

FINE(ING) WINE: CHALLENGING DIRECT-SHIPMENT
LICENSING FEES ON DORMANT COMMERCE CLAUSE
GROUNDS

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INTRODUCTION

“[W]ine,” Thomas Jefferson once remarked, “[is] a necessary of life with me.”¹ An avid wine consumer, Jefferson notoriously spent over \$16,500 on imported wines during his presidency alone.² But imagine if, much to Jefferson’s chagrin, he could not have had his favorite wines shipped directly to Monticello because the producer had not paid the Commonwealth of Virginia for a direct-to-consumer shipping license.³ Jefferson’s worst nightmare is a reality for Americans in most states today, where costly licensing fees hinder direct-to-consumer (DtC) shipping from out-of-state wine producers.⁴

Following the repeal of Prohibition in 1933, states were given broad discretion to control the production, distribution, and sale of alcoholic beverages.⁵ Contemporary regulations vary greatly state-by-state, but many states have adopted frameworks encouraging domestic wine production by allowing wine producers to sell directly to consumers.⁶ At the core of DtC regulations is the requirement that producers obtain a direct-shipment license.⁷

Since the Supreme Court’s landmark ruling in *Granholm v. Heald*, which invalidated laws in New York and Michigan that

1. Letter from Thomas Jefferson to Thomas Appleton (Jan. 14, 1816), in 9 THE PAPERS OF THOMAS JEFFERSON 349, 351 (J. Jefferson Looney ed., 2012).

2. See JOHN HAILMAN, THOMAS JEFFERSON ON WINE 256 (2006).

3. Jefferson, a Virginian, credited North Carolina planters with producing “the first specimen of an exquisite [American] wine,” making it plausible that a hypothetical Virginia licensing fee could inhibit North Carolina-based wine producers from shipping directly to Jefferson. Letter from Thomas Jefferson to William Johnson (May 10, 1817), in 11 THE PAPERS OF THOMAS JEFFERSON 344, 345 (J. Jefferson Looney ed., 2014).

4. See James T. Lapsley, Julian M. Alston & Olena Sambucci, *The US Wine Industry*, in THE PALGRAVE HANDBOOK OF WINE INDUSTRY ECONOMICS 105, 125-26 (Adeline Alonso Ugaglia et al. eds., 2019). For reasons unclear, some states distinguish between different types of alcoholic beverages, for example, wine versus beer versus spirits. See, e.g., MONT. CODE ANN. §§ 16-4-101, -1101 (2019) (governing licenses for the sale of beer and wine, respectively). The scope of this Note is limited to DtC regulations as applied to wine.

5. See Lapsley et al., *supra* note 4, at 122; see also U.S. CONST. amend. XXI, § 2.

6. See Lapsley et al., *supra* note 4, at 121-23.

7. See, e.g., CAL. BUS. & PROF. CODE § 23661.3(a) (West 2019) (“[A]ny person currently licensed ... as a winegrower who obtains a wine direct shipper permit pursuant to this section may sell and ship wine directly to a resident of California.”); N.Y. ALCO. BEV. CONT. LAW § 79-d (LexisNexis 2011) (“Any person ... license[d] as a winery ... [may ship] directly to a New York state resident.”); TEX. ALCO. BEV. CODE ANN. § 16.09(a) (West 2009) (“The holder of a winery permit may ship wine to the ultimate consumer.”).

permitted in-state wineries to ship wine directly to consumers but otherwise prohibited out-of-state wineries from doing the same,⁸ most states have extended direct shipment benefits to both in-state and out-of-state wineries.⁹ While the *Granholm* Court implied that states could police direct-shipment through “an evenhanded licensing requirement,”¹⁰ the reality is that producers are required to pay exorbitant licensing fees on a state-by-state basis if they wish to ship directly to consumers across the country. DtC licensing fees, “while in [the] aggregate are reasonable expenses for in-state wineries with significant volumes of direct sales, [are] prohibitively expensive” for out-of-state wineries.¹¹ Because DtC wine shipments have become an increasingly important part of the wine industry,¹² there are emerging concerns that state scrutiny of DtC wine shipping will be intensified.¹³

This Note advocates for a constitutional challenge to state DtC licensing fees, arguing that the licensing fees impose an undue burden on interstate commerce. To this end, this Note will apply the Supreme Court’s dormant Commerce Clause jurisprudence to state DtC wine licensing fees. Under this framework, the Court has almost always invalidated state laws that discriminate against out-of-state interests absent a showing that the law is necessary to achieve a legitimate purpose other than economic protectionism.¹⁴ If the state law is not found to discriminate against out-of-state interests, the Court balances the law’s burdens on interstate commerce against its benefits, invalidating a law when the burden

8. See 544 U.S. 460, 465-66 (2005).

9. See Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 ANTITRUST L.J. 505, 505-06 (2008) (discussing direct shipment laws post-*Granholm*).

10. *Granholm*, 544 U.S. at 492.

11. Lapsley et al., *supra* note 4, at 125.

12. See SOVOS, DIRECT TO CONSUMER WINE SHIPPING REPORT: 2018 YEAR IN REVIEW 4 (Andrew Adams ed., 2019), <http://go.sovos.com/rs/334-HVN-249/images/2019-Direct-to-Consumer-Wine-Shipping-Report.pdf> [<https://perma.cc/3R5F-MA8F>] (noting that DtC accounted for over three billion dollars in revenue in 2018).

13. See *id.* at 32 (“As the DtC channel continues to grow ... [e]xpect more reporting requirements focused on enforcing licensing and tax regulations.”).

14. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (invalidating a facially discriminatory state law prohibiting the importation of out-of-state municipal waste); see also *infra* notes 103-04 and accompanying text.

imposed on interstate commerce is “excessive in relation to the [law’s] putative local benefits.”¹⁵

There are two approaches to this balancing test. In balancing the law’s burdens on interstate commerce against its benefits, some circuit courts require a heightened standard in which the government must prove that the asserted local benefits are both genuine and credibly advanced by the law;¹⁶ other circuits accept any rational assertion of benefit by the state.¹⁷ This Note argues that the heightened approach to balancing is appropriate with respect to DtC licensing fees because of concerns that states will prop up seemingly legitimate interests that are not truly advanced by the licensing fees.¹⁸ Moreover, a rational basis standard ignores the unique climate conditions of particular states that affect the quality of wine production.¹⁹ This Note will ultimately conclude that DtC licensing fees are unconstitutionally burdensome on interstate commerce.

Part I overviews state DtC wine shipment licensing frameworks and examines how the existing frameworks create a substantial burden on wine producers. Part II discusses the Twenty-First Amendment, the Commerce Clause, and the doctrinal framework relevant to DtC licensing. Part III applies the Court’s dormant Commerce Clause framework to DtC licensing fees using a heightened balancing standard for weighing the asserted benefits of the licensing fees against the burdens on interstate commerce. Part IV anticipates and addresses potential counterarguments about the appropriate standard of review, as well as institutional concerns about the judiciary weighing in on state policy decisions relating to alcohol regulation.

15. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also infra* notes 105-07 and accompanying text.

16. *See, e.g.*, *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 216 (3d Cir. 2002) (opining that states “must provide evidence” that laws burdening interstate commerce “have the benefits contemplated” by the legislature).

17. *See, e.g.*, *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 164 (5th Cir. 2007) (“[W]e credit a putative local benefit ‘so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes.’” (quoting *Ford v. Tex. Dep’t of Transp.*, 264 F.3d 493, 504 (5th Cir. 2001))).

18. *See infra* Part III.A.

19. By ignoring the significance of regional environmental idiosyncrasies in viticulture, rationality review has the potential to embolden states to enact protectionist DtC licensing fee structures. *See infra* Part IV.A.

