granholm*. In the *Granholm* decision itself, though, the Court gave an indication of how it will approach the matter by declaring that discrimination is “neither authorized nor permitted by the Twenty-first Amendment,” “contrary to the Commerce Clause[,] and . . . not saved by the Twenty-first Amendment.”¹⁴ The Court further explained that the “Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers” and that “[s]tates may not enact laws . . . simply to give a competitive advantage to in-state businesses.”¹⁵ Most of all, the Court determined that “[Section 2 of the Twenty-first Amendment] does not allow States to regulate the direct shipment of wine on terms that discriminate. . . .”¹⁶ New York has no compelling justification for discriminating against out-of-state retailers, and striking down this differential treatment does not abrogate New York’s core Twenty-first Amendment rights. Accordingly, the Supreme Court will likely strike down New York’s use of the ban on interstate direct shipping to favor in-state retailers.¹⁷

Part One of this Note argues that, contrary to the analysis of the recent New York *Arnold’s Wines* decision, the federal interest in free trade with respect to interstate wine shipping is quite strong.¹⁸ As a threshold matter, New York discriminates between “similarly situated” entities—in-state and out-of-state retailers—

¹³ See *Arnold’s Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 412 (S.D.N.Y. 2007) (“[T]his Court is not aware of any pre-*Granholm* authority calling into question the legitimacy of state laws that limit licenses to retailers and wholesalers located within the state.”).

¹⁴ *Granholm v. Heald*, 544 U.S. 460, 466, 489 (2005).

¹⁵ *Id.* at 486, 472.

¹⁶ *Id.* at 476.

¹⁷ See *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 867 n.19 (N.D. Tex. 2008).

¹⁸ *Perry*, 530 F. Supp. 2. at 862–64, 867.

that would compete in New York's wine consumer market, and thus the State invites a high level of judicial scrutiny.¹⁹ The ban on direct to customer shipments into the state creates a legal barrier limiting access to New York's market.²⁰ The burden on interstate commerce is "clearly excessive" in relation to the two local benefits New York put forward—efficient tax collection and preventing minors' access to alcohol—because these benefits can be achieved without discriminating against out-of-state businesses by requiring all retailers to file taxes in a timely fashion and all shippers to require an adult signature upon delivery.²¹

Part Two of this Note argues that the national interest in free

¹⁹ See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 307 n.15 (1997) ("[I]f a State discriminates against out-of-state interests by drawing geographical distinctions between entities that are otherwise similarly situated, such facial discrimination will be subject to a high level of judicial scrutiny even if it is directed toward a legitimate health and safety goal."); see, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626–28 (1978); *Dean Milk Co. v. Madison*, 340 U.S. 349, 353–54 (1951).

²⁰ New York shipping laws expressly prohibit shipments to consumers that originate outside the state. See N.Y. ALCO. BEV. CONT. LAW §§ 102(1)(a), 102(1)(b) (Gould 2007) (prohibiting shipments "into the state"). In contrast, shipments originating within the state are authorized. See N.Y. ALCO. BEV. CONT. LAW §§ 94, 105.8, 105.9, 116 (Gould 2007); N.Y. COMP. CODES R. & REGS. tit. 9, § 67 (2007). As a "package store licensee," a New York wine retailer may sell and deliver liquor and wine "to homes and offices not to be resold by the purchaser[;] by messenger afoot[;] by trucking and delivery companies who hold a trucking permit issued by the Authority[; and] in a vehicle owned and operated, or hired and operated by the package store licensee." New York State Liquor Authority Compliance FAQs, available at <http://abc.state.ny.us/JSP/content/faq.jsp> (last visited Apr. 2, 2008) [hereinafter NYSLA Compliance FAQs].

²¹ See *Granholm v. Heald*, 544 U.S. 460, 491 (2005); see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is *clearly excessive* in relation to the *putative local benefits*. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.") (emphasis added).

trade among the states outweighs New York's interest in using its ban on interstate direct shipping to grant in-state retailers exclusive access to New York's direct shipping consumer market. Though *Granholm*, on the facts, pertains to direct shipping by wineries and the differential treatment of in-state and out-of-state producers,²² the plain language of *Granholm* stresses the need to protect out-of-state "economic interests" broadly from economic protectionism, not producers exclusively.²³ Banning shipments by out-of-state retailers is not critical to maintaining the centralized control of New York's "unquestionably legitimate" three-tier system.²⁴ Though wine shipped directly to New York consumers by out-of-state retailers would bypass in-state wholesalers,²⁵ New York can maintain centralized control over out-of-state retailers and enforce compliance with its regulations "by requiring a permit as a condition of direct shipping."²⁶ Without an exception for out-of-state retailers, however, New York's use of the ban on direct shipping clearly burdens interstate commerce in a way unnecessary to maintaining New York's central control in regulating alcohol.²⁷

Part Three of this Note further argues that extending the current permit exception to New York's ban on interstate direct shipments does not abrogate New York's right to regulate alcohol. Though the Twenty-first Amendment is understood to grant New York "virtually complete control" over in-state liquor distribution,²⁸

²² See *Granholm*, 544 U.S. at 472.

²³ *Id.* ("This Court has long held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'") (quoting *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 99 (1994)).

²⁴ See *id.* at 488–89 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)); see also *North Dakota*, 495 U.S. at 447 (Scalia J., concurring).

²⁵ See N.Y. ALCO. BEV. CONT. LAW §§ 1–164 (2007).

²⁶ *Granholm*, 544 U.S. at 491; see also *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 867 (N.D. Tex. 2008).

²⁷ See *Granholm v. Heald*, 544 U.S. 460, 488–89 (2005) (quoting *North Dakota*, 493 U.S. at 432).

²⁸ *Cal. Retail Liquor Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 (1980); see also *North Dakota*, 495 U.S. at 432 (holding that the three-tier

“there is a marked difference between ‘virtually complete control’ and absolute control.”²⁹ Further, extending the permit exception to the ban has no effect on New York’s ability to regulate alcohol using the three-tier system.³⁰ Unless New York establishes that these core interests are impaired in a concrete way, it cannot be said as a matter of law that New York’s Twenty-first Amendment interest in using the ban to favor in-state businesses outweighs the federal Commerce Clause interest in promoting free trade.³¹

For these reasons, this Note argues that the decision in *Arnold’s Wines* should be overturned.³² As it stands, New York’s use of the ban on interstate direct shipping denies out-of-state retailers access to New York’s lucrative wine consumer market, facially discriminating against out-of-state economic interests while providing in-state retailers with exclusive access.³³ This Note argues that New York can and must give out-of-state retailers

system is “unquestionably legitimate”).

²⁹ *Siesta Vill. Mkt. v. Granholm*, No. 06-13041, 2007 WL 2984127, at *4 (E.D. Mich. Oct. 12, 2007) (quoting *Cal. Retail Liquor Ass’n*, 445 U.S. at 100).

³⁰ In *Arnold’s Wines, Inc. v. Boyle*, New York did not make a concrete showing of any harm to the three-tier system, instead asserting only that “requiring alcohol to pass through the three-tier system allows the State to collect taxes more efficiently and to decrease the sale of alcohol to minors” and that “[d]irect shipment laws . . . are integral to maintaining centralized control over alcohol sales because they ensure that every drop of alcohol flows through the three-tier system.” 515 F. Supp. 2d 401, 407 (S.D.N.Y. 2007). Without concrete evidence to support these assertions, New York failed the standard set by the Supreme Court: “Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods.” *Granholm*, 544 U.S. at 492. “The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State’s nondiscriminatory alternatives will prove unworkable.” *Id.* at 493.

³¹ *Id.*

³² See *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 867 n.19 (N.D. Tex. 2008); see also *Siesta Vill. Mkt.*, 2007 WL 2984127, at *4–5.

³³ See *Maine v. Taylor*, 477 U.S. 131, 148 (1986) (“Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to ‘simple economic protectionism’ consequently have been subject to a ‘virtually per se rule of invalidity.’”) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

“access [to its market] . . . on equal terms.”³⁴

I. NEW YORK’S BAN ON DIRECT SHIPPING VIOLATES THE FEDERAL COMMERCE CLAUSE INTEREST IN FREE TRADE

When states attempt to regulate interstate commerce, they encroach on Congress’s exclusive power under the Commerce Clause of the United States Constitution “[t]o regulate Commerce. . . among the several States.”³⁵ According to James Madison, a “dormant” or “negative” aspect of the Clause

grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged,

and this dormant aspect is understood to limit state’s power to enact laws that interfere with or burden interstate commerce.³⁶ New York’s shipping laws implicate this constitutional “prohibition against border-closing laws” by giving unequal treatment to in-state and out-of-state wine retailers.³⁷ By assigning to in-state retailers the right to ship directly to New York consumers while generally denying this right to out-of-state retailers, New York engages in the kind of blatant economic protectionism that clearly benefits in-state businesses at the expense of out-of-state competitors.³⁸

³⁴ *Granholm v. Heald*, 544 U.S. 460, 473 (2005).

³⁵ U.S. CONST. art. I, § 8, cl. 3; *see generally, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–38 (1937).

