TWENTY-FIRST AMENDMENT
REPEAL OF PROHIBITION

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TWENTY-FIRST AMENDMENT—REPEAL OF PROHIBITION

Section 1—Repeal of Eighteenth Amendment

Amdt21.S1.1 Repeal of Prohibition

Twenty-First Amendment, Section 1:

> *The eighteenth article of amendment to the Constitution of the United States is hereby repealed.*

Ratification of the Twenty-First Amendment on January 23, 1933 repealed the Eighteenth Amendment, which had prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the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."[1]

Section 2—Importation, Transportation, and Sale of Liquor

Amdt21.S2.1 Discrimination Against Interstate Commerce

Twenty-First Amendment, Section 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.*

In a series of decisions rendered shortly after ratification of the Twenty-First Amendment, the Court established the proposition that states are competent to adopt legislation discriminating against imported intoxicating liquors in favor of those of domestic origin and that such discrimination offends neither the Commerce Clause of Article I nor the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Modern cases, however, have recognized that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause,"[1] also known as the Dormant Commerce Clause.[2]

Initially, the Court upheld a California statute that exacted a $500 annual license fee for the privilege of importing beer from other states and a $750 fee for the privilege of manufacturing beer,[3] and a Minnesota statute that prohibited a licensed manufacturer or wholesaler from importing any brand of intoxicating liquor containing more than 25% alcohol by volume and ready for sale without further processing, unless such brand was registered in the United States Patent Office.[4] Also validated were retaliation laws prohibiting sale of beer from states that discriminated against sale of beer from the enacting state.[5]

Conceding, in *State Board of Equalization v. Young's Market Co.*,[6] that, "[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for [the privilege of importation] . . . even if the State had exacted an equal fee for the

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[1] U.S. Const. amend. XVIII.

[1] Granholm v. Heald, 544 U.S. 460, 487 (2005).

[2] *See, e.g.*, Tenn. Wine and Spirits Retailers Ass'n. v. Thomas, No. 18-96, slip op. (June 26, 2019).

[3] State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

[4] Mahoney v. Triner Corp., 304 U.S. 401 (1938).

[5] Brewing Co. v. Liquor Comm'n, 305 U.S. 391 (1939) (Michigan law); Finch & Co. v. McKittrick, 305 U.S. 395 (1939) (Missouri law).

[6] 299 U.S. 59, 62 (1936).

privilege of transporting domestic beer from its place of manufacture to the [seller's] place of business," the Court proclaimed that this Amendment "abrogated the right to import free, so far as concerns intoxicating liquors." Because the Amendment was viewed as conferring on states an unconditioned authority to prohibit totally the importation of intoxicating beverages, it followed that any discriminatory restriction falling short of total exclusion was equally valid, notwithstanding the absence of any connection between such restriction and public health, safety, or morals. As to the contention that the unequal treatment of imported beer would contravene the Equal Protection Clause, the Court succinctly observed that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[7]

In *Seagram & Sons v. Hostetter*[8] the Court upheld a state statute regulating the price of intoxicating liquors, asserting that the Twenty-First Amendment bestowed upon the states broad regulatory power over the liquor sales within their territories.[9] The Court also noted that states are not totally bound by traditional Commerce Clause limitations when they restrict the importation of intoxicants destined for use, distribution, or consumption within their borders.[10] In such a situation the Twenty-First Amendment demands wide latitude for regulation by the state.[11] The Court added that there was nothing in the Twenty-First Amendment or any other part of the Constitution that required state laws regulating the liquor business to be motivated exclusively by a desire to promote temperance.[12]

More recent cases undercut the expansive interpretation of state powers in *Young's Market* and the other early cases. The first step was to harmonize Twenty-First Amendment and Commerce Clause principles where possible by asking "whether the interests implicated by a state regulation are 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 policies."[13] Because "[t]he central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition," the "central tenet" of the Commerce Clause will control to invalidate "mere economic protectionism," at least where the state cannot justify its tax or regulation as "designed to promote temperance or to carry out any other purpose of the . . . Amendment."[14] But the Court eventually came to view the Twenty-First Amendment as not creating an exception to the commerce power. "[S]tate regulation of alcohol is limited by the nondiscrimination principle of

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7 299 U.S. at 64. In the three decisions rendered subsequently, the Court merely restated these conclusions. The contention that discriminatory regulation of imported liquors violated the Due Process Clause was summarily rejected in *Brewing Co. v. Liquor Comm'n,* 305 U.S. 391, 394 (1939).