I. LICENSING TO CHILL: THE CHILLING EFFECT OF STATE DIRECT-SHIPMENT LICENSING FEES ON DTC COMMERCE

Before addressing the constitutionality of DtC licensing fees, it is necessary to overview state DtC wine shipment licensing frameworks. This Part briefly explains the structure of state regulatory frameworks and discusses the purposes served by direct-shipment licensing. It then discusses the pernicious effect that DtC licensing fees have on wine producers and illustrates how the existing frameworks create a substantial burden on interstate commerce.

A. State Direct-Shipment Licensing Frameworks

Following the repeal of Prohibition by the Twenty-First Amendment in 1933, states were given broad discretion to regulate the production, distribution, and sale of alcohol.²⁰ Most states adopted, and some states continue to enforce,²¹ a three-tiered distribution system to control the alcohol industry.²² In effect, the tiered system requires that licensed producers sell to licensed wholesalers, who in turn are required to sell to licensed retailers, who alone are authorized to sell to consumers.²³ A common component of this system is the requirement that each entity within each tier obtain a license.²⁴ The tiered system has long been justified as a means of “promoting temperance,” collecting state tax revenue, and “ensuring orderly market conditions.”²⁵

With the emergence of more efficient means of distribution, including ever-growing internet marketplace, states have become increasingly receptive to schemes in which wine producers are permitted to circumvent the traditional three-tiered system by

20. See Lapsley et al., *supra* note 4, at 122; see also U.S. CONST. amend. XXI, § 2.

21. See 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, 3 (2004).

22. See, e.g., S.C. CODE ANN. § 61-4-735(D) (2001) (“A producer, winery, vintner, and importer of wine are declared to be in business on one tier, a wholesaler on another tier, and a retailer on another tier.”).

23. See Lapsley et al., *supra* note 4, at 123.

24. See generally *id.* at 122-23.

25. *North Dakota v. United States*, 495 U.S. 423, 432 (1990); see Susan Lorde Martin, *Changing the Law: Update from the Wine War*, 17 J.L. & POL. 63, 64 (2001).

obtaining a license to ship wine directly to consumers.²⁶ Direct shipping refers to when producers ship “wine directly to consumers outside the three-tier system, usually to their home or work via a package delivery company.”²⁷ Although the three-tiered system is slowly becoming a relic of the past,²⁸ certain aspects have carried over to the newer DtC frameworks—most notably the licensing requirement.²⁹

Currently, forty-four states permit wine producers to ship directly to consumers.³⁰ Forty-one states require that wine producers obtain a license as a condition of shipping wine directly to consumers, and all but two of these states charge a fee for the shipping licenses.³¹ In effect, this means that wine producers must pay for a direct-shipment license in every state where it is required if the producer wishes to distribute directly to consumers on a nationwide basis. Moreover, because most states’ direct-shipment licenses expire annually, producers must pay the licensing fee each year to renew direct-shipment privileges in a given state.³² There is great variance in the cost of DtC licensing state-by-state, but the annual cost of DtC licensing fees exceeds one hundred dollars in twenty-three states—a hefty financial burden for smaller producers.³³

It is important to note that federal law mandates that wine producers obtain a federal permit from the Alcohol and Tobacco Tax and Trade Bureau (TTB) as a condition of conducting business.³⁴ A

26. See Anderson, *supra* note 21, at 3.

27. FED. TRADE COMM’N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 7 (2003), https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf [<https://perma.cc/2V8Q-5Y8V>] [hereinafter FTC REPORT].

28. See *Granholt v. Heald*, 544 U.S. 460, 467 (2005) (discussing the waning vitality of the three-tiered system).

29. See *supra* note 7 and accompanying text.

30. See *Off-Site Direct Shipping Summary*, WINE INST. (2020), <https://wineinstitute.com/pliancerules.org/off-site-direct-shipping-summary/#off-site> [<https://perma.cc/R3C8-NQ2V>].

31. See *id.*

32. See *id.*

33. See *id.*; *infra* notes 49-52 and accompanying text (noting that most wine producers are small-scale operations). The annual cost of DtC licensing is particularly high in some states, such as Connecticut (\$315-\$415), Illinois (\$350-\$1,500), Indiana (\$100-\$500), Louisiana (\$400), Nebraska (\$500), New Jersey (\$938), New York (\$375), South Carolina (\$600), Tennessee (\$150-\$450), Texas (\$526), Vermont (\$330), and Virginia (\$230-\$425). See *Off-Site Direct Shipping Summary*, *supra* note 30.

34. See Federal Alcohol Administration Act, 27 U.S.C. § 203(b).

winery cannot operate in any state without a federal license.³⁵ Ironically, there is no fee at the federal level to apply for or maintain a license to operate a winery.³⁶ The Federal Alcohol Administration Act, which mandates TTB licensing, is silent with respect to state licensing provisions.³⁷ As such, it is unclear whether the federal requirement that wine producers obtain a license preempts state DtC licensing requirements.³⁸ However, the question of whether federal licensing requirements preempt state DtC licensing requirements is beyond the scope of this Note.

B. DtC Licensing Fees Are Prohibitively Expensive for Wine Producers

While the cost of state DtC licensing fees may seem reasonable when viewed on a single-state basis, the costs of DtC licensing are striking when viewed in the aggregate.³⁹ The United States is the largest national wine market in the world, but from a marketing perspective it “is better considered as 51 different entities consisting of 50 states and the Federal District of Columbia.”⁴⁰ DtC licensing fees in a single state may seem like an ordinary business expense for wine producers—and they might be for a winery with significant volumes of direct sales in a particular state—but the reality is that in the aggregate, the cost of DtC licensing fees is “prohibitively expensive for ... out-of-state winer[ies] that [are] shipping only a few cases per month to a particular state.”⁴¹ As such, wineries end up spending several thousand dollars annually just to access consumers across the country.⁴² The Federal Trade Commission (FTC) has

35. *See id.*; *Granholt v. Heald*, 544 U.S. 460, 492 (2005).

36. *See Applying for a Permit and/or Registration*, ALCOHOL & TOBACCO TAX & TRADE BUREAU (Mar. 19, 2019), <https://www.ttb.gov/applications> [<https://perma.cc/B67A-YHZQ>].

37. *See* 27 U.S.C. § 203(b).

38. *See* U.S. CONST. art. VI, cl. 2 (“[T]he Laws of the United States ... shall be the supreme Law of the Land.”). *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226-28 (2000) (discussing implied preemption of state law).

39. *See Off-Site Direct Shipping Summary*, *supra* note 30.

40. Lapsley et al., *supra* note 4, at 121.

41. *See id.* at 125.

42. *See supra* notes 30-33 and accompanying text.

stressed that “[e]ven seemingly small fees can deter smaller wineries from shipping wine to a particular state.”⁴³

This burden is corroborated by producers throughout the country. In Maryland, for example, which opened its borders to direct shipment in 2011, state officials reported that only eleven producers applied for DtC licenses in the first month.⁴⁴ To obtain a DtC license in Maryland, wine producers must pay an annual fee of two hundred dollars plus an annual insurance payment of one hundred dollars, which some commentators have observed is “prohibitive for many of the country’s smaller wineries.”⁴⁵ Similarly, two New York-based wine producers explicitly cite costly licensing fees as the reason why they ship only to a limited number of states.⁴⁶ On their webpages these wineries emphasize that, although direct shipping is legal in most states, “[licensing] fees are prohibitively expensive for ... small wineries” like themselves.⁴⁷

It is misguided to characterize this as an issue that affects “only” small wine producers.⁴⁸ There are nearly ten thousand wineries in the United States, and 96 percent are classified as “small,” “very small,” or “limited production.”⁴⁹ Given that DtC licensing fees may “deter smaller wineries from shipping wine to a particular state,”⁵⁰ it is doubtful that many wineries ship directly to consumers in every state in which direct-shipment is available.⁵¹ To this end, it is

43. FTC REPORT, *supra* note 27, at 41.

44. See Julie Bykowitz, *Few Takers So Far for Direct Wine Shipping*, BALTIMORE SUN (June 26, 2011, 12:38 PM), <https://www.baltimoresun.com/business/bs-md-wine-shipping-20110620-story.html> [<https://perma.cc/6FAA-KZ4F>].