³⁶ Letter from James Madison to J.C. Cabell (Feb. 13, 1829), *in* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (1911) (Max Farrand, ed., 1st Am. ed. 1911) (quoted in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994)).

³⁷ *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000); *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951); *Welton v. Missouri*, 91 U.S. 275, 280 (1875); *Cooley v. Bd. of Port Wardens*, 53 U.S. 299, 319 (1851).

³⁸ *See Taylor*, 477 U.S. at 148; *see also City of Philadelphia v. New*

A. *In-State and Out-of-State Wine Retailers are “Similarly Situated” for Dormant Commerce Clause Purposes*

A threshold question in determining whether a state law violates the dormant aspect of the Commerce Clause is whether the in-state and out-of-state entities in question are “similarly situated.”³⁹ There can be no violation of this dormant aspect unless in-state and out-of-state wine retailers are “similarly situated.”⁴⁰ The Supreme Court has found that entities are similarly situated when there exists “actual or prospective competition between the supposedly favored and disfavored entities in a single market.”⁴¹ Further, the Supreme Court explained:

[If] the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. . . . [.] eliminating the . . . regulatory differential would not serve the dormant Commerce Clause’s fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.⁴²

Where, as here, in-state and out-of-state wine retailers engage in the same business—selling wine to retail consumers—and seek access to the exact same market—New York’s lucrative wine consumer base—the retailers are potential competitors that are “similarly situated” for purposes of the dormant aspect of the Commerce Clause.⁴³

Jersey, 437 U.S. 617, 624 (1978).

³⁹ *Gen. Motors Corp.*, 519 U.S. 278, 299 (1997).

⁴⁰ *Id.* at 298–99.

⁴¹ *Id.* at 300.

⁴² *Id.* at 299.

⁴³ The Texas district court approached this threshold issue in the same way and reached the same conclusion. *See Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 873–74 (N.D. Tex. 2008).

B. New York Discriminates Against Interstate Commerce by Allowing In-State Retailers to Ship Directly to New York Consumers and Banning Shipments by Out-of-State Retailers

Through a combination of shipping provisions promulgated under its Alcohol Beverage Control Law (“ABC Law”), New York discriminates against out-of-state wine retailers.⁴⁴ First, New York authorizes wine retailers residing in New York to sell and ship wine directly to consumers within New York.⁴⁵ Second, New York generally prohibits wine shipments “into the state,” unless the in-state recipient is a licensed wholesaler or the out-of-state shipper has previously received a permit available only to licensed out-of-state wineries.⁴⁶ Together, these shipping provisions mandate “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”⁴⁷ This combination of shipping provisions facially discriminates against out-of-state business interests, including wine retailers, by singling out shipments “into the state” while ignoring shipments originating within New York, thereby effectively giving in-state retailers exclusive access to New York’s consumers while denying out-of-state wine retailers access to the same market.⁴⁸

Specifically, ABC Law provisions 94, 105.8, 105.9, and 116, and Rule 10 of the Rules of the State Liquor Authority authorize

⁴⁴ See N.Y. ALCO. BEV. CONT. LAW §§ 1–164 (Gould 2007).

⁴⁵ See N.Y. ALCO. BEV. CONT. LAW §§ 94, 105.8, 105.9, 116 (Gould 2007); N.Y. COMP. CODES R. & REGS. tit. 9, § 67 (2007).

⁴⁶ N.Y. ALCO. BEV. CONT. LAW §§ 79(c), 102(1)(a), 102(1)(b) (Gould 2007); N.Y. State Liquor Auth., Advisory: Direct Shipment of Wine to New York Customers by Wine Manufacturers Located outside New York (Aug. 5, 2005), <http://www.abc.state.ny.us/system/files/advisory-out-of-state-winery.pdf>.

⁴⁷ *Id.*; see also *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988) (“[S]tate statutes that clearly discriminate against interstate commerce are routinely struck down.”).

⁴⁸ See *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994); see also *Lewis v. BT Inv. Managers*, 447 U.S. 27, 39 (1980) (holding that a statute burdens interstate commerce if “it overtly prevents foreign enterprises from competing in local markets”).

in-state retailers to sell and ship wine directly to consumers.⁴⁹ As a “package store licensee,” a New York retailer may deliver the wine that they sell: “to homes and offices not to be resold by the purchaser[;] by messenger afoot[;] by trucking and delivery companies who hold a trucking permit issued by the Authority[; and] in a vehicle owned and operated, or hired and operated by the package store licensee.”⁵⁰ To become such a licensee, a candidate residing in New York applies to the agency that oversees enforcement of the state’s ABC Laws, the New York State Liquor Authority (“NYSLA”).⁵¹ If the NYSLA approves the application, the newly licensed New York retailer can deliver directly to a New York consumer’s residence immediately.⁵²

Meanwhile, ABC Law provisions 100(1), 102(1)(a), and 102(1)(b) ban all direct shipments “into the state” and generally require all wine shipped into the state to pass first through a New York business entity, a wholesaler, licensed by the State of New York.⁵³ Because of this general prohibition against direct shipments into the state, even if out-of-state retailers were eligible for retail licenses within the state, those out-of-state retailers who had received licenses would still be prohibited from shipping directly “into the state” to New York consumers.⁵⁴

⁴⁹ See N.Y. ALCO. BEV. CONT. LAW §§ 94, 105.8, 105.9, and 116 (Gould 2007); N.Y. COMP. CODES R. & REGS. tit. 9, § 67 (2007).

⁵⁰ NYSLA Compliance FAQs, *supra* note 20.

⁵¹ See Welcome to New York State Liquor Authority, <http://abc.state.ny.us/index.html> (last visited Apr. 2, 2008).

⁵² See N.Y. ALCO. BEV. CONT. LAW §§ 94, 105.8, 105.9, 116 (Gould 2007); N.Y. COMP. CODES R. & REGS. tit. 9, § 67 (2007); *see also* NYSLA Compliance FAQs, *supra* note 20.

⁵³ N.Y. ALCO. BEV. CONT. LAW § 100(1) (Gould 2007) (“No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.”); § 102(1)(a) (“[N]o alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages.”); § 102(1)(b) (“[N]o common carrier or other person shall bring or carry into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages. . . .”).

⁵⁴ See NYSLA Compliance FAQs, *supra* note 20; *see also* N.Y. ALCO.

In an exception to this general ban on interstate shipping, however, in the aftermath of *Granholm*, out-of-state wineries have won the right to apply for an “Out of State Direct Shipper’s License” that permits them to ship directly to New York consumers.⁵⁵ This direct shipping permit operates as an exception to New York’s ban on direct shipments into the state. The permit, however, is only available to persons who are recognized as wine producers by the federal government and another state.⁵⁶ As such, out-of-state wine retailers, who do not produce wine themselves, are ineligible for this permit.⁵⁷ Under the status quo, then, out-of-state retailers are deprived both of the opportunity to sell wine directly to customers within New York and the right to deliver wine to customers within New York.⁵⁸ Meanwhile, their retail counterparts and would-be competitors in New York receive these advantages by virtue of being located within the state.⁵⁹ This combination of laws confers markedly different rights to in-state and out-of-state retailers with respect to their ability to sell and deliver wine directly to New York consumers.

New York’s discrimination against out-of-state wine retailers strikingly mirrors its discrimination against out-of-state wineries that was struck down by the Supreme Court in *Granholm*.⁶⁰ In that case, when faced with New York’s statutory scheme of allowing its own wineries to bypass in-state wholesalers and retailers and to sell directly to consumers while denying such a

BEV. CONT. LAW §§ 94, 105.8, 105.9, 116 (Gould 2007); N.Y. COMP. CODES R. & REGS. tit. 9, § 67 (2007).

⁵⁵ See N.Y. ALCO. BEV. CONT. LAW § 79(c) (Gould 2007). There are also quantity limits. See N.Y. State Liquor Auth., Advisory: Direct Shipment of Wine to New York Customers by Wine Manufacturers Located outside New York (Aug. 5, 2005), <http://www.abc.state.ny.us/system/files/advisory-out-of-state-winery.pdf>.

⁵⁶ See N.Y. ALCO. BEV. CONT. LAW § 79(c) (Gould 2007).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See NYSLA Compliance FAQs, *supra* note 20; see also N.Y. ALCO. BEV. CONT. LAW §§ 94, 105.8, 105.9, 116 (Gould 2007); N.Y. COMP. CODES R. & REGS. tit. 9, § 67 (2007).

⁶⁰ See *Granholm v. Heald*, 544 U.S. 460, 472 (2005).

clear economic advantage to out-of-state wineries, the Supreme Court had “no difficulty concluding that New York . . . [had] discriminate[d] against interstate commerce through its direct-shipping laws”⁶¹ and struck down New York’s discriminatory scheme.⁶² The *Granholm* majority found that “[a]llowing States to discriminate against out-of-state [wine producers] ‘invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.’”⁶³ Similarly, New York’s facial discrimination against out-of-state wine retailers creates a de facto preferential trade area and gives New York wine retailers exclusive access to New York consumers.⁶⁴ By burdening interstate commerce to favor in-state businesses, New York’s direct shipping laws inhibit free trade among the states and violate the dormant aspect of the Commerce Clause of the United States Constitution.