8 384 U.S. 35 (1966).

9 384 U.S. at 42. *See* United States v. Frankfort Distilleries, 324 U.S. 293, 299 (1945) and Nippert v. City of Richmond, 327 U.S. 416 (1946).

10 384 U.S. at 35. *See, e.g.*, Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964) and State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

11 384 U.S. at 35. The Court added that it was not deciding then whether the mode of liquor regulation chosen by a state in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. *Id.* at 42–43.

12 384 U.S. at 47.

13 Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984). "[T]he central power reserved by § 2 of the Twenty-first Amendment [is] that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" 467 U.S. at 715 (quoting California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980)).

14 Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984). *See also*, *e.g.*, Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 713 (1984) ("In rejecting the claim that the Twenty-first Amendment ousted the Federal Government of all jurisdiction over interstate traffic in liquor, we have held that when a State has not attempted directly to regulate the sale or use of liquor within its borders—the core § 2 power—a conflicting exercise of federal authority may prevail.").

the Commerce Clause," the Court stated in 2005.[15] Discrimination in favor of local products can be upheld only if the state "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[16] This interpretation stemmed from the Court's conclusion that the Twenty-First Amendment restored to states the powers that they had possessed prior to Prohibition "to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use" in a manner that did not discriminate against out-of-state goods.[17]

Consequently, in *Granholm v. Heald*, the Supreme Court struck down regulatory schemes employed by Michigan and New York that discriminated against out-of-state wineries.[18] Both states employed a "three-tier system," in which producers, wholesalers, and retailers had to be separately licensed by the state.[19] The Court first affirmed its prior cases holding that as a general matter, "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment."[20] But within their three-tier systems, Michigan and New York gave certain advantages to in-state wineries by creating special licensing systems allowing them to directly ship wine to in-state consumers.[21] While recognizing that both states did have significant authority to regulate the importation and sale of liquor, the Court said that the challenged systems "involve[d] straightforward attempts to discriminate in favor of local producers . . . contrary to the Commerce Clause," and that these schemes could not be "saved by the Twenty-first Amendment."[22]

The states argued in *Granholm* that their restrictions on direct shipments by out-of-state wineries passed muster under Dormant Commerce Clause principles because they advanced two legitimate local purposes: "keeping alcohol out of the hands of minors and facilitating tax collection."[23] The Supreme Court rejected these claims, concluding that there was insufficient evidence to show that prohibiting direct shipments would solve either of these problems.[24] The

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[15] Granholm v. Heald, 544 U.S. 460, 487 (2005). *See also* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984) (invalidating tax that discriminated in favor of specific locally produced products); Healy v. The Beer Institute, 491 U.S. 324, 343 (1989) (invalidating "price affirmation" statute requiring out-of-state brewers and beer importers to affirm that their prices are not higher than prices charged in border states); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 585 (1986) (invalidating "price affirmation" statute requiring distillers or agents who sell to in-state wholesalers to affirm that their prices would not be higher than prices elsewhere in the United States).

[16] Granholm v. Heald, 544 U.S. 460, 487, 489 (2005) (invalidating Michigan and New York laws allowing in-state but not out-of-state wineries to make direct sales to consumers). This is the same test the Court applies outside the context of alcoholic beverages. *See* Maine v. Taylor, 477 U.S. 131, 138 (1986) (once discrimination against interstate commerce is established, "the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means") (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).

[17] 460 U.S. at 484. According to Justice Anthony Kennedy's opinion for the Court, these pre-Prohibition state powers were framed by the Wilson and Webb-Kenyon Acts, and the Twenty-First Amendment evidenced a "clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Id.*, *accord* Tenn. Wine and Spirits Retailers Ass'n v. Thomas, No. 18-96, slip op. (June 26, 2019). However, in *Tennessee Wine*, the Court rejected the suggestion that a law should be deemed constitutional under the Twenty-First Amendment merely because it—or a similar law—predated Prohibition. *Id.* at 30. The Court clarified that pre-Prohibition laws that were "never tested" in the Supreme Court could have been held invalid then and, consequently, might remain invalid in modern times. *Id.*

[18] 544 U.S. 460, 493 (2005).

