NOTES

DOES THE TWENTY-FIRST AMENDMENT DISPLACE *PIKE* BALANCING?

Absent alcohol, dormant commerce clause doctrine is mostly familiar. Courts use strict scrutiny when state laws discriminate — facially, in purpose, or in effect — against out-of-state economic interests.[1] These laws are invalid unless the state proves that they advance a legitimate local interest that reasonable, nondiscriminatory alternatives could not adequately serve.[2] Courts use a looser test called *Pike*[3] balancing for nondiscriminatory regulations that incidentally burden interstate commerce.[4] These laws are valid unless the plaintiff shows that the burden on interstate commerce is "clearly excessive in relation to the putative local benefits."[5] And with an "unmistakably clear" statement, Congress can bless laws that would violate the dormant commerce clause.[6]

Alcohol muddles this basic model. The Twenty-First Amendment ended national Prohibition in 1933 and gave states extensive control over alcohol.[7] Soon afterward, the Court held that states could regulate alcohol without any Commerce Clause restraints.[8] Gradually, it has retreated. Since 1984, states have lost every dormant commerce case at the Supreme Court involving alcohol.[9] But alcohol still uniquely alters the doctrine. In 2019, for example, the Court held that discriminatory alcohol laws trigger a "different inquiry," rather than strict scrutiny.[10]

Recent cases and commentators have tried to explain this different inquiry for discriminatory alcohol laws,[11] but have largely overlooked *non*discriminatory alcohol laws.[12] Yet, before and after 2019, lower

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1 *See* Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 99, 101 (1994); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 270 (1984); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

2 New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988).

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

4 *See id.* at 142. This Note also describes nondiscriminatory laws interchangeably as "even-handed" or "neutral."

5 *Id.* (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

6 S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984).

7 *See* U.S. CONST. amend. XXI, §§ 1–2.

8 *See* Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 398 (1939).

9 *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2476 (2019); Granholm v. Heald, 544 U.S. 460, 489 (2005); Healy v. Beer Inst., 491 U.S. 324, 342–43 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 585 (1986); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 276 (1984).

10 *Tenn. Wine*, 139 S. Ct. at 2474.

11 *See* Anvar v. Dwyer, 82 F.4th 1, 5, 8 (1st Cir. 2023); Recent Case, B-21 Wines, Inc. v. Bauer, *36 F.4th 214 (4th Cir. 2022)*, 136 HARV. L. REV. 2160, 2162–67 (2023).

12 No article has analyzed how *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), interacts with *Pike* balancing. One author proposed that the Court should use *Pike* balancing for discriminatory alcohol laws, but did not address nondiscriminatory alcohol laws. *See*

courts have split over the proper test. Some appear open to *Pike* balancing.[13] Others, not so much.[14] Some withhold judgment.[15] A few use *Pike* balancing.[16] And a concurrence in *Lebamoff Enterprises, Inc. v. Huskey*[17] expressly argues that *Pike* balancing does not apply.[18] Commentators also disagree.[19] In short, it's a mess.[20]

This Note clears the mess. Building off *Huskey*'s concurrence, it argues that courts should not use *Pike* balancing when states evenhandedly regulate alcohol within their borders. Rather, the Twenty-First Amendment shields these nondiscriminatory laws from the dormant commerce clause. The Note proceeds in three parts. Part I traces the history of state and federal power over alcohol. Part II argues that *Pike* balancing does not apply to neutral alcohol laws because that thesis (1) best reflects modern precedents; (2) best aligns with the text, history, and purpose of federal statutes and the Twenty-First Amendment; and (3) avoids a doctrinal anomaly. Part III argues that beyond clarifying an "arcane corner of constitutional jurisprudence,"[21] this Note can help states defend neutral alcohol laws.

I. ALCOHOL AND THE COMMERCE CLAUSE

To understand whether the Twenty-First Amendment affects *Pike* balancing, one must first understand how the Amendment broadly interacts with the dormant commerce clause. The answer is not straightforward. But recent cases have foregrounded the history of state and

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Evan W. Saunders, Note, *It's 1919 Somewhere: What* Tennessee Wine & Spirits Retailers Association v. Thomas *Means for the National Hangover of the Twenty-First Amendment, The Dormant Commerce Clause, and Federal Legalization of Intoxicating Substances*, 86 BROOK. L. REV. 261, 285–87 (2020). Before *Tennessee Wine*, another argued that rather than using *Pike* balancing, courts should validate neutral alcohol laws if they advance a state's core Twenty-First Amendment interests. *See* 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, 1108 n.72 (2006).

13 *See, e.g.*, Jean-Paul Weg., LLC v. Graziano, No. 19-14716, 2023 WL 5370522, at *8 (D.N.J. Aug. 22, 2023); S. Glazer's Wine & Spirits, LLC v. Harrington, 594 F. Supp. 3d 1108, 1121 (D. Minn. 2022).

14 *See, e.g.*, B-21 Wines, Inc. v. Bauer, 36 F.4th 214, 222 (4th Cir. 2022) (noting that nondiscriminatory alcohol laws do not violate the dormant commerce clause); Day v. Henry, 686 F. Supp. 3d 887, 894 (D. Ariz. 2023) (same).

15 *See, e.g.*, Fam. Winemakers of Cal. v. Jenkins, 592 F.3d 1, 19 n.27 (1st Cir. 2010).

16 *See, e.g.*, Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, 945 F.3d 206, 222 (5th Cir. 2019); Lebamoff Enters., Inc. v. Huskey, 666 F.3d 455, 460 (7th Cir. 2012) (citing Baude v. Heath, 538 F.3d 608, 612 (7th Cir. 2008)); Wine & Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1, 15 (1st Cir. 2007) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

17 666 F.3d 455 (7th Cir. 2012).

18 *See id.* at 467 (Hamilton, J., concurring in the judgment).

19 *Compare* Durkin, *supra* note 12, at 1108 n.72, *with* James Alexander Tanford, *E-Commerce in Wine*, 3 J.L. ECON. & POL'Y 275, 328 (2007) (arguing that "*all* traditional Commerce Clause principles apply to liquor").

20 *Cf.* Churchill Downs Inc. v. Trout, 589 F. App'x 233, 235 (5th Cir. 2014) (per curiam) ("[T]he jurisprudence in the area of the dormant Commerce Clause is, quite simply, a mess.").

21 Anvar v. Dwyer, 82 F.4th 1, 5 (1st Cir. 2023).

federal power over alcohol to tackle the question. Accordingly, this Part briefly chronicles that history and the evolving case law.[22] The story begins before Prohibition, when Congress twice responded after the Court frustrated local regulations. Section Two of the Twenty-First Amendment drew on those responses and barred "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof."[23] Subsequent cases struggled to explain how the Amendment alters the Commerce Clause.

A. Pre-Prohibition

The Court concluded that the Commerce Clause limited state power over alcohol in the late nineteenth century. In a pair of cases, it held that congressional silence meant that alcohol traveling in interstate commerce in original packages should be "free and untrammeled."[24] Importantly, this doctrine immunized both importing alcohol[25] and reselling it in original packages after delivery.[26] Soon enough, "original package houses" and "supreme court saloons" invaded dry states.[27] Dealers also flouted laws in wet states.[28]

Congress rushed to undo the original package holdings and restore power to the states. The Wilson Act of 1890[29] provided that alcohol "transported into any State . . . or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State . . . be subject to . . . the laws of such State . . . enacted in the exercise of its police powers, to the same extent" as local alcohol.[30] Thus, the Commerce Clause no longer protected original package stores and saloons.