45. *Id.*

46. See *Wine Shipping FAQs*, HUNT COUNTRY VINEYARDS, <https://www.huntwines.com/Wine-Shipping-FAQs> [<https://perma.cc/U9D4-28WS>]; *Wine Shipping FAQs*, KEUKA SPRING VINEYARDS, <https://www.keukaspringwinery.com/Wines/Wine-Shipping-FAQs> [<https://perma.cc/73DB-H57N>].

47. *Wine Shipping FAQs*, HUNT COUNTRY VINEYARDS, *supra* note 46.

48. See SOVOS, *supra* note 12, at 3. Winery size is determined by annual case production. “Large” wineries produce more than 500,000 cases of wine annually, “medium” wineries produce between 50,000-499,999 cases annually, “small” wineries produce between 5,000-49,999 cases annually, “very small” wineries produce between 1,000-4,999 cases annually, and “limited production” wineries produce less than 1,000 cases annually. *Id.*

49. *See id.*

50. FTC REPORT, *supra* note 27, at 41.

51. *See generally* James Alexander Tanford, *E-commerce in Wine*, 3 J.L. ECON., & POL’Y 275, 303-04 (2007) (discussing how wine producers focus on developing local markets in the absence of accessible national markets).

unsurprising that smaller wineries accounted for less than two-thirds of the total volume of DtC wine shipments in 2018.⁵²

Even though “[t]he United States is an attractive market for wine producers because it is large [and] lucrative,”⁵³ DtC shipping still represents a small percentage of wine sales in the United States—just 10 percent.⁵⁴ While there may be other contributing factors discouraging wine producers from shipping directly to consumers,⁵⁵ costly licensing fees bear significant responsibility.⁵⁶ Direct shipment will remain a small part of the wine market so long as states impose burdensome direct shipment licensing fees on producers.⁵⁷ Consumers will have limited access to the wine market, and producers will be hostages to the inefficient three-tiered system.⁵⁸ This Note provides a roadmap for challenging these direct-shipment licensing schemes under the Supreme Court’s dormant Commerce Clause jurisprudence.

II. LEGAL VINTAGES: CONSTITUTIONAL FRAMEWORKS GOVERNING DTC LICENSING

To challenge the constitutionality of state DtC licensing fees, this Note argues that DtC licensing fees violate the dormant Commerce Clause. The dormant Commerce Clause stands for the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce.⁵⁹ State alcohol regulations have an additional layer of constitutional complexity because of the Twenty-First Amendment, which grants states broad discretion to regulate the production, distribution, and sale of alcohol.⁶⁰ States find constitutional authorization for DtC licensing in section 2 of the

52. See SOVOS, *supra* note 12, at 20.

53. Lapsley et al., *supra* note 4, at 126.

54. See SOVOS, *supra* note 12, at 5.

55. See FTC REPORT, *supra* note 27, at 41-42 (noting that “[t]he wine industry also faces more subtle barriers to e-commerce, including ... very low quantity limits, advertising bans”).

56. See *supra* notes 39-52 and accompanying text.

57. See FTC REPORT, *supra* note 27, at 31 (forecasting slow growth in DtC shipments).

58. See generally Lapsley et al., *supra* note 4, at 126.

59. See James L. Buchwalter, Annotation, *Construction and Application of Dormant Commerce Clause, U.S. Const. Art. I, § 8, cl. 3—Supreme Court Cases*, 41 A.L.R. Fed. 2d 1, § 2 (2009); see also U.S. CONST. art. I, § 8, cl. 3.

60. See U.S. CONST. amend. XXI, § 2.

Twenty-First Amendment.⁶¹ This Part explores the history and development of these constitutional frameworks.

A. *The Twenty-First Amendment*

Although many believe that the Twenty-First Amendment's sole purpose was to repeal Prohibition,⁶² its scope is much more expansive than just a mere negation of the Eighteenth Amendment.⁶³ Section 2 of the Twenty-First Amendment grants states broad regulatory authority over alcohol, specifically prohibiting the production, distribution, and sale of alcoholic beverages within a state's borders if doing so would violate applicable state law.⁶⁴ The Twenty-First Amendment is largely viewed as being a return to the pre-Prohibition regulatory state,⁶⁵ making it necessary to examine the regulatory framework prior to the ratification of the Eighteenth Amendment.

Before the Eighteenth Amendment, states had authority to regulate the import of alcohol into their borders under the Wilson Act.⁶⁶ The Wilson Act, passed in 1890, permitted states to regulate imported alcohol to the same extent that they regulated domestic liquor.⁶⁷ Notably, states could not prohibit the distribution of alcohol under the Wilson Act.⁶⁸ This loophole was closed by the Webb-Kenyon Act in 1913, which permitted states to ban alcohol importation and consumption altogether.⁶⁹ This all changed with the

61. *See id.*; Lapsley et al., *supra* note 4, at 122.

62. Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L. 552, 552 (2006); *see also* U.S. CONST. amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

63. *See* 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."); Yablon, *supra* note 62, at 552.

64. *See* U.S. CONST. amend. XXI, § 2.

65. *See* Yablon, *supra* note 62, at 554.

66. *See id.* at 581; *see also* Wilson Act, 27 U.S.C. § 121.

67. *See* 27 U.S.C. § 121 ("All ... intoxicating liquors ... transported into any State ... [shall] be subject to the operation and effect of the laws of such State ... to the same extent and in the same manner as though such liquids or liquors had been produced in such State.").

68. Yablon, *supra* note 62, at 581.

69. *Id.*; *see* Webb-Kenyon Act, 27 U.S.C. § 122 ("The shipment or transportation ... [of] intoxicating liquor of any kind, from one State ... into any other State ... to be received, possessed, sold, or in any manner used ... in violation of any law of such State ... is prohibited.").

Eighteenth Amendment in 1919, which banned alcohol nationwide and ushered in the era of Prohibition.⁷⁰

Prohibition was short-lived, however; the Twenty-First Amendment, ratified in 1933, repealed Prohibition just fourteen years after it took effect.⁷¹ Prohibition is often remembered as a “failed experiment” and a “strange aberration” in American history, but temperance advocates hardly saw Prohibition’s repeal as a permanent setback.⁷² Indeed, “[t]he 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.”⁷³ Section 2 of the Twenty-First Amendment granted states broad regulatory power “to ensure that [the] states had the legal tools necessary to continue to fully effectuate their temperance goals.”⁷⁴ With these interests in mind, states began implementing the three-tiered regulatory frameworks soon after the Twenty-First Amendment’s ratification.⁷⁵

The Supreme Court’s early Twenty-First Amendment jurisprudence suggested that section 2 permitted the states to regulate alcohol with exceptionally broad constitutional discretion—perhaps to the extent that these powers superseded other constitutional provisions.⁷⁶ For example, in *Indianapolis Brewing Co. v. Liquor Control Commission*, the Court rejected a challenge to a Michigan law forbidding the importation of beer manufactured in states with laws discriminating against beer made in Michigan.⁷⁷ The plaintiff,

70. See U.S. CONST. amend. XVIII, § 1 (repealed 1933) (“[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”).

71. See *id.* amend. XXI, § 1.

72. Yablon, *supra* note 62, at 553.

73. *Granholt v. Heald*, 544 U.S. 460, 484 (2005).

