The Constitutionality of Oklahoma’s Prohibition on Liquor Advertising

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NOTES AND COMMENTS

THE CONSTITUTIONALITY OF OKLAHOMA'S PROHIBITION ON LIQUOR ADVERTISING

I. INTRODUCTION*

The twenty-first amendment to the United States Constitution repealed national prohibition as provided under the eighteenth amendment and allocated the power to regulate the "transportation or importation" of intoxicating liquors to the states. Under this authority, a state may absolutely forbid the use or sale¹ of liquor within its jurisdiction or enact reasonable measures to control that commodity.²

In Oklahoma, legislative enactments control all phases of the liquor industry, from importation and distribution, to sale and consumption of alcoholic beverages.³ Enforcement of these regulations is delegated to a state policing agency, the Oklahoma Alcoholic Beverage Control Board.⁴ This agency is also empowered to adopt reasonable measures to control the sale and consumption of alcoholic beverages.⁵

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¹ See, e.g., United States v. Frankfort Distilleries, 324 U.S. 293, 300 (1944) (Frankfurter, J., concurring): "[A] state may enact any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high, or insurmountable."
³ Okla. Stat. tit. 37, § 507 (1971). The powers and duties of the Board are described here. Id. § 514. It is delegated the responsibility for the supervision and inspection of liquor businesses; issue, suspension, and revocation of liquor licenses; promulgation of rules and standards; conduct

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1. U.S. Const. amend. XXI:
   Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
   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 law thereof, is hereby prohibited.
   Section 3. 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.

2. See, e.g., United States v. Frankfort Distilleries, 324 U.S. 293, 300 (1944) (Frankfurter, J., concurring): "[A] state may enact any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high, or insurmountable."


4. Okla. Stat. tit. 37, § 507 (1971). The powers and duties of the Board are described here. Id. § 514. It is delegated the responsibility for the supervision and inspection of liquor businesses; issue, suspension, and revocation of liquor licenses; promulgation of rules and standards; conduct
police regulations beyond the extensive statutory mandates concerning liquor. One example is the Board's power to regulate the signs of establishments adjacent to liquor stores. A few of these provisions have been the subject of increasing public controversy. A frequent criticism of the ABC Board concerns its selective enforcement of state liquor laws. Another particularly volatile issue is Oklahoma's proscription of liquor-by-the-drink. Preferring the private club concept of sale and consumption, Oklahoma is currently the only state in the nation to forbid the sale of liquor-by-the-drink. A recent referendum campaign in favor of liquor-by-the-drink has sparked heated debate concerning the entire subject of alcoholic beverages.

Although Oklahoma's prohibition of liquor advertising is less newsworthy than the "liquor-by-the-drink" issue, it involves constitutional questions previously unaddressed by the courts of this state. The Oklahoma Constitution provides that: "It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'" Additionally, Oklahoma statutes provide that:

It shall be unlawful for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma except one sign at the retail outlet bearing the words "Retail Alcoholic Liquor Store" or any combination of such words or any of them and no letter in any such

of hearings concerning liquor violations; compilation of informational statistics; and the enforcement of intoxicating liquor rules, regulations and statutes.

5. Id. This comment uses the words liquor, alcoholic beverages, intoxicating beverages, and alcohol interchangeably. These categories include all such intoxicants containing more than 3.2% alcohol by weight. OKLA. STAT. tit. 37, § 163.1 (1971) (intoxicating beverages). See also id. § 506(1), (2), (3).


8. OKLA. CONST. art. XXVII, § 4 forbids the operation of an "open saloon." This is defined as "any place, public or private, wherein alcoholic beverage is sold or offered for sale, by the drink; or, sold, offered for sale, or kept for sale for consumption on the premises."

This does not prohibit one from taking his own bottle to a private place and having drinks therefrom or paying to have a drink mixed. However, the drink must be from his own bottle, and his bottle may not become commingled with other bottles so as to lose its personal identification. Barnes v. State ex rel. Wolf, 383 P.2d 635 (Okla. 1963). Likewise, separate bottles for each member of the party are required and "house bottles" are forbidden.

OKLA. STAT. tit. 37, § 505 (1971) provides in part: "[N]othing herein shall prevent the possession and transportation of alcoholic beverages for personal use of the possessor, his family, and guests..."

9. See generally Scott, supra note 7, at 47 (data from earlier, unsuccessful liquor-by-the-drink campaigns, present enforcement controversies and policy arguments on both sides).