Beyond that, the solution was limited. The Court held that under the Wilson Act, alcohol arrived in a state not when it crossed the border, but only once it was delivered to consignees.[31] In other words, states could prohibit selling original packages of alcohol within their borders, but could not touch interstate shipments until after delivery. Savvy

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[22] For more comprehensive accounts, see generally RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT (1995); Brannon P. Denning, Smokey and the Bandit *in Cyberspace: The Dormant Commerce Clause, The Twenty-First Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENT. 297 (2002); Lindsay Rogers, *Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act*, 4 VA. L. REV. 353 (1917).

[23] U.S. CONST. amend. XXI, § 2.

[24] Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465, 495 (1888) (quoting Brown v. Houston, 114 U.S. 622, 630 (1885)); Leisy v. Hardin, 135 U.S. 100, 110 (1890) (citing, inter alia, County of Mobile v. Kimball, 102 U.S. 691 (1880)).

[25] *Bowman*, 125 U.S. at 498.

[26] *See Leisy*, 135 U.S. at 124–25. The Court has since repudiated the original package doctrine. *See* Michelin Tire Corp. v. Wages, 423 U.S. 276, 294–301 (1976).

[27] HAMM, *supra* note 22, at 69.

[28] *See id.* at 73.

[29] Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121).

[30] *Id.*

[31] *See* Rhodes v. Iowa, 170 U.S. 412, 423 (1898); Vance v. W.A. Vandercook Co., 170 U.S. 438, 451–52 (1898) (citing Scott v. Donald, 165 U.S. 58 (1897); *Rhodes*, 170 U.S. at 412).

dealers exploited this distinction.[32] In 1911, over twenty million gallons of liquor reached dry areas.[33]

Congress again responded, this time empowering states to regulate alcohol once it crossed their borders. In language that would resemble the Twenty-First Amendment, the Webb-Kenyon Act[34] outlawed the "shipment or transportation, in any manner . . . of any . . . intoxicating liquor . . . from one State . . . into any other State" that was "intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State . . . ."[35]

B. Post-Prohibition

Hewing closely to the Twenty-First Amendment's text after it was ratified in 1933, the Court held that states had near-plenary power to regulate alcohol entering their jurisdictions. First, it held that forcing states to treat imported and domestic alcohol equally "would involve not a construction of the Amendment, but a rewriting of it."[36] Next, it upheld a law that "clearly discriminate[d]" by requiring only certain foreign liquor producers to register their brands.[37] Finally, the Court distilled the principle: "[T]he right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."[38]

Over the next four decades, the Court clarified that the Twenty-First Amendment does not modify other parts of the Constitution,[39] but reiterated that it "created an exception to the normal operation of the Commerce Clause."[40] That exception is broad. "[A] state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."[41] And states have "virtually complete control"

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[32] *See* Kirmeyer v. Kansas, 236 U.S. 568, 570–72 (1915); Rossi v. Pennsylvania, 238 U.S. 62, 65 (1915); HAMM, *supra* note 22, at 180; Rogers, *supra* note 22, at 364–65.

[33] THOMAS R. PEGRAM, BATTLING DEMON RUM 132 (1998).

[34] Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122).

[35] *Id.*

[36] State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936). The Court also held that a "classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." *Id.* at 64.

[37] Mahoney v. Joseph Triner Corp., 304 U.S. 401, 403 (1938).

[38] Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 398 (1939); *see also* Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394 (1939); Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939).

[39] *See* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 333–34 (1964); United States v. Tax Comm'n, 421 U.S. 599, 614 (1975); Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 n.5 (1982); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996); Craig v. Boren, 429 U.S. 190, 204–05 (1976); Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 345–46 (1964). The Amendment also does not wholly shield state alcohol laws from preemption. *See, e.g.*, Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 114 (1980).

[40] *Boren*, 429 U.S. at 206.

[41] *Hostetter*, 377 U.S. at 330.

over regulating liquor.[42] Accordingly, the Twenty-First Amendment continued to shield alcohol laws from the dormant commerce clause.[43]

Softening its textualism, though, the Court invalidated several alcohol laws under the dormant commerce clause in the 1980s. Three cases are instructive. First, *Bacchus Imports, Ltd. v. Dias*[44] addressed a law exempting certain traditional Hawaiian alcohol from taxation.[45] After concluding that the exemption was protectionist and discriminatory, the Court rejected Hawaii's argument that the Twenty-First Amendment nonetheless saved the law.[46] Prioritizing the Amendment's history, the Court reasoned that the "central purpose . . . was not to empower States to favor local liquor industries by erecting barriers to competition."[47] It then used a balancing test, asking "whether the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended."[48] Commerce Clause principles won.[49] Second, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*[50] considered a requirement that dealers certify monthly that they would not sell alcohol elsewhere at prices lower than in New York.[51] The Court held that the regulation violated the dormant commerce clause by effectively regulating alcohol prices outside of New York.[52] Finally, *Healy v. Beer Institute*[53] extended *Brown-Forman* to contemporaneous price affirmation statutes.[54]

The Court cemented these principles in recent alcohol cases. First, *Granholm v. Heald*[55] involved two laws that allowed in-state wineries but not out-of-state wineries to sell and ship wine directly to consumers.[56] In a 5–4 decision, the Court concluded that the Twenty-First Amendment reinstated the pre-Prohibition landscape under the Wilson and Webb-Kenyon Acts.[57] As the Court viewed the history, that scheme did not allow states to discriminate against out-of-state entities.[58]

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[42] *Midcal Aluminum*, 445 U.S. at 110.

[43] *See, e.g.*, Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 42–43 (1966); California v. Washington, 358 U.S. 64, 64 (1958) (per curiam).

[44] 468 U.S. 263 (1984).

[45] *See id.* at 265.

[46] *Id.* at 276.

[47] *Id.*

[48] *Id.* at 275.

[49] *See id.* at 276.

[50] 476 U.S. 573 (1986).

[51] *See id.* at 575.

[52] *See id.* at 585. The Court noted that the Twenty-First Amendment's text speaks only of state laws regulating alcohol transported or imported "for delivery or use therein." *Id.* (quoting U.S. CONST. amend. XXI, § 2).

[53] 491 U.S. 324 (1989).

[54] *See id.* at 342.

[55] 544 U.S. 460 (2005).

[56] *See id.* at 469, 474–76.

[57] *See id.* at 483. The Court distanced itself from the earlier Twenty-First Amendment precedents because they did not adequately consider the pre-Prohibition history. *See id.* at 485.

[58] *See id.* at 483–84.

Therefore, the Twenty-First Amendment did not alter the Commerce Clause's nondiscrimination principle.[59] Finally, the Court applied strict scrutiny to the discriminatory laws and struck them down.[60] Second, *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*[61] concerned a law that conditioned alcohol retail licenses on living in Tennessee for two years.[62] Although the Court acknowledged that states have regulatory "leeway" under the Twenty-First Amendment, it clarified that the nondiscrimination principle also applies to alcohol retailers.[63] Instead of applying strict scrutiny, however, it asked whether the residency requirement could be justified on legitimate, nonprotectionist grounds and whether its effect was predominantly protectionist.[64] The Tennessee law failed this test.[65]

Together, the alcohol cases confirm several principles. States have more power over alcohol than other products. But the Twenty-First Amendment does not wholly immunize alcohol laws against the dormant commerce clause. For example, the nondiscrimination principle constrains states. Still, the Twenty-First Amendment gives states whatever additional leeway the Wilson and Webb-Kenyon Acts provided. Therefore, one must reckon with pre-Prohibition history to determine whether the Twenty-First Amendment displaces *Pike* balancing.