74. Yablon, *supra* note 62, at 584.

75. See Lapsley et al., *supra* note 4, at 122-23.

76. See, e.g., *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) (“The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause.”); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939) (“Since [the Twenty-First] amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.”); *State Bd. of Equalization v. Young’s Mkt. Co.*, 299 U.S. 59, 64 (1936) (“A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.”).

77. See 305 U.S. 391, 393 (1939).

an Indiana-based beer manufacturer, was prohibited from selling beer to Michigan wholesalers because Michigan identified Indiana as a state “which by its laws discriminate[d] against Michigan beer.”⁷⁸ The manufacturer argued the Michigan law violated the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment.⁷⁹ In rejecting the manufacturer’s claims, the Court reasoned that under the Twenty-First Amendment, “the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause ... [or] by the equal protection clause.”⁸⁰ The Court endorsed this sweeping interpretation of section 2 in a number of other early Twenty-First Amendment cases.⁸¹

The expansive view of the Twenty-First Amendment began to fade by the 1960s.⁸² Around that time, the Court began to scale back earlier suggestions that the Twenty-First Amendment permitted state laws to violate other provisions of the Constitution, “confirm[ing] that the Twenty-first Amendment does not supersede other provisions of the Constitution.”⁸³ In the following decades, the Court invalidated state alcohol regulations—notwithstanding Twenty-First Amendment defenses—that were in violation of the First Amendment,⁸⁴ the Establishment Clause,⁸⁵ the Equal Protection Clause,⁸⁶ the Due Process Clause,⁸⁷ and the Import-Export Clause.⁸⁸

78. *Id.* at 392.

79. *Id.* at 394.

80. *Id.*

81. *See supra* note 76 and accompanying text.

82. *See, e.g.,* *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964) (“To draw a conclusion ... that the Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification.”).

83. *Granholm v. Heald*, 544 U.S. 460, 486 (2005).

84. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (“[A]n abridgment of speech protected by the First Amendment ... is not shielded from constitutional scrutiny by the Twenty-first Amendment.”).

85. *See* *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (“The State may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment.”).

86. *See* *Craig v. Boren*, 429 U.S. 190, 204-05 (1976) (“[T]he Twenty-first Amendment does not save ... invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment.”).

87. *See* *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (“We have no doubt as to the power of a State to deal with the evils [of alcohol] ... [but the] requirements of procedural

Of particular relevance to the issue of DtC licensing fees, the Court also invalidated state alcohol regulations on dormant Commerce Clause grounds.⁸⁹

The Court's pivot from its early Twenty-First Amendment jurisprudence, especially with respect to cases involving both the Twenty-First Amendment and the dormant Commerce Clause, reflects the idea that "[b]oth 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."⁹⁰ In other words, the Twenty-First Amendment "must be viewed as one part of a unified constitutional scheme."⁹¹ The effect of this proposition is that state laws that purport to be promulgated under the auspices of section 2 of the Twenty-First Amendment must comply with other provisions of the Constitution.⁹² As such, state DtC wine licensing fees are not shielded simply because they find affirmative authorization in the Twenty-First Amendment; the licensing frameworks must still comply with dormant Commerce Clause principles.

B. The Dormant Commerce Clause

The Commerce Clause expressly grants Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States."⁹³ In addition to this affirmative grant to Congress, the Supreme Court has "construed the Commerce Clause to imply

due process must be met.").

88. *See* *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-46 (1964) ("To sustain the tax which Kentucky has imposed in this case would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Export-Import Clause.... Nothing in the language of the Amendment nor in its history leads to such an extraordinary conclusion.").

89. *See* *Granholm v. Heald*, 544 U.S. 460, 493 (2005); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

90. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964).

91. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462-63 (2019) (first citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980); then citing *Hostetter*, 377 U.S. at 331-32; and then citing *ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 167-69, 180-82 (2012)*).

92. *See id.*

93. U.S. CONST. art. I, § 8, cl. 3.

a further command” known as the dormant Commerce Clause.⁹⁴ When Congress has not exercised its plenary power under the Commerce Clause to regulate a given area of commerce or, in other words, has remained “dormant,” the Commerce Clause still prohibits states from enacting laws that place an undue burden on interstate commerce.⁹⁵

The dormant Commerce Clause has a long and complicated history, but its roots trace back to the framing of the Constitution.⁹⁶ The dormant Commerce Clause “reflect[s] a central concern of the Framers that ... in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”⁹⁷ The Commerce Clause’s implied nondiscrimination principle ensures that “[r]ivalries among the States are ... kept to a minimum, and a proliferation of trade zones is prevented.”⁹⁸ Moreover, the dormant Commerce Clause roots out economic protectionism, or state laws “that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.”⁹⁹ This ensures that states are not “compelled to negotiate with each other regarding favored or disfavored status for their own citizens.”¹⁰⁰ Indeed, in the landmark case *Gibbons v. Ogden*, Chief Justice John Marshall found that these arguments in favor of the dormant Commerce Clause had “great force.”¹⁰¹

The Supreme Court’s case law suggests a generally applicable framework for determining whether a state law violates the dormant Commerce Clause.¹⁰² Under this analysis, courts must inquire

94. Buchwalter, *supra* note 59.

95. *See id.*

96. *Tenn. Wine*, 139 S. Ct. at 2459-60.

97. *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (alteration in original) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)).

98. *Id.* at 472-73 (citing *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994)).

99. *C & A Carbone*, 511 U.S. at 390.

100. *Granholm*, 544 U.S. at 472.

101. 22 U.S. (9 Wheat.) 1, 209 (1824). Chief Justice Marshall coined the term “dormant” vis-à-vis the Commerce Clause, noting in dicta that the commerce power “can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.” *Id.* at 189.

102. *See, e.g., Dep’t of Revenue v. Davis*, 553 U.S. 328, 338-39 (2008) (summarizing the Court’s dormant Commerce Clause analysis).

whether the challenged state law facially discriminates against out-of-state interests. Discriminatory laws are presumptively invalid absent a state showing that the law advances a legitimate local interest that cannot be adequately served by a nondiscriminatory alternative.¹⁰³ In this context, discrimination refers to “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”¹⁰⁴ In the alternative, if the state or local law treats in-state and out-of-state interests evenhandedly, then the law “will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the [law’s] putative local benefits.”¹⁰⁵ This balancing test, which weighs the state law’s burden on interstate commerce against the purported benefits the law advances,¹⁰⁶ is commonly referred to as *Pike* balancing.¹⁰⁷

Circuit courts take two different approaches to applying this balancing test. Some circuit courts require a heightened standard in which the government must prove that the asserted local benefits are both genuine and credibly advanced by the law,¹⁰⁸ other circuits instead accept any rational assertion of benefit by the state.¹⁰⁹ The Supreme Court has yet to weigh in on this circuit split. Regardless of the approach taken, *Pike* balancing does not necessarily prove fatal for state laws; state laws incidentally burdening interstate commerce are frequently upheld under *Pike* balancing.¹¹⁰

103. *Id.* at 338; see also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (“[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.”).

104. *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality*, 511 U.S. 93, 98 (1994).

105. *Davis*, 553 U.S. at 338-39 (first alteration in original) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

106. See *id.*

107. See *id.* at 353.

108. See, e.g., *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 216 (3d Cir. 2002) (holding that states “must provide evidence” that laws burdening interstate commerce “have the benefits contemplated by the” legislature).

109. See, e.g., *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 164 (5th Cir. 2007) (“[W]e credit a putative local benefit ‘so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes.’” (quoting *Ford Motor Co. v. Tex. Dep’t of Transp.*, 264 F.3d 493, 504 (5th Cir. 2001))).