[19] *Id.* at 466–67.

[20] *Id.* at 466 (discussing North Dakota v. United States, 495 U.S. 423, 444 (1990) (plurality opinion); *id.* at 444 (Scalia, J., concurring)).

[21] *Id.* at 469–70.

[22] *Id.* at 489.

[23] *Id.*

[24] *Id.* at 490–91.

Court also suggested that the states could achieve "their regulatory objectives . . . without discriminating against interstate commerce."[25]

The Court struck down another discriminatory regulation in *Tennessee Wine and Spirits Retailers Association v. Thomas*.[26] In that case, the Court considered specific aspects of Tennessee's three-tier system.[27] In particular, Tennessee would only issue new retail licenses to individuals who had been residents of the state for the previous two years.[28] In defense of the law, a trade association representing Tennessee liquor stores argued that the case was not governed by *Granholm*.[29] In its view, *Granholm*'s analysis was limited to laws that discriminate against out-of-state products and producers, whereas Tennessee's provision concerned "the licensing of domestic retail alcohol stores."[30] The Court disagreed, explaining that instead, *Granholm* established that the Constitution "prohibits state discrimination against all 'out-of-state economic *interests*.'"[31]

Ultimately, the Court concluded in *Tennessee Wine* that the challenged law was unconstitutional because its predominant effect was protectionism, saying that the law had "at best a highly attenuated relationship to public health or safety."[32] The trade association argued that the provision was justified because it made retailers "amenable to the direct process of state courts," allowed the state "to determine an applicant's fitness to sell alcohol," and "promote[d] responsible alcohol consumption."[33] But in the Court's view, there was no "'concrete evidence' showing that the two-year residency requirement actually promotes public health or safety; nor [was] there evidence that nondiscriminatory alternatives would be insufficient to further those interests."[34]

When passing upon the constitutionality of legislation regulating the carriage of liquor interstate, a majority of the Justices seemed disposed to bypass the Twenty-First Amendment and to resolve the issue exclusively in terms of the Commerce Clause and state power. This trend toward devaluation of the Twenty-First Amendment was set in motion by *Ziffrin, Inc. v. Reeves*[35] in which a Kentucky statute that prohibited the transportation of intoxicating liquors by carriers other than licensed common carriers was enforced as to an Indiana corporation engaged in delivering liquor obtained from Kentucky distillers to consignees in Illinois but licensed only as a contract carrier under the Federal Motor Carriers Act. After acknowledging that "the Twenty-first Amendment sanctions the right of a State to legislate concerning

[25] *Id.* at 491.

[26] No. 18-96, slip op. (June 26, 2019).

[27] *Id.* at 2.

[28] *Id.* at 3. Some additional aspects of Tennessee's regulatory scheme had been invalidated by the lower courts, and the state did not defend those provisions on appeal to the Supreme Court. *Id.* at 1.

[29] *Id.* at 26.

[30] *Id.*

[31] *Id.* at 27 (quoting Granholm v. Heald, 544 U.S. 460, 472 (2005)). The Court also characterized the association's reading of the Twenty-First Amendment as "implausible." *Id.* While the association conceded that Section 2 of the Twenty-First Amendment could not shield discriminatory laws that address the importation of alcohol, it argued that Section 2 authorized its discriminatory law regarding licensing domestic stores. *Id.* The Court noted that the Twenty-First Amendment specifically prohibits the "importation" of alcohol into a state in violation of that state's laws, but does not literally address states' ability to license domestic retailers. *Id.* The majority argued that "if § 2 granted States the power to discriminate in the field of alcohol regulation, that power would be at its apex when it comes to regulating the activity to which the provision expressly refers." *Id.* at 26–27. But because Section 2 did *not* shield importation laws from analysis under the Dormant Commerce Clause, the Court reasoned that it would be odd for the provision to nonetheless protect other types of discriminatory regulations. *Id.*

[32] *Id.* at 33.