⁶¹ *Id.* at 476. The *Granholm* majority’s succinct criticism of both schemes is well illustrated by its comments regarding Michigan’s discriminatory scheme:

Michigan allows in-state wineries to ship directly to consumers, subject only to a licensing requirement. Out-of-state wineries, whether licensed or not, face a complete ban on direct shipment. The differential treatment requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers. These two extra layers of overhead increase the cost of out-of-state wines to Michigan consumers. The cost differential, and in some cases the inability to secure a wholesaler for small shipments, can effectively bar small wineries from the Michigan market.

Id. at 473–74.

⁶² *See id.*

⁶³ *Id.* at 473 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)); *see also* *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521–23 (1935).

⁶⁴ *See Granholm*, 544 U.S. at 473.

C. *New York's Putative Interests—Preventing Minors' Access to Alcohol and Efficient Tax Collection—Can Be Achieved Through Nondiscriminatory Alternatives*

New York is unable to justify its discrimination against interstate commerce because it is unable to put forward legitimate local purposes that “cannot be adequately served by reasonable nondiscriminatory alternatives.”⁶⁵ When New York’s legislature enacted its three-tier liquor licensing system seventy-five years ago, its primary goals were to prevent minors’ access to alcohol and to assist state tax collection.⁶⁶ The legislature also aimed “to promote temperance by keeping the price of alcohol artificially high.”⁶⁷ To justify its discrimination against out-of-state retailers,

⁶⁵ *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); *see also* *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (“Facial discrimination by itself may be a fatal defect” and “at a minimum . . . invokes strictest scrutiny.”); *see also* *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (“[O]nce a state law is shown to discriminate against interstate commerce either on its face or in practical effects, [the Supreme Court has held] the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.”) (internal quotation marks omitted).

⁶⁶ Alix M. Freedman & John R. Emshwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking Its Very Private World*, WALL ST. J., Oct. 4, 1999, at A1. By requiring producers to sell their alcoholic beverages through wholesalers, New York’s legislature “hoped to collect taxes more efficiently and to limit alcohol sales to minors.” FTC REPORT, *supra* note 1, at 6; *see also* N.Y. ALCO. BEV. CONT. LAW § 65 (Gould 2007); N.Y. TAX LAW §§ 420–45, 1105(a), (d) (Gould 2007) (excise and sales taxes); N.Y. COMP. CODES R. & REGS. tit. 20, §§ 60.1 et seq. (2007) (taxes on alcoholic beverages); *Arnold’s Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 407 (S.D.N.Y. 2007).

⁶⁷ Having the producers sell to distributors who then sold the alcoholic beverages to retailers raised the price of alcohol by creating an extra link in the chain of distribution. By raising the price of alcohol, one might argue, one lowers the rate of consumption. It is hard to gauge the extent to which this goal still guides lawmakers, but to the extent that it does, it would explain why some lawmakers are less receptive to the argument that direct shipping is a good thing because it increases competition and lowers prices for alcohol consumers. *See* FTC REPORT, *supra* note 1, at 6.

the State of New York again put forward two of these interests: preventing the access of minors to alcohol and efficiently collecting taxes.⁶⁸ These two interests, however, failed to justify similar discrimination in *Granholm*, where the majority concluded that “the State . . . provide[d] little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries,” and for the same reasons, these two interests again do not justify discriminating against out-of-state retailers.⁶⁹

First, preventing minors’ access to alcohol can be achieved by the nondiscriminatory alternative of requiring an adult signature upon delivery.⁷⁰ As the NYSLA itself has announced, “shipping companies like FedEx are required . . . to receive approval from the [NYSLA] before transporting wine directly to New York residents, ensuring that common carriers have the proper systems in place enabling them to accurately capture and verify a recipient’s age.”⁷¹ These safeguards achieve the state’s interest in preventing minors’ access to alcohol without discriminating against out-of-state retailers. Further, of the twenty-six States that allow direct shipping, none report problems with underage drinking and officials openly recognize a number of reasons why underage drinkers find online wine purchases unappealing, not least of which is that underage drinkers seek immediate gratification, not several days of waiting for a shipment to arrive.⁷² Because preventing

⁶⁸ See *Arnold’s Wines, Inc.*, 515 F.Supp. 2d at 407.

⁶⁹ *Granholm v. Heald*, 544 U.S. 460, 492 (2005).

⁷⁰ *Id.* at 489–91.

⁷¹ Press Release, State of New York Executive Dep’t Div. of Alcoholic Beverage Control, State Liquor Authority Announces Approval of FedEx to Make Direct Wine Shipments to New Yorkers: Approval Offers N.Y. Residents Greater Choice and Convenience (Feb. 9, 2006), <http://www.abc.state.ny.us/system/files/mediaadvisory020906.pdf>.

⁷² See *Granholm*, 544 U.S. at 490 (“A recent study by . . . the FTC found that the 26 States currently allowing direct shipments report no problems with minors’ increased access to wine. This is not surprising for several reasons. First, minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor. Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who, in the words of the past president of the National Conference of State Liquor Administrators, ‘want instant gratification.’

minors' access to alcohol can be achieved without discriminating against out-of-state retailers, this state interest does not support discriminating against out-of-state retailers.⁷³

Second, with respect to efficient tax collection, as the Supreme Court explained in *Granholm*: “[I]mprovements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail.”⁷⁴ New York is equally capable of running background checks on out-of-state retailers, especially in light of out-of-state retailers' ability to provide New York with their financial records and sales data. Further, the risk of tax evasion presented by online sales does not change with or without the prohibition on direct sales by out-of-state wine retailers.⁷⁵ Further still, since *Granholm*, New York has collected “taxes directly from out-of-state wineries whose products are sold in the state.”⁷⁶ In projecting whether New York will be able to collect taxes efficiently from out-of-state retailers, it is particularly instructive that New York has not reported problems collecting taxes from out-of-state wineries.⁷⁷ In sum, because modern technology allows taxes to be collected efficiently without discriminating against out-of-state retailers, this interest does not justify New York's discrimination against out-of-state retailers.⁷⁸

(explaining why minors rarely buy alcohol via the mail or the Internet.)”
(internal citations omitted).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ As a Michigan district court astutely observed, “there is a risk for tax evasion with direct shipping, whether in-state or out-of-state.” *See* *Siesta Vill. Mkt. v. Granholm*, No. 06-13041, 2007 WL 2984127, at *5 (E.D. Mich. Oct. 12, 2007) (citing *Granholm*, 544 U.S. at 490–91).

⁷⁶ *Id.*

⁷⁷ *See* N.Y. STATE LIQUOR AUTH., DIV. OF ALCOHOLIC BEVERAGE CONTROL, 2006 ANNUAL REPORT; N.Y. STATE LIQUOR AUTH., DIV. OF ALCOHOLIC BEVERAGE CONTROL, 2005 ANNUAL REPORT; *see also* Press Release, State of New York Executive Dep't Div. of Alcoholic Beverage Control, State Liquor Authority Announces Approval Of Fedex To Make Direct Wine Shipments To New Yorkers (Feb. 9, 2006), <http://www.abc.state.ny.us/system/files/mediaadvisory020906.pdf>.

⁷⁸ *See Granholm*, 544 U.S. at 491; *see also Siesta Vill. Mkt.*, 2007 WL

Despite the Supreme Court's clear guidance on these issues, the *Arnold's Wines* decision nevertheless cited these two state interests without any analysis of whether the interests could be achieved in a manner that avoided discrimination against out-of-state retailers.⁷⁹ In making the case for judgment in favor of its discrimination, New York should have been required to provide "more than mere speculation to support discrimination against out-of-state goods" and should have been required to meet the higher burden of showing that "the discrimination is demonstrably justified."⁸⁰ However, unlike in *Granholm*, where the Supreme Court refused to allow New York to make sweeping assertions about its inability to police direct shipments by out-of-state wine producers without concrete evidence,⁸¹ the *Arnold's Wines* opinion appears to have accepted New York's justifications without further scrutiny.⁸² New York should have had to make at least a concrete showing that it could neither collect taxes effectively nor prevent minors' access to alcohol without the discriminatory direct shipping laws.⁸³ The State likely would have been unable to produce such evidence and meet such a burden.⁸⁴ At bottom, neither interest put forward excuses New York's discrimination against out-of-state retailers because both efficient tax collection and preventing minors' access to alcohol can be achieved without such discrimination.

2984127, at *5.

⁷⁹ See *Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 407 (S.D.N.Y. 2007).

⁸⁰ *Granholm*, 544 U.S. at 492 (quoting *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 (1992)).

⁸¹ See *id.* at 490.

⁸² See *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 407.

⁸³ See *Granholm*, 544 U.S. at 492 (quoting *Chem. Waste Mgmt., Inc.*, 504 U.S. at 344).

⁸⁴ See *id.* at 490; see also *Siesta Vill. Mkt.*, 2007 WL 2984127, at *4-5.