10. OKLA. CONST. art. XXVII, § 5, cl. 5.
sign shall be more than four (4) inches in height or more than three (3) inches in width, and if more than one (1) line is used the lines shall not be more than one (1) inch apart.\textsuperscript{11}

The liquor advertising ban effectively silences all commercial advertising of liquor by the Oklahoma media except for the one sign allotted each liquor store. Note that newspapers and magazines published outside the state and intended for nationwide distribution, but which are sold in Oklahoma, are not prohibited from including alcoholic beverage advertising.\textsuperscript{12} Similarly, a newspaper printed and published in Oklahoma, but not circulated in the state, is not subject to the advertising proscription. However, an Oklahoma publication which circulates both inside and outside the state may not advertise liquor pursuant to Oklahoma law.\textsuperscript{13} National television and radio broadcasts relayed through state affiliates must have liquor commercials blocked out by the local stations in order to conform to state law. If the commercial is broadcast to Oklahoma viewers, the liquor manufacturer who purchased the national advertising space must show that it took reasonable efforts to have the commercial preempted in Oklahoma.\textsuperscript{14}

Retailers, wholesalers, distributors, and manufacturers of alcoholic beverages are all subject to the statutory proscriptions. After issuing

\textsuperscript{11} Okla. Stat. tit. 37, § 516 (1971). The prohibition of the advertising of alcoholic beverages in § 516 covers instances not prohibited by the constitutional ban on advertising the sale of alcoholic beverages. 11 Okla. Op. Att'y Gen. 453, 454 (1976) defines "advertise" as: "to give notice of," "to announce publicly," or "to make known." In Okla. Op. Att'y Gen. (65-362) (1965), the Attorney General stated that an advertisement including recipes for mixed drinks would be prohibited even though it did not refer to the sale of such beverages. The standard for determining the violation of § 516 then, is whether an advertisement tends to promote the consumption of alcoholic beverages. This comment will treat the statutory and constitutional provisions together, as a total prohibition of advertising alcoholic beverages, beyond the narrow exception of the "Retail Alcoholic Liquor Store" sign.

\textsuperscript{12} 9 Okla. Op. Att'y Gen. 418, 419-20 (1976) explains: "Article XXVII, Section 5 of the Oklahoma Constitution, and 37 O.S. 1971, § 516 do not prohibit liquor advertising in a magazine and/or program published and printed outside the State of Oklahoma by a publisher headquartered outside the State of Oklahoma, and to be distributed in all fifty states. . . ."

\textsuperscript{13} 1 Okla. Op. Att'y Gen. 28, 30-31 (1968) states: "[A] newspaper published in Oklahoma which may have circulation both inside and outside the state may not accept advertisements of alcoholic beverages although . . . an Oklahoma publisher may accept alcoholic beverage advertisements for newspaper issues not circulated within Oklahoma."

\textsuperscript{14} Oklahoma Alcoholic Bev. Control Bd. v. Heublein Wines, Int'l, 566 P.2d 1158, 1160 (Okla. 1977). In this case, the license of a liquor manufacturer was not revoked since there was no evidence of intentional or willful telecast of wine commercials. The court also found Heublein to have prudently taken action to assure compliance with Oklahoma advertising proscriptions. Id. at 1161.
warnings of the illegality of any liquor advertisement, the Alcoholic Beverage Control Board may take action against the advertiser by revoking the license to sell that commodity or imposing a fine, misdemeanor jail sentence, or both.

Advertising restrictions are generally classified as being within the expanded state police powers attributable to the twenty-first amendment. Although the constitutionality of Oklahoma's advertising proscription was upheld by the state supreme court as early as 1909, cases have continued to challenge similar advertising limitations in other states as violative of the United States Constitution. In 1977, the Oklahoma Supreme Court held that the regulations do not cause an undue burden on interstate commerce in light of expanded state authority under the twenty-first amendment. In 1980, that same court upheld state liquor advertising regulations when subjected to a first amendment challenge. Generally, Oklahoma has favored state regulations.

15. OKLA. STAT. tit. 37, § 528(1) (1971) states: “Any license issued hereunder shall, by order of the Board, after due notice and hearing: (a) be revoked, or suspended for such period as the Board deems appropriate, if the Board finds that the licensee has wilfully violated any of the provisions of this Act...”

In Oklahoma Alcoholic Bev. Control Bd. v. Heublein Wines, Int'l, 566 P.2d 1158, 1160 (Okla. 1977) the court held that § 528(1) was the applicable penalty provision rather than § 524(c) which imposed a “strict liability” standard. See Note, Application of the Twenty-first Amendment to Interstate Alcoholic Beverage Advertising, 3 OKLA. CITY U.L. REV. 102, 103-04 (1978).

16. OKLA. STAT. tit. 37, § 566 (1971) sets out the general penalty provision for violation of the various liquor regulations:

Any person who shall violate any provision of this Act for which no specific penalty is prescribed shall be guilty of a misdemeanor and be fined not more than Five Hundred Dollars ($500.00), or imprisoned in the county jail for not more than six (6) months, or both such fine and imprisonment.


