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## Great Beer, Good Intentions, Bad Law: The Unconstitutionality of New York's Farm Brewery License

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# GREAT BEER, GOOD INTENTIONS, BAD LAW: THE UNCONSTITUTIONALITY OF NEW YORK'S FARM BREWERY LICENSE

**Abstract:** In January 2013, New York joined a recent legislative trend and adopted into law a farm brewery license. The law seeks to protect and promote New York's brewery-related agricultural sectors by creating a new and cheaper "farm brewery" license that grants special privileges to licensees while mandating that they brew with in-state ingredients. This Note argues that, although well-intentioned, this legislative adaption to the craft beer revolution is a protectionist violation of the dormant Commerce Clause. In doing so, this Note provides a background to alcohol regulation in the United States, outlines the tensions these regulations have with the Commerce Clause, and concludes that although states should promote craft brewing, they must do so legally, uniformly, and non-discriminatorily.

## INTRODUCTION

The tension between state legislation and the Commerce Clause is deeply rooted in United States' legal history.<sup>1</sup> As is true in life as well as law, alcohol's involvement has made the situation both more interesting and more contentious.<sup>2</sup> Because the Twenty-first Amendment constitutionalized state-level alcohol regulation, the tension between states' robust alcohol regulatory schemes and the Commerce Clause's proscription of state-level regulation of national commerce has been particularly sharp.<sup>3</sup>

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<sup>1</sup> See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 198 (1824) (acknowledging tension between state regulation and the Commerce Clause, and first recognizing what would become known as the "dormant" Commerce Clause); Brannon P. Denning, *The Dormant Commerce Clause Doctrine: Prolegomenon to a Defense*, 88 MINN. L. REV. 1801, 1804 (2004) ("Claims that the [dormant Commerce Clause doctrine] has no basis in the original understanding of the Constitution's framers are often made, but not well supported.").

<sup>2</sup> See Kevin C. Quigley, Note, *Uncorking Granholm: Extending the Nondiscrimination Principle to All Interstate Commerce in Wine*, 52 B.C. L. REV. 1871, 1873–74 (2011) (demonstrating that alcohol regulation has often been the source of Commerce Clause litigation). See generally Elizabeth D. Lauzon, Annotation, *Interplay Between Twenty-First Amendment and Commerce Clause Concerning State Regulation of Intoxicating Liquors*, 116 A.L.R. 5th 149 (2004) (same).

<sup>3</sup> U.S. CONST. amend. XXI (repealing the Eighteenth Amendment, and stating that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited"); *id.* amend. XVIII, repealed by *id.* amend. XXI (prohibiting the "manufacture, sale, or transportation of intoxicating liquors"). See generally Lauzon, *supra* note 2 (listing cases demonstrating tension between the Commerce Clause and state regulation of the alcohol industry).

As this battle over regulatory control of the alcohol industry has raged in the courts, American brewing has undergone an explosive revolution spurred by the advent of craft.<sup>4</sup> A “craft brewery” is defined by its traditional, small, and independent nature: it must primarily brew with traditional ingredients using traditional techniques, must produce less than six million barrels of beer per year, and must not be more than twenty-five percent owned or controlled by a non-craft brewery.<sup>5</sup> Approximately 2,768 craft breweries operated for some or all of 2013 (the highest total number at least since the 1880s), and in that same year the craft brewing industry grew 17.2% by volume.<sup>6</sup> Consequently, states have dipped into their reservoirs of legislative imagination to construct ways to encourage the development of this booming sector of the economy while maintaining their regulatory control.<sup>7</sup> The results are mixed.<sup>8</sup>

One regulatory development has come in the form of a “farm brewery license.”<sup>9</sup> This license is both much cheaper than its traditional counterpart, and affords more flexible privileges in exchange for sourcing ingredients from

<sup>4</sup> See *Granolm v. Heald*, 544 U.S. 460, 465–66 (2005); see *Economic Impact Data*, BREWERS ASS’N, <http://www.brewersassociation.org/statistics/economic-impact-data/>, archived at <http://perma.cc/AXU5-2UCU> (last visited Jan. 12, 2015) (calculating a \$33.9 billion contribution to the U.S. economy from craft beer in 2012, with over 360,000 jobs created); see also *History of Craft Brewing*, BREWERS ASS’N, <http://www.brewersassociation.org/brewers-association/history/history-of-craft-brewing/>, archived at <http://perma.cc/N3T8-XN92> (last visited Jan. 12, 2015).

<sup>5</sup> See *Craft Brewer Defined*, BREWERS ASS’N, <http://www.brewersassociation.org/statistics/craft-brewer-defined/>, archived at <http://perma.cc/5WK7-2KHQ> (last visited Jan. 12, 2015). The requirement that brewers use traditional ingredients and techniques means, in essence, that they brew without adjuncts—that is, they primarily brew all-malt styles. See *id.* This requirement excludes flavored malt beverages. See *id.* In addition to these objective requirements, craft breweries are also marked by their innovative approach to brewing, their involvement in local community, and their “individualistic approaches to connecting with their customers.” *Id.* “The majority of Americans live within 10 miles of a craft brewer.” *Id.*

<sup>6</sup> See *National Beer Sales & Production Data*, BREWERS ASS’N, <http://www.brewersassociation.org/statistics/national-beer-sales-production-data/>, archived at <http://perma.cc/9ATU-3Q9X> (last visited Jan. 12, 2015) (showing percentage of growth by volume); *Number of Breweries*, BREWERS ASS’N, <http://www.brewersassociation.org/statistics/number-of-breweries/>, archived at <http://perma.cc/NZ7E-JNLM> (last visited Jan. 12, 2015) (showing the number of craft breweries operating in 2012 and 2013 and noting a 15.3% increase in the number of craft breweries during that time).

<sup>7</sup> See *Granolm*, 544 U.S. at 465–66 (describing New York and Michigan distribution laws); *Self-Distribution Laws*, BREWERS ASS’N, <http://www.brewersassociation.org/government-affairs/laws/self-distribution-laws/>, archived at <http://perma.cc/L7FR-WM55> (last visited Jan. 12, 2015) (surveying largely fragmented self-distribution laws among the states).

<sup>8</sup> See *Granolm*, 544 U.S. at 466 (striking down New York and Michigan distribution laws); *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 21 (1st Cir. 2010) (striking down a Massachusetts wine distribution law designed to remedy constitutional infirmities in a previously invalidated Massachusetts wine distribution law); Quigley, *supra* note 2, at 1888 (noting continued pushback from states regarding alcohol regulation); *Self-Distribution Laws*, *supra* note 7 (demonstrating the patchwork and dysfunctional nature of fifty separate regulatory frameworks).

<sup>9</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533) (providing two key provisions in the New York farm brewery legislation).

farmers within the state.<sup>10</sup> For example, in order to promote its brewery-related agricultural sectors, New York's law requires that farm brewers source 20% of their hops and barley from within the state for the first five years after the law's enactment, then 60%, then eventually 90% after twenty years.<sup>11</sup> As of June 2, 2014, thirty-five farm breweries operate in New York, which includes twenty-two established in 2013 alone.<sup>12</sup>

Yet here familiar Commerce Clause jurisprudence sounds again: if out-of-state hop and barley farmers wish to sell to these new brewers, they will face significant hurdles.<sup>13</sup> Likewise, if these brewers source more than the approved quantity of out-of-state ingredients, they violate their license.<sup>14</sup> Moreover, if

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<sup>10</sup> *See id.* §§ 3, 51-a, 56; N.Y. TAX LAW § 1136(i)(1)(C) (McKinney 2014) (exempting farm breweries, wineries, cideries, and distilleries from tax filing provisions relating to information regarding sales of alcoholic products); NEW YORK STATE LIQUOR AUTH., COMPLYING WITH NEW YORK'S ALCOHOLIC BEVERAGE CONTROL LAW—A GUIDE FOR WINERIES AND FARM WINERIES 11 (2013), available at <http://www.newyorkwines.org/Resources/9918908bf4a040f8b945863dcdac9a8e.pdf>, archived at <http://perma.cc/9K6L-QL9W> (“Farm’ manufacturing licenses have more privileges than standard manufacturing licenses.”). Compare N.Y. ALCO. BEV. CONT. LAW § 56(1)(a) (\$4,000 annual license fee for traditional brewers that produce over 75,000 barrels per year), with *id.* § 56(1)(b) (\$320 annual license fee for farm brewers). Massachusetts and Maryland have similar farm brewery laws. *See* MASS. GEN. LAWS ANN. ch. 138, § 19c (West 2006 & Supp. 2014); MD. CODE ANN., ALCO. BEV. § 2-209 (LexisNexis Supp. 2014). New Jersey has proposed a similar statute as well. *See* S. 133, 216th Leg., Reg. Sess. (N.J. 2014).

<sup>11</sup> N.Y. ALCO. BEV. CONT. LAW § 3, 51-a; *see* Press Release, Governor Andrew M. Cuomo, Governor Cuomo Welcomes 14 Licensed Farm Breweries in New York State (Oct. 9, 2013), available at <http://www.governor.ny.gov/news/governor-cuomo-welcomes-14-licensed-farm-breweries-new-york-state>, archived at <http://perma.cc/CXK4-FE9V>.

<sup>12</sup> Will Cleveland, *Law Opens Door for Local Brewers*, DEMOCRATIC & CHRON. (June 2, 2014), <http://www.democratandchronicle.com/story/news/2014/06/01/farm-winery-law-rochester-breweries/9835431/>, archived at <http://perma.cc/AYL7-BUQ4> (noting also that “[t]he rapid growth will only continue as more, including The Lost Borough in Rochester and Nedloh in Bloomfield, take advantage of the law”); *see Farm Breweries Growing Fast in New York*, BREWYORK (Feb. 20, 2014), <http://brewyorknewyork.com/post/77308095246/farm-breweries-growing-fast-in-new-york>, archived at <http://perma.cc/VP85-QER7>; *see also* Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces 72 Percent Increase in Taste NY Farm-Based Beverage Licenses Since 2011 (Feb. 3, 2014), available at <http://www.governor.ny.gov/news/governor-cuomo-announces-72-percent-increase-taste-ny-farm-based-beverage-licenses-2011>, archived at <http://perma.cc/NNB3-XKQK> (“There are currently 26 licensed farm breweries in New York, with more than a dozen applications currently in the pipeline.”) (emphasis added).

<sup>13</sup> *See* N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a; Cleveland, *supra* note 12 (quoting several complaints that soon New York's brewery-related agriculture will not be able to withstand growing demand); *infra* note 151–154 and accompanying text (addressing various concerns that New York's brewery related agriculture cannot meet the increase in demand that will be caused by the farm brewery law's graduating in-state sourcing requirements).

<sup>14</sup> *See* N.Y. ALCO. BEV. CONT. LAW § 51-a(11) (“[N]o licensed farm brewery shall manufacture or sell any beer other than New York state labeled beer.”); *id.* § 3 (defining New York state labeled beer).

New York's agricultural infrastructure cannot fully handle the increased demand, problems will abound.<sup>15</sup>

This Note argues that although New York and other states deserve praise for attempting to accommodate the art and industry of craft beer, they must do so constitutionally.<sup>16</sup> Furthermore, this Note argues that protectionism is contrary both to the spirit of entrepreneurship and to the spirit of the craft beer revolution.<sup>17</sup> Part I provides the historical backdrop on which this battle is fought.<sup>18</sup> It examines the role of the dormant Commerce Clause, the function of the Twenty-first Amendment, and the tension between these provisions as altered in 2005 by the U.S. Supreme Court in *Granholm v. Heald*.<sup>19</sup> Part II focuses on New York's farm brewery law and compares it to the distribution laws that the Supreme Court struck down in *Granholm*.<sup>20</sup> Part III argues that New York's farm brewery license violates the dormant Commerce Clause and cannot be saved by the Twenty-first Amendment.<sup>21</sup> Finally, it suggests that states should instead pursue simple deregulation as a way to foster craft breweries constitutionally.<sup>22</sup>

## I. THE COMMERCE CLAUSE, STATE REGULATION, AND ALCOHOL: A STORY OF TENSION

The Commerce Clause is a primary font of congressional power.<sup>23</sup> By way of over two centuries of changing economic landscapes and expansive judicial interpretation, it has produced a vast federal legislative and regulatory framework.<sup>24</sup> This federal regulatory framework often and inevitably conflicts with state regulatory schemes.<sup>25</sup> The resulting tension is particularly evident

<sup>15</sup> See *infra* notes 151–154 and accompanying text (explaining potential agricultural deficiencies in the farm brewery scheme).

<sup>16</sup> See *infra* notes 185–268 and accompanying text.

<sup>17</sup> See *infra* notes 185–268 and accompanying text.

<sup>18</sup> See *infra* notes 23–104 and accompanying text.

<sup>19</sup> See *infra* notes 23–104 and accompanying text.

<sup>20</sup> See *infra* notes 105–184 and accompanying text.

<sup>21</sup> See *infra* notes 185–268 and accompanying text.

<sup>22</sup> See *infra* notes 252–268 and accompanying text.

<sup>23</sup> See U.S. CONST. art. I, § 8, cl. 3 (“[Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .”); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534–35 (1949) (“The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state.”).

<sup>24</sup> See *U.S. v. Lopez*, 514 U.S. 549, 556 (1995) (finding that this steady expansion of congressional power under the Commerce Clause was due in part to the “recognition of the great changes that had occurred in the way business was carried out in this country. Enterprises that had once been local or at most regional in nature had become national in scope.”).

<sup>25</sup> See *id.* at 553–54 (“[T]he Court’s Commerce Clause decisions dealt but rarely with the extent of Congress’ power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce.”); *H.P. Hood & Sons*, 336 U.S. at 534–35 (demonstrating the conflict between state legislation and Congress’s plenary power to regulate interstate commerce).

with regard to alcohol regulation because the Twenty-first Amendment constitutionalizes state-level regulation of the alcohol industry.<sup>26</sup> This Part tells one sliver of this storied friction in three Sections.<sup>27</sup> First, Section A briefly explains the origin, purpose, and scope of what is commonly referred to as the dormant Commerce Clause.<sup>28</sup> Section B examines the history and current standing of the Twenty-first Amendment vis-à-vis the dormant Commerce Clause, and reviews how states have regulated the alcohol industry since its ratification.<sup>29</sup> Finally, Section C explores how the U.S. Supreme Court handled these opposing forces in its most recent treatment of the topic.<sup>30</sup>

### A. *The Dormant Commerce Clause: The Commerce Clause's Murkier, Quieter, and Mischievous Other Side*

The Commerce Clause gives Congress the authority to regulate commerce “among the several States.”<sup>31</sup> The U.S. Supreme Court, in some of its earliest cases, interpreted this positive power to also negate state action that interferes with interstate commerce or regulates it as only Congress may.<sup>32</sup> This logical corollary, commonly called the “dormant” Commerce Clause, has served as a jurisprudential tool of choice in the effort to harmonize a national economy populated by self-interested and highly sovereign states.<sup>33</sup> The doctrine essentially teaches that states cannot adversely affect the cohesion and fluidity of a single, national economy—that is, they cannot economically Balkanize the nation.<sup>34</sup>

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<sup>26</sup> U.S. CONST. amend. XXI, § 2 (“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.”); see Quigley, *supra* note 2, at 1880–81 (tracing the U.S. Supreme Court’s treatment of the Twenty-first Amendment).