II. THE NATIONAL INTEREST IN FREE TRADE OUTWEIGHS NEW YORK'S INTEREST IN AN ABSOLUTE BAN ON INTERSTATE DIRECT SHIPPING

The federal interest in free trade outweighs New York's interest in using its ban on interstate direct shipping to favor in-state retailers with exclusive access to the New York direct shipping consumer market. As the *Arnold's Wines* decision correctly observed, on the facts, the Supreme Court's *Granholm* decision pertains directly to differential treatment of in-state and out-of-state producers.⁸⁵ The *Arnold's Wines* decision, however, errs in arguing that the principles in *Granholm* only apply to an *exception* to the three-tier licensing system, direct shipping by wine producers to wine consumers that bypasses wholesalers and retailers, and not to the three-tier licensing system itself.⁸⁶ More to the point, however, a challenge to New York's use of its ban on interstate shipping to favor in-state retailers at the expense of out-of-state retailers in no way amounts to an attack on the entire three-tier system, and striking down New York's use of the ban to unfairly privilege its own retailers would neither invalidate nor undermine the three-tier system, even if out-of-state retailers bypass in-state wholesalers.⁸⁷ First of all, it is a logical fallacy to argue that "allowing out-of-state retailers to compete in a state's domestic market 'is clearly an attack on the three-tier system itself.'"⁸⁸ On a practical level, though, New York could maintain centralized control and enforce compliance with its regulations by

⁸⁵ *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 412.

⁸⁶ *Id.* at 411.

⁸⁷ See *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 867 n.19 (N.D. Tex. 2008) ("[A] state can treat in-state and out-of-state entities on equal terms and still preserve its three-tier system."); see also N.Y. ALCO. BEV. CONT. LAW §§1-164 (Gould 2007); see also *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 403.

⁸⁸ See *Perry*, 530 F. Supp. 2d at 867 n.19 ("[I]t does not follow that allowing out-of-state retailers to compete in a state's domestic market 'is clearly an attack on the three-tier system itself.'" (quoting *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 411)).

using a direct shipping permit system similar to the one it currently administers to out-of-state wineries.⁸⁹ In balancing and attempting to harmonize the Twenty-first Amendment with the federal Commerce Clause, on the particular issue of New York's use of its ban on interstate shipping to favor its in-state retailers, the federal Commerce Clause interest in promoting free trade surely outweighs New York's Twenty-first Amendment in regulating alcohol.

A. The Supreme Court Struck Down Shipping Laws That Discriminated Against Out-of-State "Economic Interests"

The most ready explanation for why, on the facts, the Supreme Court's *Granholm* decision applies to out-of-state producers is because it was out-of-state producers who were challenging New York's ban on direct shipping.⁹⁰ The *Granholm* majority, however, broadened the prospective effect of the decision by focusing "more on discrimination against out-of-state *economic interest* and access to out-of-state markets, rather than, specifically, on out-of-state wine producers."⁹¹ The plain language of the *Granholm* majority opinion stresses the need to broadly protect out-of-state "economic interests" from economic protectionism as opposed to protect out-of-state wine producers exclusively.⁹² Out-of-state wine retailers who want to compete with in-state retailers in the New York market possess such an "economic interest."⁹³

The *Granholm* majority articulated an underlying principle of "mutual economic interests" behind the enforcement of the

⁸⁹ See *Granholm v. Heald*, 544 U.S. 460, 491 (2005); see also *Perry*, 530 F. Supp. 2d at 867.

⁹⁰ See *Granholm*, 544 U.S. at 489.

⁹¹ *Siesta Vill. Mkt.*, 2006 WL 2984127, at *4 (E.D. Mich. Oct. 12, 2007) (citing *Granholm*, 544 U.S. at 472–73) (emphasis added).

⁹² *Granholm*, 544 U.S. at 472 ("Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'") (quoting *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 99 (1994)).

⁹³ *Id.* at 474–75.

Commerce Clause⁹⁴ in which “[r]ivalries among the States are . . . kept to a minimum, and a proliferation of trade zones is prevented.”⁹⁵ The *Granholm* majority used these broad principles to scrutinize laws that allowed in-state, but not out-of-state, wineries to ship directly to customers. The majority wrote:

Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms. The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid.⁹⁶

In short, the laws were offensive and violated the Commerce Clause not because they discriminated against out-of-state producers and their products in particular, but because the laws offended an underlying principle of “mutual economic interests” by “depriv[ing] citizens of their right to have access to the markets of other States on equal terms.”⁹⁷ In transposing the principles of *Granholm* to the ongoing discrimination against out-of-state retailers, then, it is more reasonable to focus on the majority opinion’s broad language with respect to protecting out-of-state “economic interests” than to narrowly limit, as in the improvident *Arnold’s Wine* decision, the rights recognized in *Granholm* to only out-of-state “wine producers.”⁹⁸

⁹⁴ See *Granholm*, 544 U.S. at 472 (“The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their *mutual economic interests*.”) (citing U.S. CONST., art. I, § 10, cl. 3) (emphasis added).

⁹⁵ *Id.* (citing *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994) (citing THE FEDERALIST No. 22, at 143–45 (Alexander Hamilton) (Clinton Rossiter ed., 1961); JAMES MADISON, *Vices of the Political System of the United States*, in 2 WRITINGS OF JAMES MADISON 362–63 (G. Hunt ed., 1901)).

⁹⁶ *Granholm v. Heald*, 544 U.S. 460, 473 (2005).

⁹⁷ *Id.*

⁹⁸ *Id.*

“State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.”⁹⁹ This language of *Granholm* does not mean that the Twenty-first Amendment shields New York’s use of shipping laws to reserve “the exclusive right to sell, deliver, and transport wine directly to New York consumers” to in-state retailers simply because their out-of-state retail competitors are not producers.¹⁰⁰ The same general principles enunciated in *Granholm* still generally apply. It thus sounds willfully obtuse to declare, as in *Arnold’s Wines*, that “In upholding the three-tier system, the Supreme Court acted intentionally to limit application of the nondiscrimination principle enunciated in *Granholm* to products and producers as opposed to wholesalers and retailers. . . .”¹⁰¹ In *Siesta Village Market v. Perry*, the Texas district court “respectfully disagree[d]” with this interpretation, and observed that “[t]he laws in question in *Arnold’s Wines* do not appear to satisfy that requirement [of treating out of state and domestic liquor the same].”¹⁰²

In *Siesta Village Market*, Texas residents and out-of-state retailers challenged the Texas Alcoholic Beverage Code’s provisions restricting the right to ship directly to Texas customers to retailer residing in the same county.¹⁰³ The court determined that “[t]he Code facially discriminates . . . [by] giving in-state wine retailers access to the direct-shipping markets of their respective counties, while denying the same access to out-of-state wine retailers.”¹⁰⁴ Similarly, in Michigan, where the same out-of-state retailer, *Siesta Village Market*, is currently challenging shipping provisions nearly identical to New York’s provisions, the court

⁹⁹ *Id.* at 489.

¹⁰⁰ *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 867 n.19 (N.D. Tex. 2008) (quoting *Arnold’s Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 402 (S.D.N.Y. 2007)).

¹⁰¹ 515 F. Supp. at 412.

¹⁰² 530 F. Supp. 2d at 867 n.19.

¹⁰³ See 530 F. Supp. 2d 848; TEX. ALCO. BEV. CODE ANN. §§ 6.03, 11.46(a)(11), 11.61(b)(19), 22.03, 24.01(c), 24.03, 54.12, 107.05(a), 107.07(a), 107.07(f), 109.53 (Vernon 2007).

¹⁰⁴ *Perry*, 530 F. Supp. 2d at 864.

denied the State of Michigan's motion to dismiss and disagreed with the State's explanation for the discrimination against out-of-state retailers.¹⁰⁵ Michigan argued that under its bans on interstate direct shipping, "liquor produced out-of-state" was treated "the same as its domestic equivalent"¹⁰⁶ and that "whether produced in Michigan or elsewhere, . . . wine cannot be directly shipped to Michigan consumers from out-of-state retailers, and [that] in that sense the products are treated equally."¹⁰⁷ Michigan essentially asserted that because its shipping laws discriminated between retailers based on a wine product's current location rather than its origin, the federal interest in promoting free trade was not implicated.¹⁰⁸ Refusing to "limit the holding of *Granholm* in a way that is debatable,"¹⁰⁹ the court recognized that the general language in *Granholm* made it difficult to limit its effect to producers.¹¹⁰

In light of the plain reading of *Granholm* found in the *Siesta Market* analyses, there is little support for the *Arnold's Wines* holding that the principles found in the *Granholm* decision narrowly apply to an *exception* to the three-tier licensing system—direct shipping by wine producers to in-state wine consumers—and do not apply to other discriminatory aspects of the three-tier licensing system.¹¹¹ The Supreme Court in *Granholm*, far from distinguishing shipping laws pertaining to wine producers from those pertaining to retailers, directly compared the shipping rights of wine producers and retailers, observing: "Michigan, for example, already allows its licensed retailers (over 7,000 of them) to deliver alcohol directly to consumers."¹¹² The thrust and breadth of the

¹⁰⁵ See *Siesta Vill. Mkt. v. Granholm*, No. 06-13041, 2007 WL 2984127, at *4 (E.D. Mich. Oct. 12, 2007).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* ("[I]n light of a broad reading of *Granholm*, [the argument that a State is treating out-of-state products equally] may not pass constitutional muster under the Commerce Clause.").