II. *PIKE* BALANCING AND NEUTRAL ALCOHOL LAWS

The Court has never expressly said whether the Twenty-First Amendment affects *Pike* balancing, but a Seventh Circuit concurrence offers a useful starting point. The *Huskey* majority used *Pike* balancing to uphold an Indiana statute barring retailers from shipping alcohol to residents by motor carrier.[66] Judge Hamilton's concurrence raised three concerns with applying *Pike*. First, the Supreme Court has never used *Pike* balancing for alcohol laws.[67] Second, other courts either cited *Pike* in alcohol cases and didn't apply the test, or quickly used the test.[68] Third, *Pike* balancing is an "intrusive and uncertain" inquiry that erodes state authority under the Twenty-First Amendment.[69]

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59 S*ee id.* at 486–87.

60 *See id.* at 489–93.

61 139 S. Ct. 2449 (2019).

62 *Id.* at 2457.

63 *Id.* at 2474.

64 *Id.*

65 *Id.* at 2476.

66 Lebamoff Enters., Inc. v. Huskey, 666 F.3d 455, 457, 462 (7th Cir. 2012). The majority defended using *Pike* for evenhanded alcohol regulations because no sister court had held otherwise, *id.* at 460, and it did not want to "get ahead of the Supreme Court," *id.* at 461.

67 *Id.* at 467 (Hamilton, J., concurring in the judgment).

68 *See id.* at 467–68 (citing, inter alia, Wine & Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1, 10–11, 15 (1st Cir. 2007)).

69 *Id.* at 468; *see also id.* at 469.

This Part expands and updates Judge Hamilton's concurrence. It argues that because of the Twenty-First Amendment, courts should not use *Pike* balancing when states regulate alcohol evenhandedly and internally. This thesis finds support in (1) modern Supreme Court precedents; (2) the text, history, and purpose of the Wilson and Webb-Kenyon Acts and the Twenty-First Amendment; and (3) a doctrinal anomaly.

Two preliminary notes are in order. First, this Part does not call for overruling any Supreme Court precedent. Second, this Part does not attack *Pike* balancing generally.[70] Instead, it argues that the Twenty-First Amendment displaces the test specifically for neutral alcohol laws.

A. Modern Precedents

Generally speaking, courts invalidate state laws under the dormant commerce clause in three situations: (1) when a law discriminates against out-of-state economic entities and fails strict scrutiny — or the different inquiry for alcohol laws, (2) when it regulates evenhandedly but fails *Pike* balancing, or (3) when it regulates interstate commerce extraterritorially. While "no clear line" divides the first and second options,[71] and a recent case trimmed the third category,[72] the Court historically organized the doctrine into these categories.[73]

Alcohol precedents embrace only two of the categories: the nondiscrimination and extraterritorial effects doctrines. The nondiscrimination category includes *Bacchus*, *Healy*, *Granholm*, and *Tennessee Wine*. And the extraterritorial category includes *Brown-Forman* and *Healy*. Or, as *Granholm* summarized, "modern" alcohol cases establish three principles: (1) the Twenty-First Amendment doesn't alter the Constitution beyond the Commerce Clause, (2) Congress retains power over alcohol, and (3) the nondiscrimination principle constrains states.[74]

Missing from this summary is *Pike* balancing. While three alcohol cases reference *Pike* balancing, they do not suggest that the test applies to neutral alcohol laws. First, *Bacchus* refused to use *Pike* balancing because Hawaii's alcohol tax discriminated in effect and purpose.[75] But the Court mentioned *Pike* only because Hawaii advocated for the

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[70] For broader critiques of *Pike* balancing, see, for example, Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 493–94 (2008); Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897–98 (1988) (Scalia, J., concurring in the judgment).

[71] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

[72] *See* Jack Goldsmith & Alan Sykes, *The California Effect, Process-Based Regulation, and the Future of* Pike *Balancing*, 2023 SUP. CT. REV. 125, 154–55 (2024).

[73] *See, e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2090–91 (2018); Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153–54 (2023). To be sure, the categories are somewhat porous. For example, the extraterritorial effects cases reflect concerns about discrimination. *See Nat'l Pork Producers Council*, 143 S. Ct at 1153–57.

[74] Granholm v. Heald, 544 U.S. 460, 486 (2005); *id.* at 486–87. *Granholm* folded the extraterritorial cases into the nondiscrimination principle. *See id.* at 487.

[75] Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 271 (1984).

deferential standard.[76] Rather than answering the harder question about whether the Twenty-First Amendment saves nondiscriminatory alcohol laws, the Court understandably noted that *Pike* is a nonstarter for discriminatory laws.[77] Second, *Brown-Forman* mentioned the *Pike* standard when summarizing general dormant commerce clause doctrine.[78] Yet, when the Court later analyzed the Twenty-First Amendment, it considered only whether states could directly regulate alcohol outside their territories.[79] Third, *Healy* cited to *Brown-Forman*'s summary of the dormant commerce clause, but also without analyzing *Pike* and the Twenty-First Amendment.[80] Thus, these cases say little about whether the Twenty-First Amendment retains *Pike* balancing.

To the contrary, the Court has suggested elsewhere that nondiscriminatory alcohol laws would never violate the dormant commerce clause. In *Granholm*, states argued that the nondiscrimination principle would upend their regulatory schemes.[81] But the Court tried to calm their worries. "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."[82] The Court also concluded in much-quoted dicta that "[t]he aim of the Twenty-First Amendment was to allow States to maintain an effective and *uniform* system for controlling liquor."[83] In other words, neutral alcohol laws should survive the dormant commerce clause. *Tennessee Wine* was less direct, but it too emphasized that the Twenty-First Amendment allows states to pass some laws that would otherwise violate the dormant commerce clause.[84]

These cases strongly support that the Twenty-First Amendment displaces *Pike* balancing. The argument is not merely that the Court "has not signaled that the lower courts should apply *Pike* balancing to alcoholic beverage laws."[85] It's stronger. The cases signal that courts should not apply *Pike* balancing.

Critics may argue that the Court's relative silence and dicta do not prove much here. After all, *Tennessee Wine* chided litigants for a similar mistake. There, the plaintiff argued that because *Granholm* explicitly

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[76] *See id.* at 270–71.

[77] *See id.*; Lebamoff Enters., Inc. v. Huskey, 666 F.3d 455, 467 (7th Cir. 2012) (Hamilton, J., concurring in the judgment).

[78] *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

[79] *See id.* at 584–85.

[80] Healy v. Beer Inst., 491 U.S. 324, 337 n.14 (1989) (quoting *Brown-Forman*, 476 U.S. at 579).

[81] *See* Granholm v. Heald, 544 U.S. 460, 488 (2005). Specifically, they worried about the validity of the three-tier system. *See id.* That system typically separates alcohol producers, wholesalers, and retailers into distinct units. *Id.* at 466. Producers then sell only to in-state wholesalers, who sell only to in-state retailers, who then sell to consumers. *See id.* at 469.

[82] *Id.* at 489.

[83] *Id.* at 484 (emphasis added).

[84] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2470 (2019).