[33] *Id.* at 33–35.

[34] *Id.* at 33.

[35] 308 U.S. 132 (1939).

intoxicating liquors brought from without, unfettered by the Commerce Clause,"[36] the Court proceeded to found its ruling largely upon decisions antedating the Amendment that sustained similar state regulations as a legitimate exercise of the police power not unduly burdening interstate commerce. In light of the contemporaneous cases enumerated in the preceding topic construing the Twenty-First Amendment as according a plenary power to the states, such extended emphasis on the police power and the Commerce Clause would seem to have been unnecessary. Thereafter, a total eclipse of the Twenty-First Amendment was recorded in *Duckworth v. Arkansas*[37] and *Carter v. Virginia*,[38] in which, without even considering that Amendment, a majority of the Court upheld, as not contravening the Commerce Clause, statutes regulating the transport through the state of liquor cargoes originating and ending outside the regulating state's boundaries.[39]

Amdt21.S2.2 State Regulation of Imports Destined for a Federal Area

Twenty-First Amendment, Section 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.*

Importation of alcoholic beverages into a state for ultimate delivery at a National Park located in the state but over which the United States retained exclusive jurisdiction has been construed as not constituting "transportation . . . into [a] State for delivery and use therein" within the meaning of Section 2 of the Amendment. The importation having had as its objective delivery and use in a federal area over which the state retained no jurisdiction, the increased powers that the state acquired from the Twenty-First Amendment were declared to be inapplicable. California therefore could not extend the importation license and other regulatory requirements of its Alcoholic Beverage Control Act to a retail liquor dealer doing business in the Park.[1] On the other hand, a state may apply nondiscriminatory liquor regulations to sales at federal enclaves under concurrent federal and state jurisdiction, and may require that liquor sold at such federal enclaves be labeled as being restricted for use only within the enclave.[2]

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[36] 308 U.S. at 138.

[37] 314 U.S. 390 (1941).

[38] 321 U.S. 131 (1944). *See also* Cartlidge v. Raincey, 168 F.2d 841 (5th Cir. 1948), *cert. denied*, 335 U.S. 885 (1948).

[39] Arkansas required a permit for the transportation of liquor across its territory, but granted the same upon application and payment of a nominal fee. Virginia required carriers engaged in similar through-shipments to use the most direct route, carry a bill of lading describing that route, and post a $1,000 bond conditioned on lawful transportation; and also stipulated that the true consignee be named in the bill of lading and be one having the legal right to receive the shipment at destination.

[1] Collins v. Yosemite Park Co., 304 U.S. 518, 537–38 (1938). The principle was reaffirmed in *United States v. Mississippi Tax Comm'n,* 412 U.S. 363 (1973), holding that Mississippi could not apply its tax regulations to liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within the State and over which the United States had obtained exclusive jurisdiction. "[A]bsent an appropriate express reservation . . . the Twenty-first Amendment confers no power on a State to regulate –whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction." *Id.* at 375. Nor may states tax importation of liquor for sale at bases over which the United States exercises concurrent jurisdiction only. United States v. Mississippi Tax Comm'n, 421 U.S. 599 (1975).

[2] North Dakota v. United States, 495 U.S. 423 (1990) (also upholding application to federal enclaves of a uniform requirement that shipments into the state be reported to state officials).

Amdt21.S2.3 Imports, Exports, and Foreign Commerce

Twenty-First Amendment, Section 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.*

The Twenty-First Amendment did not repeal the Export-Import Clause, Article I, Section 10, Clause 2, nor obliterate the Commerce Clause, Article I, Section 8, Clause 3. Accordingly, a state cannot tax imported liquor while it remains "in unbroken packages in the hands of the original importer and prior to [his] resale or use" thereof.[1] Likewise, New York is precluded from terminating the business of an airport dealer who, under sanction of federal customs laws, acquired "tax-free liquors for export" from out-of-state sources for resale exclusively to airline passengers, with delivery deferred until the latter arrive at foreign destinations.[2] "The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country . . . or another State."[3]

Amdt21.S2.4 Effect of Section 2 upon Other Constitutional Provisions

Twenty-First Amendment, Section 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.*