<sup>27</sup> See *infra* notes 31–104 and accompanying text.

<sup>28</sup> See *infra* notes 31–50 and accompanying text.

<sup>29</sup> See *infra* notes 51–64 and accompanying text.

<sup>30</sup> See *infra* notes 65–104 and accompanying text.

<sup>31</sup> U.S. CONST. art. I, § 8, cl. 3 (“[Congress shall have Power] To regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes . . .”).

<sup>32</sup> See *Maine v. Taylor*, 477 U.S. 131, 137–38 (1986) (noting that the Commerce Clause both bestows positive power on Congress and also restrains state regulatory power); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980) (same). Chief Justice John Marshall formulated this foundational doctrine early in the Court’s history in striking a New York permitting scheme that unduly regulated interstate shipping. See *Gibbons*, 22 U.S. (9 Wheat.) at 198; see also Quigley, *supra* note 2, at 1874–75 (2011) (summarizing dormant Commerce Clause jurisprudence).

<sup>33</sup> *H.P. Hood & Sons*, 336 U.S. at 535 (“Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.”).

<sup>34</sup> See *id.* at 537–38 (“This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.”) The point here, at heart of the doctrine and at the heart of this Note, is that the Constitution guarantees a single, unified, unobstructed national economy—that the Framers intended as much, and

Violations of the dormant Commerce Clause typically come in two forms, with two corresponding levels of judicial scrutiny.<sup>35</sup> First, there are state laws that, even if facially neutral, discriminate against interstate commerce in purpose or effect.<sup>36</sup> These are held to heightened scrutiny with an almost insurmountable presumption of invalidity.<sup>37</sup> Second, there are state laws that merely burden interstate commerce.<sup>38</sup> These are instead subjected to a more lenient

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that this power was considered to be one of the most essential contrasts to the failed Articles of Confederation. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). The vehemence with which this congressional power is defended is therefore tantamount to its importance. See *id.* (“The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”).

<sup>35</sup> See *Taylor*, 477 U.S. at 138 (outlining the analytical framework for the dormant Commerce Clause, stating that when “determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions”); Catherine Gage O’Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 573–74 (1997).

<sup>36</sup> See *Taylor*, 477 U.S. at 138; Alexandra Thompson, Note, *The Legacy of Granholm v. Heald: Questioning the Constitutionality of Facially Neutral Direct-Shipping Laws*, 61 CASE W. RES. L. REV. 309, 323–24 (2010). A state law can discriminate against interstate commerce in three ways: either facially (that is, discriminatory in its very language), effectually (that is, it appears neutral but it has a discriminatory effect), or purposefully (actually passed with a discriminatory purpose). See Thompson, *supra* at 523–24. In reality, plaintiffs allege (and defendants defend) dormant Commerce Clause challenges with a large variety of interlocking doctrines relating to whether certain industries are “similarly situated,” whether the state benefit is a tax subsidy (and under Supreme Court jurisprudence, sometimes immune from the dormant Commerce Clause), or whether a law’s intent (and the means of determining that intent) need be distinct from—or is related to—the laws’ effect. See, e.g., *General Motors Corp. v. Tracy*, 519 U.S. 278, 298–99 (1997) (“Although this central assumption [that discrimination assumes substantially similar entities] has more often than not itself remained dormant in this Court’s opinions on state discrimination subject to review under the dormant Commerce Clause . . . there is a threshold question whether the companies are indeed similarly situated for constitutional purposes.”); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (“Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition [of regulating interstate commerce clause in a discriminatory way] . . .”); *Jenkins*, 592 F.3d at 11 n.11, 13–14 (2010) (noting potentially important distinctions made by courts between a challenged law’s effect and its purpose, and describing a holistic methodology for determining a law’s purpose). For purposes of both brevity and relevance, this Note does not fully flesh out these (and other) nuances in dormant Commerce Clause jurisprudence; rather, this Note argues that the New York farm brewery law—given its facial and effectual discriminatory aspects, and given that New York and out-of-state hop farmers are obviously “similarly situated”—remains unconstitutional even in light of these defenses. See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533) (explicitly regulating similarly situated economic actors to the determinant of out-of-state actors and to the benefit of in-state actors); *infra* notes 185–268 and accompanying text.

<sup>37</sup> See O’Grady, *supra* note 35, at 573–74. This is not to say that the Court simply invalidates all facially discriminatory state laws without inquiry. See *Taylor*, 477 U.S. at 151. Instead, the Court applies a strict test whereby the government must show that the law, though discriminatory, serves a non-discriminatory, a non-protectionist purpose, which itself could not be effectuated without a less discriminatory method. See Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 422 (2008).

<sup>38</sup> See Thompson, *supra* note 36, at 323.

balancing test formulated by the U.S. Supreme Court in its 1970 decision *Pike v. Bruce Church, Inc.*<sup>39</sup> Given heightened scrutiny's always-fatal effect, a court's threshold determination of a challenged law's status is outcome determinative.<sup>40</sup>

In explaining which of these two levels of scrutiny apply, the Court has defined "discrimination" straightforwardly.<sup>41</sup> A state law is discriminatory if it treats in-state and out-of-state economic interests differently so as to benefit the former and burden the latter.<sup>42</sup> Notably, discriminatory laws in this context do not have to be intentional or malicious, although evidence of either intent or malice is predictably relevant.<sup>43</sup> Instead, they merely need to treat a kind of commerce differently because of its state identity.<sup>44</sup> By formulating such a broad jurisprudence, the Court arguably takes a hard, more scrutinizing look at discriminatory state laws in the dormant Commerce Clause context than in others.<sup>45</sup>

Clarity, however, is not the dormant Commerce Clause's virtue.<sup>46</sup> States continue to test its amorphous boundaries, and courts continue to struggle with its application.<sup>47</sup> Changing economies and industries only further complicate

<sup>39</sup> See 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly 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."); Thompson, *supra* note 36, at 323.

<sup>40</sup> See O'Grady, *supra* note 35, at 574. A finding that a state law is in fact discriminatory is almost always fatal to that law; the chance the state is afforded to demonstrate otherwise is, as one scholar puts it, "illusory." *Id.* at 574 n.12 (citing multiple cases where courts have struck down state laws on a *per se* basis upon a finding of discrimination under a Commerce Clause analysis). The test of whether a law is in fact discriminatory is however unclear. See Thompson, *supra* note 36, at 323. If the law makes it past this stage without invoking the heightened standard, its chances of survival are greatly increased. Denning, *supra* note 37, at 422 (describing the *Pike* balancing test—whereby the challenger of a law must prove that the burdens on interstate commerce are clearly excessive in relation to putative benefits—as deferential); O'Grady, *supra* note 35, at 574.

<sup>41</sup> See O'Grady, *supra* note 35, at 578.

<sup>42</sup> *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994) ("As we use the term here, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid."); see O'Grady, *supra* note 35, at 578.

<sup>43</sup> See O'Grady, *supra* note 35, at 578. This indifference to—or more precisely, the unnecessary of—intent as an element of discrimination in the dormant Commerce Clause context contrasts with the concept of discrimination in other constitutional contexts, such as Equal Protection, in which a law's intent to discriminate against a class of persons is highly relevant. See *id.* at 578 n.26.

<sup>44</sup> *Id.*

<sup>45</sup> See *id.* at 578 n.26; see also Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 117–23 (1988) (fleshing out more extensively the juxtaposition of intent and judicial review in Equal Protection and Commerce Clause doctrines).

<sup>46</sup> *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 203 (1990) (Scalia, J., concurring) ("[N]obody of our decisional law has changed as regularly as our 'negative' Commerce Clause jurisprudence."); Denning, *supra* note 37, at 422–23 (noting the lack of clarity or logical cohesion in the dormant Commerce Clause decisions, concluding that many decisions are irreconcilable).

<sup>47</sup> See *Am. Trucking Ass'ns*, 496 U.S. at 203 (Scalia, J., concurring).



the matter, especially when other constitutional doctrines are implicated.<sup>48</sup> Given arguably inconsistent and expansive Supreme Court decisions in seemingly similar fact patterns, further analysis is better situated in highly specific factual settings rather than in the abstract.<sup>49</sup> It can confidently be said, however, that given the dormant Commerce Clause's serpentine history, and the inherent fragility of most constitutional test-based jurisprudences, it is likely the doctrine's future will be equally as opaque.<sup>50</sup>

### *B. The Twenty-first Amendment: A Power (Maybe) Delegated to the States*

The Twenty-first Amendment, appearing much further down the timeline of constitutional history, put an end to America's disastrously failed experiment with Prohibition.<sup>51</sup> Instead of merely repealing the Eighteenth Amendment (which constitutionalized Prohibition), the Amendment also contains a lesser known second and heavily litigated provision, referred to here as the "Second Provision."<sup>52</sup> This Provision states that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."<sup>53</sup>

This famously controversial and somewhat ambiguous Second Provision gives states a higher degree of regulatory authority.<sup>54</sup> That is, although states

<sup>48</sup> See *id.* ("Change is almost [the dormant Commerce Clause's] natural state, as it is the natural state of legislation in a constantly changing national economy.")

<sup>49</sup> See *Denning, supra* note 37, at 422 ("[Dormant Commerce Clause] rules are easy to recite, but their application is notoriously difficult, resulting in cases with similar facts being decided differently, and the different outcomes justified on the basis of tendentious distinctions.")

<sup>50</sup> See *Am. Trucking Ass'ns*, 496 U.S. at 203 (Scalia, J., concurring); *Denning, supra* note 37, at 428–52 (explaining the convoluted history of the dormant Commerce Clause and describing a theory of "constitutional calcification," whereby constitutional tests or jurisprudential frameworks erode with time in a predictable matter—a sort of shelf life for constitutional doctrines).

<sup>51</sup> U.S. CONST. amend. XXI. The outright failure of the temperance movement's attempt to banish alcohol is widely acknowledged as simple fact. See, e.g., Gordon Eng, Note, *Old Whine in a New Battle: Pragmatic Approaches to Balancing the Twenty-First Amendment, the Dormant Commerce Clause, and the Direct Shipping of Wine*, 30 FORDHAM URB. L.J. 1849, 1860–62 (2003) (tracing the history of the temperance movement and its unequivocal failure); Clayton L. Silvernail, Comment, *Smoke, Mirrors and Myopia: How the States Are Able to Pass Unconstitutional Laws Against the Direct Shipping of Wine in Interstate Commerce*, 44 S. TEX. L. REV. 499, 512 (2003) ("In fact, Prohibition was a colossal failure.")

<sup>52</sup> U.S. CONST. amend. XXI, § 2. The Eighteenth Amendment, before being repealed, prohibited the manufacture, sale, or transportation of intoxicating liquors. *Id.* amend. XVIII (repealed 1933).

<sup>53</sup> *Id.* amend. XXI, § 2.

<sup>54</sup> *Granholm*, 544 U.S. at 484 ("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."). *But see* *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984) ("It is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause.")

regulated the alcohol industry before Prohibition, the constitutionalization of this practice solidified an arguably unprecedented authority to do so as aggressively as they wished.<sup>55</sup>

Although such a doctrine may seem odd today, one must understand that public and governmental distrust of the alcohol industry persisted despite enormous dissatisfaction with Prohibition.<sup>56</sup> Fears of organized crime and widespread intemperance—sentiments that spurred Prohibition in the first place—endured.<sup>57</sup> To protect against such evils it was thought necessary to allow states the power to regulate every aspect of the industry, including the power to prohibit alcohol.<sup>58</sup> As a result, the alcohol industry emerged from the shadows of Prohibition as one of the most heavily and sporadically regulated sectors of the economy.<sup>59</sup> As is to be expected with heavy state regulation, liti-

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<sup>55</sup> *Granholm*, 544 U.S. at 495 (Stevens, J., dissenting) (articulating a view that the Twenty-first Amendment provides states with nearly unmitigated authority to regulate alcohol); see *infra* notes 75–91 and accompanying text (explaining the perspective that the Twenty-first Amendment grants states near-plenary power to regulate alcohol).

<sup>56</sup> See Marcia Yablon, *The Prohibition Hangover: Why Are We Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L. 552, 553 (2006) (“Over time, the purpose behind the ratification and then repeal of National Prohibition has been forgotten by the majority of Americans. Currently, Prohibition is most often referred to as a ‘failed experiment’ or a ‘strange aberration’ in our country’s history. However, although Prohibition was the culmination of the temperance movement’s goals, the temperance movement itself was nothing new. This movement *had been* an important and accepted part of American society since the early Nineteenth Century.”) (emphasis added); Andrew Tamayo, Comment, *What’s Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina’s Craft Breweries*, 88 N.C. L. REV. 2198, 2209–12 (2010) (tracing the historical roots of modern state alcohol regulation, and noting the societal mores which dominated at the time of repeal).

<sup>57</sup> See Tomayo, *supra* note 56, at 2209–12. Of particular importance was the work of a leader of the Temperance Movement, John D. Rockefeller, Jr., who commissioned a report called “Toward Liquor Control.” See *id.* at 2209. See generally RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL (1933) (demonstrating the Temperance Movement’s perspective on alcohol). This report polled expert and public opinion towards the alcohol industry and in turn laid the intellectual foundation upon which modern state alcohol regulation would be founded. See Tomayo, *supra* note 56, at 2209–11. One key tenet of this foundation was a robust licensing system for alcohol manufacturers. See *id.*; see also Yablon, *supra* note 56, at 555–67 (describing the social context and content of the prohibition movement); *infra* notes 111–137 (outlining New York brewery licensing scheme).

<sup>58</sup> See Yablon, *supra* note 56, at 594–95 (“In the period following the repeal of Prohibition, alcohol consumption in the country was at the lowest levels it had ever been and many states remained completely dry long after repeal. Oklahoma did not repeal its statewide Prohibition until 1959 and Mississippi remained dry until 1966.”); Tomayo, *supra* note 56, at 2209–11; see also *Granholm*, 544 U.S. at 494–95 (Stevens, J., dissenting) (“[T]he moral condemnation of the use of alcohol as a beverage represented not merely the convictions of our religious leaders, but the views of a sufficiently large majority of the population to warrant the rare exercise of the power to amend the Constitution on two occasions.”) Also demonstrating the social mores of the time, the Twenty-first Amendment is the only constitutional amendment to have been ratified by the people in state conventions, rather than by state legislatures. See *Granholm*, 544 U.S. at 497 (Stevens, J., dissenting).