[85] Lebamoff Enters., Inc. v. Huskey, 666 F.3d 455, 467 (7th Cir. 2012) (Hamilton, J., concurring in the judgment).

mentioned alcohol producers but not wholesalers or retailers, *Granholm*'s holding applied only to alcohol producers or products.[86] *Tennessee Wine* was unimpressed. *Granholm* focused on producers for "an obvious" reason: "The state laws at issue in *Granholm* discriminated against out-of-state producers."[87] Likewise, the Court may have focused so far on the extraterritorial and nondiscrimination principles simply because the challenged laws violated those principles.

Reading a lot into the Court's silence and dicta can make sense for the Twenty-First Amendment. As Part I has demonstrated, modern alcohol precedents start from a baseline where states have "virtually complete control" over alcohol distribution.[88] The Court then explicitly subtracts out power from that baseline. Granted, it's unreasonable to infer permission when the Court broadly subtracts out power. For example, the Supreme Court has never directly said that the Twenty-First Amendment leaves the Fourth Amendment untouched. But one doesn't need a direct holding to know that's the case. *Granholm* already removed state power under the Twenty-First Amendment that abridges anything outside the Commerce Clause. Likewise, *Granholm* also broadly prohibited discrimination: "[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."[89]

By contrast, the Court has never subtracted out neutral-yet-burdensome alcohol laws. And more than that, the Court has suggested that the dormant commerce clause does not block neutral alcohol laws. When the doctrine starts from virtually complete state authority, one should read a lot into the Court's silence and dicta.

Alternatively, critics might argue that modern precedents endorse *Pike* balancing. *Tennessee Wine* concluded that there is "no evidence that [the Amendment] was understood to give States the power to enact protectionist laws."[90] And the nondiscrimination principle is one way that the Court combats protectionist laws. But *Pike* balancing can also uncover protectionist laws.[91] Therefore, shouldn't courts use *Pike* balancing for neutral alcohol laws?

Two responses. First, although *Pike* balancing may uncover protectionism, the Court has never held that is the test's only purpose. Consider the Court's most recent dormant commerce clause case. There, three Justices characterized the *Pike* inquiry as

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[86] *Tenn. Wine*, 139 S. Ct. at 2471.

[87] *Id.*

[88] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980).

[89] Granholm v. Heald, 544 U.S. 460, 487 (2005) (citing, inter alia, Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 276 (1984)).

[90] *Tenn. Wine*, 139 S. Ct. at 2468.

[91] *See* RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION 310–11 (2d ed. 2013); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1706–07 (1984); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1106–07 (1986).

"traditionally . . . another way to test for purposeful discrimination" and, by extension, protectionism.[92] But six Justices argued that *Pike* was broader. Two agreed that the *Pike* test is "most frequently deployed to detect the presence or absence of latent economic protectionism."[93] Still, they added that the Court has never held that *Pike* doesn't apply to neutral laws that are nonprotectionist but unduly burden interstate commerce.[94] Four Justices argued that *Pike* "extends beyond laws either concerning discrimination or governing interstate transportation."[95] Accordingly, critics here target only *Pike*'s protectionist strand.

Yet, even for the protectionist strand, the counterargument needlessly misreads the precedents. True, modern alcohol cases worry about economic protectionism. But the Court also recognizes that the Twenty-First Amendment empowers states. As a result, the precedents are comfortable with incidental or moderate protectionism when states regulate alcohol. Recall that *Bacchus* condemned "*mere* economic protectionism."[96] *Tennessee Wine* attacked laws that are "*purely* protectionist."[97] And the *Tennessee Wine* inquiry probes discriminatory laws for a *predominantly* protectionist effect.[98] Applying *Pike* balancing to neutral alcohol laws to uncover any degree of protectionism would do too much. And it's unnecessary to combat pure protectionism. In dormant commerce clause cases, courts first ask whether a law is discriminatory.[99] By searching for a discriminatory effect or purpose, courts can likely uncover pure protectionism at step one. *Bacchus* had no trouble doing just that.[100] Thus, courts can still police pure protectionism even if the Twenty-First Amendment displaces *Pike*.

B. Text, History, and Purpose

The Twenty-First Amendment's text, history, and purpose reveal an unmistakably clear intent to rebut dormant commerce clause limits when states regulate alcohol evenhandedly and internally. The Amendment reinstated what the Wilson and Webb-Kenyon Acts accomplished before Prohibition. And those statutes themselves rebutted dormant commerce clause limits for nondiscriminatory alcohol laws.

While this argument partly resembles two dissents in *Granholm* and *Tennessee Wine*,[101] its aim is narrower. This Note agrees that the

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92 Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1159 (2023) (opinion of Gorsuch, J.); *id.* at 1149 (majority opinion).

93 *Id.* at 1165–66 (Sotomayor, J., concurring in part).

94 *See id.* at 1166.

95 *Id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1167.

96 Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 276 (1984) (emphasis added).

97 Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2469 (2019) (emphasis added).

98 *See id.* at 2474.

99 *See* Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008).

100 *See Bacchus*, 468 U.S. at 276.

101 *See* Granholm v. Heald, 544 U.S. 460, 493–94 (2005) (Stevens, J., dissenting); *Tenn. Wine*, 139 S. Ct. at 2477–78 (Gorsuch, J., dissenting).

Twenty-First Amendment preserved the nondiscrimination principle. But the Amendment blessed nondiscriminatory alcohol laws even if they burden interstate commerce.

Still, this section proceeds cautiously in light of three challenges. First, older doctrine diverged from current understandings. When it came to the Commerce Clause, pre-Prohibition courts often separated state and federal power into nonoverlapping spheres.[102] Dormant commerce clause doctrine also differed. Courts enforced a version of the nondiscrimination principle.[103] But, before *Pike* balancing crystallized, the Court restlessly adopted and abandoned other tests.[104] Something like *Pike* balancing emerged only after states ratified the Twenty-First Amendment.[105] Therefore, this section foregrounds Commerce Clause limits before Prohibition and explains how Congress's response affects the modern doctrine. Second, by the late 1930s, the Court had erroneously held that the Twenty-First Amendment authorized discriminatory laws. One does not expect decisions that soon followed to question nondiscriminatory laws. Accordingly, this section prioritizes cases before 1936. Third, as *Tennessee Wine* cautioned, states passed many alcohol laws before Prohibition that the Court never reviewed.[106] Therefore, such laws may be unhelpful here.

Start with the text. While the modern Court has used history more than text to interpret the Twenty-First Amendment,[107] the text still reveals a clear intent to allow nondiscriminatory alcohol laws. Prohibiting alcohol transports or imports "for delivery or use" in states "in violation of the laws thereof" negates the pre-Prohibition cases that immunized alcohol in interstate commerce.[108] And like similar language in the Webb-Kenyon and Wilson Acts, the text does not speak of limits for nondiscriminatory alcohol laws.

Nor do the Twenty-First Amendment's history and purpose. While the legislative history is notoriously contested,[109] a modest reading shows that legislators and ratifying conventions contemplated that states could exercise wide power over alcohol with neutral laws. That is because the modest reading — that section 2 only assuaged worries that Congress or the Court might weaken the Wilson and Webb-

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[102] *See* Denning, *supra* note 70, at 428–31.

[103] *See id.* at 437–41.

[104] The Court had asked whether a state regulation exercised police powers or commerce powers, whether its subject was local or national, and whether a regulation directly or indirectly regulated interstate commerce. *See id.* at 431, 435–40.

[105] *See id.* at 445–46.

[106] *See Tenn. Wine*, 139 S. Ct. at 2472–73.

[107] *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 484 (2005).

[108] U.S. CONST. amend. XXI, § 2.