110. See, e.g., *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 526 (1989) (upholding an environmental regulation adopted by the State Corporation Commission of Kansas because it was “not ‘clearly excessive’” in relation to Kansas’s interest in preventing production waste); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-74 (1981)

Although the Court's recent case law has extended the dormant Commerce Clause framework to alcohol regulations,¹¹¹ this was not always the case. The Court previously employed an analogous balancing test in *Bacchus Imports, Ltd. v. Dias*, which it created in an attempt to alleviate the inherent tension between the dormant Commerce Clause and the Twenty-First Amendment.¹¹² Under the *Bacchus* framework, courts considered "whether the principles underlying the Twenty-first Amendment [were] sufficiently implicated by the [law being challenged] to outweigh the Commerce Clause principles that would otherwise be offended."¹¹³ In other words, the Court looked to "whether the interests implicated by a state regulation [were] so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal [interstate commerce] policies."¹¹⁴ This balancing test is commonly referred to as the "core concerns" test.¹¹⁵

In *Bacchus*, the Court considered the constitutionality of a Hawaii liquor tax that provided exemptions for certain locally produced alcoholic beverages.¹¹⁶ The Court ruled that the tax exemption violated the dormant Commerce Clause because it had both the purpose and effect of discriminating in favor of local products, and because it was "not supported by any clear concern of the Twenty-first Amendment."¹¹⁷ The Court emphasized that this sort of "economic protectionism" is "not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."¹¹⁸ Thus, in creating the "core concerns" test, the Court concluded that economic protectionism is not considered a core

(upholding a Minnesota milk regulation because the "burden imposed on interstate commerce by the statute [was] relatively minor").

111. See *infra* notes 121-38 and accompanying text.

112. See 468 U.S. 263, 275-76 (1984).

113. *Id.* at 275.

114. *Id.* at 275-76 (quoting *Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)).

115. See, e.g., *Dickerson v. Bailey*, 336 F.3d 388, 404 (5th Cir. 2003) (stating that the analysis used in *Bacchus* "is commonly referred to as the 'core concerns' test").

116. See *Bacchus*, 468 U.S. at 265.

117. See *id.* at 276 ("[B]ecause the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State's belated claim based on the Amendment.").

118. *Id.*

concern of the Twenty-First Amendment.¹¹⁹ In subsequent cases, the Court identified “temperance, ensuring orderly market conditions, and raising revenue” as core concerns of the Twenty-First Amendment.¹²⁰

Despite the existence of this “core concerns” test, the Supreme Court’s reasoning in *Granholm v. Heald*,¹²¹ the most notable contemporary case involving wine regulations and the dormant Commerce Clause, makes no mention of any “core concerns.”¹²² In *Granholm*, the Court considered a challenge to state laws in Michigan and New York that allowed in-state wineries to make direct sales to consumers, but effectively prohibited out-of-state wineries from doing the same.¹²³ The Court explained that its modern Twenty-First Amendment cases established three categorical principles: (1) “state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment”;¹²⁴ (2) “Congress’[s] Commerce Clause powers with regard to liquor” were not “abrogate[d]” by Section 2 of the Twenty-First Amendment;¹²⁵ and (3) “state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.”¹²⁶ The Court then proceeded into a dormant Commerce Clause analysis without any consideration of whether the state laws in question implicated the “core concerns” of the Twenty-First Amendment.¹²⁷

Under the dormant Commerce Clause analysis, the *Granholm* Court concluded that Michigan and New York’s direct-shipment laws were invalid.¹²⁸ Because the challenged direct-shipment regulations “involve[d] straightforward attempts to discriminate in favor

119. *See id.*

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

121. 544 U.S. 460 (2005).

122. Indeed, Justice Thomas’s dissent in *Granholm* sharply criticizes the majority’s reasoning for overlooking the “core concerns” test, noting that even though “[t]he Court places much weight upon the authority of *Bacchus* ... the Court does not even mention, let alone apply, the ‘core concerns’ test that *Bacchus* established.” *Id.* at 524 (Thomas, J., dissenting) (internal citation omitted).

123. *See id.* at 468-71.

124. *Id.* at 486.

125. *Id.* at 487.

126. *Id.*

127. *See id.* at 489.

128. *See id.* at 493.

of local producers,”¹²⁹ the Court looked to whether the laws “advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives.”¹³⁰ The Court swiftly discarded the states’ alleged interests in curbing underage drinking and facilitating tax collection, noting that “the States provide[d] little concrete evidence” to show that these interests were advanced by the discriminatory direct-shipment bans.¹³¹ Because the states failed to meet the “exacting standard” of showing that “the discrimination [was] demonstrably justified,” the Court concluded that the direct-shipment regulations were unconstitutional.¹³²

The *Granholm* Court appeared to abandon the “core concerns” test in favor of the conventional dormant Commerce Clause framework.¹³³ Although some early commentators were skeptical as to whether the Court completely abandoned the “core concerns” test,¹³⁴ the Court answered that question definitively in *Tennessee Wine & Spirits Retailers Association v. Thomas* in 2019.¹³⁵

In *Tennessee Wine*, the Court relied heavily on *Granholm*’s application of the dormant Commerce Clause analysis in striking down a Tennessee regulation requiring alcohol retailers to satisfy a two-year preconditional residency requirement before being issued a retail license.¹³⁶ Like in *Granholm*, the Court made no mention of the “core concerns” test and instead applied the conventional dormant Commerce Clause analysis.¹³⁷ Justice Alito’s opinion for the

129. *Id.* at 489.

130. *Id.* (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

131. *Id.* at 489-92.

132. *Id.* at 492-93 (emphasis omitted) (quoting *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 (1992)).

133. *See id.* at 489.

134. *See, e.g.*, Gregory E. Durkin, Note, *What Does Granholm v. Heald Mean for the Future of the Twenty-First Amendment, the Three-Tier System, and Efficient Alcohol Distribution?*, 63 WASH. & LEE L. REV. 1095, 1106-10 (2006) (discussing whether *Granholm* implicated a complete elimination of the “core concerns” test, or a partial elimination).

135. *See* 139 S. Ct. 2449, 2459 (2019) (noting that the Court granted certiorari “in light of the disagreement among the Courts of Appeals about how to reconcile our modern Twenty-first Amendment and dormant Commerce Clause precedents”).

136. *See id.* at 2470-71.

137. *See id.* It is possible that the *Granholm* Court and the *Tennessee Wine* Court strayed from the “core concerns” test because the laws challenged in those cases were facially discriminatory to out-of-state interests. *See id.* at 2458-59; *Granholm*, 544 U.S. at 489. Nonetheless, this should not be construed to imply that the “core concerns” test will otherwise

majority, coupled with the other Justices' questions during oral argument, indicates that the appropriate test for determining the constitutionality of state alcohol regulations is the dormant Commerce Clause framework and not the "core concerns" test.¹³⁸

The Court's reasoning in *Granholm* and *Tennessee Wine* offers a useful foundation for challenging DtC licensing fees. This Note argues that the Court's dormant Commerce Clause jurisprudence precludes prohibitively expensive state DtC licensing fees because the licensing fees place a substantial burden on interstate commerce, notwithstanding the states' Twenty-First Amendment interests. Part III uses the Court's reasoning in *Granholm* and *Tennessee Wine* as a framework for challenging the constitutionality of DtC licensing fees on dormant Commerce Clause grounds.