<sup>59</sup> See *Granholm*, 544 U.S. at 496 (Stevens, J., dissenting) (listing as examples certain state laws regarding alcohol, including prohibition of sale on Sundays, prohibition of hard liquor specifically, and the infamous three-tier system). The three-tier system, adopted at least in part in every state, is

gation flourished—litigation which to this day continues to etch out the exact boundaries of state authority under the Twenty-first Amendment.<sup>60</sup>

Meanwhile, roughly over the last thirty years and most prominently in the last ten, a highly popular craft beer revolution has taken the alcohol industry by storm.<sup>61</sup> In just a few decades, the American beer landscape has been transformed from one in which a few large breweries dominated the market with largely indiscernible product to one populated by thousands of breweries representing unprecedented creativity, historical reinterpretation, variety, locality, and entrepreneurship.<sup>62</sup> This revolution has forever changed the culture and mechanisms of the beer industry, which no longer resemble the market as it was when the Twenty-first Amendment was enacted in 1933.<sup>63</sup> The laws and regulations stemming from the Second Provision are struggling to keep up.<sup>64</sup>

one of the most litigated aspects of these states' laws. See Quigley, *supra* note 2, at 1882. Generally, the system, in an attempt to prevent crime or corruption and to encourage temperance, legally requires manufacturers to sell only to wholesalers, who in turn sell to retailers, who in turn sell to consumers. *Id.* Vertical integration between these tiers is forbidden. *Id.*

<sup>60</sup> See generally Lauzon, *supra* note 2 (listing well over a hundred cases in just the Commerce Clause context of state alcohol regulation).

<sup>61</sup> See *History of Craft Brewing*, *supra* note 4.

<sup>62</sup> See Shirley Chen, Note, *Craft Beer Drinkers Reignite the Wine Wars*, 26 LOY. CONSUMER L. REV. 526, 539–40 (2014) (noting the previous lack of diversity and recent rise of craft styles); David R. Scott, Comment, *Brewing up a New Century of Beer: How North Carolina Laws Stifle Competition in the Beer Industry and How They Should Be Changed*, 3 WAKE FOREST J. L. & POL'Y 417, 417 (2013); *History of Craft Brewing*, *supra* note 4 (“The history of craft brewing saw America’s brewing landscape start to change by the late-1970s. The traditions and styles brought over by immigrants from all over the world were disappearing. Only light lager appeared on shelves and in bars, and imported beer was not a significant player in the marketplace.”). There were 2,403 breweries in operation for at least part of 2012 in the United States; forty-six percent of these breweries were microbreweries; and a majority of Americans by estimate live within ten miles of a brewery. Scott, *supra* at 417. These statistics are most compelling when compared to the fact that in 1979, there were only forty-four operating breweries in the U.S. See Tamayo, *supra* note 56, at 2212. Necessary to understanding the simultaneously consolidating nature of the brewing market is the fact that even though the number of small breweries has shot upward, so has the market share of the largest five breweries, which was 87.2% in 2001. See *id.*; see also Nick Cibula, Note, *It’s Always a Good Time for Beer, but What About the Hops?*, 18 DRAKE J. AGRIC. L. 157, 157–59 (2013) (describing massive consolidation among the major players in the beer market).

<sup>63</sup> See *History of Craft Brewing*, *supra* note 4; see also Tamayo, *supra* note 56, at 2199. There is a widely held belief that craft beer began with Jack McAuliffe’s New Albion Ale in 1977, which, though commercially unviable, laid the foundation for stronger pillars of the craft beer movement: Jim Koch’s Boston Beer Company in Boston, MA and Ken Grossman’s Sierra Nevada in Chico, CA. See Tamayo, *supra* note 56, at 2199. Also belonging among these names is Jeff Labesch’s New Belgium Brewing, in Fort Collins, CO. See *Our History*, NEW BELGIUM BREWING CO., <http://www.newbelgium.com/brewery/company.aspx>, archived at <http://perma.cc/46JC-QFT> (last visited Jan. 15, 2015).

<sup>64</sup> See *infra* notes 111–137 and accompanying text (outlining New York’s farm brewery licensing mechanism).

C. *Alcohol and the Dormant Commerce Clause: A Storied Rivalry, and Granholm's "Reconciliation"*

On one hand there is the dormant Commerce Clause, dictating national unity on economic policies.<sup>65</sup> On the other is the Second Provision of the Twenty-first Amendment, providing states an often utilized and constitutionally guaranteed right to regulate alcohol within their borders.<sup>66</sup> From such obvious adversity well over a hundred cases have sprung.<sup>67</sup>

More specifically, the passage of the Eighteenth and the Twenty-first Amendments, along with the related Wilson and Webb-Kenyon Acts, afforded alcohol special status in any Commerce Clause analysis.<sup>68</sup> That is, historically and constitutionally speaking, alcohol is not merely just another item in commerce.<sup>69</sup> And although the extent of this unique status remains the heart of the uncertain and unresolved tension between the Commerce Clause and Second Provision, today the Commerce Clause appears to be winning.<sup>70</sup>

This trend is best told in two parts.<sup>71</sup> Subsection 1 discusses the Court's non-deferential treatment of alcohol regulation prior to the Temperance Movement and the Eighteenth Amendment.<sup>72</sup> It then examines the Court's early interpretation of the Twenty-first Amendment as a blanket delegation of nearly plenary regulatory power to states.<sup>73</sup> Subsection 2 explains the Court's partial rejection of this old model and its adoption of a modern, balanced approach—and explains how this modern approach tilted even further in the Commerce Clause's favor in *Granholm*.<sup>74</sup>

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<sup>65</sup> See *supra* notes 31–50 (outlining the dormant Commerce Clause).

<sup>66</sup> See *supra* notes 51–64 (outlining Twenty-first Amendment jurisprudence).

<sup>67</sup> See Lauzon, *supra* note 2, § 2a at 162–71 (collecting cases); James J. Williamson III, Case-brief, *Raise Your Glass: The Third Circuit Holds New Jersey Wine Laws in Violation of the Dormant Commerce Clause and Leaves Room for a Future Challenge of the Direct Shipment Ban*, 56 VILL. L. REV. 753, 754–55 (2012) (noting tension between the dormant Commerce Clause and the Twenty-first Amendment and concluding that reconciliation does not leave “an easy choice”).

<sup>68</sup> See U.S. CONST. amend. XXI; *id.* amend. XVIII (repealed 1933); Webb-Kenyon Act of 1913, 37 Stat. 699 (codified at 27 U.S.C. § 122 (2012)) (affording states greater regulatory control of alcohol within their borders); Wilson Act of 1890, 26 Stat. 313 (codified at 27 U.S.C. § 121 (2012)) (same); Lauzon, *supra* note 2, § 2a at 162–71 (describing the Wilson and Webb-Kenyon Acts and how they singled out alcohol and afforded it special status for regulatory purposes); *infra* note 81–82 and accompanying text (discussing the Wilson and Webb-Kenyon Acts).

<sup>69</sup> See *Granholm*, 544 U.S. at 494 (Stevens, J., dissenting); Lauzon, *supra* note 2, § 2a at 162–71.

<sup>70</sup> See *Granholm*, 544 U.S. at 476–89 (tracing the Court's own jurisprudential history on this issue); Lauzon, *supra* note 2, § 2 at 162–71 (tracing the Supreme Court's interpretation of the Twenty-first Amendment and finding a consistent chipping-away at states' plenary powers under the Second Provision).

<sup>71</sup> See *infra* notes 72–104 and accompanying text.

<sup>72</sup> See *infra* notes 75–77 and accompanying text.

<sup>73</sup> See *infra* notes 78–91 and accompanying text.

<sup>74</sup> See *infra* notes 92–104 and accompanying text.

## 1. The Temperance Movement's Rise and Fall

Before the Temperance Movement garnered enough strength to pass the Eighteenth Amendment, the U.S. Supreme Court treated alcohol like any other commodity in interstate commerce.<sup>75</sup> It was thus subjected like any other commodity to the dormant Commerce Clause.<sup>76</sup> That is, the Court would strike down discriminatorily improper regulation of the national alcohol industry like it would any other similarly improper law—even those which today would seem perfectly commonplace.<sup>77</sup>

Alcohol's quotidian status changed with the rise of the Temperance Movement.<sup>78</sup> The Temperance Movement in the United States was born out of growing public dismay over what was perceived to be alcohol's corrosive effect on societal morality.<sup>79</sup> Construing causation between intoxication and criminality, national opinion shifted dramatically enough to move Congress to action.<sup>80</sup>

The major acts Congress passed in response to this movement were the Wilson and Webb-Kenyon Acts, which essentially closed loopholes in state alcohol laws opened by the U.S. Supreme Court with various dormant Commerce Clause analyses.<sup>81</sup> In substance, these laws are congressional delega-

<sup>75</sup> See *Granholm*, 544 U.S. at 476–78 (relating pre-Prohibition jurisprudence); Lauzon, *supra* note 2, § 2a at 164 (“Before the enactment of the Twenty-first Amendment, and disregarding the interlude of the Eighteenth Amendment, alcohol was treated as any other article of commerce, and therefore the power of the states to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause.”).

<sup>76</sup> Lauzon, *supra* note 2, § 2a at 162–231. This does not mean that it was treated like any other commodity by the states; since the Civil War the Temperance Movement had marched on this “commodity” with fervor. See Autumn R. Veatch, Comment, *Where Does the Commerce Clause End and the Twenty-First Amendment Begin Under Bainbridge v. Turner?*, 39 NEW ENG. L. REV. 111, 115–16 (2004).

<sup>77</sup> See, e.g., *Bowman v. Chicago*, 125 U.S. 465, 500 (1888) (striking down an Iowa statute that required all liquor importers to have a permit); *Walling v. Michigan*, 116 U.S. 446, 461 (1886) (striking down tax targeting importers); *Tiernan v. Rinker*, 102 U.S. 123, 128 (1880) (same); see also *Quigley*, *supra* note 2, at 1875 n.40 (collecting cases).

<sup>78</sup> See *Tamayo*, *supra* note 56 at 2207–09. The Temperance Movement was a nation-wide movement organized on the principles of sobriety and dedicated to abolishing what they perceived as America's collective alcoholism. *Id.*

<sup>79</sup> See *id.*

<sup>80</sup> *Id.*

<sup>81</sup> See Webb-Kenyon Act of 1913, 37 Stat. 699 (codified at 27 U.S.C. § 122 (2012)); Wilson Act of 1890, 26 Stat. 313 (codified at 27 U.S.C. § 121 (2012)); *Granholm*, 544 U.S. at 478, 481. The Wilson Act overruled the Supreme Court's 1890 decision in *Leisy v. Hardin*, specifically allowing states to regulate imported liquor on the same grounds as domestic liquor. See 26 Stat. 313; *Leisy v. Hardin*, 135 U.S. 100 (1890); *Granholm*, 544 U.S. at 478. When the Supreme Court ruled that the Wilson Act did not prevent direct shipments of alcohol to persons for personal use or otherwise discriminate against interstate commerce, Congress passed the Webb-Kenyon Act. See 37 Stat. 699; *Rhodes v. Iowa*, 170 U.S. 412, 421 (1898) (discussing the Wilson Act and emphasizing that despite that Act, consumers have a right to receive direct shipments of liquor in interstate commerce); *Vance v. W. A. Vandercook Co.*, 170 U.S. 438, 455 (1898) (same); *Scott v. Donald*, 165 U.S. 58, 92–3 (1897) (striking down a South Carolina dispensary law that favored its own alcohol industry and holding that dis-

tions of regulatory power to states, allowing them to regulate interstate commerce in liquor to the same extent they could regulate similar intrastate commerce.<sup>82</sup>

Although the Wilson and Webb-Kenyon Acts vested in states strong and special regulatory power, they were rendered temporarily moot with the passage of the Eighteenth Amendment.<sup>83</sup> With the alcohol industry banned, the dormant Commerce Clause was irrelevant in this context.<sup>84</sup> Prohibition turned out to be, however, a misguided disaster.<sup>85</sup> Thirteen years after its enactment, the Eighteenth Amendment was repealed by the Twenty-first Amendment, which also contained the aforementioned and troublesome Second Provision.<sup>86</sup>

In the early cases interpreting the relationship between this Second Provision and the newly relevant dormant Commerce Clause, the U.S. Supreme Court held that states possessed near-plenary power to regulate alcohol as they wished.<sup>87</sup> The Second Provision of the Amendment was thus interpreted as a broad and nearly unqualified delegation of authority to states, immunizing alcohol regulations from the dormant Commerce Clause.<sup>88</sup> In other words, the Twenty-first Amendment was interpreted as a constitutionalized form of the Webb-Kenyon Act.<sup>89</sup> Though no longer banned, alcohol remained a very dif-

crimination against out of state alcohol industries is not protected by the Wilson Act); *see also Granholm*, 544 U.S. at 479–81 (discussing these cases). This law, after surviving a constitutional challenge, effectively closed the loophole left by the Wilson Act. *See* 37 Stat. 699; *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 332, (1917) (upholding constitutionality of the Webb-Kenyon Act); *see also Granholm*, 544 U.S. at 481 (observing this evolution). This broad delegation of regulatory control served as the basis for the Court's early interpretation of the Twenty-first Amendment. *See* 37 Stat. 699; 26 Stat. 313; *Granholm*, 544 U.S. at 481.

<sup>82</sup> *See* 27 U.S.C. §§ 121, 122 (2012); *Granholm*, 544 U.S. at 481; *Jenkins*, 592 F.3d at 18. Because the dormant Commerce Clause is a default rule reserving national commercial regulatory power in Congress, specific delegation of that power to the states effectively obviates the need for dormant Commerce Clause scrutiny. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91–92 (1984) (holding that such a congressional delegation must be “expressly stated.”). In other words, there is no need to protect what Congress has given away. *See id.*

<sup>83</sup> U.S. CONST. amend. XVIII (repealed 1933) (constitutionalizing Prohibition); Lauzon, *supra* note 2, § 2a at 162–71.

<sup>84</sup> *See Granholm*, 544 U.S. at 484.

<sup>85</sup> *See Tamayo*, *supra* note 56, at 2209 (“Prohibition brought an increase in organized crime and a wide and flagrant disregard for the law, which had the more subtle and pernicious effect of undermining public confidence and respect for police authority.”).

<sup>86</sup> *See Granholm*, 544 U.S. at 484.

<sup>87</sup> *See State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 63 (1936), *abrogated by Granholm*, 544 U.S. 460; *see also Quigley*, *supra* note 2, at 1879 (describing the Court's approach to the Twenty-first Amendment shortly after its passage as being highly deferential to state legislation).

<sup>88</sup> *See Young's Market Co.*, 299 U.S. at 62–63 (holding that had the challenged law been before the court before the Twenty-first amendment, it would have been struck under the Commerce Clause, but that this amendment “confer[s] upon the state the power to forbid all importations which do not comply with the conditions which it prescribes”).