18. E.g., Premier-Pabst Sales Co. v. State Bd. of Equalization, 13 F. Supp. 90 (S.D. Cal. 1935) (upholding a statute regulating the size and location of alcohol signs on premises serving liquor on the basis of the twenty-first amendment); Advertiser Co. v. State, 193 Ala. 418, 69 So. 501 (1915) (upholding total ban on liquor advertising from claim based on the contract clause); State v. Delaye, 193 Ala. 500, 68 So. 993 (1915) (dismissing a commerce clause challenge to liquor advertising prohibition statute); Commonwealth v. Anheiser-Busch, 181 Va. 678, 26 S.E.2d 94 (1943) (sustaining state agency's power to restrict liquor advertising on police power of state).

19. Oklahoma Alcoholic Bev. Control Bd. v. Heublein Wines, Int'l, 566 P.2d 1158, 1162-63 (Okla. 1980) held: “Although television stations are engaged in interstate commerce and Oklahoma laws prohibiting advertising the sale of alcoholic beverages [via television] have unquestionably imposed a restraint upon that commerce, these facts alone do not justify a holding that they impose a constitutionally impermissible burden on interstate commerce.”

20. Oklahoma Alcoholic Bev. Control Bd. v. Burris, 612 P.2d 257 (Okla. 1980). The court upheld a regulation of the Alcoholic Beverage Control Board restricting the signs which may be placed on or near premises adjacent to retail liquor stores. Addressing the first amendment challenge, the Oklahoma Supreme Court generally discussed the prohibition of all state liquor advertising:
latory powers under the twenty-first amendment over constitutional objections derived from other provisions to the point of implying limitless state control over all liquor issues.

A constitutional challenge to Oklahoma's restriction of liquor advertising currently takes on a new dimension in light of the United States Supreme Court's expansion of first amendment protection to the area of commercial speech. There is no disputing the power of any state to absolutely forbid the importation of alcohol within state jurisdictional boundaries. However, once the sale of alcohol is allowed, the state's ability to regulate the advertising of that commodity becomes increasingly questionable as restrictions must be reasonable in light of federal constitutional requirements. This comment addresses two issues: The extent to which advertising of alcoholic beverages is entitled to first amendment protection; and whether the expansion of state police powers under the twenty-first amendment permits Oklahoma's prohibition of this protected speech. First, the police powers of the state as granted by the twenty-first amendment will be considered as well as the restraints courts have imposed on those powers. Of particular interest is the questionable ability of the state to infringe on first amendment freedom of speech in furtherance of liquor regulations. Second, the validity of any distinction between commercial and fully-protected forms of speech will be scrutinized in light of the theoretical underpinnings of the first amendment. Third, the nature of the speech will be examined to determine which types of advertisements are entitled to first amendment protection. Finally, the constitutional status of particular liquor advertisements will be discussed, applying the commercial speech decisions announced in the 1980 Term of the Supreme Court.

Historically, however, a state has greater powers to regulate speech in the form of commercial advertisement than any other form... This, coupled with the broad grant of power vested in the states by the twenty-first amendment, leaves no doubt (that the) Board has the power to allow advertisement or forbid it entirely if it concerns the sale of alcohol.

Id. at 259 (footnote omitted).

Original publication of this case in the advance sheets of the unofficial reporter was withdrawn by the Oklahoma Supreme Court before publication of the final edition of volume 612 of the Pacific Reporter Second Series.


II. STATE AUTHORITY TO REGULATE LIQUOR UNDER THE TWENTY-FIRST AMENDMENT

In 1919, responding to public outcry over liquor violations in dry states, state legislatures ratified the eighteenth amendment and national prohibition.23 However, after fourteen years of difficult implementation, the eighteenth amendment was repealed by section one of the twenty-first amendment24 while the power to control liquor regulation was explained in section two: "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."25 From the language of this provision, it is unclear whether state power to control alcohol is limited solely to the transportation and importation aspects of commerce or whether it extends beyond these areas to all measures affecting the commodity. More importantly, the degree of exclusive power allowed to the states free of federal constraint is uncertain.26 The precise proportion of delegated powers under the ambiguous wording of section two is the main issue of most state liquor cases.

The United States Supreme Court has examined the various interpretations of section two many times since the ratification of the twenty-first amendment. The choices include absolute state power, concurrent state and federal power, and a middle course between both extremes. Early cases followed the absolutist position of deference to state liquor control.27 This sentiment is generally supported by examination of prior national liquor enactments28 as well as reference to con-

23. U.S. CONST. amend. XVIII (1919)(repealed U.S. CONST. amend. XXI, §1 (1933)) states: Section 1. After one year from the ratification of this article 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 is hereby prohibited. Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation. Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of submission hereof to the States of the Congress. Congress enacted the Volstead Act, 41 Stat. 305 (1919) (repealed 49 Stat. 872 (1935)), as the enforcement measure of the eighteenth amendment.
24. U.S. CONST. amend. XXI.
25. Id. § 2.
26. Discussing the growth and limitations on this power, see notes 32-104 infra and accompanying text.
27. See, e.g., State Bd. of Equalization v. Young's Market, 299 U.S. 59 (1936); see cases listed in note 40 infra and accompanying text.
gressional hearings and Senate floor debates concerning the twenty-first amendment. The broad grant of state authority indicated by early opinions was severely curtailed by later cases which limited state power in particular areas traditionally occupied by federal authority. In order to appreciate the shifting from seemingly limitless state power trends of the court to more federal intrusion in the area, some cases will be examined according to the various constitutional areas affected.