Notwithstanding the 1936 assertion that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth,"[1] the Court has now in a series of cases acknowledged that Section 2 of the Twenty-First Amendment did not repeal provisions of the Constitution adopted before ratification of the Twenty-First, save for the severe cabining of Commerce Clause application to the liquor traffic, but it has formulated no consistent rationale for a determination of the effect of the later provision upon earlier ones. In *Craig v. Boren*,[2] the Court invalidated a state law that prescribed different minimum drinking ages for men and women as violating the Equal Protection Clause. To the state's Twenty-First Amendment argument, the Court replied that the Amendment "primarily created an exception to the normal operation of the Commerce Clause" and that its "relevance . . . to other constitutional provisions" is doubtful. "'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.'"[3] The holding on this point is "that the operation of the Twenty-First Amendment does not alter the application of

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[1] Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964). The Court distinguished *Gordon v. Texas,* 355 U.S. 369 (1958) and *De Bary v. Louisiana,* 227 U.S. 108 (1913).

[2] Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).

[3] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 585 (1986) (citation omitted). *Accord*, Healy v. Beer Institute, 491 U.S. 324 (1989).

[1] State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 64 (1936). In *Craig v. Boren,* 429 U.S. 190, 206–07 (1976), this case and others like it are distinguished as involving the importation of intoxicants into a state, an area of increased state regulatory power, and as involving purely economic regulation traditionally meriting only restrained review. Neither distinguishing element, of course, addresses the precise language quoted. For consideration of equal protection analysis in an analogous situation, the statutory exemption of state insurance regulations from Commerce Clause purview, see Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 655–74 (1981).

[2] 429 U.S. 190 (1976).

[3] 429 U.S. at 206 (quoting P. Brest, Processes of Constitutional Decisionmaking–Cases and Materials 258 (1975).

the equal protection standards that would otherwise govern this case."[4] Other decisions reach the same result but without discussing the application of the Amendment.[5] Similarly, a state "may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment."[6]

The Court departed from this line of reasoning in *California v. LaRue*,[7] in which it sustained the facial constitutionality of regulations barring a lengthy list of actual or simulated sexual activities and motion picture portrayals of these activities in establishments licensed to sell liquor by the drink. In an action attacking the validity of the regulations as applied to ban nude dancing in bars, the Court considered at some length the material adduced at the public hearings which resulted in the rules demonstrating the anti-social consequences of the activities in the bars. It conceded that the regulations reached expression that would not be deemed legally obscene under prevailing standards and reached expressive conduct that would not be prohibitable under prevailing standards,[8] but the Court thought that the constitutional protection of conduct that partakes "more of gross sexuality than of communication" was outweighed by the state's interest in maintaining order and decency. Moreover, the Court continued, the second section of the Twenty-First Amendment gave an "added presumption in favor of the validity" of the regulations as applied to prohibit questioned activities in places serving liquor by the drink.[9]

A much broader ruling resulted when the Court considered the constitutionality of a state regulation banning topless dancing in bars. "Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs."[10] This recurrence to the greater-includes-the-lesser-power argument, relatively rare in recent years,[11] would if it were broadly applied give the states in the area of regulation of alcoholic beverages a review-free discretion of unknown scope.

In *44 Liquormart, Inc. v. Rhode Island*,[12] the Court disavowed *LaRue* and *Bellanca*, and reaffirmed that, "although the Twenty-first Amendment limits the effect of the Dormant

[4] 429 U.S. at 209–10.

[5] *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178–97 (1972) (invalidating a state liquor regulation as an equal protection denial in a racial context); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (invalidating a state law authorizing the posting of someone as an "excessive drinker" and thus barring him from buying liquor, as reconstrued in *Paul v. Davis,* 424 U.S. 693, 707–09 (1976)).

[6] Larkin v. Grendel's Den, 459 U.S. 116, 122 n.5 (1982).

[7] 409 U.S. 109 (1972).

[8] *Cf.* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (ban on live nude dancing in Borough); Doran v. Salem Inn, 422 U.S. 922 (1975) (ban on nude dancing in "any public place" applied to topless dancing in bars).