¹¹¹ See *Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 411 (S.D.N.Y. 2007).

¹¹² *Granholm v. Heald*, 544 U.S. 460, 490 (2005).

Granholm decision gives ample reason to conclude that the principles and holding of the case protect out-of-state retailers as well as producers from economic protectionism.¹¹³

B. Treating Out-of-State Competitors the Same as In-State Wine Retailers Would Not Invalidate New York's "Unquestionably Legitimate" Licensing System

It is illogical to argue that striking down New York's use of its ban on direct shipping to favor in-state retailers with exclusive access to New York's direct shipping wine consumer market "is clearly an attack on the three-tier system itself."¹¹⁴ To the contrary, treating out-of-state competitors the same as in-state retailers neither invalidates nor undermines New York's long-standing three-tier system.¹¹⁵ As observed in the Texas *Siesta Village Market* decision, "a state can treat in-state and out-of-state entities on equal terms and still preserve its three-tier system."¹¹⁶ Similarly, when it struck down New York's use of its ban on interstate direct shipping to favor in-state wineries, the *Granholm* majority declared that striking down the provisions did not "call into question [the constitutionality of New York's] three-tier system."¹¹⁷ As in *Granholm* and *Siesta Village Market*, it does not follow that striking down New York's protectionist use of its ban on interstate direct shipping "is clearly an attack on the three-tier

¹¹³ See generally *id.*; see also *Best & Co. v. Maxwell*, 311 U.S. 454, 455–56 (1940) ("The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.").

¹¹⁴ *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 867 n.19 (N.D. Tex. 2008). ("[A] state can treat in-state and out-of-state entities on equal terms and still preserve its three-tier system. Therefore, it does not follow that allowing out-of-state retailers to compete in a state's domestic market 'is clearly an attack on the three-tier system itself.'" (quoting *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 411).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Granholm*, 544 U.S. at 488.

system itself.”¹¹⁸

Simplifying a complex matter, the Fourth Circuit opined in *Brooks v. Vassar* that any “argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system.”¹¹⁹ Under the *Brooks* analysis, then, the Supreme Court’s act in upholding the challenge to New York’s differential treatment of in-state and out-of-state wineries, that is, an “in-state entity” with its “out-of-state counterpart,” was ultimately a “challenge to the three-tier system” acceptable to the Supreme Court.¹²⁰ As the *Arnold’s Wine* decision correctly observed, “all nine Justices [in *Granholm*] agreed that [New York’s three-tier system] is within the scope of Commerce Clause immunity granted [to] the States by Section 2 of the Twenty-first Amendment and that ‘state policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent.’”¹²¹ What is crucial in this language, however, is that under *Granholm*, provisions of such laws are only protected under the Twenty-first Amendment to the extent that they treat “liquor produced out-of-state the same as its domestic equivalent.”¹²² The Twenty-first Amendment neither shields state laws that violate other provisions of the Constitution¹²³ nor abrogates Congress’s federal Commerce Clause powers with regard to liquor,¹²⁴ not least of which is that

¹¹⁸ *Id.*

¹¹⁹ *Brooks v. Vassar*, 462 F. 3d 341, 352 (4th Cir. 2006).

¹²⁰ *Id.*

¹²¹ *Arnold’s Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 413 (S.D.N.Y. 2007) (quoting *Granholm v. Heald*, 544 U.S. 460, 489 (2007); see also *Granholm*, 544 U.S. at 496 (Stevens, J., dissenting); *Granholm*, 544 U.S. at 517–18 (Thomas, J., dissenting)).

¹²² *Granholm*, 544 U.S. at 489.

¹²³ See, e.g., *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

¹²⁴ See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712–13 (1984) (“[To conclude] that the Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd over-simplification. . . . Notwithstanding the

“state regulation of alcohol is limited by the Commerce Clause’s nondiscrimination principle.”¹²⁵

Despite guidance from the Supreme Court on the enduring applicability of this principle to state regulation of alcoholic beverages in general, the *Arnold’s Wines* court incorrectly determined that “the nondiscrimination principle enunciated in *Granholm* [is limited] to products and producers as opposed to wholesalers and retailers. . . .”¹²⁶ The *Granholm* court, however, did not specify that the Commerce Clause governs state regulation of *products* but instead used more encompassing language, such as referring to “state regulation of alcohol” in general.¹²⁷ Though it may sound fair to argue that “[t]he limited exception afforded under the Code for direct sales by wineries does not permit the conclusion that [a State] has relinquished its right to regulate the vast remainder of wine sales through its three-tier system,” this argument misplaces a basic proposition in *Granholm*: the right to regulate wine sales through the three-tier system is not a right to discriminate against interstate commerce with impunity, or even to dictate that all wine must flow through the three-tier system.¹²⁸ On this latter point, a majority of the Supreme Court in *North Dakota v. United States* determined that the Twenty-first Amendment did not authorize North Dakota to require all liquor sold for use in the State to be purchased from a licensed in-state wholesaler; in other words, the military could bypass North Dakota’s three-tier system.¹²⁹

Amendment’s broad grant of power to the States, therefore, the Federal Government plainly retains authority under the Commerce Clause to regulate even interstate commerce in liquor.”) (internal quotations and citations omitted).

¹²⁵ *Granholm v. Heald*, 544 U.S. 460, 487 (2005) (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984)).

¹²⁶ *Arnold’s Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 412 (S.D.N.Y. 2007); see also *id.* at 487; *Bacchus Imports, Ltd.*, 468 U.S. at 276.

¹²⁷ *Granholm*, 544 U.S. at 487 (citing, e.g., *Bacchus Imports, Ltd.*, 468 U.S. at 276).

¹²⁸ *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 870 (N.D. Tex. 2008) (citing *Brooks v. Vasser*, 462 F.3d 341, 345, 349, 350 n.2 (4th Cir. 2006); *Brooks*, 462 F.3d at 352 n.3 (Neimeyer, J., concurring); *Granholm*, 544 U.S. at 487).

¹²⁹ See *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

C. Though New York's Long-Standing Three-tier System Has Historical Pedigree, It Can and Must Be Modified When It Harms the Federal Interest in Free Trade

Like other states that have adopted a 'three-tier' licensing system, New York regulates the importation and sale of wine by requiring separate licenses for producers, wholesalers, and retailers.¹³⁰ Of these three "tiers" of licensees, producers are licensed to make wine; wholesalers to distribute it within the state; and retailers to sell it to New York consumers.¹³¹ This three-tier system remains a testament to the man perhaps most responsible for its basic form, John D. Rockefeller, Jr., a self-described teetotaler and supporter of Prohibition who near its end in 1933 commissioned a study on how New York could best regulate the alcohol industry.¹³²

From 1920 to 1933, the Eighteenth Amendment had banned the sale, manufacture, and transportation of alcoholic beverages within the United States.¹³³ By 1933, however, the lack of legal regulation had resulted in a nationwide illegal industry that produced and distributed alcoholic beverages, keeping the American public well supplied.¹³⁴ New York's licensing system thus began as a direct response to the failure of Prohibition.¹³⁵

In early 1933, as it became clear that the proposed Twenty-first Amendment would probably be ratified, then Governor

¹³⁰ See *Granholm*, 544 U.S. at 466; see also FTC REPORT, *supra* note 1, at 5–7. Federal and state laws limit vertical overlap between tiers of licensees. See *Granholm*, 544 U.S. at 466; 27 U.S.C. § 205 (2007); see, e.g., *Bainbridge v. Turner*, 311 F.3d 1104, 1106 (11th Cir. 2002).

¹³¹ See N.Y. ALCO. BEV. CONT. LAW §§ 3(20), (26), (35), 103–05 (Gould 2007).

¹³² See Harry Gene Levine, *The Birth of American Alcohol Control*, 12 CONTEMP. DRUG PROBS. 63, 84 (1985).

¹³³ See U.S. CONST. amend. XVIII, § 1 (“[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”), *repealed by* U.S. CONST. amend. XXI.

¹³⁴ See Levine, *supra* note 132, at 83.

¹³⁵ *Id.* at 84.

Lehman of New York asked Rockefeller to commission a private study that compared methods of alcohol regulation.¹³⁶ In late 1933, Rockefeller published the study, entitled *Toward Liquor Control*, which was popularly known as the *Rockefeller Report*.¹³⁷ Rockefeller's report gave detailed proposals for two methods of liquor regulation: state-run monopolies and state licensing systems.¹³⁸ New York's state legislators adopted the state licensing system.¹³⁹ By 1937, twenty-six States had implemented licensing systems, eighteen States had implemented monopolies, and the rest remained dry, that is, they continued to ban the sale of alcohol.¹⁴⁰

Almost every state that implemented a licensing system limited the retail, wholesale, and manufacturing licenses it issued to residents of the state or domestic corporations.¹⁴¹ Today, most States still use the three-tier system to regulate alcohol, and the system enjoys wide support as the preferred means of regulating the alcoholic beverages industry within the federal system.¹⁴² In

¹³⁶ *Id.*

¹³⁷ *Id.* at 86–87; see also John D. Rockefeller, Jr., *Foreword* to TOWARD LIQUOR CONTROL, at viii (Raymond B. Fosdick & Albert L. Scott, eds., 1933).