<sup>89</sup> *See Veatch*, *supra* note 76, at 120–21 (noting the similarity between the “Second Provision” and the Webb-Kenyon Act).

ferent kind of commodity, and its regulators were afforded special deference.<sup>90</sup> This interpretation, however, would not last forever.<sup>91</sup>

## 2. The Modern Approach to the Second Provision

With continued pushback, this broad interpretation of the Twenty-first Amendment eventually gave way to a more tempered approach.<sup>92</sup> It was replaced with a narrower reading of the Second Provision and a balancing test, dubbed by one observer the “modern accommodation standard rule.”<sup>93</sup> According to this approach, courts do not simply uphold any state regulation of alcohol as valid under the Second Provision, but instead determine 1) whether the regulation violates the dormant Commerce Clause, and if it does 2) whether the regulation can be “saved” by the Second Provision.<sup>94</sup> To determine whether the Second Provision will in fact rescue the endangered law, the court determines whether the “core concerns” of the Twenty-first Amendment are implicated by the state’s regulation.<sup>95</sup> Although undefined, these “core con-

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<sup>90</sup> Lauzon, *supra* note 2, § 2a at 162–231 (listing cases and demonstrating that alcohol is afforded special attention in Commerce Clause analyses).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* With its 1945 decision in *United States v. Frankfort Distilleries, Inc.*, the Court hinted at a potential vulnerability in the broad Twenty-first Amendment framework. See 324 U.S. 293, 299 (1945); Lauzon, *supra* note 2, § 2a at 162–71. This vulnerability was further exposed in the Court’s 1964 decisions in *Hostetter v. Idlewild Bon Voyage Liquor Corp.* and *Craig v. Boren*, each expanding on the idea that the Twenty-first Amendment does not necessarily trump other parts of the Constitution. See *Craig v. Boren*, 429 U.S. 190, 206–07 (1976); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332–33 (1964); Lauzon, *supra* note 2, § 2a at 162–71.

<sup>93</sup> See Lauzon, *supra* note 2, § 2a at 162–71. A key ruling leading to this conclusion was the 1984 Supreme Court decision in *Bacchus Imports, Ltd.*, which formulated this balancing test. See 468 U.S. at 275–76 (“The central purpose of [the Second Provision] was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond a doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.”) (internal citations omitted); see also *Dickerson v. Bailey*, 336 F.3d 388, 404 (5th Cir. 2003) (“[I]t is by now clear that the [Twenty-First] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause.”) (internal quotations omitted).

<sup>94</sup> See Lauzon, *supra* note 2, § 2a at 162–71; see, e.g., *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584 (1986) (recognizing the modern accommodation standard); *Hostetter*, 377 U.S. at 332 (explaining that separate parts of the Constitution must accommodate one another).

<sup>95</sup> See *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (“The two North Dakota regulations fall within the core of the State’s power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate.”); *Dickerson*, 336 F.3d at 404 (“This is commonly referred to as the ‘core concerns’ test, which entails assessing whether state statutes reflect the ‘central purpose’ or the ‘core concern’ of the Twenty-First Amendment, *viz.*, the promotion of temperance. Some courts have also recognized the prevention of monopolies or organized crime from (re)gaining control of the alcohol industry and the collection of taxes as other policies effectuated by the Twenty-First Amendment.”);

cerns” have included the promotion of temperance, market orderliness, and revenue.<sup>96</sup> With frequent application, it seems this more balanced approach has been firmly established as the modern mechanism by which courts analyze dormant Commerce Clause challenges in the alcohol industry.<sup>97</sup>

Importantly, however, the U.S. Supreme Court has recently ruled on states’ regulatory power over the alcohol industry in *Granholm*.<sup>98</sup> There, the Court found New York and Michigan distribution laws that afforded in-state wineries the right to sell product directly to consumers while denying this privilege to out-of state wineries unconstitutional.<sup>99</sup> Although the Court did not explicitly overrule its precedent, it did strike the challenged distribution laws as violations of the dormant Commerce Clause without explicitly appealing to the “core interests” of the Twenty-first Amendment.<sup>100</sup> Instead, it mentioned the test in passing and moved on without explicitly applying it.<sup>101</sup> Thus, it would seem that appeal to these core interests is no longer a necessary component of the modern approach.<sup>102</sup> If this is the case, the Court in *Granholm* has built a new framework, one which affords the Second Provision even less deference, and which steps a bit further away from those forces which disturbed the dormant Commerce Clause in the first place.<sup>103</sup> The “modern accommodation rule” would therefore imply a process whereby the Court bends the Twenty-first Amendment to accommodate the Commerce Clause—limiting prior language mandating balance, and imperiling states’ rights to regulate alcohol freely.<sup>104</sup>

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Beskind v. Easley, 325 F.3d 506, 513 (4th Cir. 2003) (“The core interests protected by the Twenty-first Amendment are described as the States’ interests in promoting temperance, ensuring orderly market conditions, and raising revenue, all in connection with the manufacture, shipment, and use of alcoholic beverages.”) (internal quotations omitted); Lauzon, *supra* note 2, § 2a at 162–71.

<sup>96</sup> See Lauzon, *supra* note 2, § 2a at 162–71; *supra* note 95 and accompanying text.

<sup>97</sup> See Lauzon, *supra* note 2, § 2a at 162–71; *supra* note 95 and accompanying text.

<sup>98</sup> See *Granholm*, 544 U.S. at 486–89 (providing the modern approach to the Second Provision).

<sup>99</sup> See *id.* at 493.

<sup>100</sup> See *id.* at 487–88 (noting *Bacchus*, but not directly applying it); Quigley, *supra* note 2, at 1886–87 (proffering idea that the Court implicitly rejected the modern balancing test).

<sup>101</sup> See *Granholm* 544 U.S. at 487–88; *Jenkins*, 592 F.3d at 21 (“In any event, it is unclear that this balancing test survives *Granholm*.”).

<sup>102</sup> See *Granholm*, 544 U.S. at 487–88; *Jenkins*, 592 F.3d at 21; Quigley, *supra* note 2, at 1886–87.

<sup>103</sup> See *Granholm* 544 U.S. at 487–88; Lauzon, *supra* note 2, § 2a at 162–71; Quigley, *supra* note 2, at 1886–87.

<sup>104</sup> Compare *Granholm*, 544 U.S. at 486 (“Our more recent cases, furthermore, confirm 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.”), with *Hostetter*, 377 U.S. at 332 (“Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, 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.”).



## II. THE “FARMER BREWER”: A NEW KIND OF LICENSE, AN OLD KIND OF SCRUTINY.

State regulation of the alcohol industry is extensive, varied, and sporadic.<sup>105</sup> It is also, much like the industry itself, a frequently changing area of the law.<sup>106</sup> As breweries, wineries, and distilleries continue to evolve, so too do those laws which regulate their trade.<sup>107</sup> This Part looks at one specific instance of this evolution in the brewing context: the recently-enacted New York Farmer Brewer License.<sup>108</sup> Section A examines how this license changes the law of brewing in New York and compares it to similar legislation proposed or enacted in Massachusetts and Maryland.<sup>109</sup> Section B then places the law in the dormant Commerce Clause context, elucidating some of the law’s potential constitutional improprieties.<sup>110</sup>

### A. A New Kind of Brewing License

Effective January 14, 2013, a new kind of brewing license exists in New York.<sup>111</sup> Dubbed a “farm brewery license,” it is both cheaper than a standard brewer’s license and allows the licensee certain privileges in exchange for compliance with specific rules.<sup>112</sup> In large part this new license is modeled after the state’s 1976 “Farm Winery Act,” and seeks to advance many of the same goals—namely, the encouragement and protection of New York industries, the increase of demand for locally sourced ingredients, and the expansion of tourism.<sup>113</sup>

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<sup>105</sup> See John Foust, Note, *State Power to Regulate Alcohol Under the Twenty-First Amendment: The Constitutional Implications of the Twenty-First Amendment Enforcement Act*, 41 B.C. L. REV. 659, 661 (2000) (noting the “virtual patchwork of local and state laws” that regulate the alcohol industry); *Liquor Laws by State*, LEGALBEER.COM, <http://www.legalbeer.com/liquor-laws-by-state>, archived at <http://perma.cc/9SZ8-SYNF> (last visited Jan. 14, 2015) (demonstrating different state laws regarding various aspects of alcohol regulation, including restrictions on alcohol contents, retail hours, dry counties, and home brewing restrictions, among others).

<sup>106</sup> See Drew D. Massey, *Dueling Provisions: The 21st Amendment’s Subjugation to the Dormant Commerce Clause Doctrine*, 7 TENN. J. BUS. L. 71, 78–112 (outlining the changing nature of state alcohol regulatory frameworks in the wine-shipping context).

<sup>107</sup> See *id.*

<sup>108</sup> See *infra* notes 111–184 and accompanying text.

<sup>109</sup> See *infra* notes 111–137 and accompanying text.

<sup>110</sup> See *infra* notes 138–184 and accompanying text.

<sup>111</sup> N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533).

<sup>112</sup> *Id.* §§ 3, 51-a, 56; see Press Release, Governor Andrew M. Cuomo, *supra* note 12. Although this Note is purposefully limited to the farm brewery license, it should be noted that the license is part of a larger farm manufacturing scheme which strikes a similar deal with farm cideries, distilleries, and wineries—with similar constitutional implications. See NEW YORK STATE LIQUOR AUTH., *supra* note 10, at 12.

<sup>113</sup> See Press Release, Governor Andrew M. Cuomo, *supra* note 12; Craig Gravina, *The Ups and Downs of Farm-to-Glass*, DRINKDRANK (Oct. 25, 2013), <http://www.drinkdrank1.com/2013/10/the>

Specifically, the farm brewery license allows the licensee to operate a brewery for the manufacture of what it designates as “New York state labelled beer.”<sup>114</sup> This designation is the heart of the new license.<sup>115</sup> “New York state labelled beer” is beer that, until the end of year 2018, is brewed with at least 20% New York-grown hops and “other ingredients” (meaning, in effect, mostly barley).<sup>116</sup> The label then has a graduating effect: starting January 1, 2019, the percentage requirements are increased to 60% for both hops and barley, and then from January 1, 2024 and beyond, to 90%.<sup>117</sup>

In exchange, farm breweries meeting these requirements are afforded exclusive privileges.<sup>118</sup> Most pertinently, they pay lower annual licensing fees and are exempted from “burdensome” tax rules that would otherwise require them to file information relating to sales tax.<sup>119</sup> New York farm brewers may

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ups-and-down-of-farm-to-table.html, archived at <http://perma.cc/44ZY-A66X>; *Legislation*, NEW YORK STATE BREWERS ASS'N, <http://thinknydrinkny.com/about/legislation/>, archived at <http://perma.cc/AZ6C-6YB4> (last visited Jan. 14, 2015). Notably, the protectionist distribution laws the U.S. Supreme Court found unconstitutional in 2005 in *Granholm v. Heald* were actually provisions in the same Farm Winery Act on which the Farm Brewery License is modeled. See 544 U.S. 460, 470 (2005) (striking down N.Y. ALCO. BEV. CONT. LAW §§ 3(20-a), 76-a(3) (West Supp. 2005)). Though the Court struck down those provisions of the Farm Winery Act that granted in-state wineries distribution rights that were forbidden to out-of-state wineries, it never addressed those provisions that, similar to the farm brewery law, mandated that a certain percentages of grapes be grown in New York. See *id.* Consequently, although farm wineries remain outside the scope of this Note, protectionist sourcing requirements in the wine industry would be equally as unconstitutional as those in beer industry—and are subject to the same kind of analysis. See N.Y. ALCO. BEV. CONT. LAW § 76-a (outlining current farm winery license requirements); *Granholm*, 544 U.S. at 470. The same is true with regard to farm cider and liquor. See N.Y. ALCO. BEV. CONT. LAW § 58-c (concerning farm cidery and distillery licenses).

<sup>114</sup> N.Y. ALCO. BEV. CONT. LAW § 3.

<sup>115</sup> See *id.* § 3; Press Release, Governor Andrew M. Cuomo, *supra* note 12.

<sup>116</sup> See N.Y. ALCO. BEV. CONT. LAW § 3; Press Release, Governor Andrew M. Cuomo, *supra* note 12.

<sup>117</sup> See N.Y. ALCO. BEV. CONT. LAW § 3 (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533).

<sup>118</sup> Compare *id.* § 51-a (describing farm brewery license), with *id.* § 51 (describing traditional brewer's license). See NEW YORK STATE LIQUOR AUTH., *supra* note 10, at 11 (“Farm manufacturing licenses have more privileges than standard manufacturing licenses.”).

<sup>119</sup> See N.Y. ALCO. BEV. CONT. LAW § 56 (listing an annual licensing fee of \$320 for farm breweries and \$4,000 for traditional breweries producing more than 75,000 barrels per year); N.Y. TAX LAW § 1136(i) (1) (C) (McKinney 2014) (exempting farm breweries, wineries, cideries, and distilleries from tax filing provisions relating to information regarding sales of alcoholic products); *Legislation*, *supra* note 113 (explaining that the tax filing requirement from which farm breweries are exempted is “costly and burdensome,” and that many farm breweries had “struggled to afford the costs of complying” with the requirement); see also Gail Cole, *New York Exempts Farm Breweries from Tax Filing Requirements*, TAXRATES.COM (Oct. 30, 2012), <http://www.taxrates.com/blog/2012/10/30/new-york-exempts-farm-breweries-from-tax-filing-requirements/>, archived at <http://perma.cc/64JE-22V5> (explaining that farm breweries are exempted from certain tax filing requirements in order to “support local businesses”). Moreover, farm breweries may arguably sell both their own and other New York state labeled beer (and cider) at retail for on-premise consumption without accompanying requirements that

also, with no additional licensing, conduct tastings of New York labelled wine, cider, and liquor, and may sell these products at retail for off-premise consumption.<sup>120</sup> Although New York recently extended to all brewers the privilege to sell their product at retail for on-premise consumption (an important privilege previously enjoyed exclusively by farm brewers), it remains clear that the farm brewery license, albeit now less attractive, grants its holder more economic flexibility.<sup>121</sup>

Although the New York license is the most developed of its kind, it is not unique, as Massachusetts and Maryland (and potentially New Jersey) have similar schemes.<sup>122</sup> Massachusetts, for example, issues a “farmer-brewery license” to applicants for the “purpose of encouraging the development of domestic farms.”<sup>123</sup> Similar to the New York scheme, the Massachusetts farmer brewery license allows for special privileges not extended to the standard “Manufacturing of Wine and Malt Beverage” license.<sup>124</sup> In addition to simply being cheaper, these privileges include the right to sell beer made by the brewery at retail for off-premise consumption, and immunization from pre-

they also serve food. *Compare* N.Y. ALCO. BEV. CONT. LAW § 51 (traditional license, allowing for on-site retail sales if food is also provided), *with id.* § 51-a (farm brewery license, allowing for same retail rights without requirements regarding food).

<sup>120</sup> *See id.* N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a, 56.

<sup>121</sup> *See id.* §§ 3, 51, 51-a, 56; NEW YORK STATE LIQUOR AUTH., *supra* note 10, at 12 (describing differences between the different liquor licenses). The very recent extension to all brewers—not just farm brewers—of the right to sell one’s own product for on-premise consumption mitigates the incentive to become a farm brewer. *See* N.Y. ALCO. BEV. CONT. LAW § 56 (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533) (amending brewing licenses to extend benefits to non-farm brewers, effective December 13, 2014). The fact remains, however, that the farm brewery license is much cheaper and, other than sourcing, is less stringently regulated. *See id.* §§ 3, 51, 51-a, 56; N.Y. TAX LAW § 1136(i) (1) (C); *Legislation, supra* note 113; *see also* Cole, *supra* note 119.

<sup>122</sup> *See* MASS. GEN. LAWS ANN. ch. 138, § 19c (West 2006 & Supp. 2014); MD. CODE ANN., ALCO. BEV. § 2-209 (LexisNexis Supp. 2014).