Objections under the commerce clause involve four additional types of federal challenges to extended state authority in that same general area. These challenges include matters concerning imports and exports, federal enclaves, shipment of liquor through states, and antitrust violations. Likewise, the fourteenth amendment discussion will explore due process and equal protection challenges to state liquor regulations. This brief inquiry into the extent of state powers under the twenty-first amendment is intended to ascertain the effect state regulatory measures may have on the Bill of Rights. Finally, the first amendment cases will

26 Stat. 313) expanded traditional state police powers by allowing the regulation of interstate liquor shipments after reaching the state of their ultimate destination. Rhodes v. Iowa, 170 U.S. 412 (1898). However the commerce clause still operated to prohibit more extensive interstate regulatory measures. Scott v. Donald, 165 U.S. 58 (1897). To further increase state powers, in 1913 Congress enacted the Webb-Kenyon Act, 27 U.S.C. § 122 (1976) (originally enacted as Act of Mar. 1, 1913, ch. 90, 37 Stat. 699) which exempted state liquor regulations governing shipment and transportation from the ordinary operation of the commerce clause. Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917). A pertinent part of the Act reads: "The shipment or transportation . . . of any . . . intoxicating liquor . . . from one State . . . into any other State . . . which . . . is intended . . . to be received . . . or in any manner used, . . . in violation of any law of such State . . . is hereby prohibited."

29. See 76 Cong. Rec. 64-4172 (1933). Senator Wagner, a sponsor of the amendment, advocated total state control over alcohol in belief that local responsibility for "liquor problems" was most effective. Id. at 4144. Advocating a similar position was Senator Blaine, the Chairman of the Senate Judiciary Committee which authored the amendment: "This proposal is restoring to the states, in effect, the right to regulate commerce respecting a single commodity . . . namely, intoxicating liquor." Id. at 4141.

Supporting state power in alcohol regulation, the Senate rejected an amendment proposing concurrent power between federal and state governments in that area, adopting instead, the present language of § 2.

Though any attempt to ascertain legislative intent is by the nature of the body, futile, and contrary opinions were certainly manifested, 76 Cong. Rec. 4168 (1933), it would seem that § 2 of the twenty-first amendment was intended to return to the states the police powers to regulate alcoholic beverages in a manner which would ordinarily be forbidden by the commerce clause.

For a detailed examination of the state conventions ratifying the twenty-first amendment, see E. Brown, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1970).

30. See notes 48-104 infra and accompanying text.

be examined to determine whether the twenty-first amendment allows state infringement on commercial speech afforded first amendment protection.

A. **Commerce Clause**

Early Supreme Court cases appeared to grant virtually limitless power to the state in regulating liquor. Most of the first cases challenging these regulatory measures were based on violations of the commerce clause. 32 State Board of Equalization v. Young's Market Co. 33 concerned a California wholesalers' challenge to that state's $500 fee for wholesale beer importers to which domestic wholesalers were not subject. The California importation fee was disputed as violating both the commerce clause and the equal protection clause of the constitution. The three-judge federal district court found for the liquor wholesalers. 34

Reversing the decision of the lower court, Justice Brandeis relied heavily on the twenty-first amendment to sustain the importation tax from both constitutional challenges. Emphasizing that prior to the ratification of the twenty-first amendment, such a tax would have violated the commerce clause, 35 the Court held that the amendment had given the states broad powers to regulate alcoholic beverages without violating the commerce clause. Addressing the equal protection issue, Justice Brandeis flatly declared: "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth." 36 The court nevertheless explained that the California taxation scheme rested on "conditions requiring difference of treatment," 37 thereby implying that a rational basis existed for the classification. Despite the harsh dismissal of the fourteenth amendment classification indicated by the quotation, Justice Brandeis specifically stated that the Court was not declaring that the twenty-first amendment freed state regulations from all other constitutional restrictions on its police power. 38

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32. U.S. Const. art. 1, § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
33. 299 U.S. 59 (1936).
34. 12 F. Supp. 140, 142 (S.D. Cal. 1935). The lower court discussed the twenty-first amendment issue only briefly.
35. 299 U.S. at 62.
36. Id. at 64.
37. Id.
38. Id. Responding to the plaintiffs' contention that to sustain the California tax would produce such a result, the Court replied, "[t]he question for decision requires no such generalization." Id.
cision was limited solely to interpreting the twenty-first amendment as conferring upon the state the power to dictate the conditions of liquor importation. 39