¹³⁸ See Levine, *supra* note 132, at 93.

¹³⁹ *Id.* at 89, 95; see also FTC REPORT, *supra* note 1, at 6.

¹⁴⁰ See Robert H. Skilton, *State Power Under the Twenty-First Amendment*, 7 BROOK. L. REV. 342, 345–46 & nn.18–19 (1937).

¹⁴¹ Notes, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 HARV. L. REV. 1145, 1148 (1959); see also Granholm v. Heald, 544 U.S. 460, 518 n.6 (2005) (Thomas J., dissenting) (listing the residency, citizenship, or physical presence requirements of twenty States during the 1930s of Colorado (“residency”), Florida (“prohibiting out-of-state manufacturers from being distributors”), Illinois (“residency”), Indiana (“residency”), Maryland (“residency”), Massachusetts (“residency”), Michigan (“residency”), Missouri (“citizenship”), Nebraska (“residency” and “physical presence”), Nevada (“residency and physical presence”), New Jersey (“citizenship and residency”), North Carolina (“residency”), North Dakota (“citizenship and residency”), Ohio (“residency and physical presence”), Rhode Island (“residency”), South Dakota (“residency”), Vermont (“residency”), Washington (“physical presence” and “citizenship and residency”), Wisconsin (“citizenship and residency”), and Wyoming (“citizenship and residency”).).

¹⁴² See State Shipping Laws—The Wine Institute, *available at*

limiting direct shipment to in-state wine retailers, then, New York's three-tier system is consistent with the practices of the majority of states that permit some level of direct shipping.¹⁴³ Currently, of the thirty-five States that permit some level of direct shipping to in-state consumers, only fourteen permit out-of-state wine retailers to ship directly to consumers.¹⁴⁴

Although the three-tier system is long-standing, widely used, and "unquestionably legitimate," this is not to say that the system is perfect or inviolate.¹⁴⁵ As *Granholm* demonstrated, the system can and must be modified when it violates the dormant aspect of the Commerce Clause.¹⁴⁶ In that case, out-of-state wineries challenged Michigan and New York shipping laws that allowed in-state wineries to bypass wholesalers and retailers and ship directly to in-state consumers while denying that same opportunity to out-of-state wine retailers.¹⁴⁷ The Supreme Court rejected New York's argument that out-of-state wineries were seeking "nothing less than the dismantling of New York's 70-year-old three-tier distribution system."¹⁴⁸ The *Granholm* majority explained:

The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. . . . States may . . . assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. . . . State policies

<http://www.wineinstitute.org/initiatives/stateshippinglaws> (last visited Apr. 6, 2008).

¹⁴³ See *id.*

¹⁴⁴ See Peck, *supra* note 2, at 22; see also Press Release, Specialty Wine Retailer's Ass'n, New Wine Retailer Association Formed to Ensure Consumer Access to National Wine Market (Mar. 6, 2006), available at <http://www.specialtywineretailers.org/forms/SWRA%20Intro%20Release%20FINAL.pdf>.

¹⁴⁵ *Granholm*, 544 U.S. at 488–89 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)); see also *North Dakota*, 495 U.S. at 447 (Scalia J., concurring).

¹⁴⁶ See *Granholm*, 544 U.S. at 489.

¹⁴⁷ See *id.* at 465–66.

¹⁴⁸ Brief for Respondents, *Swedenburg v. Kelly*, No. 03-1274, 2004 WL 2138121, at *12–13 (U.S. Sept. 23, 2004).

are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.¹⁴⁹

As *Granholm* demonstrated, although the *general* three-tier system may be legitimate, certain portions are severable and can be struck down as unconstitutional without rendering the remainder of the regulatory scheme impractical or invalid.¹⁵⁰ New York's use of the ban on interstate direct shipping to provide its in-state retailers with exclusive access to New York's lucrative consumer market¹⁵¹ are not "an integral part of the three-tier system upheld by the Supreme Court in *Granholm*."¹⁵² If New York ceased its discrimination against out-of-state wine retailers, it could still maintain centralized control over the regulation of alcohol "by requiring a permit as a condition of direct shipping."¹⁵³ The Supreme Court's reaffirmation of "the constitutionality of the three-tier system" in no way supports the conclusion that any challenge to ABC Laws "must fail."¹⁵⁴ To the contrary, the *Granholm* majority at once upheld the constitutionality of the three-tier system and severed and struck down the unequal

¹⁴⁹ *Granholm v. Heald*, 544 U.S. 460, 488–89 (2005).

¹⁵⁰ See *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 869 (N.D. Tex. 2008) ("A decision . . . that invalidates components of a state's direct-shipment laws does not necessarily call into question the constitutionality of the state's three-tier system.") (citing *Granholm*, 544 U.S. at 488); see also *Siesta Vill. Mkt. v. Granholm*, No. 06-13041, 2007 WL 2984127, at *2 (E.D. Mich. Oct. 12, 2007).

¹⁵¹ See N.Y. ALCO. BEV. CONT. LAW §§ 100(1), 102(1)(a), 102(1)(b) (Gould 2007).

¹⁵² *Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 413–14 (S.D.N.Y. 2007).

¹⁵³ *Granholm*, 544 U.S. at 491; see also *Perry*, 530 F. Supp. 2d at 867 (holding that the lack of proof that Texas would encounter difficulty collecting taxes in the context of alcohol sales is fatal).

¹⁵⁴ *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 411.

treatment of in-state and out-of-state shippers, establishing that state laws regulating the distribution of alcohol must be in harmony with the dormant aspect of the Commerce Clause.¹⁵⁵

If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.¹⁵⁶

By choosing to allow the direct shipment of wine to in-state consumers, New York took on the added responsibility of treating in-state and out-of-state business interests equally. Although the *Arnold's Wines* court may validly maintain that “[the Twenty-first Amendment] authorizes the States to require all sellers of alcoholic beverages to obtain permits and . . . nothing in *Granholm* alters this result,”¹⁵⁷ it cannot use this line of reasoning to undermine the basic proposition in *Granholm* that New York, after allowing direct shipments of wine in general, cannot grant this right to some and deny it to others on the basis of state citizenship alone.¹⁵⁸

In upholding the constitutionality of the three-tier system in general in *North Dakota v. United States*, the Supreme Court did so without using a Commerce Clause analysis.¹⁵⁹ The plurality opinion found that the challenged regulations were “within the core of the State’s power under the Twenty-first Amendment” because North Dakota’s legislature had enacted them “in the interest of promoting temperance, ensuring orderly market conditions, and raising revenue.”¹⁶⁰ In his concurring opinion, Justice Scalia observed that the Twenty-first Amendment “empowers North

¹⁵⁵ See *Granholm v. Heald*, 544 U.S. 460, 489–93 (2005).

¹⁵⁶ *Id.* at 493.

¹⁵⁷ *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 411; see also *State Bd. of Equalization of Cal. v. Young's Mkt. Co.*, 299 U.S. 59, 60–62 (1936) (affirming that the Twenty-first Amendment authorizes a state licensing fee to wholesale importers even though it is a “direct burden on interstate commerce”).

¹⁵⁸ See *Granholm*, 544 U.S. at 493 (“If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.”).

¹⁵⁹ See *North Dakota v. United States*, 495 U.S. 423 (1990).

¹⁶⁰ *Id.* at 432.

Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.”¹⁶¹ As observed in *Arnold's Wines, Inc. v. Boyle*,¹⁶² nine Supreme Court justices were in agreement that North Dakota's three-tier system was “unquestionably legitimate.”¹⁶³ A majority of the Court, however, declined to join Justice Scalia in arguing that the Twenty-first Amendment allowed North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.¹⁶⁴ This is not a matter of settled law, but what is clear is that New York's use of a ban on interstate direct shipping is not so clearly, as asserted in *Arnold's Wines*, “within the authority granted to New York by the Twenty-first Amendment.”¹⁶⁵

III. STRIKING DOWN NEW YORK'S USE OF THE BAN DOES NOT ABROGATE NEW YORK'S TWENTY-FIRST AMENDMENT RIGHTS

Striking down New York's use of the ban on interstate direct shipping laws to discriminate against out-of-state retailers would not be an abrogation of New York's Twenty-first Amendment rights because the shipping laws exist within the limitations of a superseding federal framework in which the dormant aspect of the Commerce Clause prohibits discrimination against interstate commerce. Section 2 of the Twenty-first Amendment states: “The 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.”¹⁶⁶ The language of the amendment differs subtly but importantly from the language of the predecessor Webb-Kenyon Act, which prohibited the interstate shipment of liquor into a State “in violation of any law of such State,” with the phrase “any law” suggesting that “any law, including a ‘discriminatory’ one,” was

¹⁶¹ *Id.* at 447.