<sup>123</sup> MASS. GEN. LAWS ANN. ch. 138, § 19c. This law bears an illuminating history for the purposes of this Note. *See* Andy Crouch, *Why the ABCC Got It Right About Farmer-Brewers in Massachusetts*, BEERSCRIBE (Aug. 9, 2011), <http://www.beerscribe.com/2011/08/09/why-the-abcc-got-it-right-about-farmer-brewers-in-massachusetts/>, archived at <http://perma.cc/Z9PG-Z9TC>. Generally speaking, the license was created in the 1980s as an attempt to spur the brewing industry in the Commonwealth. *See id.* Largely unused until the craft beer revolution began full force, it remained a difficult-to-apply measure, with the Massachusetts Alcoholic Beverages Control Commission (“ABCC”) attempting to require at least *some* in-state sourcing, which proved infeasible given the Commonwealth’s poor ecology for grain cultivation. *See id.* Though a new “brewpub” license was passed to help alleviate the concerns, the farmer-brewers license was never rescinded, and remains today the license of choice for Massachusetts craft breweries given its extension of benefits without exaction of cost. *See id.* The spirit of the law remains, however, rather unsatisfied given its original purpose. *See id.*

<sup>124</sup> *Compare* MASS. GEN. LAWS ANN. ch. 138, § 19 (describing standard brewing license), *with id.* § 19c (describing farmer-brewer license).

established quotas for so-called “pouring licenses.”<sup>125</sup> The license thus intends, like New York’s, to extend greater flexibility to brewers that at least partially eschew out of state ingredients.<sup>126</sup>

Notably, unlike the New York scheme, the Massachusetts license is largely unenforced.<sup>127</sup> This is because, unlike the New York license, the Massachusetts law does not specifically quantify the percentage of local ingredients needed to satisfy the license’s conditions.<sup>128</sup> When the Massachusetts Alcoholic Beverage Control Commission issued an advisory opinion denying a license to the then-upstart Idle Hands Brewery, it attempted to assert a new rule requiring a minimum fifty percent in-state sourcing requirement.<sup>129</sup> With ample backlash from legislators and the brewing community, however, the rule floundered, allowing for the continued operation of farm breweries without any special sourcing requirements.<sup>130</sup>

Maryland’s recently-enacted Farm-Brewery license also lacks New York’s specific source-percentage quantification.<sup>131</sup> Like the Massachusetts and New York schemes, the Maryland farm brewery license allows holders certain privileges—on-site consumption and retail sales of growlers, cases, and kegs—in exchange for brewing their beer with “an ingredient from a Maryland agricul-

<sup>125</sup> See *id.* §§ 19, 19c; see also John P. Connell, *The Different Types of Brewery Licenses in Massachusetts*, LAW OFFICES OF JOHN P. CONNELL, P.C., <http://www.connelllawoffices.com/the-different-types-of-brewery-licenses-in-massachusetts/>, archived at <http://perma.cc/83YB-GHVS> (last visited Jan. 14, 2015). These quotas, applicable to the standard Manufacturing license, limit the total number of licenses available to pour alcoholic beverages in a given area. See Connell, *supra*. Immunization from such a quota therefore guarantees the farmer-brewer the right to pour beer on-premises—a guarantee the standard license, distinct from any legislative purpose of promoting local farms, is without. See *id.*

<sup>126</sup> See MASS. GEN. LAWS ANN. ch. 138, §§ 19, 19c.

<sup>127</sup> See Crouch, *supra* note 123, (describing the general failure of the original purposes behind the farm brewery license in Massachusetts); *supra* note 123 and accompanying text (discussing the Massachusetts farm brewers license).

<sup>128</sup> See MASS. GEN. LAWS ANN. ch. 138, § 19c (West 2006 & Supp. 2014) (stating only that the license is to be issued “[f]or the purpose of encouraging the development of domestic farms”); Crouch, *supra* note 123; *supra* note 123 and accompanying text (discussing the Massachusetts farm brewers license).

<sup>129</sup> Bill Chappell, *Small Beer Brewers Hit with ‘50 Percent Local’ Rule in Massachusetts*, NPR (Aug. 5, 2011), <http://www.npr.org/blogs/thetwo-way/2011/08/05/139031233/small-beer-brewers-hit-with-50-percent-local-rule-in-massachusetts>, archived at <http://perma.cc/VMC7-SB3J>; Deron, *Regulation Without Thought*, ANDOVER LIQUORS (Aug. 23, 2011), <https://andoverliquors.wordpress.com/2011/08/23/regulation-without-thought/>, archived at <http://perma.cc/3APB-KDMW> (discussing the Idle Hands debacle). Idle Hands is a craft brewery focusing on Belgian styles, located in Everett, Massachusetts. See IDLE HANDS CRAFT ALES, <http://www.idlehandscraftales.com/site/>, archived at <http://perma.cc/7V9M-47WU> (last visited Jan. 14, 2015).

<sup>130</sup> See Crouch, *supra* note 123. This backlash included a vehement denunciation from then-Senator Scott Brown of Massachusetts. *Id.*

<sup>131</sup> MD. CODE ANN., ALCO. BEV. § 2-209 (LexisNexis Supp. 2014) (requiring only that a farm brewery’s product “be manufactured with an ingredient from a Maryland agricultural product, including hops, grain, and fruit, produced on the licensed farm”).

tural product.”<sup>132</sup> Finally, proposed legislation in New Jersey would create a cheap “farm brewery license,” the details of which remain hazy but which would, in present form, require the licensee to grow on-site ingredients used in the manufacture of the beer.<sup>133</sup>

Thus, although the New York farm-brewery license does not stand alone, it is the most quantified and elaborate of its kind.<sup>134</sup> Predictably, public reaction to the new license has been mixed.<sup>135</sup> Despite uncertainties of the law’s viability, however, it has led to rapid expansion: since it took effect in January of 2013, at least thirty five farm breweries have opened in New York, contributing to a doubling of hop acreage in the state.<sup>136</sup> Given the nature of the still-booming craft beer revolution, this expansion can only be expected to grow—at least while the farms can produce amply, and while the law remains unchallenged.<sup>137</sup>

### B. *An Old Kind of Constitutional Scrutiny*

Although, like its counterparts in other states, New York’s farm brewery license has yet to be constitutionally challenged, it likely will be.<sup>138</sup> This Section foreshadows that challenge and explores how courts are likely to examine the law.<sup>139</sup> Subsection 1 discusses the reasons for challenging the farm brewery license scheme.<sup>140</sup> Then, Subsection 2 compares the relatively new in-state

<sup>132</sup> See *id.*; Greg Kitsock, *Maryland Beer: New Law Is a License to Swill (Onsite)*, WASH. POST (June 4, 2012, 7:00 AM), [http://www.washingtonpost.com/blogs/all-we-can-eat/post/maryland-beer-new-law-is-a-license-to-swill-onsite/2012/06/01/gJQAfxYm7U\\_blog.html](http://www.washingtonpost.com/blogs/all-we-can-eat/post/maryland-beer-new-law-is-a-license-to-swill-onsite/2012/06/01/gJQAfxYm7U_blog.html), archived at <http://perma.cc/9CHR-QV3D>. It should be noted that this requirement is far less stringent than those provided by New York’s law. Compare MD. CODE ANN., ALCO. BEV. § 2-209 (requiring only that a single on-site ingredient be used), with N.Y. ALCO. BEV. CONT. LAW § 3 (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533) (providing stringent in-state sourcing requirements).

<sup>133</sup> See S. 133, 216th Leg., Reg. Sess. (N.J. 2014).

<sup>134</sup> See *supra* notes 111–121 and accompanying text (describing the New York farm brewery license and its graduating in-state source requirements).

<sup>135</sup> See, e.g., Gravina, *supra* note 113 (expressing reservations about the law); *supra* note 113 and accompanying text (discussing various concerns with the law). Much of this criticism comes not necessarily from the purpose of the law, but rather its ecological feasibility. See Gravina, *supra* note 113. Some maintain that New York will be unable to meet the increased demand this law will impose on farmers, and argue that the effects will be felt by the far more belabored barley market in New York (relative to the more robust hop market). See Cleveland, *supra* note 12; Gravina, *supra* note 113; *supra* note 12 and accompanying text.

<sup>136</sup> See Cleveland, *supra* note 12 (reporting the number of farm breweries as of June 2, 2014); see also Press Release, Governor Andrew M. Cuomo, *supra* note 12 (noting that hop acreage has doubled as of October 9, 2013).

<sup>137</sup> See Cleveland, *supra* note 12; Press Release, Governor Andrew M. Cuomo, *supra* note 12. See generally Cibula, *supra* note 62 (providing an overview of the tight nexus between the brewing and agricultural sectors).

<sup>138</sup> Cf. *Granholm*, 544 U.S. at 465–66 (challenging a discriminatory New York law); see *infra* notes 142–158 and accompanying text (outlining the complaints likely to be lodged against the license from both out-of-state farmers and local farm breweries).

<sup>139</sup> See *infra* notes 142–184 and accompanying text.

<sup>140</sup> See *infra* notes 142–158 and accompanying text.

sourcing requirements to the distribution schemes that have already undergone stringent constitutional analysis.<sup>141</sup>

### 1. The Motivation for Challenge

At first blush, New York's farm brewery license seems a creative and reasonable legislative adaptation to a new kind of brewing phenomenon.<sup>142</sup> Generally speaking, the response from the brewing community has been positive, encouraging, and excited—earning an implicit stamp of approval from the New York State Brewers Association and the national Brewers Association.<sup>143</sup>

At second glance, however, concerns begin to emerge.<sup>144</sup> For example, although a requirement that hops and other ingredients be sourced from in-state farms certainly benefits those farms, a necessary secondary effect is that out-of-state farms will suffer weakened demand from a growing sector of New York's brewing industry.<sup>145</sup> This effect is compounded by the license's graduating scheme.<sup>146</sup> In other words, until the end of 2018, out-of-state farms will be forced to compete for 80% of a farm brewery's malt and hop requirements; starting January 1, 2019, these out-of-state farms will then be forced to compete for only 40% of New York farm brewery's demand; finally, starting January 1, 2024, merely 10% of the farm brewery's sourcing demands will be open to out-of-state farmers.<sup>147</sup>

This restriction placed on out-of-state farmers will be of course partially alleviated by the continued expansion of the ranks of New York farm breweries, but in the final analysis such expansion further compounds the prohibitive effect.<sup>148</sup> With the opening of each additional farm brewery, an eventual ninety percent of that brewery's additional sourcing demand is fenced off from all

<sup>141</sup> See *infra* notes 159–184 and accompanying text.

<sup>142</sup> See N.Y. ALCO. BEV. CONT. LAW § 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533); *N.Y. Governor Cuomo Signs Craft-Friendly Bill*, BREWERS ASS'N, <http://old.brewersassociation.org/pages/government-affairs/current-issues/show?title=ny-governor-cuomo-signs-craft-friendly-bill>, archived at <http://perma.cc/2BHQ-KDKW> (last visited Jan. 14, 2015).

<sup>143</sup> See *Legislation*, *supra* note 113; *N.Y. Governor Cuomo Signs Craft-Friendly Bill*, *supra* note 142. But see Cleveland, *supra* note 12 (expressing doubts about the law's feasibility in its current form, given the burdens placed on New York farms). Brewers associations are essentially trade guilds that seek to promote craft beer policies and best practices, and have become increasingly influential with the rise of the craft beer movement. See *Purpose*, BREWERS ASS'N, <http://www.brewersassociation.org/brewers-association/purpose/>, archived at <http://perma.cc/V5JJ-FKTG> (last visited Jan. 14, 2015). The Brewers Association is the largest and most influential of its kind. See *id.*

<sup>144</sup> See *infra* notes 145–158.

<sup>145</sup> See N.Y. ALCO. BEV. CONT. LAW § 3. If by definition “New York state labelled beer” is made up of primarily NY ingredients, then the logical corollary is that it is *not* primarily made up of out-of-state ingredients. See *id.*

<sup>146</sup> See *id.* § 51-a. Perhaps a better word is “accelerated.” See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> See *id.*

non-New York farms.<sup>149</sup> The law therefore benefits some and neglects others.<sup>150</sup>

Moreover, the neglected out-of-state farmers may not be the only ones to complain.<sup>151</sup> Indeed, there is credible concern that New York farms will be unable to withstand the increased demand from emerging farm breweries, especially as that demand is exponentially increased via the step-like nature of the law.<sup>152</sup> If such ingredients are simply wanting—or if limited supply and increased demand lead to prices so high as to be unobtainable by an inherently small farm brewery—the law’s prohibition on selling non-New York state labeled beer might face a challenge from the farm breweries themselves.<sup>153</sup> This precise concern, after all, prompted the vehement backlash from Massachusetts breweries when that state’s Alcoholic Beverages Control Commission attempted to bolster its own farm brewery licensing mechanism with actual in-state sourcing requirements.<sup>154</sup>

Thus the New York law, as it stands, might prompt a disagreeable response and consequently birth a new round of litigation challenging state alco-

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> See O’Grady, *supra* note 35, at 578–79 (hypothesizing a challenge by in-state bakeries against a fictional state law requiring in-state ingredients). It is important not to overstate the issue, for in New York, Massachusetts, Maryland, and New Jersey there are other licensing mechanisms unencumbered by sourcing requirements (though encumbered by different requirements, such as a higher cost). See Connell, *supra* note 125; see also MD. CODE ANN., ALCO. BEV. § 2-209 (LexisNexis Supp. 2014) (outlining production brewery license requirements in Maryland). Although these alternative (or traditional) licensing and permit schemes do alleviate some of the harm done to out-of-state farmers, the point remains that these out-of-state farmers are, insofar as the New York farm brewery market is concerned, barred significant access. See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533).

<sup>152</sup> See Gravina, *supra* note 113 (characterizing the New York agricultural infrastructure as “woefully under equipped to even meet the first quota” mandated by the law). New York’s law—unlike some of its peers—does not require that farm breweries be located on actual farms, which expands their potential numbers and increases the burden on the already-strained infrastructure. See N.Y. ALCO. BEV. CONT. LAW § 51-a (authorizing non-farm breweries to hold farm brewery licenses); Gravina, *supra* note 113. Nor will this be a problem easily solved: barley—a principal ingredient in beer and subject to the law’s sourcing requirements—does not grow well in New York’s climate. See Gravina, *supra* note 113. Further, hops—a second principal ingredient and also subject to sourcing requirements—are more easily grown in New York, but at present the farms are far smaller than their larger Pacific Northwest or European competitors, and are arguably incapable of handling the increase in demand sure to come from their exclusive access to farm breweries. See *id.*; see also *Farm Breweries Growing Fast in New York*, *supra* note 12 (“The problem these breweries may face, of course, is that those ingredients simply may not exist.”)

<sup>153</sup> See Cleveland, *supra* note 12 (noting complaints from several farm brewers that the New York sourcing requirement will have to be changed if the license is to remain economically feasible).