Despite the limitations imposed on states' power by the *Young's Market* opinion, that holding was greatly expanded in subsequent decisions over unsuccessful federal commerce clause objections. 40 Upholding far more restrictive state statutes than that considered in *Young's Market*, the later decisions nevertheless relied on that opinion in granting broad regulatory authority to the states. The court summarized the expansive absolutist reasoning of these holdings: "[T]he right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." 41

Following the *Young's Market* approach, a 1966 case, *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 42 held that a New York price fixing statute was not invalidated by the commerce clause. Even though such a sweeping regulatory measure might not have been protected by the enhanced police powers of the state, the court weighed the state's goal of protecting in-state customers from price discrimination and the concommitant disadvantage of higher prices against the burden on the commerce clause to allow this rational regulatory measure to stand. 43

Emphasizing that the twenty-first amendment had not totally repealed the commerce clause, *Seagram* nevertheless indicated that a state is to be accorded wide latitude as to its choice of means in pursuit of a permissible end. 44

From these cases it seems an accurate observation that "the regulation of the liquor traffic is one of the oldest and more untrammeled of legislative powers." 45 Despite the sweeping language of the decisions discussed above, the regulatory measures they involve have been dis-

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39. *Id.* at 62.
41. 305 U.S. at 394, (emphasis added).
43. *Id.* at 42-43.
tinguished as exceptions to the commerce clause by the twenty-first amendment rather than exemptions from all federal constitutional constraints. The seemingly broad grant of state authority implicit in the early decisions is steadily reduced by the later assertion of federal power in areas of particular national concern. No longer does the general state interest in alcoholic beverages outweigh the concentrated federal interest in specific national issues. Claims of absolute state power quickly diminish in the face of increased federal controls in cases involving imports and exports, federal enclaves, shipments through states, and antitrust violations. The expansive holdings of the early cases are sharply narrowed by curtailed applications of state authority in specialized areas.

1. Import-Export

The power to legislate concerning imports and exports is one constitutionally allocated to the national government. In Department of Revenue v. James B. Beam Distilling Co., the court addressed a conflict between the import-export clause and the twenty-first amendment. Kentucky sought to tax liquor which Beam had imported from Scotland into warehouses in that state for distribution in the United States. The Kentucky Court of Appeals held for the importer. Affirming the Kentucky court's decision, the United States Supreme Court explained the effect of the twenty-first amendment on the im-

46. Id. at 206-17; see United States v. Frankfort Distilleries, 324 U.S. 293, 300 (1945) (Frankfurter, J., concurring):

Before that Amendment . . . alcohol was for constitutional purposes treated in the abstract as an article of commerce just like peanuts and potatoes, . . . The Twenty-First Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of a State to control, and to control effectively, the traffic in liquor within its borders.

But see California v. LaRue, 409 U.S. 109 (1972): "[T]he broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." Id. at 114-15.

47. See discussion infra notes 52-76 and accompanying text.

48. U.S. CONS.T. art. I, § 10, cl. 2: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws . . . ."


50. This issue was raised earlier in William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939) (per curiam). Upholding a federal statute controlling the labelling of imported liquor, the Court dismissed the importer's argument that total state control granted by the twenty-first amendment prevented any federal interference by flatly stating that "we see no substance in this contention." Id. at 173. The opinion deals primarily with jurisdictional inadequacy, id. at 172-75, however, and left the issue partially unresolved until the Beam decision.

51. 367 S.W.2d 267 (Ky. 1963).
port-export clause. Distinguishing between the general authority granted to the states by the twenty-first amendment and the flat prohibition of state duties by the import-export clause, Justice Stewart’s opinion clearly favored the particular prohibition over the general power of the states.

To sustain the tax which Kentucky has imposed in this case would require nothing short of squarely holding that the Twenty-First Amendment has completely repealed the Ex-Port-Import Clause so far as intoxicants are concerned. Nothing in the language of the Amendment nor in its history leads to such an extraordinary conclusion.

Although Justice Stewart’s distinction does not account for the reasoning behind the subordination of the commerce clause to the twenty-first amendment, in light of the superiority of the import-export clause, the decision clearly marks an inroad into the breadth of state power concerning liquor. The untrammelled power of the states declared in earlier opinions began to develop federal limitations despite broad commerce clause exceptions.

2. Federal Enclaves

State liquor regulations have been sharply narrowed by limiting state power under the twenty-first amendment to the territorial jurisdiction of that entity. This distinction becomes particularly important where distinct areas within state boundaries are subject to varying quantities of federal jurisdiction by some prior agreement between state and federal governments.