III. RED, RED FINE¹³⁹: DTC LICENSING FEES VIOLATE THE DORMANT COMMERCE CLAUSE

In *Granholm*, the Court suggested that states could further interests in "facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability ... through the alternative of an evenhanded licensing requirement."¹⁴⁰ Evenhanded licensing requirements must nevertheless comply with the demands of the dormant Commerce Clause.¹⁴¹ Facially neutral state laws will be invalidated when "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."¹⁴² Part III argues that DtC licensing fees fail this balancing test, first arguing that DtC licensing fees require a

apply when state law affords evenhanded treatment, for this would run afoul with the "unified constitutional scheme" principle. See *Tenn. Wine*, 139 S. Ct. at 2462-63.

138. See *Tenn. Wine*, 139 S. Ct. at 2470-71; Amy Howe, *Argument Analysis: Justices Weigh Text and History of 21st Amendment in Challenge to State Residency Requirement for Liquor Licenses*, SCOTUSBLOG (Jan. 16, 2019, 3:45 PM), <https://www.scotusblog.com/2019/01/argument-analysis-justices-weigh-text-and-history-of-21st-amendment-in-challenge-to-state-residency-requirement-for-liquor-licenses/> [https://perma.cc/QXR4-PPE7].

139. See UB40, *Red Red Wine*, on LABOUR OF LOVE (Virgin Records Ltd. 1983).

140. *Granholm*, 544 U.S. at 492.

141. See *Dep't of Revenue v. Davis*, 553 U.S. 328, 338-39 (2008); *supra* text accompanying notes 90-92.

142. *Davis*, 553 U.S. at 338-39 (alteration in original) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

heightened balancing standard and then weighing commonly advanced state interests in tax collection, facilitating orderly market conditions, ensuring regulatory accountability, and protecting public health and safety, against the burdens DtC licensing fees pose on interstate commerce.

A. Wine DtC Licensing Requires a “Heightened” Balancing Test

As a threshold matter, it is important to observe that *Pike* balancing applies only when considering the constitutionality of evenhanded state laws.¹⁴³ This Note will assume arguendo that state DtC licensing fees are nondiscriminatory. In other words, this Note will assume that state DtC licensing fees cost the same for all applicants, regardless of whether the license applicant is an in-state producer or an out-of-state producer. There is no indication that any state has a facially discriminatory licensing fee structure.¹⁴⁴

In applying *Pike* balancing, some circuit courts require a heightened standard in which the government must prove that the asserted local benefits are both genuine and credibly advanced by the law;¹⁴⁵ other circuits will instead accept any “rational” assertion of benefit by the state.¹⁴⁶ In light of the current circuit split in applying *Pike* balancing, this Note argues that, at least with respect to DtC licensing fees,¹⁴⁷ courts should adopt the heightened approach, which would require proof that the asserted local benefits of DtC

143. See *Pike*, 397 U.S. at 142.

144. See *supra* text accompanying notes 30-31.

145. See, e.g., *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 216 (3d Cir. 2002) (holding that states “must provide evidence” that laws burdening interstate commerce “have the benefits contemplated by the” legislature); see also *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 52 (2d Cir. 2007) (“In applying the *Pike* balancing test, the District Court did not ... engage in any meaningful examination of the claimed local benefits conferred by the [challenged law].”).

146. See, e.g., *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 164 (5th Cir. 2007) (“[W]e credit a putative local benefit ‘so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes.’” (quoting *Ford v. Tex. Dep’t of Transp.*, 264 F.3d 493, 504 (5th Cir. 2001))); see also *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, J., concurring) (noting that *Pike* balancing “is a test akin to the general rational basis test”).

147. The issue of whether “heightened” *Pike* balancing must extend to all dormant Commerce Clause cases is beyond the scope of this Note.

licensing be both genuine and credibly advanced by the fee component.

There are compelling reasons for using a heightened balancing standard in the DtC context. First, alcohol is a sensitive regulatory subject matter, making it easy for states to dredge up pretextual interests that would justify stricter DtC regulations.¹⁴⁸ Second, heightened balancing acknowledges the unique link between wine production and terroir, which refers to the effect of the total natural environment of a particular viticultural site on the quality of the wine produced.¹⁴⁹ This Part evaluates these reasons in turn.

One need not look far for an example of a seemingly legitimate—albeit baseless—state interest in regulating alcohol distribution. In *Granholm*, Michigan and New York justified facially discriminatory DtC regulations by asserting an alleged interest in curbing underage drinking.¹⁵⁰ This regulation would likely survive rationality review, primarily because it is not wholly irrational to think that placing limitations on DtC shipping would limit underage drinking.

In *Granholm*, the Court exposed the flaws of rationality review by simply evaluating the record, ultimately concluding that there was “little evidence” to support the states’ claim that DtC shipping posed an underage drinking problem.¹⁵¹ In fact, the Court cited an FTC study that reported findings to the contrary.¹⁵² The Court further noted that minors are more likely to consume other types of alcohol than wine, that minors have more direct means of disobeying the law than direct-shipment, and that minors are likely dissuaded by direct shipment because they “want instant gratification.”¹⁵³ In any event, the burdens placed on interstate commerce by the discriminatory DtC shipping bans were excessive in relation to the states’ interest in preventing underage drinking.¹⁵⁴

148. See, e.g., *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (banning direct-shipment from out-of-state wine producers to curb underage drinking).

149. See generally *THE OXFORD COMPANION TO WINE* 966-67 (Jancis Robinson ed., 1994) (overviewing terroir).

150. See *Granholm*, 544 U.S. at 489.

151. See *id.* at 490.

152. See *id.* (citing FTC REPORT, *supra* note 27, at 34).

153. *Id.* (quoting FTC REPORT, *supra* note 27, at 33 & n.137).

154. See *id.*

The Court's analysis in *Granholm* strongly weighs against rationality review. Rationality review is incredibly deferential, requiring only that the challenged law be "rationally related to achievement of the statutory purposes."¹⁵⁵ Under rationality review, courts would be more likely to uphold economic protectionist state laws premised on pretextual interests, even in the absence of any concrete evidence that these pretextual interests are advanced by the law.¹⁵⁶ This concern is particularly problematic in the context of alcohol given the sensitive nature of the subject being regulated. States have long had an interest in promoting temperance, and one of the explicit purposes of the Twenty-First Amendment was to give states a constitutional basis for enacting restrictions on the distribution of alcohol.¹⁵⁷ Rationality review would do little to prevent states from implementing protectionist economic policies masked as laws related to public health and safety.

Heightened balancing further acknowledges the importance of terroir in wine production. Terroir refers to the total natural environment of a particular viticultural site, and the corresponding effect that the environment has on the quality, taste profile, and marketability of the wine produced.¹⁵⁸ Terroir is the sum of a variety of components including climate, sunlight energy, topography, soil composition, and hydrology.¹⁵⁹ Collectively, these factors "give each site its own unique terroir," which means that some states "may have distinctive wine-style characteristics which cannot be precisely duplicated elsewhere."¹⁶⁰

Because wine is intrinsically connected to the state in which it is produced, there is an increased risk that states might implement protectionist DtC licensing policies designed to favor in-state producers. In states with fledgling wine industries, higher DtC licensing fees are likely to favor in-state producers by reducing out-of-state competition.¹⁶¹ DtC licensing fees, "while in [the] aggregate

155. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-63 (1981).

156. *See id.* at 464.

157. *See supra* notes 73-75 and accompanying text.

158. *See THE OXFORD COMPANION TO WINE, supra* note 149, at 966.

159. *See id.*

160. *Id.*

161. *See Lapsley et al., supra* note 4, at 125 (discussing the reasonableness of DtC licensing costs for in-state producers versus out-of-state producers).

are reasonable expenses for in-state wineries with significant volumes of direct sales, [are] prohibitively expensive for” out-of-state wineries with smaller volumes of direct sales.¹⁶² Rationality review would likely uphold this strain of protectionism so long as the state could rationally connect the licensing fees to an interest in tax collection, facilitating orderly market conditions, ensuring regulatory accountability, or protecting public health and safety. In the alternative, heightened balancing requires proof that the asserted benefits of DtC licensing are both genuine and credibly advanced by the fee component, which would expose impermissible economic protectionism when it exists.