<sup>154</sup> See Deron, *supra* note 129; Crouch, *supra* note 123. During the immense public backlash against the Massachusetts ABCC’s attempt to impose a fifty percent rule on Massachusetts farm breweries, critics cited the unsettling practice where a farm brewer in Massachusetts was forced to grow barley, for no purpose whatsoever, except to meet certain sourcing requirements. See Crouch, *supra* note 123; *supra* notes 127–130 and accompanying text.

hol laws.<sup>155</sup> Should these problems in fact be encountered—and non-New York farmers seek to sell their goods to New York farm brewers—the most obvious legal challenge that would follow will be grounded in the dormant Commerce Clause.<sup>156</sup>

Such a new challenge is significant because, although much has been written both academically and judicially about the dormant Commerce Clause's application to alcohol distribution mechanisms (often in the context of wine), the Clause has yet to be applied to modern in-state sourcing requirements in the craft beer context.<sup>157</sup> Still, because the most pertinent and recent case law on this issue focuses on alcohol distribution, the farm brewery sourcing trend is best analyzed by analogy to this field.<sup>158</sup>

## 2. The Farm Brewery Law and the Three Tier System: Similarities and Differences

The alcohol industry is broadly regulated by a three-tier distribution system that has been adopted at least in part by all fifty states.<sup>159</sup> The three-tier scheme generally dictates that licensed manufacturers of alcoholic beverages must sell to licensed wholesalers, who in turn sell to licensed retailers for sale to the general public.<sup>160</sup> Prohibition of vertical integration between these tiers

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<sup>155</sup> Cf. Crouch, *supra* note 123 (detailing push back against sourcing requirements in Massachusetts). Though in New York the small initial backlash was not as strong as, for example, in Massachusetts, this is because Massachusetts attempted to retroactively apply the scheme to already-existing breweries; in contrast, it is possible that New York, applying a new scheme prospectively to new breweries, has merely yet to encounter similar resistance. See Gravina, *supra* note 113 (highlighting New York's under-equipped agricultural infrastructure and how it may fail to support the growing demand from New York farm breweries).

<sup>156</sup> Cf. *Granholm*, 544 U.S. 460 (2005); *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1 (2010); see *infra* notes 194–229 and accompanying text (arguing that New York's farm brewery license runs into problems with the dormant Commerce Clause).

<sup>157</sup> For examples of examinations and applications of the dormant Commerce Clause to alcohol shipment laws, see generally *Granholm*, 544 U.S. 460; *Jenkins*, 592 F.3d 1; Lloyd C. Anderson, *Direct Shipment of Wine, the Commerce Clause and the Twenty-first Amendment: A Call for Legislative Reform*, 37 AKRON L. REV. 1 (2004); Massey, *supra* note 106; Eng, *supra* note 51; Foust, *supra* note 105; Gerald B. McNamara, Comment, *Free the Grapes: The Commerce Clause Versus the Twenty-first Amendment with Regard to Interstate Shipment of Wine in America*, 43 DUQ. L. REV. 113 (2004); Russ Miller, Note, *The Wine Is in the Mail: The Twenty-first Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND. L. REV. 2495 (2001); Silvernail, *supra* note 51; Thompson, *supra* note 36; Williamson, *supra* note 67. See *infra* notes 194–253 and accompanying text (applying the dormant Commerce Clause to the craft beer industry).

<sup>158</sup> See *Granholm*, 544 U.S. at 484.

<sup>159</sup> See *id.* at 466 (describing the three-tier distribution system); Quigley, *supra* note 2, at 1882 (same).

<sup>160</sup> Quigley, *supra* note 2, at 1882.



is designed to promote temperance and prevent monopolization and consequent corruption.<sup>161</sup>

Although the legitimacy of this system as a whole has been held perfectly valid, one of its particular iterations was struck down by the 2005 U.S. Supreme Court decision *Granholm v. Heald*.<sup>162</sup> That case examined tweaks both New York and Michigan implemented in their three-tier systems that allowed in-state wineries to bypass the system—that is, sell directly to consumers—while denying the same privilege to out-of-state wineries.<sup>163</sup> The Court held that privileging only in-state wineries with direct access to consumers discriminated against out-of-state wineries, and consequently violated the dormant Commerce Clause.<sup>164</sup> It proceeded to hold that such a violation cannot be saved by the Twenty-first Amendment.<sup>165</sup>

Thus, the most salient similarity between the New York farm brewery law and the struck distribution laws in *Granholm* is the implication of the Twenty-first Amendment.<sup>166</sup> Because New York's law directly regulates the brewing industry, it will at least partially fall under constitutional protections guaranteed by the Second Provision.<sup>167</sup> To at least some extent, therefore, the New York farm brewery law will be analyzed not under a traditional dormant Commerce Clause jurisprudence but instead, like in *Granholm*, in light of the more complex nexus between the Commerce Clause and the Second Provision of the Twenty-first Amendment.<sup>168</sup>

<sup>161</sup> See *id.* (“States offer several policy justifications for the three-tier system. Funneling distribution through the relatively small number of wholesalers facilitates excise tax collection. Prohibiting vertical integration theoretically helps ‘prevent organized crime from gaining control of alcohol distribution.’ By maximizing their oversight of distribution, states hope to limit illegal sales of alcohol to minors. Finally, by forcing the resale of alcohol through several tiers, states keep the price of alcohol artificially high, allegedly promoting temperance.”); see also FED. TRADE COMM’N, POSSIBLE ANTI-COMPETITIVE BARRIERS TO E-COMMERCE: WINE 5–6 (2003), available at [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-report-concerning-possible-anticompetitive-barriers-e-commerce-wine/winereport2.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-possible-anticompetitive-barriers-e-commerce-wine/winereport2.pdf), archived at <http://perma.cc/DP7H-ZXSW> (explaining the purposes and mechanisms of the three-tier distribution system while studying potential barriers to trade in the alcohol industry).

<sup>162</sup> See 544 U.S. at 466 (striking provisions in New York and Michigan distribution laws).

<sup>163</sup> See *id.*

<sup>164</sup> See *id.*

<sup>165</sup> See *id.*

<sup>166</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533); *Granholm*, 544 U.S. at 466. Because the New York law at issue here is a state regulation of its alcohol industry, it implicates the Twenty-first Amendment, and thus implicates *Granholm*. See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a; *Granholm*, 544 U.S. at 466.

<sup>167</sup> See U.S. CONST. amend. XVIII (repealed 1933); N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a. The extent of this protection is, however, highly dubious given the law's stated purpose of protecting New York agriculture, not its brewing industry. See *infra* notes 230–251 (arguing that the Twenty-first Amendment has less purchase in this context).

<sup>168</sup> See *Granholm*, 544 U.S. at 466; *infra* notes 194–253 and accompanying text (analyzing the scope of protections afforded by the Twenty-first Amendment to New York's farm brewery law).

Additionally, both the laws struck in *Granholm* and the farm brewery law at issue here involve elements of protectionism.<sup>169</sup> The former laws were explicitly intended to protect in-state wineries, whereas the latter is explicitly intended to protect in-state farmers.<sup>170</sup> This is important because, as at least one scholar has noted, protectionism is a distinct issue in dormant Commerce Clause doctrine that deserves distinct analysis.<sup>171</sup> The Supreme Court has indeed directly addressed the role protectionism plays in the broader dormant Commerce Clause context.<sup>172</sup>

A potentially important distinction, however, between the invalid law in *Granholm* and the farm brewery law at issue is the limited scope of the latter.<sup>173</sup> Under the New York law, out-of-state farmers may still sell to other kinds of breweries and may still, in a limited way, market to farm breweries.<sup>174</sup> Thus, unlike at least the Michigan law in *Granholm*, there is no absolute prohibition or denial of market access, only an encumbrance.<sup>175</sup> Nor, importantly, is the sourcing requirement imposed on all New York breweries: it merely applies to those operating under a specific type of license.<sup>176</sup> This limited and navigable aspect of the law is material given the Court's observation in *Granholm*'s opening lines that direct sales were wholly "impractical" for out-of-state wineries; obtaining a traditional license is not similarly "impractical" in New York.<sup>177</sup>

Additionally, the farm brewery law is a less direct means of regulation insofar as both the dormant Commerce Clause and the Second Provision might

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<sup>169</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a; *Granholm*, 544 U.S. at 466 (describing the protectionist effects of the unconstitutional laws at issue in that case); Press Release, Governor Andrew M. Cuomo, *supra* note 12.

<sup>170</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a; *Granholm*, 544 U.S. at 466; Press Release, Governor Andrew M. Cuomo, *supra* note 12.

<sup>171</sup> See O'Grady, *supra* note 35, at 577–603 (fleshing out distinctions between economic protectionism and economic discrimination, and the roles of that distinction in the Commerce Clause analysis).

<sup>172</sup> See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (finding unpersuasive the state's argument that its law was permissible because it favored in-state products rather than disfavored out-of-state products).

<sup>173</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533).

<sup>174</sup> See *id.* § 51 (outlining the rules and procedures of the standard "Brewer's license," without mention of any sourcing requirements). Indeed, given New York's insufficient agricultural infrastructure, most ingredients are in fact sourced from out of state. See Gravina, *supra* note 113.

<sup>175</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a; *Granholm*, 544 U.S. at 466. Arguably the out-of-state wineries in *Granholm* only faced an "encumbrance" as well, but as here this "encumbrance" is better characterized, for practical purposes, as a denial of market access to a particular form of business: direct sales to consumers. See *Granholm*, 544 U.S. at 466–67.

<sup>176</sup> Compare N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (requiring farm breweries to use an increasing percentage of in-state ingredients), with *Wyoming v. Oklahoma*, 502 U.S. 437, 443 (1992) (discussing a law requiring Oklahoma utilities to use at least ten percent in-state coal).

<sup>177</sup> *Granholm*, 544 U.S. at 466.

be implicated.<sup>178</sup> The invalidated distribution law in *Granholm* ran afoul the Commerce Clause by directly bestowing privileges exclusively on in-state wineries that it explicitly denied to out-of-state wineries.<sup>179</sup> This was, in effect, a direct legislative attempt to favor in-state wineries with legislation that could very well have also benefited out-of-state wineries.<sup>180</sup> In contrast, the farm brewery law extends benefits to certain kinds of in-state breweries that, only if accepted by the breweries, in turn have a *secondary* effect of burdening out-of-state farmers.<sup>181</sup> In other words, a brewer seeking to enter the industry may become either a farm brewer or seek a more traditional license, and it is only upon *the brewer's* choice that New York ingredients are favored to their out-of-state equivalents.<sup>182</sup> This additional step and element of choice was notably absent in the *Granholm* decision.<sup>183</sup> Thus there are both striking similarities and important differences between the three-tier distribution system struck down in *Granholm* and the newly signed New York farm brewery law.<sup>184</sup>

### III. CRAFT SHOULD BE UNFETTERED: FARM BREWERY LAWS LIKE NEW YORK'S VIOLATE THE DORMANT COMMERCE CLAUSE

Responding to rapid changes in the craft beer industry, some states, most notably New York, have created brewing licenses that are protectionist, discriminatory, and wholly unconstitutional under the dormant Commerce Clause.<sup>185</sup> Farm brewery laws are unconstitutional when coupled with in-state sourcing requirements because they either require or potentially require licen-

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<sup>178</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a; *Granholm*, 544 U.S. at 466. This “directness” of the regulation is potentially relevant should a *Pike* balancing test—laden as it is with burdens and justifications—be relevant in a future challenge. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly 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.”).

<sup>179</sup> See *Granholm*, 544 U.S. at 466. Indeed, as will be discussed further later, this is the kind of state legislation that draws particular attention from the federal courts. See O’Grady, *supra* note 35, at 578–80; *infra* note 188 and accompanying text (explaining characteristics of dormant Commerce Clause violations).

<sup>180</sup> See *Granholm*, 544 U.S. at 466.

<sup>181</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533). This is relevant given its comparison to *Wyoming*, 502 U.S. at 433. See *infra* notes 222–226 and accompanying text (discussing that comparison).

<sup>182</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a.

<sup>183</sup> See *id.* §§ 3, 51-a; *Granholm*, 544 U.S. at 466.

<sup>184</sup> See *supra* notes 159–184 and accompanying text (discussing the similarities and differences between the New York laws struck in *Granholm* and the New York farm brewery law).

<sup>185</sup> See *supra* notes 111–121 and accompanying text (outlining New York’s farm brewery law); *infra* notes 194–229 and accompanying text (arguing that the New York farm brewery law is unconstitutional).

sees to eschew ingredients from out-of-state farms.<sup>186</sup> The stated intent of these licenses is to promote local industries to the detriment of other similarly situated—and unrepresented—non-local industries, which is the hallmark of dormant Commerce Clause violations.<sup>187</sup> Section A of this Part analyzes New York's license in light of the U.S. Supreme Court's most recent formulation of the dormant Commerce Clause and Twenty-first Amendment jurisprudence.<sup>188</sup> Section B then suggests a constitutional alternative that still promotes and supports the craft beer revolution: simple deregulation, sans burden.<sup>189</sup>

### A. *The Unconstitutionality of the Encumbered Farm Brewer*

The protectionist and discriminatory nature of the farm brewery license is directly contrary to the U.S. Supreme Court's 2005 decision in *Granholm v. Heald*, which examined the dormant Commerce Clause in the context of the alcohol industry.<sup>190</sup> In that case, the Court reaffirmed the waning nature of the Twenty-first Amendment's state-empowering Second Provision, and touched upon a two part test whereby these dueling constitutional provisions are balanced.<sup>191</sup> Specifically, the test requires courts to determine whether there has been a constitutional violation, and then whether the violation can be "saved" by the Second Provision.<sup>192</sup> Subsection 1 shows how the New York Farm Brewery Law violates the dormant Commerce Clause, and Subsection 2 explains why the Second Provision cannot save it.<sup>193</sup>

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<sup>186</sup> See *supra* notes 111–137 and accompanying text (describing the New York law); *infra* notes 190–251 and accompanying text (arguing that the New York law is unconstitutional).

<sup>187</sup> See Press Release, Governor Andrew M. Cuomo, *supra* note 12. This element of legislative self-protection is highly relevant in the dormant Commerce Clause context. See O'Grady, *supra* note 35, at 582. Called the political process rationale or the inner political check doctrine, it generally dictates that courts are highly concerned with legislation that benefits those intimately involved with the legislative process while burdening those with little to no voice in the system. See *id.* Admittedly, this doctrine also tends to curry judicial favor to statutes that distribute burdens to actors involved in the legislative process, which arguably the New York statute does via burdens placed on in-state farm breweries. See *id.*

<sup>188</sup> See *infra* notes 190–251 and accompanying text.

<sup>189</sup> See *infra* notes 252–268 and accompanying text.

<sup>190</sup> See *Granholm v. Heald*, 544 U.S. 460, 465–74 (2005); Quigley, *supra* note 2, at 1885–88.

<sup>191</sup> See *Granholm*, 544 U.S. at 466–68; Silvernail, *supra* note 51, at 541 (noting the shift in the Supreme Court's treatment of Twenty-first Amendment jurisprudence from absolutist to accommodationist); Massey, *supra* note 106, at 71 (tracing the Twenty-first Amendment's gradual decline of influence.).