In an early enclave case involving the transportation of alcohol from outside the state into a national park within state borders the
Court reasoned that the requirement of transportation into the state "for delivery or use therein" was not met since the destination of the liquor shipment was not within state territorial jurisdiction. The Court further explained, "Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable." Equating the twenty-first amendment with territorial jurisdiction, state authority under that provision can be defeated even within geographical state boundaries. This approach of strict jurisdictional limitation has been followed and expanded by subsequent cases. The Court has liberally construed state statutes regulating shipments "into the state" in the same manner that it interpreted the identical phrase in section two. By restricting the power to act in furtherance of the twenty-first amendment with principles of territorial jurisdiction, shipments into an area within the state under exclusive federal jurisdiction are not subject to full state liquor regulations.

The federal enclave cases illustrate further that liquor control granted to the states is neither exclusive nor insurmountable. Rather, the territorial jurisdictions of each government seem to determine the limits of authority each may exert over alcoholic beverages shipped to or from the enclave.

3. Shipments Through a State

State statutes which unduly burden the shipment of goods through a state are normally held unconstitutional under the commerce clause. In the case of alcoholic beverages, the commerce clause has been liberally interpreted to allow the reasonable exercise of police

the same importation fee as in Young's Market on carriers importing alcohol into Yosemite National Park.

57. Id. at 538.
58. Id.
59. E.g., United States v. Mississippi Tax Comm'n, 412 U.S. 363 (1973) (exempting military bases under exclusive federal jurisdiction from a state marketing restriction even though liquor consumption was not limited to the enclave).
60. Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944) (interpreting the language of OKLA. STAT. tit. 37, § 41 (1941)(repealed 1947) to avoid addressing the constitutional issues raised by the statute.)
61. "[A]bsent an appropriate express reservation—which is lacking here—the Twenty-First Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into the territory over which the United States exercises exclusive jurisdiction." United States v. Mississippi Tax Comm'n, 412 U.S. 363, 375 (1972); see Note, The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors, 75 COLUM. L. REV. 1578, 1589 (1975).
powers by the state with regard to liquor being shipped through it for a destination beyond state borders. Without mentioning the twenty-first amendment, early cases relied solely on traditional police powers to uphold reasonable state liquor regulations for through shipments. In a later opinion, the Court explained that a state may regulate through shipments in a reasonable manner to prevent any unlawful in-state diversion of the commodity. The regulatory measures involved in that case were far more stringent than those previously considered. However, without utilizing the additional authority granted by the twenty-first amendment, the Court held that the commerce clause was not violated by the state regulations in furtherance of its police power. In a concurring opinion, Justice Frankfurter stated that even though he found the state regulations to violate the commerce clause, the twenty-first amendment authorized such circumvention of that federal power. He reasoned: "Having the power to prohibit liquor from coming into a State, a State may take measures against frustration of that power by resort to the claim that liquor passing through a State enjoys the protection of the Commerce Clause."

4. Antitrust

Under the Sherman Antitrust Act, the statutory proscriptions of collusive price-fixing have been applied to alcoholic beverages as well as normal commodities. In 1945, the Court held that a multi-state price-fixing scheme involving retailers, wholesalers, and manufacturers was not insulated from federal operation of the Sherman Act due to state power granted by the twenty-first amendment.

In a 1980 case, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., the Court held that the twenty-first amendment did not prevent the operation of the Sherman Antitrust Act, even though


E.g., Duckworth v. Arkansas, 314 U.S. 390 (1941) (upheld a statute requiring the acquisition of a permit for a nominal fee before transporting alcohol through the state).

Id. at 396.


Id. at 137.

Id. at 140 (Frankfurter, J., concurring).

Id. at 142.


the Act was adopted under the commerce power of Congress.\footnote{72} Deliver-
ing the majority opinion, Justice Powell traced the judicial history of state regulatory power under the amendment but concluded that constitutional interests of the federal government, particularly the commerce clause, are not abolished in the face of state liquor regulations.\footnote{73}

These decisions demonstrate 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.”\footnote{74}

The Court then concluded that the federal interest in a competitive economy outweighed the unsubstantiated state interest in promoting temperance and the protection of small retailers through resale price maintenance.\footnote{75}

Even though earlier cases showed twenty-first amendment superiority to federal commerce clause interests, a statutory scheme derived from that subordinated provision was not powerless in the liquor regulation area. Dissenting in an earlier case, Justice Black summarized the relationship between state and federal governments in antitrust matters:

\begin{quote}
\footnote{72} \textit{Id.} at 108-10, 114.
\footnote{73} \textit{Id.} at 108-09.
\footnote{74} \textit{Id.} at 110 (citing \textit{Hostetter v. Idlewild Bon Voyage Liquor Corp.}, 377 U.S. 324, 332 (1964)); see Epstein v. Lordi, 261 F. Supp. 921 (D.N.J. 1966) \textit{aff'd per curiam}, 389 U.S. 29 (1967) which states:

The Federal scheme does not preempt all State regulation merely because commerce is affected. This possibility was implicitly rejected in \textit{Hostetter}. Nor is there an explicit conflict between the direction of the Federal and State statutes as such. Rather, the significance of the Federal scheme lies in the fact that it delineates both the local and national interests which must be weighed in assessing the “reasonable necessity” of the burden imposed by the wholesale license requirement. In other words, the Court must determine whether the burden imposed on foreign commerce, and on the national interest therein, is justified by “the character of the local interests and the available means of protecting them.”