[109] *Compare, e.g.*, Denning, *supra* note 22, at 303–08 (arguing that legislative records support the early Court's expansive reading of the Twenty-First Amendment), *with* Todd Zywicki & Asheesh Agarwal, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J.L. & LIBERTY 609, 628 (2005) (arguing that legislative records show that states could not discriminate against out-of-state entities).

Kenyon Acts[110] — takes the pre-Prohibition laws as it finds them. Thus, the best way to understand the Twenty-First Amendment's history and purpose is to examine what the Wilson and Webb-Kenyon Acts accomplished. And with few qualifications, those statutes already rebutted dormant commerce clause constraints if states did not discriminate.

The Wilson Act started the process. It targeted the original package doctrine by name.[111] But it could expel sellers only if it blessed neutral laws that the Court had struck down. This was the issue in the first Supreme Court challenge. Indicted for violating Kansas's alcohol licensing law, Charles Rahrer argued that the original packages still had commerce clause immunity.[112] He added that the Wilson Act was unlawful because Congress could not authorize states to pass unconstitutional laws.[113] The Court disagreed:

> No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which *divests them* of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.[114]

It continued the metaphor of Congress freeing the states from the dormant commerce clause: The Wilson Act "removed an impediment"[115] or "removed the obstacle."[116]

Even as the Court later invalidated neutral alcohol laws under a cramped reading of "arrival,"[117] it recognized that states could burden interstate commerce in ways they previously could not. Two cases are especially revealing. First, *Pabst Brewing Co. v. Crenshaw*[118] considered a law setting purity and inspection requirements for alcohol brewed in or entering Missouri for resale.[119] Plaintiffs waived any claim that the law was discriminatory but argued that it unconstitutionally interfered with interstate commerce by deterring interstate sales.[120] The Court first concluded that Missouri adopted the law pursuant to its police powers and regulated alcohol only after it arrived in the state.[121] It then impatiently rejected plaintiffs' claim:

> This proposition simply amounts to contending that the Wilson Act should be disregarded, since to enforce it would give the States power to regulate

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110 *See* Zywicki & Agarwal, *supra* note 109, at 628.

111 *See* Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121).

112 *See In re* Rahrer, 140 U.S. 545, 548, 550 (1891).

113 *See id.* at 552–53.

114 *Id.* at 562 (emphasis added).

115 *Id.* at 564.

116 *Id.* at 564–65.

117 *See id.* at 564; Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1103 n.84 (2000) (collecting cases).

118 198 U.S. 17 (1905).

119 *See id.* at 22–23.

120 *See id.* at 23–24.

121 *See id.* at 26–30.

> interstate traffic in liquor. If when a State has but exerted the power lawfully conferred upon it by the act of Congress its action becomes void as an interference with interstate commerce because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be . . . to say at one and the same time that the power could and could not be exercised.[122]

Four Justices dissented, but they characterized the Missouri law as discriminatory.[123] Under that view, the interstate sales would fall outside the Wilson Act and retain their immunity.

Delamater v. South Dakota[124] also read the Wilson Act to rebut the dormant commerce clause. South Dakota imposed licensing fees on liquor dealers, including "any traveling salesman who solicits orders by the jug or bottle in lots less than five gallons."[125] One salesman argued that the law violated the Commerce Clause.[126] Not so, the Court held. It started with the Wilson Act's "special rule."[127] "[T]he purpose of the Wilson [A]ct . . . was to allow the States, as to intoxicating liquors, . . . to exert ampler power than could have been exercised before the enactment of the statute."[128] State regulations could now reach alcohol in original packages earlier than before the Wilson Act.[129] Thus, South Dakota's law "cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota, a right which by virtue of the Wilson Act did not exist."[130]

The Webb-Kenyon Act expanded states' powers to burden interstate commerce. In *Clark Distilling Co. v. Western Maryland Railway Co.*,[131] the Court considered a West Virginia law that barred alcohol shipments for all uses, but did not also ban the personal use of alcohol.[132] At the outset, the Court concluded that Congress enacted the Webb-Kenyon Act "simply to extend that which was done by the Wilson Act."[133] Next, it clarified that activating the statute against foreign shippers effectively required two steps. First, states had to identify an interested person within their borders who intended to receive, possess, sell, or use the shipment in violation of their laws.[134] Second, they could then enforce their separate regulations of the out-of-state dealers. The second step

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122 *Id.* at 30.
123 *See id.* at 43–44 (Brown, J., dissenting).
124 205 U.S. 93 (1907).
125 *Id.* at 96.
126 *Id.* at 96–97.
127 *Id.* at 98.
128 *Id.*
129 *See id.* at 98–99.
130 *Id.* at 101.
131 242 U.S. 311 (1917).
132 *Id.* at 318.
133 *Id.* at 324.
134 *See* 27 U.S.C. § 122.

without the first was inadequate. For example, if a state only prohibited rail carriers from shipping into certain areas but didn't also prohibit the recipient's intended receipt, sale, possession, or use in those areas, then the Act did not apply.[135] Notwithstanding that qualification, the Court rejected other limits and resolved an ongoing debate: Did the statute apply only if a state outlawed the recipient's intended use?[136] Or was it enough that the recipient intended to violate receipt and possession laws? The Court scolded a state court for choosing the first option. The Webb-Kenyon Act "took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."[137] Finally, the Court held that the Webb-Kenyon Act constitutionally rebutted dormant commerce clause constraints.[138]

The Court subtly expanded the Webb-Kenyon Act's breadth in two more cases. First, the Court considered a law requiring that railroads shipping alcohol into North Carolina maintain records that any citizen could inspect.[139] One railroad argued that the regulation unconstitutionally burdened interstate commerce.[140] In its view, the Webb-Kenyon Act did not apply because the destination county did not prevent the consignee from possessing or receiving alcohol.[141] The Court disagreed. "The greater power includes the less."[142] If North Carolina wished, it could ban outright the shipments in conjunction with banning the consignee's personal possession, receipt, or use. Instead, the state regulated the shipper and impliedly made the consignee receive deliveries subject to inspection records. Thus, the Webb-Kenyon Act expanded state power even when the Court did not identify a law that the consignee technically intended to violate. Second, the Court signed off on a clever innovation to Webb-Kenyon's two steps. If a statute defined a shipment's place of delivery as the place of sale, then out-of-state dealers counted as interested sellers within the delivery state.[143] The upshot was that regulating the out-of-state dealer alone activated the Webb-Kenyon Act.

State courts also held that the Webb-Kenyon Act enabled localities to pass neutral alcohol laws that would have been unconstitutional beforehand. To give a few examples: Washington could force railroads to

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135 *See Clark Distilling*, 242 U.S. at 324 (explaining the holding in Adams Express Co. v. Kentucky, 238 U.S. 190 (1915)). Professor Thomas Reed Powell argued that *Clark Distilling* mischaracterizes and is in tension with *Adams Express*. *See* Thomas Reed Powell, *The Validity of State Legislation Under the Webb-Kenyon Law*, 2 S.L.Q. 112, 121–22 (1917).

136 *See Clark Distilling*, 242 U.S. at 322.

137 *Id.* at 325.

138 *See id.* at 330–31.

139 Seaboard Air Line Ry. v. North Carolina, 245 U.S. 298, 299–301 (1917).

140 *See id.* at 302.

141 *See id.* at 303.

142 *Id.* at 304.