In the interest of protecting the integrity of the dormant Commerce Clause principle, states must be required to demonstrate that the asserted local benefits of DtC licenses are both genuine and credibly advanced by licensing fees. The dormant Commerce Clause prevents states “from retreating into economic isolation or jeopardizing the welfare of the nation as a whole,” which would inevitably transpire if “states were free to impose burdens on the flow of [interstate] commerce.”¹⁶³ Without a heightened balancing standard, states may circumvent these principles at the expense of wine producers and consumers alike, so long as they can build a logical bridge between the asserted local benefits of the license and the burdensome fee component.

B. Weighing State Interests

Having established that a heightened balancing standard is necessary, this Note’s analysis shifts to weighing the asserted benefits of DtC licensing fees against the incidental burdens on interstate commerce. When legitimate local purposes exist, “the question [then] becomes one of degree,” with the extent that a commerce-burdening law is constitutional depending “on whether [the state’s interests] could be promoted as well with a lesser impact on interstate activities.”¹⁶⁴ In other words, commerce-burdening

162. *Id.*

163. *See generally* Buchwalter, *supra* note 59, § 2.

164. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

laws are unconstitutional if less restrictive alternatives can advance state's interests.

In the context of alcohol regulations, the Court has recognized state interests in “facilitating orderly market conditions,” collecting taxes, “ensuring regulatory accountability,” and “protecting public health and safety.”¹⁶⁵ Under a “heightened” balancing standard in which states would need to provide evidence that DtC licensing fees actually advance these “putative local benefits,”¹⁶⁶ states would be hard-pressed to find proof that the licensing fee component furthers the state interests. For example, states make no effort to demonstrate a link between DtC licensing fees and state interests in protecting public health and safety. Several states have explicit provisions directing DtC licensing fee revenue to the state's general fund, as opposed to earmarking the revenue for any specific public health and safety initiative.¹⁶⁷ Moreover, states can satisfy regulatory interests through less restrictive means such as federal licensing and the Twenty-First Amendment Enforcement Act.¹⁶⁸ There is no doubt about the legitimacy of these state interests; rather, the concern is about the efficacy of DtC licensing fees as a means of advancing these interests when existing, viable alternatives would be less burdensome on interstate commerce and more effective at furthering states' interests.

Turning to state regulatory objectives, facilitating orderly market conditions, collecting taxes, and ensuring regulatory accountability can all be advanced through less restrictive means, such as the federally mandated TTB license and the Twenty-First Amendment Enforcement Act.¹⁶⁹ The Alcohol and Tobacco Tax and Trade Bureau has the authority to revoke a winery's federal TTB license if the winery violates state law; a winery cannot operate in any state without a federal license.¹⁷⁰ Further, the Twenty-First Amendment Enforcement Act gives state attorneys general considerable power

165. See *Granholm v. Heald*, 544 U.S. 460, 492 (2005); see also *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

166. See *Pike*, 397 U.S. at 142 (citing *Huron Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).

167. See *infra* notes 174-76 and accompanying text.

168. See 27 U.S.C. § 122a(b); *supra* notes 34-35 and accompanying text.

169. See § 122a(b); Federal Alcohol Administration Act, 27 U.S.C. § 203(b).

170. See § 203(b); see also *Granholm*, 544 U.S. at 492.

to sue wine producers in federal court to enjoin violations of state law.¹⁷¹ The requirement that a producer pay for a state DtC shipping license is unnecessary when viewed in conjunction with these federal remedies. These remedies provide powerful incentives for wineries to comply with state regulations, whereas DtC licensing fees provide disincentives for wineries to conduct business in a state in the first place.¹⁷²

One can hardly argue that DtC licensing fees credibly advance state interests in protecting public health and safety, either. DtC licensing fees are an underinclusive method of protecting health and safety given the ready availability of wine in other channels of commerce.¹⁷³ Moreover, the link between licensing fees and protecting public health and safety is tenuous at best, especially considering that several states have explicit provisions in their state law directing that licensing fee revenue be deposited into the states' general fund.¹⁷⁴ Licensing fees would more credibly advance state interests in protecting public health and safety if the fee revenue was earmarked for a specific initiative related to public health and safety.¹⁷⁵ In the absence of any such link, the burden on interstate commerce is "clearly excessive" in relation to the alleged health and safety benefits of DtC licensing fees.¹⁷⁶

The foregoing analysis demonstrates that DtC licensing fees, although applied evenhandedly to in-state and out-of-state wine producers, must be held to a heightened balancing standard under the dormant Commerce Clause framework. DtC licensing fees do not survive heightened scrutiny; less restrictive alternatives can adequately advance state interests in facilitating orderly market conditions, collecting taxes, ensuring regulatory accountability, and protecting public health and safety. Because DtC licensing fees

171. See § 122a(b).

172. See *supra* Part I.B.

173. Cf. *supra* notes 151-54 and accompanying text (noting that direct-shipment bans would be ineffective to curb underage drinking).

174. See, e.g., N.Y. ALCO. BEV. CONT. LAW § 125 (LexisNexis 1934).

175. For an example of this earmarking principle, see generally Armikka R. Bryant, *Taxing Marijuana: Earmarking Tax Revenue from Legalized Marijuana*, 33 GA. STATE U. L. REV. 659, 684-86 (2017) (proposing that state tax revenue from marijuana sales be earmarked for developing social programs to assist those disproportionately and adversely impacted by the War on Drugs).

176. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *supra* Part I.B.

impose an unnecessary burden on interstate commerce and do not credibly advance any of the putative state interests, the licensing fee component violates the dormant Commerce Clause and is therefore unconstitutional.

IV. SOUR GRAPES: ADDRESSING COUNTERARGUMENTS

Despite the evident dormant Commerce Clause concerns that DtC licensing fees invite, opponents of the foregoing constitutional arguments will likely raise issues with the appropriate standard of review for *Pike* balancing and, in a similar vein, concerns about the propriety of courts weighing in on alcohol policy. This Part addresses and rebuts these concerns.

A. *Rationality Review*

Some skeptics have suggested that heightened balancing puts federal courts in the position of evaluating the merits of state legislation, thus transforming *Pike* balancing into a test bordering on strict scrutiny.¹⁷⁷ Proponents of this view instead advocate that *Pike* balancing mandates rationality review.¹⁷⁸ Under rationality review, the relevant consideration is whether the commerce-burdening regulation “is rationally related to [the] achievement of the statutory purposes.”¹⁷⁹ This standard is deferential to the legislature, suggesting that “it is up to legislatures, [and] not courts, to decide on the wisdom and utility of legislation.”¹⁸⁰ Evenhanded DtC licensing fees would likely survive *Pike* balancing under a rational basis standard because states would need only demonstrate that a logical bridge exists between the fee component and the achievement of the relevant state interests. So long as there is a plausible link between the two, courts would likely uphold the fee component.

Proponents of rationality review mischaracterize the nature and purpose of *Pike* balancing. *Pike* balancing is “deferential but not

177. See James D. Fox, Note, *State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 AVE MARIA L. REV. 175, 179 (2003).

178. See *id.*

179. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 462-63 (1981).

180. *Id.* at 469 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963)).

toothless,”¹⁸¹ meaning that state laws may be invalidated on dormant Commerce Clause grounds when the alleged local benefits are a pretext for discrimination or are otherwise trivial.¹⁸² “The *Pike* test requires closer examination ... when a court assesses a statute’s burdens, especially when the burdens fall predominantly on out-of-state interests.”¹⁸³ That reasoning necessarily requires that DtC licensing fees, which are prohibitively expensive for out-of-state wineries,¹⁸⁴ must be subject to a “heightened” standard.