\textit{Id.} at 936-37.
\footnote{75} 377 U.S. at 113-14. The Court noted the unconvincing statistics cited in support of the resale price maintenance regulations. Citing the state supreme court, Justice Powell agreed that the small correlation between price-fixing policies and per capita liquor consumption revealed by studies “at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance.” \textit{Id.} at 112.
\end{quote}
Granting the state's full authority to determine the conditions upon which liquor can come into its territory and what will be done with it after it gets there, it does not follow from that fact, that the United States is wholly without power to regulate the conduct of those who engage in interstate trade outside the jurisdiction of the state. . . .

B. The Fourteenth Amendment

Decisions interpreting the relationship between the fourteenth and the first amendment are particularly important in determining the constitutionality of Oklahoma's liquor advertising prohibitions since it is through the fourteenth amendment that the first amendment is applied to the states. Increased judicial deference to both the due process and equal protection clauses in liquor cases is favorable to any first amendment challenge to a liquor regulation.

1. Due Process

The constitutional guarantee of due process provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." The precise constitutional requirements of due process have been explored in a series of cases in the procedural due process area.

The sweeping language of early twenty-first amendment cases seemed to signal that due process was not a bar to any state regulatory measure concerning liquor. In some cases the Court disposed of the due process statutory challenge entirely without discussion of the issue. But the limits more recently imposed on state liquor authority signal an increase of constitutional power in due process challenges to state liquor regulations.

One recent case involved a due process objection to a statute allowing the public posting of the names of persons determined by public officials to be excessive drinkers and forbidding the sale of liquor to any of those named. No hearing or notice was given before the public

78. U.S. CONST. amend. XIV, § 1.
posting. The federal district court ruled that the statute unconstitutionally violated the named person's right to due process. Affirming the decision of the lower court, the Supreme Court held that although the twenty-first amendment had greatly increased state police power in the area of alcoholic beverage regulation, it had not empowered the state to arbitrarily infringe on the rights of individuals. The opinion implies that a narrow reading of the twenty-first amendment is appropriate in confrontations with individual liberties: "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat." Other lower court opinions have expanded the constitutional decision by narrowing the breadth of state power. It appears that the trend toward increasing limitations on state liquor regulations has favorably affected due process claims in that area.

2. Equal Protection

Consistent with due process decisions, early Supreme Court cases involving liquor regulation dismissed equal protection claims of arbitrary classifications with little or no comment, implying that the fourteenth amendment would not restrain an otherwise valid state exercise of its police power. Although portions of the opinion read otherwise, the Court may have been using a rational basis, lower-tiered approach in reviewing the regulations, having silently weighed and rejected equal protection interests.

83. 400 U.S. at 436.
87. "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth." State Bd. of Equalization v. Young's Market, 299 U.S. at 64. See supra notes 36-37 and accompanying text.
88. Generally the judiciary has deferred to legislative wisdom on equal protection challenges to classifications in areas as zoning, taxation, and economic distribution or regulation by requiring that there be only a rational basis for the distinction (lower-tier analysis). See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 365 (1973); Jefferson v. Hackney, 406 U.S. 535, 546 (1972). Classifications which burden fundamental rights such as voting or prejudice "discrete and insular minorities" are upheld only after being strictly scrutinized so that the means are very narrowly drawn to accomplish a permis-
After the initial surge of cases supporting absolute state liquor authority, equal protection challenges to state regulations began to be scrutinized more carefully. This movement eliminated earlier speculation of possible exemption for alcohol control statutes from fourteenth amendment restrictions. Eventually, in *Moose Lodge No. 107 v. Irvis* the Court applied full scale equal protection analysis to discriminatory liquor classifications although that opinion totally ignored any twenty-first amendment considerations.

In *Craig v. Boren*, the Supreme Court openly confronted the conflict between the equal protection clause and the fourteenth amendment. Applying equal protection standards to a liquor regulation which discriminated on the basis of sex, the Court invalidated an Oklahoma statute which allowed women to purchase beer at the age of eighteen but required men to have reached twenty-one. Justice Brennan's opinion stressed that the twenty-first amendment "primarily created an exception to the normal operation of the Commerce Clause" without rendering that clause totally inoperative in liquor matters.

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89. In *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948), the Court upheld a statute forbidding female bartenders in urban areas who were not the wife or daughter of the tavern's owner. Citing deference to legislative wisdom and applying the reasonableness requirement to measure the equal protection issue, the majority dashed any hopes of wholesale superiority of the twenty-first amendment in this particular area.