¹⁶² 515 F. Supp. 2d 401, 412 (S.D.N.Y. 2007).

¹⁶³ *Id.* at 413 (citing *North Dakota*, 495 U.S. at 432).

¹⁶⁴ *Id.*

¹⁶⁵ *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 414.

¹⁶⁶ U.S. CONST. amend. XXI, § 2.

permissible.¹⁶⁷ As the Court explained in *Granholm*, this notable change in language from “any laws” in the Webb-Kenyon Act to simply “laws” in the amendment reflects the basic proposition that the “Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers.”¹⁶⁸

Although the court in *Arnold's Wines* correctly observed that the *Granholm* majority “concluded that Section 2 [of the Twenty-first Amendment] restored to the States the Commerce Clause immunity provided by the Wilson and Webb-Kenyon Acts,”¹⁶⁹ a review of these Acts and their reception by the Supreme Court demonstrates that these Acts did not immunize State regulation of alcohol from the dormant aspect of the Commerce Clause.¹⁷⁰ To the contrary, when the Wilson and Webb-Kenyon Acts were passed into law, States were no more able to discriminate against out-of-State liquor providers than they were against in-state providers.¹⁷¹ Rather than empower States to treat in-state and out-of-state competitors differently, these Acts standardized how a State regulated domestic and imported liquor, giving States the power to treat both equally.¹⁷² To the extent that the Twenty-first Amendment was modeled on the language of these predecessor Acts, and these Acts did not immunize states from the nondiscrimination principle of the Commerce Clause, the Twenty-first Amendment itself must be understood as existing within the ambit of the Commerce Clause.¹⁷³ As contemporary commentators explained in the aftermath of the repeal of Prohibition:

The adoption of the Twenty-first Amendment does not, as many people think, wipe the slate clean for completely new

¹⁶⁷ *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 413 (quoting *Granholm*, 544 U.S. at 500 (Thomas, J., dissenting)) (quoting 27 U.S.C. § 122 (2007)).

¹⁶⁸ *Granholm*, 544 U.S. at 486.

¹⁶⁹ *Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 410 (S.D.N.Y. 2007).

¹⁷⁰ See *Granholm*, 544 U.S. at 489.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

systems of liquor control. It leaves untouched the laws and constitutional provisions now existing in the various states. Moreover, a number of federal statutes relating to liquor were passed before the adoption of the Eighteenth Amendment and have never been repealed. After a period of more or less suspended animation, these laws now revive and may become potent instruments of control.¹⁷⁴

A. Before Prohibition and the Passing of the Twenty-first Amendment, the Commerce Clause Prohibited States from Burdening Interstate Commerce Involving Alcohol

The Twenty-first Amendment was drafted with the knowledge that preexisting laws and doctrines, like the Commerce Clause, would prevent states from using the Amendment to burden interstate commerce.¹⁷⁵ It was commonly understood that the Amendment did not “wipe the slate clean.”¹⁷⁶ In particular, prior Supreme Court cases interpreted two pre-Prohibition statutes—the Wilson Act and the Webb-Kenyon Act—that both influenced the drafting of Section 2 of the Twenty-first Amendment.¹⁷⁷ When the Supreme Court reviewed these cases in *Granholm*, two distinct principles emerged.¹⁷⁸ First, the cases collectively held that the Commerce Clause prohibited state discrimination against imported liquor.¹⁷⁹ Second, the cases as a group held that the dormant aspect of the Commerce Clause prohibited states from passing “facially neutral laws that placed an impermissible burden on interstate commerce.”¹⁸⁰ These two distinct principles stand for the proposition that the dormant aspect of the Commerce Clause prevents states from using the Twenty-first Amendment to burden

¹⁷⁴ RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 20 (1933).

¹⁷⁵ *Granholm*, 544 U.S. at 476.

¹⁷⁶ FOSDICK & SCOTT, *supra* note 174, at 20.

¹⁷⁷ *Granholm*, 544 U.S. at 476.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 477.

¹⁸⁰ *Id.*

interstate commerce.¹⁸¹

In the earliest cases, before the Wilson Act was passed in 1890, the Supreme Court used the dormant aspect of the Commerce Clause to invalidate state liquor regulations.¹⁸² In *Bowman v. Chicago & Northwestern Railway Co.*, for instance, the Supreme Court struck down an Iowa law that prohibited common carriers from transporting liquor into Iowa from another State unless it was certified beforehand that the recipient was authorized to sell the liquor.¹⁸³ The Supreme Court explained that the Commerce Clause prohibits even nondiscriminatory regulations “directly affecting interstate commerce.”¹⁸⁴ After *Bowman*, however, the question remained whether a State could ban the sale of imported liquor after it had arrived in the State.¹⁸⁵ This issue was resolved two years later in *Leisy v. Hardin*, when the Supreme Court held that Iowa could not ban the sale of imported beer sold in “original packages,” and that, “in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer.”¹⁸⁶ Under *Leisy*, States could ban the sale of liquor made within the State but could not stop sales of imported liquor.¹⁸⁷

To remedy this unequal treatment of in-state and out-of-state liquor, Congress passed the Wilson Act in 1890, which gave States the power to regulate imported liquor “upon arrival in such State . . . to the same extent and in the same manner” as domestic liquor.¹⁸⁸ Eight years later, however, the Supreme Court held that the Wilson Act did not authorize States to prohibit the importation of liquor for personal use.¹⁸⁹ Although the Supreme Court

¹⁸¹ *Id.* at 476.

¹⁸² *Id.* at 476–78.

¹⁸³ See 125 U.S. 465, 496–98 (1888).

¹⁸⁴ *Id.* at 497.

¹⁸⁵ See *Leisy v. Hardin*, 135 U.S. 100, 124–25 (1890).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 125; see also *Granholm v. Heald*, 544 U.S. 460, 478 (2005).

¹⁸⁸ *Granholm*, 544 U.S. at 478 (quoting Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified as amended at 27 U.S.C. § 121)).

¹⁸⁹ See generally *Rhodes v. Iowa*, 170 U.S. 412 (1898); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898).

recognized that States could ban the sale of imported liquor in its “original package,” the Court interpreted the phrase “upon arrival” to mean that State law only controlled after delivery to the in-state recipient and not when the imported liquor entered into the State.¹⁹⁰ The practical result of this decision was a thriving mail order liquor business because States could ban the sale of imported liquor within the State but not the importation of the liquor itself.¹⁹¹ In effect, the *Rhodes* decision created a “direct-shipment loophole.”¹⁹²

Congress closed this loophole with the Webb-Kenyon Act of 1913.¹⁹³ The Act solidified the States’ power to regulate the sale of alcohol and provided that:

[T]he shipment . . . of any . . . intoxicating liquor of any kind from one State . . . into any other State . . . which . . . is intended . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is prohibited.¹⁹⁴

Four years later, in *Clark Distilling Co. v. Western Maryland Railway Co.*, the Supreme Court acknowledged that, with the passage of the Webb-Kenyon Act, States had the power to regulate the transportation of liquor, even though this additional regulatory power imposed a direct burden on interstate commerce.¹⁹⁵ However, as the *Granholm* majority observed, “The Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court’s line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state. . . . States were required to regulate domestic and imported liquor *on equal terms*.”¹⁹⁶

As the *Granholm* majority further observed, “The wording of §

¹⁹⁰ *Rhodes*, 170 U.S. at 420.

¹⁹¹ See *Granholm*, 544 U.S. at 480.

¹⁹² *Id.* at 481.

¹⁹³ *Id.*

¹⁹⁴ Act of Mar. 1, 1913, ch. 90, 37 Stat. 699, 699–700 (codified as amended at 27 U.S.C. § 122).

¹⁹⁵ See 242 U.S. 311, 320–23 (1917).

¹⁹⁶ *Granholm v. Heald*, 544 U.S. 460, 483 (2005) (emphasis added).

2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes."¹⁹⁷ In conclusion, the *Granholm* majority determined that:

The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.¹⁹⁸

The Court found that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent."¹⁹⁹

B. The Commerce Clause has Come to Limit States from Using the Twenty-first Amendment to Burden Interstate Commerce

Even though the Twenty-first Amendment grants States the power to regulate alcohol within their borders, the amendment does not prevent the application of the Commerce Clause to individual provisions that are clearly discriminatory in nature.²⁰⁰ In rejoicing that "the power of a dry state to exclude liquor shipments, previously protected only by Act of Congress, will be given the added sanction of an express constitutional guarantee," commentators at the time of the passing of the amendment give telling insight into the fact that the Twenty-first Amendment was commonly understood to have been designed to preserve a state's right to ban completely the sale of alcoholic beverages, not to ban

¹⁹⁷ *Id.* at 484 (quoting *Craig v. Boren*, 429 U.S. 190, 205–06 (1976)).

¹⁹⁸ *Id.* at 484–85.

¹⁹⁹ *Id.* at 489.