Moreover, concerns about courts deciding the wisdom and utility of state laws are equally misguided. The Court has recognized that the “[e]xamination of [statutory] purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country,”¹⁸⁵ and that “governmental purpose is a key element of a good deal of constitutional doctrine.”¹⁸⁶ Scrutinizing laws to determine a discriminatory purpose is particularly relevant to a dormant Commerce Clause claim.¹⁸⁷ *Pike* balancing exists for this precise purpose, and is the Court’s primary tool for rooting out economic protectionism masked as a facially neutral state law.¹⁸⁸

It is true that “[t]he Constitution does not prohibit legislatures from enacting stupid laws,”¹⁸⁹ but that does not save state laws from meaningful judicial scrutiny. DtC licensing fees demand a heightened balancing standard because otherwise states could simply dredge up any pretextual interest to justify stricter licensing regulations, even in the absence of any proof that the alleged state

181. *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013) (citing *Dep’t of Revenue v. Davis*, 553 U.S. 328, 339 (2008)).

182. *See, e.g., Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670-71 (1981) (using *Pike* to invalidate an Iowa highway regulation because the alleged safety benefits were “illusory”).

183. *Yamaha Motor Corp., U.S.A. v. Jim’s Motorcycle, Inc.*, 401 F.3d 560, 569 (4th Cir. 2005) (first citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987); then citing *Clover Leaf Creamery*, 449 U.S. at 473 n.17; and then citing *Telvest, Inc. v. Bradshaw*, 697 F.2d 576, 580 (4th Cir. 1983)).

184. *See supra* Part I.B.

185. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 861 (2005) (citing *Gen. Dynamics Land Sys. Inc. v. Cline*, 540 U.S. 581, 600 (2004)).

186. *Id.* (first citing *Washington v. Davis*, 426 U.S. 229 (1976); then citing *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 352-53 (1977); and then citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)).

187. *See supra* notes 102-07 and accompanying text.

188. *See supra* Part III.

189. *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring).

interests are genuine or credibly advanced by the law.¹⁹⁰ Rationality review further ignores the unique link between wine production and terroir, and may in fact embolden states with fledgling wine industries to impose protectionist licensing fees to protect in-state wine producers.¹⁹¹ In sum, heightened balancing is better suited to acknowledge these concerns than rationality review.

B. DtC Licensing Fees as a Matter of State Policy

In a similar vein, other critics have argued that DtC licensing frameworks pose a collective action problem, more appropriately addressed by the legislative branch—whether that be Congress or state legislatures.¹⁹² In the context of interstate commerce, collective action problems refer to state policies that promote the self-interests of one state at the expense of another.¹⁹³ The actions of individually rational states may produce irrational results for the nation as a whole.¹⁹⁴ Article I, Section 8 of the Constitution acknowledges collective action concerns, and confers Congress with the power to confront these problems.¹⁹⁵

These concerns take on an extra layer of complexity in the context of alcohol policy because of the Twenty-First Amendment, which grants the states exceptionally broad power to regulate the production, distribution, and sale of alcoholic beverages.¹⁹⁶ Some have viewed the Twenty-First Amendment as a return to the pre-Prohibition regulatory state in which Congress granted states the discretion to make these policy choices.¹⁹⁷ In his dissenting opinion in *Granholm*, Justice Thomas embraced this argument and argued

190. See *supra* notes 155-62 and accompanying text.

191. See *supra* notes 158-62 and accompanying text.

192. See generally Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010) (discussing collective action issues under Article I, Section 8).

193. See *id.* at 117.

194. See *id.* at 160 (“When commerce from different states intermingles, large economic advantages come from uniformity, access, and coordination in the channels and instrumentalities of commerce. Thus ... a flood control program upstream is more effective if it coordinates with a flood control program downstream.”).

195. *Id.* at 121-23.

196. See Lapsley et al., *supra* note 4, at 122; see also U.S. CONST. amend. XXI, § 2.

197. See Yablon, *supra* note 62, at 554.

that the Court focused too much on weighing alcohol distribution policy issues, noting that “[t]he Twenty-first Amendment and the Webb-Kenyon Act took those policy choices away from judges and returned them to the States.”¹⁹⁸ “Whatever the wisdom of that choice,” Justice Thomas added, “the Court does this Nation no service by ignoring the textual commands of the Constitution and Acts of Congress.”¹⁹⁹ Justice Gorsuch echoed similar concerns in his dissenting opinion in *Tennessee Wine*.²⁰⁰

As persuasive as Justice Thomas’s and Justice Gorsuch’s counter-majoritarian argument may be, it undermines the “unified constitutional scheme” principle.²⁰¹ The Court’s jurisprudence indicates that the Twenty-First Amendment should not be viewed in a vacuum. Indeed, “[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution,” and “must be considered in the light of the other.”²⁰² Put differently, the Twenty-First Amendment does not discharge states of the obligation to comply with the dormant Commerce Clause in matters of alcohol policy. It follows that the Court must strike down DtC licensing fees using the dormant Commerce Clause, which “by its own force and without national legislation, puts it into the power of the Court to place limits on state authority.”²⁰³

CONCLUSION

At its core, the dormant Commerce Clause is driven by a deeply rooted suspicion that state and local governments may abuse their power to effectuate economic protectionism.²⁰⁴ Although the Framers envisioned a degree of state and local autonomy to make

198. *Granholm v. Heald*, 544 U.S. 460, 527 (2005) (Thomas, J., dissenting).

199. *Id.*

200. *See Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2484 (2019) (Gorsuch, J., dissenting) (“As judges, we may be sorely tempted to ‘rationalize’ the law and impose our own free-trade rules for all goods and services in interstate commerce. Certainly, that temptation seems to have proven nearly irresistible for this Court when it comes to alcohol.”).

201. *See supra* notes 90-92 and accompanying text.

202. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964).

203. FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* 18 (1937).

204. *See Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008).

certain policy choices, the dormant Commerce Clause effectuates the Framers' desire to prevent states from retreating into economic isolationism, which "had plagued relations among the Colonies and later among the States under the Articles of Confederation."²⁰⁵ The Constitution offers no clear solution to alleviate the tension created by the Commerce Clause and the federalism principles behind the Twenty-First Amendment, leaving the Supreme Court's dormant Commerce Clause jurisprudence as the most viable path for challenging the constitutionality of DtC licensing fees.

Indeed, the Court's reasoning in *Granholm* and *Tennessee Wine* suggests that the conventional dormant Commerce Clause framework is the appropriate analytical framework for challenging DtC licensing fees.²⁰⁶ Costly DtC licensing fees place substantial burdens on interstate commerce by discouraging smaller wineries from shipping directly to consumers.²⁰⁷ Under a heightened balancing standard, it is apparent that commonly advanced state interests in facilitating orderly market conditions, collecting taxes, ensuring regulatory accountability, and protecting public health and safety are not credibly advanced by DtC licensing fees,²⁰⁸ and therefore the fee component must be invalidated. States burden the free flow of interstate commerce and discourage direct shipment by saddling wine producers with costly licensing fees.²⁰⁹ Although the Court's recent decisions in *Granholm* and *Tennessee Wine* provoke serious questions about the constitutionality of DtC licensing fees, the fact is the fees remain unchallenged. The Court's recent decisions are a promising step in the right direction and mark a toast to the beginning of the end of fining wine.

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205. *Id.* (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)).

206. *See supra* notes 121-38 and accompanying text.

207. *See supra* Part I.B.

208. *See supra* notes 169-76 and accompanying text.

209. *See supra* Part I.

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