[9] 409 U.S. at 114–19. In *Doran v. Salem Inn,* 422 U.S. 922, 932–33 (1975), the Court described its holding in *LaRue* more broadly, saying that "we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program."

[10] New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 717 (1981).

[11] For a rejection of the argument in another context, contemporaneously with *Bellanca*, see Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 657–68 (1981). For use of the argument in the commercial speech context, see Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345–46 (1986); this use of the argument in *Posadas* was disavowed in *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). *See also* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), not addressing the commercial speech issue but holding state regulation of liquor advertisements on cable TV to be preempted, in spite of the Twenty-First Amendment, by federal policies promoting access to cable TV).

[12] 517 U.S. 484 (1996) (statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is not shielded from constitutional scrutiny by the Twenty-First Amendment).

Commerce Clause on a state's regulatory power over the delivery or use of intoxicating beverages within its borders, 'the Amendment does not license the States to ignore their obligations under other provisions of the Constitution,'"[13] and therefore does not afford a basis for state legislation infringing freedom of expression protected by the First Amendment. There is no reason, the Court asserted, for distinguishing between freedom of expression and the other constitutional guarantees (for example, those protected by the Establishment and Equal Protection Clauses) held to be insulated from state impairment pursuant to powers conferred by the Twenty-First Amendment. The Court hastened to add by way of dictum that states retain adequate police powers to regulate "grossly sexual exhibitions in premises licensed to serve alcoholic beverages." "Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations."[14]

Amdt21.S2.5 Effect on Federal Regulation

Twenty-First Amendment, Section 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.*

The Twenty-First Amendment does not oust all federal regulatory power affecting transportation or sale of alcoholic beverages. Thus, the Court held, the Amendment does not bar a prosecution under the Sherman Antitrust Act of producers, wholesalers, and retailers charged with conspiring to fix and maintain retail prices of alcoholic beverages in Colorado.[1] In a concurring opinion, supported by Justice Owen Roberts, Justice Felix Frankfurter took the position that if the State of Colorado had in fact "authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. . . . [Because] the Sherman Law . . . can have no greater potency than the Commerce Clause itself, it must equally yield to state power drawn from the Twenty-first Amendment."[2]

Following a review of the cases in this area, the Court has observed "that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'"[3] Invalidating under the Sherman Act a state fair trade-scheme imposing a resale price maintenance policy for wine, the Court balanced the federal interest in free enterprise expressed through the antitrust laws against the asserted state interests in promoting temperance and orderly marketing conditions. Because the state courts had found that the policy under attack promoted neither interest significantly, the Supreme Court experienced no difficulty in concluding that the federal interest prevailed. Whether more substantial state interests or means more suited to promoting the state interests would survive attack under federal legislation must await further litigation.

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[13] 517 U.S. at 516 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984)).

[14] 517 U.S. at 515.

[1] United States v. Frankfort Distilleries, 324 U.S. 293, 297–99 (1945).

[2] 324 U.S. at 301–02. For application of federal laws, *see* William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939); Kiefer-Stewart Co. v. Jos. E. Seagram & Sons, 340 U.S. 211 (1951); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951); Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966); Burke v. Ford, 389 U.S. 320 (1967).

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

Congress may condition receipt of federal highway funds on a state's agreeing to raise the minimum drinking age to twenty-one, the Twenty-First Amendment not constituting an "independent constitutional bar" to this sort of spending power exercise even though Congress may lack the power to achieve its purpose directly.[4]

Section 3—Ratification Deadline

Amdt21.S3.1 Ratification Deadline

Twenty-First Amendment, Section 2:

> *This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.*

The Twenty-First Amendment was proposed by Congress on February 20, 1933, when it passed the House[1], having previously passed the Senate on February 16.[2] It appears officially in 47 Stat. 1625. Ratification was completed on December 5, 1933, when the thirty-sixth state (Utah) approved the amendment, there being then forty-eight states in the Union. On December 5, 1933, Acting Secretary of State Phillips certified that it had been adopted by the requisite number of states.[3]

[4] South Dakota v. Dole, 483 U.S. 203, 210 (1987).

[1] Cong. Rec. (72d Cong., 2d Sess.) 4516.

[2] *Id.* at 4231.

[3] 48 Stat. 1749.