<sup>192</sup> See Lauzon, *supra* note 2, § 2a at 162–71; Foust, *supra* note 105, at 683 (observing the development of the "core interest" test).

<sup>193</sup> See *infra* notes 194–229 and accompanying text (Subsection 1); *infra* notes 230–251 and accompanying text (Subsection 2).

## 1. New York's Farm Brewery Law Violates the Dormant Commerce Clause

The most basic formulation of the dormant Commerce Clause is that laws may not discriminate against out-of-state economic interests to benefit in-state economic interests.<sup>194</sup> The first problem, therefore, is that despite this constitutional principle, the New York law economically burdens out-of-state farmers in order to benefit in-state farmers.<sup>195</sup> Under New York's farm brewery licensing scheme, out-of-state farmers are precluded from full access to the farm brewery market's demand for hops and other ingredients.<sup>196</sup> This denial is explicitly coupled with the protected access that in-state farmers enjoy—protection that, within the decade, will be nearly total.<sup>197</sup>

Yet speaking directly to provisions it held invalid from the very same Farm Winery Act on which the Farm Brewery law is modeled, the U.S. Supreme Court reiterated another basic principle of dormant Commerce Clause jurisprudence: "The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States."<sup>198</sup> Shortly after, the Court declared unconstitutional laws that "deprive citizens of their right to have access to the markets of other States on equal terms."<sup>199</sup> Thus there is little doubt that explicit favoring of in-state farms to the exclusion of out-of-state farms is directly contrary to the "equal terms" the Court is mandated to enforce.<sup>200</sup> Just as the Court took issue with a requirement that an out-of-state winery would need to relocate to New York to fully avail itself of the New York market, so too would it strike a requirement that a Washington hop farmer would need to do the same.<sup>201</sup> It is, as has been oft-said, of the utmost and singular im-

<sup>194</sup> *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994).

<sup>195</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533) (requiring farm breweries and brewers of "New York state labelled beer" to forgo increasing percentages of out-of-state ingredients); *supra* notes 111–137 (describing New York's farm brewery law).

<sup>196</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a; see *supra* notes 111–137 (describing New York's farm brewery law and its in-state sourcing requirements).

<sup>197</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a; see *supra* notes 111–137 (describing New York's farm brewery law and its in-state sourcing requirements).

<sup>198</sup> *Granholm*, 544 U.S. at 472; see *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). Notably, the aspects of the Farm Winery Act challenged and struck down in *Granholm* differ from the law currently under examination. Compare *Granholm*, 544 U.S. at 466–67 (outlining specific laws challenged in that case), with N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (New York's farm brewery law).

<sup>199</sup> *Granholm*, 544 U.S. at 473.

<sup>200</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a; *Granholm*, 544 U.S. at 473. "Discrimination" in the dormant Commerce Clause context occurs when in-state and out-of-state economic interests are treated differently; thus seeing the discriminatory nature of the New York law here in question is not difficult. See *Or. Waste Sys., Inc.*, 511 U.S. at 99; O'Grady, *supra* note 35, at 578.

<sup>201</sup> See *Granholm*, 544 U.S. at 475; cf. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970) (disfavoring state laws that necessitate forced business relocation).

portance that our economy remain fluid and unencumbered.<sup>202</sup> Thus just as the Court found in *Granholm* “no difficulty concluding” that New York and Michigan laws that granted benefits to in-state wineries that it denied to out-of-state wineries were discriminatory, so too would it find with equal ease the New York farm brewery scheme equally as invalid.<sup>203</sup>

Second, differences between the *Granholm* distribution law and the New York farm brewery law do not alleviate the latter’s fundamental constitutional flaws.<sup>204</sup> For example, it is true that New York’s farm brewery law does not completely ban imported ingredients, but instead only partially bans sales to a limited sector—that is, an eventual ninety percent ban on imports to farm breweries only.<sup>205</sup> This important distinction might quell out-of-state farmers’ concerns about access to the New York brewery market.<sup>206</sup> Moreover, as stated, the farm brewery scheme is a less direct regulatory mechanism than the direct-shipping laws in *Granholm*: the brewers are the ones electing to bear the more restrictive license.<sup>207</sup>

But the sweeping language of *Granholm*’s reasoning compels the dismissal of these dissimilarities, especially given the nature of the New York law which that case struck down.<sup>208</sup> When analyzing the New York law specifically, the Court departed from its initial references to total obstruction and instead explicitly acknowledged the law’s failure to “ban direct shipments altogether.”<sup>209</sup> It observed that out-of-state wineries *could* avail themselves of many of the same rights as in-state wineries, but that such would require establishment of a physical presence—thus constituting an impermissible *burden* on market access.<sup>210</sup> Such language connotes the underlying principle that a law need not discriminate *entirely*, but merely discriminate to a degree sufficient to encum-

<sup>202</sup> See *Granholm*, 544 U.S. at 472; *H.P. Hood & Sons*, 336 U.S. at 535–38; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

<sup>203</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533); *Granholm*, 544 U.S. at 476.

<sup>204</sup> See *supra* notes 138–184 and accompanying text (showing differences between distribution laws struck in *Granholm* and the New York farm brewery law); *infra* notes 205–251 (showing the constitutional flaws of the New York law).

<sup>205</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a.

<sup>206</sup> See *id.* §§ 3, 51, 51-a. That is, if out-of-state farmers can still sell to a large New York market—especially a market enlarged by loosening permitting regulations governing traditional licenses—they might be less concerned than the out-of-state wineries were in *Granholm*, who were outright forbidden from directly shipping product to consumers. Compare N.Y. ALCO. BEV. CONT. LAW §§ 3, 51, 51-a (curbing out-of-state access to only a limited sector of New York’s barley and hop demand), with *Granholm*, 544 U.S. at 470 (striking down a New York law that fully reserved access to the direct shipment business for in-state economic interests).

<sup>207</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a; *Granholm*, 544 U.S. at 466–67; *infra* notes 174–184 and accompanying text (describing attenuation in the farm brewery law).

<sup>208</sup> See *Granholm*, 544 U.S. at 472–77.

<sup>209</sup> See *id.* at 474.

<sup>210</sup> See *id.* at 472.

ber market access.<sup>211</sup> And just as establishing a brick-and-mortar presence in the state was found far too great a burden, so too would be the establishment of an entire farm.<sup>212</sup>

Third, the economic burdens placed on farm brewers present ample fodder for complaint from their perspective as well.<sup>213</sup> In other words, the farm brewer is presented with a choice: they can either enjoy access to the nation's hops and barley markets by applying (and paying) for the more traditional license, or instead accept the large barriers to market mandated by their current permit.<sup>214</sup> This burden on full market access to out-of-state producers—simply because those producers are out-of-state—clearly presents, per *Granholm*, sufficient actual discrimination for a valid constitutional challenge.<sup>215</sup> And because *Granholm*'s language dismissed secondary permitting schemes as well as outright bans, the Court in effect maintained the well-established principle that distinctions—primary or secondary, direct or indirect—matter little if the law's actual effect is to discriminate.<sup>216</sup>

For example, the 1970 U.S. Supreme Court decision *Pike v. Bruce Church, Inc.* addressed in-state presence requirements akin to those in the farm brewery law.<sup>217</sup> That case addressed an Arizona law that mandated certain packaging requirements for exported fruits and vegetables to “protect and enhance the reputation of growers within the State.”<sup>218</sup> The secondary effect of this law was to require a company which grew fruit in Arizona, but imported the fruit into California for packaging, to establish a packaging presence in Arizona.<sup>219</sup> This effect prompted a sharp response from the Court: “[T]he

<sup>211</sup> See *id.* 472–77.

<sup>212</sup> See *id.*; *Pike*, 397 U.S. at 143 (iterating a suspicion of requirements that industries establish an in-state presence to avail themselves of benefits).

<sup>213</sup> Cf. *Granholm*, 544 U.S. at 467–68.

<sup>214</sup> See N.Y. ALCO. BEV. CONT. LAW § 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533).

<sup>215</sup> *Granholm*, 544 U.S. at 466–67. The law in fact mirrors, for constitutional purposes, the permitting scheme described and denounced in that case. See *id.* (striking down N.Y. ALCO. BEV. CONT. LAW §§ 3(20–a), 76–a(3) (West Supp. 2005)).

<sup>216</sup> See *id.*; see Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CALIF. L. REV., 1203, 1239–1244 (1986) (listing different types and concepts of discrimination—such as effectual discrimination and facial discrimination—and implying there is no hierarchical order among them).

<sup>217</sup> See 397 U.S. at 143; O'Grady, *supra* note 35, at 578 n.28 (“State statutes mandating the use of local products or services are commonly presented in dormant Commerce Clause challenges.”). Moreover, in *Pike*, the Court acknowledged the argument that a state's in-state presence requirement may be justified if it served a purely regulatory, rather than economic, purpose. See *Pike*, 397 U.S. at 143. This logically implies that if the primary purpose were to stimulate economic growth, these in-state requirements would suffer even greater scrutiny. See *id.* Such is the precise case with the New York farm brewery law. See Press Release, Governor Andrew M. Cuomo, *supra* note 12 (articulating triumphantly the benefits that New York farms will enjoy because of the farm brewery law).

<sup>218</sup> See *Pike*, 397 U.S. at 143.

<sup>219</sup> See *id.* at 144.

Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere.<sup>220</sup> Thus, the same suspicion will befall the farm brewery law given its implicit requirement that farmers be located within the state to avail themselves of the full New York farm brewing market, despite potentially greater efficiency of those operations elsewhere.<sup>221</sup>

More pertinently, this jurisprudence has extended explicitly to sourcing requirements.<sup>222</sup> For example, in its 1992 decision *Wyoming v. Oklahoma*, the U.S. Supreme Court struck down an Oklahoma statute that required in-state power plants to use at least ten percent Oklahoma-mined coal.<sup>223</sup> Noting that Oklahoma in effect preferentially reserved a segment of its own coal market for its own miners, the Court found that such action “cannot be characterized as anything other than protectionist and discriminatory,” and thus a violation of the dormant Commerce Clause.<sup>224</sup> Importantly, it continued to hold that the *extent* of discrimination—a “small portion” in Oklahoma’s words—has no bearing on the all-important *fact* of discrimination.<sup>225</sup> No practical distinction can therefore be drawn between this invalid law and New York’s, intended as it is to explicitly reserve for in-state farmers almost monopolized access to farm breweries—no matter how small that market may eventually be.<sup>226</sup>

Thus New York’s farm brewery law is discriminatory and, as a consequence, is virtually *per se* invalid.<sup>227</sup> Such discriminatory laws are nearly always found to be fatal, as they cannot withstand the “exacting standard” articulated in *Granholm*.<sup>228</sup> The farm brewery law will not bear this standard, as

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<sup>220</sup> See *id.* at 145.

<sup>221</sup> See *id.*; *supra* notes 13, 151–154 (discussing potential economic costs to in-state sourcing requirements).

<sup>222</sup> See *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992).

<sup>223</sup> See *id.* at 443, 461. The protectionist similarity between the farm brewery law here and the direct-shipment law at issue in *Granholm* is exemplified by this case. See O’Grady, *supra* note 35, at 597–99. There is an important distinction between discrimination and protectionism, since measures that can be seen as protectionist in their intent—much like the New York farm brewery law which seeks to *protect* in-state farmers—often need not suffer a full discriminatory analysis as they are immediately recognizable as unconstitutional. See *id.* Often this is an “uncomplicated task,” evidenced in *Wyoming v. Oklahoma* by Oklahoma’s candid admission that its measures were protectionist in scope. See *id.* at 597–99; see also *Wyoming*, 502 U.S. at 455. This bears a striking resemblance New York Governor Andrew Cuomo’s remarks. See Press Release, Governor Andrew M. Cuomo, *supra* note 12 (explicitly acknowledging the law’s intention to benefit in-state farmers).

<sup>224</sup> See *Wyoming*, 502 U.S. at 455.

<sup>225</sup> *Id.* at 455–56.

<sup>226</sup> See *id.*

<sup>227</sup> See *Granholm*, 544 U.S. at 476; *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); Denning, *supra* note 37, at 422; see also *Or. Waste Sys., Inc.*, 511 U.S. at 99 (defining discrimination in the dormant Commerce Clause context).

<sup>228</sup> See *Granholm*, 544 U.S. at 493. This “standard” requires that the state show no other possible less-discriminatory means of achieving its stated goal other than those implemented in the challenged law. See *id.*



there are plenty of other means of promoting an industry, simple deregulation just one among them.<sup>229</sup>

## 2. The Second Provision of the Twenty-first Amendment Cannot Save New York's Farm Brewery Law

Because, ultimately, the New York farm brewery law regulates the intra-state alcohol industry, application of the dormant Commerce Clause does not end the analysis.<sup>230</sup> Though emasculated, the Twenty-first Amendment still affords at least some protection to state regulations of alcohol that violate the Commerce Clause.<sup>231</sup>

Yet, the discriminatory nature of the New York farm brewery law cannot be cured by what are increasingly insignificant Twenty-first Amendment protections.<sup>232</sup> This is because, according to the “modern accommodation standard,” courts reconcile the Second Provision with the dormant Commerce Clause by paying deference only to those state regulations that promote the Twenty-first Amendment’s “core concerns.”<sup>233</sup> These “core concerns” have remained remarkably undefined, but have included the promotion of temperance, market orderliness, and revenue—revenue typically meaning non-discriminatory taxes or price fixations on intoxicating liquors.<sup>234</sup> Thus even discriminatory laws that regulate alcohol may survive a dormant Commerce Clause violation.<sup>235</sup>

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<sup>229</sup> See *infra* notes 252–268 (arguing that simple deregulation would accomplish the stated goal of spurring New York’s brewery-related agricultural sectors).

<sup>230</sup> See U.S. CONST. amend. XXI; N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533).

<sup>231</sup> See U.S. CONST. amend. XXI; Lauzon, *supra* note 2, § 2a at 162–71; Massey, *supra* note 106, at 71–72.

<sup>232</sup> U.S. CONST. amend. XXI; see Massey, *supra* note 106, at 71–72 (outlining the erosion of the Twenty-first Amendment’s prowess).

<sup>233</sup> See Lauzon, *supra* note 2, § 2a at 162–71.

<sup>234</sup> See *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (“The two North Dakota regulations fall within the core of the State’s power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate.”); *Dickerson v. Bailey*, 336 F.3d 388, 404 (5th Cir. 2003) (“This is commonly referred to as the ‘core concerns’ test, which entails assessing whether state statutes reflect the ‘central purpose’ or the ‘core concern’ of the Twenty-First Amendment, *viz.*, the promotion of temperance. Some courts have also recognized the prevention of monopolies or organized crime from (re)gaining control of the alcohol industry and the collection of taxes as other policies effectuated by the Twenty-First Amendment.”); *Beskind v. Easley*, 325 F.3d 506, 513 (4th Cir. 2003) (“The core interests protected by the Twenty-first Amendment are described as the States’ interests in promoting temperance, ensuring orderly market conditions, and raising revenue, all in connection with the manufacture, shipment, and use of alcoholic beverages.”) (internal quotations omitted); Lauzon, *supra* note 2, § 2a at 162–71.

