

The Twenty-First Amendment and the End of Prohibition, Part 5: State Power over Alcohol and Individual Rights

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This Legal Sidebar is the fifth in a six-part series that discusses the [Twenty-First Amendment to the Constitution](#). The Twenty-First Amendment repealed the [Eighteenth Amendment](#), which prohibited the manufacture, sale, or transportation of “intoxicating liquors” for “beverage purposes” within the United States. As interpreted by the Supreme Court, Section 2 of the Twenty-First Amendment [recognizes](#) that the states may regulate or prohibit alcoholic beverages within their jurisdictions for legitimate, nonprotectionist purposes, such as health or safety.

Since the Twenty-First Amendment’s ratification in 1933, the Supreme Court has grappled with difficult questions about how the Constitution allocates the power to regulate alcoholic beverages between the federal and state governments. Such questions implicate the concept of [federalism](#), which refers to the division and sharing of power between the national and state governments. Accordingly, understanding how the Twenty-First Amendment interplays with other constitutional provisions may assist Congress in its legislative activities. Additional information on this topic will be published in the [Constitution Annotated: Analysis and Interpretation of the U.S. Constitution](#).

State Power over Alcohol and First Amendment Free Speech and Religion Clauses

Much of the Supreme Court’s Twenty-First Amendment jurisprudence has addressed the extent to which the federal government’s power over [interstate and foreign commerce](#) limits the states’ regulatory authority over imported alcoholic beverages. However, the Court’s decisions have also explored the relationship between the states’ Section 2 powers and provisions of the Constitution that specifically protect individual rights from state interference. In this vein, the Court has determined that the Twenty-First Amendment does not authorize the states to ignore the [First Amendment’s](#) protections for freedom of speech and religion or the [Fourteenth Amendment’s](#) guarantees of due process and equal protection of the laws.

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The Court's jurisprudence on the relationship between the First and Twenty-First Amendments evolved during the late 20th century. Initially, in *California v. LaRue*, the Court held that states could restrict sexually explicit entertainment in establishments licensed to sell liquor for on-premises consumption, even if such entertainment might otherwise merit First Amendment protection. The Court suggested that such state restrictions were entitled to a "presumption" of validity under the Twenty-First Amendment and that the sexually explicit performances at issue in *LaRue* could be considered conduct that lacked a significant communicative element. Later cases clarified that a state's Twenty-First Amendment interests in regulating liquor sales could "outweigh" First Amendment interests.

However, in a 1996 decision, *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court partially overruled *LaRue*, determining that states cannot rely on their Twenty-First Amendment powers to infringe on speech protected by the First Amendment. Nonetheless, the Court suggested that states could potentially exercise their general police powers to "prohibit the sale of alcoholic beverages in inappropriate locations" even if such a ban might incidentally restrict certain First Amendment-protected activity, such as topless dancing, in establishments licensed to sell alcoholic beverages.

The Supreme Court also confirmed in *44 Liquormart* that states must comply with the First Amendment when regulating alcoholic beverage advertising. The Court invalidated Rhode Island laws that completely prohibited public dissemination of accurate information about retail liquor prices. The Court rejected the state's attempt to rely on the Twenty-First Amendment to prohibit commercial speech protected by the First Amendment, writing that Rhode Island had "failed to carry its heavy burden of justifying its complete ban on price advertising."

In addition to confirming that the Twenty-First Amendment does not qualify First Amendment guarantees of freedom of expression, the Supreme Court has held that 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." The Establishment Clause forbids the government from making any law "respecting an establishment of religion." In *Larkin v. Grendel's Den, Inc.*, the Court struck down, as a violation of the Establishment Clause, a Massachusetts law that gave "churches and schools the power effectively to veto applications for liquor licenses within a 500-foot radius." According to the Court, the law had the impermissible effect of advancing religion: the veto power could be "employed for explicitly religious goals," and the appearance of a "joint exercise of legislative authority by Church and State provide[d] a significant symbolic benefit to religion." The law also "enmeshed churches in the exercise of substantial governmental powers contrary to [the Court's] consistent interpretation of the Establishment Clause." According to the Court, "few entanglements [between Church and State] could be more offensive" than delegating "discretionary governmental powers" to religious groups. (Although the Supreme Court has not specifically overruled *Larkin*, the Court has since "abandoned" the Establishment Clause test it applied in *Larkin*, known as the *Lemon test*, in favor of examining "historical practices and understandings" when evaluating the merits of Establishment Clause challenges. It is unclear whether this analytical approach would have altered *Larkin's* outcome.)

Alcohol Regulation and the Fourteenth Amendment Due Process and Equal Protection Clauses

The Supreme Court has also confirmed that a state cannot ignore the Fourteenth Amendment's Due Process and Equal Protection Clauses when it relies on its Twenty-First Amendment powers to regulate alcoholic beverages. Among other things, the Fourteenth Amendment's Due Process Clause requires state actors to provide certain procedural protections before they deprive a person of any protected life, liberty, or property interest. In 1971, the Court held that the Fourteenth Amendment requires a state to provide an individual with due process when a state's liquor law would deprive an individual of a protected liberty interest. In *Wisconsin v. Constantineau*, the Hartford police chief, enforcing a Wisconsin statute intended

to combat excessive drinking, posted a notice in the city's retail liquor stores forbidding sales or gifts of liquor to a local adult resident for one year. The Court struck down the Wisconsin statute, determining that the law prevented an individual from buying liquor without adequate notice or the opportunity for an impartial hearing. The Court determined that the state could not rely on its Twenty-First Amendment authority or its general police powers to enact a statute that lacked such procedural due process safeguards.

In the Fourteenth Amendment [equal protection](#) context, the Supreme Court has held that it will closely scrutinize state liquor laws that single someone out based on a suspect classification (e.g., [race](#)) or quasi-suspect classification (e.g., [gender](#)). In *Craig v. Boren*, the Court determined that the Twenty-First Amendment did not override Fourteenth Amendment equal protection guarantees that prevent a state from drawing invidious distinctions based on gender. *Craig* involved a challenge to an Oklahoma law prohibiting the sale of beer with a low alcohol content to males under 21 years of age and females under 18. The Court held that this "gender-based differential" in minimum drinking ages amounted to a "denial of the equal protection of the laws to males aged 18–20." Differential treatment of young men was not "substantially related" to achieving the state's asserted objective of traffic safety, and the Twenty-First Amendment could not "save the invidious gender-based discrimination from invalidation." The Court stated, "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."

By contrast, in [several cases decided](#) during the early to mid-20th century, the Supreme Court [held](#) that the Fourteenth Amendment's Equal Protection Clause did not prevent states from exercising their Twenty-First Amendment powers to discriminate against out-of-state liquor products. Although it is unclear whether these rulings reflect the current state of Fourteenth Amendment law, the Court's jurisprudence from this era suggests that such economic legislation is subject to a lesser form of Fourteenth Amendment scrutiny because it does not differentiate between individuals based on a suspect or quasi-suspect classification. Nonetheless, since rejecting Fourteenth Amendment equal protection challenges to laws that discriminate against out-of-state economic interests, the Court has held that such laws may be invalid under the [Dormant Commerce Clause](#).

Click [here](#) to continue to Part 6.

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