143 McCormick & Co. v. Brown, 286 U.S. 131, 137, 143 (1932).

affix permits onto alcohol shipped into the state;[144] Louisiana could outlaw using someone else's name or allowing one's own name to be used in alcohol shipments into dry areas;[145] and Mississippi could limit alcohol shipments of more than one gallon.[146]

Contemporaneous law review articles confirm this broad state power. Whereas scholars debated whether the Webb-Kenyon Act or Twenty-First Amendment authorized discrimination, many assumed that nondiscriminatory alcohol laws would not violate the Commerce Clause. For example, Professor Thomas Reed Powell theorized the doctrine before Prohibition. He argued that the Wilson and Webb-Kenyon Acts outlawed violations of state laws that fell within the two statutes' terms.[147] Federally illegal interstate commerce then lost any immunity. Therefore, states could use their police powers to regulate the now-federally illegal activity without Commerce Clause issues.[148] One can extrapolate that reasoning here to neutral alcohol laws. Because such laws do not discriminate, they fall within the scope of the Wilson and Webb-Kenyon Acts. So, once someone shipped alcohol in violation of those neutral laws, that shipment would be federally outlawed. And states would then face no Commerce Clause restraints in enforcing their uniform laws. Additionally, another scholar argued that the Twenty-First Amendment "validate[d] any state regulation which is a proper exercise of the state police power."[149] While states could not "discriminate arbitrarily and unreasonably" against out-of-state liquor, the author proposed no limits beyond this nondiscrimination principle.[150] And still other sources questioned discrimination, but not neutral alcohol laws.[151]

Finally, the few precedents after states ratified the Twenty-First Amendment, but before the Court erroneously upheld discriminatory alcohol laws, do not contradict this trend. Admittedly, the precedents are less helpful because they almost exclusively address discriminatory laws. Courts split over whether the Webb-Kenyon Act, and the Twenty-First Amendment by extension, authorized discrimination.[152] Yet they

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144 State v. Great N. Ry. Co., 165 P. 1073, 1074 (Wash. 1917).

145 *See* State v. Selsor, 73 So. 270, 272 (La. 1916) (interpreting this law also to cover fictitious names).

146 Am. Express Co. v. Beer, 65 So. 575, 578 (Miss. 1914).

147 Powell, *supra* note 135, at 132–33, 135.

148 *See id.* at 135–36.

149 Howard S. Friedman, Recent Legislation, *Constitutional Law: State Regulation of Importation of Intoxicating Liquor Under Twenty-First Amendment*, 21 CORNELL L.Q. 504, 506 (1936).

150 *Id.* at 509.

151 *See, e.g.*, D.O. McGovney, *The Webb-Kenyon Law and Beyond*, 3 IOWA L. BULL. 145, 154–55 (1917); Ralph L. Wiser & Richard F. Arledge, Editorial Note, *Does the Repeal Amendment Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislating on Intoxicating Liquors in Interstate Commerce?*, 7 GEO. WASH. L. REV. 402, 413 (1939).

152 *See* Robert H. Skilton, *State Power Under the Twenty-First Amendment*, 7 BROOK. L. REV. 342, 351 (1938) (noting the "discordant diversity of lower court decisions").

did not question that the pre-Prohibition statutes removed Commerce Clause problems for neutral alcohol laws.

To be sure, the older precedents are not always consistent.[153] Nor do they neatly map onto the modern doctrine. And they do not show that states had unlimited power over alcohol if they didn't discriminate. States still could violate the Constitution by stretching their police powers beyond traditional limits. Echoing *Mugler v. Kansas*,[154] one district court noted that alcohol laws always had to have some relationship "to protect[ing] the public health, the public morals, or the public safety."[155] Still, the above sources reveal an overall consensus that nondiscriminatory alcohol laws would not violate the Commerce Clause.

That consensus still empowers states today. While the Wilson and Webb-Kenyon Acts most acutely protected dry states, *Seaboard Air Line Railway v. North Carolina*[156] and *Clark Distilling* show that all states could pass neutral alcohol laws short of complete bans. Moreover, little changes now that the Court has rejected the original package doctrine. The solution to the original package doctrine was to broadly rebut the dormant commerce clause. And while the modern Court has reconceptualized *how* Congress can rebut dormant commerce clause limits,[157] it has never questioned *that* the Wilson and Webb-Kenyon Acts did so.[158] Thus, the solution to the original package doctrine outlives the doctrine itself.

In sum, the Wilson and Webb-Kenyon Acts unequivocally removed dormant commerce clause obstacles for neutral alcohol laws. The Twenty-First Amendment constitutionalized that scheme. If modern courts use *Pike* balancing, they will restore dormant commerce clause protections that Congress — and then the Constitution — erased.

C. An Anomaly After Tennessee Wine

Applying ordinary *Pike* balancing to neutral alcohol laws would create the following anomaly. *Tennessee Wine* used a more relaxed test for discriminatory alcohol laws. But if ordinary *Pike* balancing applies to neutral alcohol and non-alcohol laws alike, then the Twenty-First Amendment would loosen the standard only for discriminatory alcohol laws.

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153 *See* Powell, *supra* note 135, at 138–39; Andrew Alexander Bruce, *The Wilson Act and the Constitution*, 21 GREEN BAG 211, 222 (1909).

154 123 U.S. 623 (1887).

155 Dugan v. Bridges, 16 F. Supp. 694, 707 (D.N.H. 1936); *see also* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2466–67 (2019) (noting that traditional police power limits constrained states' alcohol laws).

156 245 U.S. 298 (1917).

157 *See* Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 157 (2005).

158 *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 960 n.21 (1982) (citing *In re* Rahrer, 140 U.S. 545 (1891)); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 433 (1946); *id.* n.43 (collecting other cases); S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945).

Given how the Court has characterized the Commerce Clause and Twenty-First Amendment, this would be strange. Since at least the late nineteenth century, the Court warned that discrimination against out-of-state businesses would thrust the country back into the "oppressed and degraded state" before the Constitution.[159] Indeed, the Commerce Clause aimed to prevent "economic Balkanization"[160] that "was cutting off the very life-blood of the nation."[161] To be sure, neutral laws that excessively burden interstate commerce also harm the nation. But *Granholm* noted that the nondiscrimination principle in particular was "essential to the foundations of the Union."[162] Meanwhile, whatever else the Twenty-First Amendment accomplished, its primary aim was not to sanction discrimination.[163] Therefore, it would be odd if the Twenty-First Amendment relaxed the standard only for discriminatory alcohol laws.

To solve the puzzle, the Twenty-First Amendment must also loosen the standard for nondiscriminatory alcohol laws. In other words, it must be possible for a neutral alcohol law to fail *Pike* balancing yet satisfy some different standard. Otherwise, the Amendment would not give states any additional authority to enact neutral laws.

Two options come to mind: *Tennessee Wine*'s "different inquiry"[164] and *Bacchus*'s balancing test.[165] Ultimately, neither works.

The first option misreads *Tennessee Wine*. Before introducing the different inquiry, the Court highlighted that the Tennessee law was discriminatory.[166] Citing several non-alcohol cases that also involved discriminatory laws, the Court concluded that the law "could not be sustained if it applied across the board to all those seeking to operate any retail business in the State."[167] Immediately afterward, the Court introduced the different inquiry.[168] Therefore, it's unlikely that *Tennessee Wine*'s different inquiry also applies to nondiscriminatory alcohol

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159 Guy v. Baltimore, 100 U.S. 434, 440 (1880).

160 Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

161 Tenn. Wine & Spirit Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2460 (2019) (quoting MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 7 (1913)).

162 Granholm v. Heald, 544 U.S. 460, 472 (2005).

163 *Id.* at 484–85.