<sup>235</sup> See, e.g., *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 186 (2d Cir. 2009) (upholding a New York distribution law under the Twenty-first Amendment); *Okl. Alcoholic Beverage Control Bd. v.*

But no such central concerns are served by New York's farm brewery law.<sup>236</sup> The in-state sourcing requirement does not resemble price fixation or taxation and does not therefore implicate a "revenue" concern.<sup>237</sup> Moreover, the law's central purpose is the promotion of New York's agriculture, not a promotion of temperance, nor is a guarantor of market orderliness.<sup>238</sup>

Further, because it is not entirely certain that a "core concern" test is even necessary, discriminatory laws are unlikely to receive any deference.<sup>239</sup> The U.S. Supreme Court in *Granholm* applied a purely traditional dormant Commerce Clause analysis to the challenged distribution laws, implying an even less deferential standard than previously applied.<sup>240</sup> Under *Granholm*, the Court signaled that the Twenty-first Amendment simply does not protect or allow discrimination at all—that discrimination's per se invalidity under the dormant Commerce Clause applies with equal force to alcohol.<sup>241</sup> Thus this newest iteration of a long series of Twenty-first Amendment cases, couched as it is in a new formulation of the history of the Wilson and Webb-Kenyon Acts, works to afford states even less deference—and all but seals the discriminatory farm brewery law's fate.<sup>242</sup>

Finally, the Twenty-first Amendment's protection, even if its core concerns were implicated, is probably weaker with regard to the sourcing requirements.<sup>243</sup> Because ultimately the farm brewery law is, as the name im-

Heublein Wines, Int'l, 566 P.2d 1158, 1185 (Okla. 1977) (upholding an Oklahoma advertising ban under Twenty-first Amendment); *State v. Amoroso*, 975 P.2d 505, 511 (Utah 1999) (upholding a Utah direct shipment law under Twenty-first Amendment). See generally Lauzon, *supra* note 2, § 2a (providing a list of cases demonstrating the Twenty-first Amendment's protection of otherwise discriminatory laws). One could argue that, more often than not, the Twenty-first Amendment does *not* save a majority challenged statutes. See Lauzon, *supra* note 2, § 2a at 162–231.

<sup>236</sup> See N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533).

<sup>237</sup> See *id.*; *Capitol Distrib. Co. v. Redwine*, 57 S.E.2d 578, 586 (Ga. 1950) (upholding a Georgia tax that favored wines made from in-state ingredients); Lauzon, *supra* note 2, § 2a at 162–71.

<sup>238</sup> See Press Release, Governor Andrew M. Cuomo, *supra* note 12. See generally Lauzon, *supra* note 2. The promotion of temperance, stemming from the historical context of this area of the law, is a core concern. See *id.* § 2a at 162–231; see also Silvernail, *supra* note 51, at 543 (noting that temperance is *the* core concern).

<sup>239</sup> See *Granholm*, 544 U.S. at 487–99.

<sup>240</sup> See *id.*

<sup>241</sup> See *id.* (noting the *Bacchus* test in passing, but not explicitly applying it); Quigley, *supra* note 2, at 1886–87 (proffering an argument that *Granholm* has ushered in a new era of jurisprudence concerning the Twenty-first Amendment and the Commerce Clause).

<sup>242</sup> See *Granholm*, 544 U.S. at 487–99; Quigley, *supra* note 2, at 1886–87.

<sup>243</sup> See U.S. CONST. amend. XXI. Almost all cases implicating the "core concerns" of the Twenty-first Amendment dealt with direct regulation of the alcohol industry—its methods, sales, import/export, taxation, etc.—*not* ingredient sourcing methods. See, e.g., *Milton S. Kronheim & Co. v. District of Columbia*, 91 F. 3d 193, 204 (D.C. Cir. 1996) (holding that a District of Columbia law regarding alcohol storage requirements is valid even though it "facially violates the negative commerce clause" because it "is supported by a clear concern for the core enforcement function of the Twenty-first Amendment"); *Bainbridge v. Bush*, 148 F. Supp. 2d 1306, 1310–13 (M.D. Fla. 2001)

plies, a law regulating brewing, the Twenty-first Amendment's protections of state-level regulatory control over alcohol are implicated.<sup>244</sup> The law in practice and purpose, however, works to directly promote and protect New York brewing agriculture more so than New York craft beer.<sup>245</sup>

In other words, the farm brewery law discriminates not by directly regulating alcohol, but by regulating interstate commerce in hops and other brewing ingredients.<sup>246</sup> Yet facially, the Second Provision affords no protection to spirits' ingredients—only the final product stemming from those ingredients.<sup>247</sup> This face-saving Provision is therefore at least partly inapplicable to the farm brewery law, exposing a blatant intent to protect agricultural industry.<sup>248</sup> And protectionist measures in agricultural industries are a primary hunting ground for dormant Commerce Clause attacks.<sup>249</sup>

This material difference therefore all but eviscerates any Twenty-first Amendment protections with which New York would seek to clothe the law, and with them any hope of judicial affirmance.<sup>250</sup> That is, without any constitutional protections rooted in the Twenty-first Amendment nor any guarantee that

(upholding a Florida direct shipment law that prevented out of state interests from shipping to non-permitted residents, stating that “although Florida’s statutory scheme violates the dormant commerce clause, it represents a permissible regulation under the Twenty-First Amendment”); *Heublein, Inc. v. State*, 351 S.E.2d 190, 196 (Ga. 1987) (upholding a Georgia law that taxed imported liquor, despite its violation of the Commerce Clause, because of protections afforded by the Twenty-first Amendment); *Okla. Alcoholic Beverage Control Bd.*, 566 P. 2d at 1162–63 (finding the Twenty-first Amendment saved an advertising law that nonetheless interfered with interstate commerce). *See generally* Lauzon, *supra* note 2 (collecting cases on the Twenty-first Amendment and the Commerce Clause).

<sup>244</sup> *See* U.S. CONST. amend. XXI.

<sup>245</sup> *See* N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533). Indeed, the protectionist measures are focused almost entirely on agricultural interests. *See id.* § 3.

<sup>246</sup> *See supra* notes 194–229 (describing the mechanisms of NY’s farm brewery scheme, including how it essentially regulates beer’s ingredients rather than the beer itself).

<sup>247</sup> *See* U.S. CONST. amend. XXI.

<sup>248</sup> *See id.*; N.Y. ALCO. BEV. CONT. LAW §§ 3, 51-a. *But see* Yablon, *supra* note 56, at 568–69 (discussing a series of cases that upheld state regulations of the nude dancing industry under the Twenty-first Amendment). The Supreme Court disavowed an expansive reading of the Twenty-first Amendment in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515–16 (1996). *See* Yablon, *supra* note 56, at 575–79. In so doing, the Court implicitly reaffirmed the Twenty-first Amendment’s grant of power to commercial regulations of alcoholic beverages. *See 44 Liquormart*, 517 U.S. at 514–15 (“Section 1 of the Twenty-first Amendment repealed that prohibition, and § 2 delegated to the several States the power to prohibit commerce in, or the use of, alcoholic beverages. The States’ regulatory power over this segment of commerce is therefore largely unfettered by the Commerce Clause. As is clear, the text of the Twenty-first Amendment supports the view that, while it grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limit whatsoever on other constitutional provisions.”) (internal quotations and citations omitted).

<sup>249</sup> *See, e.g., H.P. Hood & Sons*, 336 U.S. at 526 (concerning milk products); *Pike*, 397 U.S. at 138 (concerning commercial farming).

<sup>250</sup> *See Granholm*, 544 U.S. at 476 (noting per se invalidity).

such protections would even matter, the violative law is bound to break underneath the immense weight of a great constitutional silence.<sup>251</sup>

### B. The Simpler Path: Deregulation

To avoid constitutional infirmities, New York and other states should instead promote craft beer through simple deregulation.<sup>252</sup> An across-the-board release of regulatory strictures does not implicate constitutional principles if effectuated evenhandedly.<sup>253</sup> Moreover, a releasing of market forces—and a shedding of the outdated ideology in which these laws are steeped—would better stimulate growth not just nationally, but locally as well.<sup>254</sup> For such is the very nature of the craft beer revolution: a return to locality.<sup>255</sup>

The unconstitutionality of New York's farm brewery scheme does not stem from legislative intent to promote craft beer.<sup>256</sup> Indeed, the promotion and fostering of the craft beer industry and its revolution is a noble thing and should be a legislator's goal.<sup>257</sup> The unconstitutionality of the farm brewery scheme stems instead from its protectionist *means* of promoting craft beer.<sup>258</sup> It is not that New York's nascent and resurgent hop and barley industries should not be promoted, nor that regulations should not be lifted from smaller breweries, but instead that such goals can only be legally accomplished in a non-discriminatory fashion that fosters the growth of the *entire* brewing communi-

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<sup>251</sup> Cf. *id.*; see *supra* notes 194–250 and accompanying text (explaining the unconstitutionality of the farm brewery license).

<sup>252</sup> See Tamayo, *supra* note 56, at 2232–48 (suggesting a variety of ways North Carolina might deregulate its craft beer industry, including abolishing barrelage limits for self-distributing craft breweries and simplifying North Carolina franchise laws).

<sup>253</sup> See *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.”) (emphasis added) (internal quotations omitted).

<sup>254</sup> See *id.* at 494–95 (Stevens, J., dissenting) (espousing that the framers of the Twenty-first Amendment held a fundamentally different view of alcohol's danger and importance than do younger policy makers today). It would seem then important to recognize the fundamental shift in society's perspective on alcohol, to better allow today's laws to reflect today's mores. See *id.*; Tamayo, *supra* note 56, at 2218–21, 2235 (further explaining Justice Stevens' dissent and also reporting increased market penetration from craft breweries allowed to limitlessly self-distribute, without the encumbrance of legislative caps).

<sup>255</sup> See *History of Craft Brewing*, *supra* note 4.

<sup>256</sup> See *supra* notes 190–229 and accompanying text (explaining the unconstitutionality of New York's farm brewery law without attributing that unconstitutionality to the law's underlying intention to promote the art of craft beer).

<sup>257</sup> See Tamayo, *supra* note 56, at 2228 (noting ample legislative recognition of the merits of craft beer promotion, including job creation, increased local taxation, and reduced environmental impacts).

<sup>258</sup> See *supra* notes 190–229 and accompanying text (outlining the unconstitutionality of discriminatory *means*).

ty.<sup>259</sup> This is the only means by which the legislature can help foster growth without inviting litigation.<sup>260</sup> The promotion of farms must be done constitutionally, without implicating that balkanization the Supreme Court is mandated to prevent.<sup>261</sup> State laws simply cannot exclude one another and remain unchallenged.<sup>262</sup>

Further, the simplicity of locality should serve as thematic inspiration: the immense patchwork of laws regulating the alcohol industry certainly testify to a need for a simpler marketplace.<sup>263</sup> One sector ripe for a loosening of control could be distribution and retail, which is already taking place across the country.<sup>264</sup> In New York this could mean granting *all* craft beer those privileges extended to farm breweries—as New York began to do in recent amendments—and allowing the industries to promote themselves.<sup>265</sup> New York has a rich hop-growing heritage, and with the ever-increasing creativity of craft beer throughout the country, it is all but certain ample demand for New York hops will be generated with their continued expansion and redevelopment.<sup>266</sup> There is thus no need for protectionism.<sup>267</sup> The law should remove barriers to growth, not create them.<sup>268</sup>

<sup>259</sup> See *supra* notes 190–229 and accompanying text (describing the unconstitutionality of discriminatory brewery licensing mechanisms).

<sup>260</sup> See *supra* notes 190–229 and accompanying text.

<sup>261</sup> See *supra* notes 190–229 and accompanying text.

<sup>262</sup> See Lauzon, *supra* note 2, § 2a at 162–71 (listing cases challenging laws that exclude out-of-state interests); *supra* notes 142–159, 195–265 and accompanying text (explaining the economic motivations for challenging New York’s farm brewery law and the unconstitutionality of the farm brewery license).

<sup>263</sup> See Foust, *supra* note 105, at 661 (noting the complexity of laws governing the alcohol industry); Scott, *supra* note 62, at 417–18.

<sup>264</sup> See, e.g., Chris Crowell, *Ohio Passes Craft Brewing-Friendly Legislation, AB InBev Upset*, CRAFT BREWING BUS. (Apr. 24, 2013), <http://www.craftbrewingbusiness.com/news/ohio-passes-craft-brewing-friendly-legislation-ab-inbev-upset/>, archived at <http://perma.cc/8N5Q-MUNH> (discussing an example of one state’s loosening of distribution laws); *Self-Distribution Laws*, *supra* note 7 (noting an opening of once-rigid distribution schemes across the country).

<sup>265</sup> See, e.g., N.Y. ALCO. BEV. CONT. LAW § 56 (West, Westlaw through L.2014, chapters 1 to 504, 506 to 508, 510 to 523, 525 to 533) (amending brewing licenses to extend benefits to non-farm brewers, effective December 13, 2014); *Virginia Governor Signs Two Laws Supporting In-state Craft Breweries*, BEERPULSE (May 15, 2012, 7:18 PM), <http://beerpulse.com/2012/05/virginia-governor-signs-two-laws-supporting-in-state-craft-breweries/>, archived at <http://perma.cc/K9TX-FSBZ> (demonstrating a granting of on-site retail privileges without any attached in-state sourcing requirements).

<sup>266</sup> See Josh Dawsey, *Farmers Give Hops a Shot*, WALL ST. J., Aug. 22, 2013, at A17.

<sup>267</sup> See *id.* New York’s hop growing regions are growing quickly, and were doing so before this legislative attempt to insulate part of the market for them. See *id.*

<sup>268</sup> See Tamayo, *supra* note 56, at 2232–48 (noting the feasibility and benefits of deregulation of the alcohol industry).

## CONCLUSION

The craft beer revolution is incredible. The industry has grown at impressive rates and has contributed enormously to localities and culture. It ought to be fostered, celebrated, encouraged, and experienced—and though its past is storied, its future is brighter.

The legislative context of the revolution, however, is highly complex. America's misguided but "Noble Experiment" with Prohibition—and its tumultuous relationship with alcohol generally—has birthed a patchwork system of state and federal laws clothed with the essence of an era when wholesalers were many and small, breweries few and large, distrust rampant, and product summarily indiscernible. The era has passed, but the legislative legacy largely endures.

New York and other states have tried to adapt. New York created a farm-brewery license, for example, which loosened regulations for breweries sourcing in-state ingredients. This particular mechanism, however, discriminates against interstate commerce and is consequently invalid. Thus the better path forward is to continue loosening regulatory strictures without also creating additional burdens. New York took steps in this direction by allowing all brewers to sell their beer by the glass, but failed to address the underlying constitutional concerns.

Thus as states adapt to this new era of craft beer (and craft cider, liquor, and wine), they must be certain to do so in ways that do not perpetuate the state-by-state legislative fragmentation of the post-Prohibition era. In New York's case, a court could ensure just that. But where laws and courts are silent, states should refuse legislative instincts, abdicate more authority vested in them by the Twenty-first Amendment, and merely open—for as regulatory barriers are removed, the creativity, the culture, and the beer will flow and flow well.

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