²⁰⁰ See *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584 (1986) (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984)); see also *Granholm v. Heald*, 544 U.S. 460, 487–88 (2005).

the sale of out-of-state beverages while allowing in-state sellers exclusive access to local markets.²⁰¹ A series of Supreme Court cases following the enactment of the amendment illustrate how “the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause.”²⁰²

In *Bacchus Imports, Ltd. v. Dias*, for instance, the Supreme Court struck down a Hawaii statute that exempted local producers from a state excise tax on liquor and rejected the State of Hawaii’s argument that the Twenty-first Amendment authorized the State to discriminate against out-of-state liquor products.²⁰³ Similarly, in *Healy v. Beer Institute*, the Supreme Court struck down “price affirmation” statutes that forced liquor producers to affirm that they were not charging lower prices for liquor in other states.²⁰⁴ In his concurrence to the opinion, Justice Scalia asserted that the statute’s “invalidity is fully established by its facial discrimination against interstate commerce,” and that this “discriminatory character eliminates the immunity afforded by the Twenty-first Amendment.”²⁰⁵ These decisions reaffirmed the Supreme Court’s basic proposition articulated in *Hostetter v. Idlewild Bon Voyage Liquor Corp.* that “[l]ike other provisions of the Constitution,” the Commerce Clause and the Twenty-first Amendment “each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.”²⁰⁶

²⁰¹ FOSDICK & SCOTT, *supra* note 174, at 21.

²⁰² *Bacchus Imports, Ltd.*, 468 U.S. at 277; *Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964); *see also Granholm*, 544 U.S. at 487–88.

²⁰³ *See* 468 U.S. at 274–76 (“The central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.”).

²⁰⁴ 491 U.S. at 343.

²⁰⁵ *Id.* at 344 (Scalia, J., concurring).

²⁰⁶ 377 U.S. 324, 332 (1964).

C. *The Granholm Majority Determined that Shipping Laws Favoring In-State Businesses Burden Interstate Commerce*

In reviewing Michigan and New York's ban on interstate direct shipping that favored in-state wineries at the expense of out-of-state competitors, the *Granholm* majority found that the statutes "involve[d] straightforward attempts to discriminate in favor of local producers."²⁰⁷ The *Granholm* majority held that "the Twenty-first Amendment does not immunize all [state liquor] laws from Commerce Clause challenge."²⁰⁸ As the Texas *Siesta Village Market* plaintiffs observed, "Nowhere in the majority opinion in *Granholm* is there the slightest whiff of a suggestion that a discriminatory part of a three-tier system is legitimate."²⁰⁹ As the *Granholm* majority explained:

State laws that discriminate against interstate commerce face a 'virtually per se rule of invalidity. . . .' The Michigan and New York laws by their own terms violate this proscription. The two States, however, contend their statutes are saved by § 2 of the Twenty-first Amendment The States' position is *inconsistent with our precedents and with the Twenty-first Amendment's history*. Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate. . . ."²¹⁰

Within this framework, the *Granholm* Court concluded that the States' direct shipment laws, allowing in-state, but not out-of-state, wineries to ship directly to in-state customers, were not authorized by the Twenty-first Amendment.²¹¹ Where, as here, the aspect of New York's ban on interstate direct shipping that discriminates in favor of in-state retailers comes as a direct result of New York's choice to allow the direct shipment of wine, such

²⁰⁷ 544 U.S. 460, 489 (2005).

²⁰⁸ *Id.* at 488.

²⁰⁹ Letter Brief by Siesta Village Plaintiffs at 3, *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848 (N.D. Tex. 2008) (underline in the original).

²¹⁰ *Granholm*, 544 U.S. at 476 (citations omitted and emphasis added).

²¹¹ *Id.* at 493.

discrimination finds no protection in the Twenty-first Amendment under *Granholm*. Though New York has “virtually complete control” over in-state liquor distribution, “there is a marked difference between ‘virtually complete control’ and absolute control,” and New York cannot unduly burden interstate commerce.²¹² The Supreme Court has declared that it will strike down New York law that “‘directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests.’”²¹³ By giving exclusive access to New York’s lucrative direct shipping wine market to its own in-state retailers, New York has protected its own business at the expense of interstate commerce. Nothing in the Twenty-first Amendment justifies such economic protectionism.²¹⁴

CONCLUSION

The issue of direct shipping is a complex matter. The difficulty in weighing the federal interest in promoting free trade among the States against each individual State’s interests in regulating alcohol is reflected in the differing approaches taken by the New York, Michigan, and Texas courts when addressing whether a state may create an in-state direct shipping market and grant its in-state retailers exclusive access to that market by banning interstate direct shipments of wine.²¹⁵ Even in the Texas *Siesta Village Market* decision, though it correctly balances the federal Commerce Clause interest in free trade against the States’ Twenty-first Amendment

²¹² *Siesta Vill. Mkt. v. Granholm*, No. 06-13041, 2007 WL 2984127, at *4 (E.D. Mich. Oct. 12, 2007) (quoting *Cal. Retail Liquor Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); see also *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (holding that the three-tier system is “unquestionably legitimate”).

²¹³ *Granholm*, 544 U.S. at 487 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

²¹⁴ See *id.* (referring to *Brown-Forman Distillers Corp.*, 476 U.S. at 579).

²¹⁵ See *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848 (N.D. Tex. 2008); *Siesta Vill. Mkt. v. Granholm*, No. 06-13041, 2007 WL 2984127 (E.D. Mich. Oct. 12, 2007); *Arnold’s Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401 (S.D.N.Y. 2007).

interest in regulating alcohol, the court falters in determining that, while bans on direct interstate shipping are unconstitutional, the Texas Code requirement that out-of-state retailers can only sell wine to Texans that had been purchased from Texas wholesalers withstands Commerce Clause analysis.²¹⁶ This holding effectively allows the State of Texas to continue discriminating against out-of-state retailers whose home states prohibit them from purchasing wine from wholesalers in other states, including Texas.²¹⁷

The underlying problem faced by both the New York and Texas courts is how to remove the provisions within the three-tier system that harm the federal interest in free trade without hamstringing the functionality of the three-tier system.²¹⁸ The Texas court at least addressed this problem in good faith, recognizing that treating similarly situated businesses, e.g., in-state and out-of-state retailers, differently based solely on their location amounts to base economic protectionism.²¹⁹ The New York *Arnold's Wines* decision, however, failing as it does to fully appreciate the federal interest in free trade and in its eagerness to accept the ban on direct shipping as necessary for upholding the State interest in maintaining its three-tier system—without a showing that the three-tier system would fail without the ban on direct shipping—departs from the nuanced and measured approach articulated by the Supreme Court in *Granholm*.²²⁰

The *Granholm* majority sought to broadly protect out-of-state “economic interests” as well as producers from discriminatory state practices²²¹ and demonstrated that aspects of the three-tier

²¹⁶ See *Perry*, 530 F. Supp. 2d at 869–70.

²¹⁷ See *id.* at 870–71.

²¹⁸ See *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 407–08, 413–14; *Perry*, 530 F. Supp. 2d at 869–70.

²¹⁹ See *Perry*, 530 F. Supp. 2d at 862.

²²⁰ See *Arnold's Wines, Inc.*, 515 F. Supp. 2d at 413–14 (“Because the Court finds that [New York’s ban on direct shipping into the state is] an integral part of the three-tier system upheld by the Supreme Court in *Granholm*, . . . the Court finds it unnecessary to undertake a dormant Commerce Clause analysis.”) (emphasis added).

²²¹ See *Granholm*, 544 U.S. at 472 (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’tl Quality of Or.*, 511 U.S. 93, 99 (1994)).

system can and must be modified when they burden free trade between the States.²²² By allowing in-state but not out-of-state wine retailers to ship directly to in-state customers, New York discriminates against interstate commerce when a reasonable nondiscriminatory alternative is available and preferable to restricting in-state retailers—allowing out-of-state retailers to apply and qualify for direct shipping permits.²²³ Modifying New York's use of its ban on interstate shipping does not abrogate New York's Twenty-first Amendment power to regulate alcohol because that power exists within a federal framework in which state laws regulating alcohol cannot discriminate against out-of-state businesses with impunity and burden interstate commerce.²²⁴

For these reasons, the *Arnold's Wines* decision should be reversed. New York should not be able to treat in-state and out-of-state wine retailers differently solely on the basis of their residence. Such discrimination violates the federal interest in promoting free trade among the States, and while New York may try to put a cork in *Granholm v. Heald*, there is still plenty left in the bottle.

²²² See *Granholm*, 544 U.S. at 493.

²²³ See *Perry*, 530 F. Supp. 2d at 871–72 (“[D]iscriminatory direct-shipping laws should be cured by extending rights to out-of-state retailers rather than by increasing restrictions on in-state retailers. . . . [T]he extension of benefits, not the extension of burdens-is [the goal] inherent in a claim under the Commerce Clause [A] Commerce Clause claim can only be redressed in the form of eliminating discriminatory restrictions that have been imposed on out-of-state interests.”) (quoting *Dickerson v. Bailey*, 336 F.3d 388, 407–09 (5th Cir. 1990)).

²²⁴ See *Granholm*, 544 U.S. at 493.