164 *Tenn. Wine*, 139 S. Ct. at 2474. One district court adopted something close to this approach, using both *Pike* balancing and *Tennessee Wine*'s test. *See* Chi. Wine Co. v. Holcomb, 532 F. Supp. 3d 702, 713–14 (S.D. Ind. 2021).

165 Before *Granholm* and *Tennessee Wine*, the Eleventh Circuit adopted something like this approach. It would apply ordinary dormant commerce clause doctrine unless a state law advanced a Twenty-First Amendment core concern. *See* Bainbridge v. Turner, 311 F.3d 1104, 1112–13 (11th Cir. 2002).

166 *See Tenn. Wine*, 139 S. Ct. at 2474.

167 *Id.* (citing C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391–92 (1994); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 39 (1980)).

168 *See id.*

laws. Understandably, lower courts have read the different inquiry this way.[169]

Notwithstanding the misreading, *Tennessee Wine*'s different inquiry still does not solve the anomaly. On its face, the standard seems permissive. The Court asks whether the alcohol law "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground."[170] If the law's "predominant effect" is protectionism, then it is invalid.[171] Yet, in practice, the standard is stricter than *Pike* balancing. "The standard has teeth."[172] States must proffer "concrete evidence" that an alcohol law furthers legitimate interests.[173] And as *Tennessee Wine* demonstrated, the Court skeptically probes those interests and nondiscriminatory alternatives.[174] Conversely, courts sometimes consider regulatory alternatives in *Pike* balancing, but it's not the norm.[175] Therefore, it is hard to conceive a nondiscriminatory law that would fail *Pike* balancing but survive the *Tennessee Wine* inquiry.

It's unclear whether the second option avoids the problem. *Bacchus* weighed federal interests against state interests and asked whether the state advanced a core concern of the Twenty-First Amendment.[176] The test seems less searching than *Tennessee Wine*'s inquiry. After all, Hawaii lost because it offered no justification for discriminating other than to support local industry.[177] But the test still may not rescue laws that fail *Pike*. One would think that the burdens in *Pike* count as the federal interests in *Bacchus*. Thus, how could a law that burdens interstate commerce far more than it promotes legitimate, local interests (it fails *Pike*) advance a Twenty-First Amendment core concern that outweighs federal interests (it satisfies *Bacchus*)? Unfortunately, the case law doesn't provide an answer.[178]

But supposing that a neutral alcohol law could fail *Pike* balancing yet survive the *Bacchus* test, this option faces another problem. The Court hasn't used the *Bacchus* test in its three latest alcohol cases.[179]

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169 *See, e.g.*, Anvar v. Dwyer, 82 F.4th 1, 8 (1st Cir. 2023).

170 *Tenn. Wine*, 139 S. Ct. at 2474.

171 *See id.*

172 Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, 945 F.3d 206, 213 (5th Cir. 2019).

173 *Tenn. Wine*, 139 S. Ct. at 2474 (quoting Granholm v. Heald, 544 U.S. 460, 490 (2005)).

174 *See id.* at 2474–76.

175 *See* Goldsmith & Sykes, *supra* note 72, at 171–73.

176 Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 275–76 (1984) (quoting Cap. Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).

177 *Id.* at 276.

178 The most on-point example concerned a law that discriminated and failed strict scrutiny, alternatively failed *Pike*, and failed the *Bacchus* test. *See* Pete's Brewing Co. v. Whitehead, 19 F. Supp. 2d 1004, 1015–19 (W.D. Mo. 1998).

179 The Court has never explained why it shelved the *Bacchus* test, but it may have recognized that the test is too indeterminate. *See* Granholm v. Heald, 544 U.S. 460, 524 (2005) (Thomas, J., dissenting).

Unsurprisingly, the near-consensus among secondary scholarship is that the Court has abandoned the test.[180]

There's an easier way around the anomaly: Neutral laws that internally regulate alcohol trigger *no* dormant commerce clause scrutiny. This avoids all the problems that *Tennessee Wine*'s and *Bacchus*' standards do not. It does not misapply a test for discriminatory alcohol laws to nondiscriminatory laws. By definition, it is more permissive than *Pike* balancing. And it does not revive an outdated test.

III. IMPLICATIONS

Does any of this matter in practice? This Part addresses worries that it may not. First, it quickly responds to the objection that *Pike* balancing is almost dead. It then responds to the objection that *Pike* balancing already is deferential.

A. Why Worry About a Dying Standard?

Although several Justices have criticized *Pike* balancing,[181] the test lives on for now. Recently, six Justices endorsed some version of it.[182] And unlike a symptom that presaged the death of a controversial test in administrative law,[183] the Court has not stopped using *Pike*.[184] Moreover, "*Pike* balancing is . . . alive and well in the lower courts."[185] Therefore, it matters how the Twenty-First Amendment interacts with *Pike*.

B. Why Worry About a Deferential Standard?

Pike balancing is highly deferential.[186] So far, no federal circuit court has invalidated a neutral alcohol law under *Pike* alone.[187] Yet despite *Pike*'s deference, two case studies show that some neutral alcohol laws

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[180] *See, e.g.*, Alexander R. Steiger, Note, *Fine(ing) Wine: Challenging Direct-Shipment Licensing Fees on Dormant Commerce Clause Grounds*, 62 WM. & MARY L. REV. 2107, 2124 (2021); Eric Hawkins, Note, *Great Beer, Good Intentions, Bad Law: The Unconstitutionality of New York's Farm Brewery License*, 56 B.C. L. REV. 313, 327 (2015); Kevin C. Quigley, Note, *Uncorking* Granholm*: Extending the Nondiscrimination Principle to All Interstate Commerce in Wine*, 52 B.C. L. REV. 1871, 1886 (2011); Christian Hart Staples, Comment, *In Vino Veritas: Does The Twenty-First Amendment Really Protect a State's Right to Regulate Alcohol? An Overview of the North Carolina Wine Industry and the Continuing Wine Distribution Litigation*, 31 CAMPBELL L. REV. 123, 138 (2008). *But see* Durkin, *supra* note 12, at 1108–10.

[181] *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897–98 (1988) (Scalia, J., concurring in the judgment); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 619 (1997) (Thomas, J., dissenting).

[182] *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1172 (2023) (Kavanaugh, J., concurring in part and dissenting in part).

[183] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2275 (2024) (Gorsuch, J., concurring).

[184] *See, e.g.*, *Nat'l Pork Producers Council*, 143 S. Ct. at 1161–63 (opinion of Gorsuch, J.).

[185] BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.05, at 6–34 (2d ed. 2013).

[186] *See* Dep't of Revenue v. Davis, 553 U.S. 328, 339 (2008).

[187] *See* Lebamoff Enters. v. Huskey, 666 F.3d 455, 467 (7th Cir. 2012) (Hamilton, J., concurring in the judgment).

plausibly fail the test. Therefore, it matters whether the Twenty-First Amendment displaces *Pike*.

First, *Huskey* again is instructive. There, an Indiana store wanted to deliver alcohol to Indiana consumers some 130 miles away.[188] But Indiana allowed only the retailer's permit holder or employees to deliver alcohol.[189] Because this was not commercially feasible, the store argued that it forfeited potential business and the law "unduly burden[ed] interstate commerce."[190]

Sidestepping the Twenty-First Amendment, the Seventh Circuit upheld the law under *Pike*.[191] First, it characterized the law as nondiscriminatory.[192] Then, it balanced interests. Indiana had a valid, local interest in ensuring that minors do not purchase alcohol.[193] The shipment regulations advanced that interest.[194] On the other side of the balancing, the court argued that the plaintiffs failed to show "even an incidental effect on interstate commerce."[195] To the extent that the law decreased the Indiana store's sales, that affected *intra*state commerce.[196]

The panel misapplied *Pike* balancing. The plaintiff store provided extensive evidence of foregone sales.[197] Importantly, many deliveries would have routed out-of-state wine through Indiana wholesalers, to the plaintiff store, and eventually to Indiana consumers.[198] That is interstate commerce. Plaintiffs also invoked a Federal Trade Commission report that documented how "bans on direct shipment dramatically reduce consumer choice."[199] That is a heavy burden on interstate commerce. By contrast, there was little evidence of substantial local benefits. As *Granholm* noted, impulsive minors want more immediate access to alcohol than is available through the mail.[200] And to the extent *Pike* balancing considers alternative regulations, motor carriers can easily verify recipients' ages.[201] Therefore, the store plausibly showed that the burden on interstate commerce was clearly excessive in relation to the local benefits.[202]

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188 *Id.* at 457 (majority opinion).

189 *Id.*

190 *Id.* at 459; *see id.* at 457, 461–62. The store also argued that the law was preempted by federal statute. *Id.* at 457.

191 *See id.* at 462.

192 *See id.* at 460.

193 *See id.* at 461.

194 *See id.* at 461–62.

195 *Id.* at 462.

196 *See id.*

197 *See id.* at 469 (Hamilton, J., concurring in the judgment).

198 *See id.*

199 *Id.* at 470 (citing FTC, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 24 (2003)).

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

201 *See Huskey*, 666 F.3d at 471 (Hamilton, J., concurring in the judgment).

202 *Id.* at 469.

A more recent example from the Fifth Circuit tells a similar story. Plaintiffs in *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*[203] challenged a Texas law that barred publicly traded corporations from obtaining a license to sell alcohol for off-premises use.[204] The Fifth Circuit first concluded that the law was not discriminatory in effect, but remanded to the lower court to consider whether it had a discriminatory purpose.[205] Next, it reversed the district court's holding that the law, even if neutral, failed *Pike*.[206] "When in-state firms have no competitive advantage over out-of-state firms, interstate commerce is not 'subjected to an impermissible burden' because *some* potential participants are shifted out of the in-state market."[207] The Fifth Circuit added that the plaintiffs provided no other evidence that the Texas law impeded interstate commerce.[208]

Even if the Texas law is neutral,[209] it plausibly should have failed *Pike*. As the district court noted, the law imposes a "substantial burden on interstate commerce" by preventing many out-of-state companies from entering the Texas market.[210] And while the law may advance Texas's legitimate interests in decreasing alcohol consumption or raising prices, Wal-Mart provided strong evidence that the benefits were quite disproportionate to the burdens. For example, it showed that "Texas's per-capita liquor consumption has *increased* since the ban was enacted in 1995."[211] Moreover, after Texas allowed public corporations to sell beer and wine, per-capita consumption of beer and wine still dropped.[212] And the district court also reasonably noted that Texas could "more easily and more directly" advance its temperance or health interests through regulations like excise taxes.[213] Therefore, Texas plausibly should have lost under *Pike*.

Yet even if the laws in *Huskey* and *Wal-Mart* rightly survived *Pike* balancing, it would have been easier for the states if the test simply did not apply. The point is not that states must expend resources because

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[203] 945 F.3d 206 (5th Cir. 2019).

[204] *Id.* at 210–11.

[205] *Id.* at 218–20.

[206] *Id.* at 224. The court initially noted that using the *Pike* test may be "questionable" given the Twenty-First Amendment. *Id.* at 222.

[207] *Id.* at 223 (quoting Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978)).

[208] *Id.* at 223–24.

[209] One commentator argues that the law is facially discriminatory because it grandfathers in some permits that Texas issued while enforcing durational residency requirements. *See* Josephine Battles, Note, Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*: The Supreme Court Misses Its "Shot" at Clarifying State Alcohol Regulations and the Commerce Clause*, 30 WM. & MARY BILL RTS. J. 825, 845–46 (2022).

[210] Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, 313 F. Supp. 3d 751, 774 (W.D. Tex. 2018), *aff'd in part, vacated in part, rev'd in part*, 94 F.3d 206 (5th Cir. 2019).

[211] *See* Principal and Response Brief for Plaintiffs-Appellees Walmart Stores, Inc., et al. at 46, *Wal-Mart*, 945 F.3d 206 (No. 18-50299).

[212] *Id.* at 47.

[213] *Wal-Mart*, 313 F. Supp. 3d at 776.

Pike balancing is indeterminate.[214] Even at its most determinate, *Pike* effectively forces states to show that an alcohol regulation promotes legitimate local interests and has little effect on interstate commerce. Sure, the burden of proof rests on the plaintiffs. And a recent study found that district courts overwhelmingly "engage in, at best, a casual qualitative analysis of the parties' claims about the benefits and burdens of the state laws."[215] But however casually courts weigh the inputs, states would be foolish not to proffer their own evidence. If the Twenty-First Amendment displaces *Pike*, states would save those resources.

Displacing *Pike* won't eliminate dormant commerce clause lawsuits, but it can still help states. If the Amendment saves nondiscriminatory alcohol laws, plaintiffs will still argue that disfavored regulations are discriminatory. But assuming that regulations are facially neutral, plaintiffs may struggle to prove a discriminatory effect or purpose. The exact showing for a discriminatory effect is imprecise, but it "must be substantial."[216] Alcohol plaintiffs have met the burden before, but those cases involved all-but-admitted discrimination. Think *Bacchus*. Or a facially neutral volume limit for small wineries that includes every Massachusetts winery yet excludes many out-of-state competitors.[217] Showing a discriminatory purpose also is onerous. Again, "the Court has never been transparent about how one ascertains discriminatory purpose."[218] But in practice, lower courts have adopted multi-factor tests[219] or deferred to legislative statements of purpose.[220] Thus, plaintiffs will strain to convert *Pike* arguments into discrimination arguments.

CONCLUSION

The Twenty-First Amendment protects states from the dormant commerce clause when they regulate alcohol evenhandedly and internally. Such laws may violate other parts of the Constitution, but not the Commerce Clause. Modern precedents; the Twenty-First Amendment's text, history, and purpose; and the logic of *Tennessee Wine* all support this thesis. And while states do not always need the Twenty-First Amendment's rescue, it may save laws that fail *Pike* balancing. Or it can make defending neutral alcohol laws just a little easier.

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[214] *But see* Lebamoff Enters., Inc. v. Huskey, 666 F.3d 455, 469 (7th Cir. 2012) (Hamilton, J., concurring in the judgment); Denning, *supra* note 70, at 494.

[215] Goldsmith & Sykes, *supra* note 72, at 151.

[216] Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 36 (1st Cir. 2007).

[217] *See* Fam. Winemakers of Cal. v. Jenkins, 592 F.3d 1, 8 (1st Cir. 2010).

[218] Denning, *supra* note 70, at 500.

[219] *See, e.g.*, Allstate Ins. Co. v. Abbott, 495 F.3d 151, 160 (5th Cir. 2007); Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 335–36 (4th Cir. 2001) (citing Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 819 (4th Cir. 1995)).

[220] *See, e.g.*, Wine & Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1, 13 (1st Cir. 2007); Norfolk S. Corp. v. Oberly, 822 F.2d 388, 403 n.21 (3d Cir. 1987) (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7, 471 n.15 (1981)).