This decision was subsequently overruled to the extent that sex discrimination analysis for equal protection was modified in *Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976).

90. 407 U.S. 163, 177-79 (1972). The case concerned an equal protection challenge by a Black man to a local branch of a national fraternity which refused to serve him a drink. Even though the opinion primarily involved standing and state action issues, the Court freely applied the strict scrutiny test of equal protection.

91. *Id.* But see *United States v. Cantrell*, 307 F. Supp. 259 (E.D. La. 1969) (invalidating a racially discriminatory local ordinance forbidding liquor sales to servicemen after noting that the twenty-first amendment presented no obstacle to a fourteenth amendment challenge).

92. 429 U.S. 190 (1976).

93. *Id.* at 210. The decision held unconstitutional the interaction of *Okla. Stat.* tit. 37, § 241 (forbidding the sale of liquor to minors) and § 245 (defining "minor" as under the age of 18 for females and under the age of 21 for males) (1971).

94. 429 U.S. at 206. The opinion traced the early historical development of § 2 of the twenty-first amendment, analogizing its treatment with that of the Webb-Kenyon Act. *Id.* at 205-06; see discussion *supra* notes 28 & 54 and accompanying text.

95. 429 U.S. at 206; accord, *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1976) ("Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case").
Constitutional provisions beyond the commerce clause however, are only vaguely affected by the twenty-first amendment.

Explicitly approving recent equal protection inroads into state authority, the Court commented that the "Twenty-First Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment."\(^\text{96}\) The Court went beyond addressing only the equal protection issue when it remarked that "[n]either 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."\(^\text{97}\)

C. The First Amendment

The reference to individual rights in the \textit{Craig} opinion leads to the central issue addressed by this comment: the effect of the twenty-first amendment on forms of expression protected by the first amendment, and particularly its effect on state power to regulate liquor advertising. Any decision in this area rests heavily on the interpretation of the only recent United States Supreme Court case to address this issue.\(^\text{98}\) In \textit{California v. LaRue}\(^\text{99}\) the Court upheld a state liquor regulation which prohibited lewd sexual performances in establishments licensed by the state to serve liquor-by-the-drink. Justice Rehnquist's opinion admitted that some forms of suppressed expression were protected by the first amendment\(^\text{100}\) since they would not be judged obscene under the \textit{Roth} test.\(^\text{101}\) However, citing the need of states to preserve the health and morality of its citizens, the Court emphasized that it was concerned with liquor licensing and the anti-social behavior which typified the areas surrounding establishments featuring liquor and lewd entertainment.\(^\text{102}\) Even though the opinion stressed that the regulations were

\(^{96}\) 429 U.S. at 204-05.

\(^{97}\) \textit{Id.} at 206 (quoting P. BREST, Processes of Constitutional Decisionmaking 258 (1975)).

\(^{98}\) \textit{But see} cases cited upholding liquor advertising restrictions before commercial speech was given first amendment protection, \textit{supra} note 18.


\(^{100}\) U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech. . . ."

The first amendment was made applicable to the States through the due process clause of the fourteenth amendment by Gitlow \textit{v. New York}, 268 U.S. 652 (1925).

\(^{101}\) 409 U.S. at 116. At the time \textit{LaRue} was decided, obscenity was defined by \textit{Roth v. United States}, 354 U.S. 476 (1957).

\(^{102}\) 409 U.S. at 110-11. Hearings had been conducted to determine the causes of the unsavory atmosphere and the best means by which to eliminate the evil:
restrictive "more of gross sexuality than of communication," it was noted that the performances were not entirely prohibited by the state—only in licensed liquor bars. The Court also distinguished any applicability of symbolic speech protections due to the absence of a communicative element in the lewd conduct as opposed to some forms of expressive conduct which have been equated with written or spoken expression.

The broad grant of state power under the twenty-first amendment is certainly not as limitless as early decisions implied. The *LaRue* decision should not be taken as giving the twenty-first amendment absolute superiority over the first amendment. Certainly, that decision would be relied on to bolster any such claim, but internal limitations to the applicability of the case do exist. For instance, *LaRue* concerned only incidental infringement of partially protected speech in furtherance of state licensing powers. The questionable communicative value of the dancing seems to have given rise to a greater toleration for limitation on its expression. Also important is the existence of alternative forums for performance of the dancing in establishments not serving liquor-by-the-drink. The isolated facts of *LaRue* do affect first amendment rights but do not foreclose all freedom of expression objections to the intrusion of twenty-first amendment regulations.

D. Application of State Police Power to Prohibit the Advertisement of Alcoholic Beverages.

The preceding sections explained judicial interpretations of state statutes enacted pursuant to the twenty-first amendment. Regardless of the particular constitutional provision involved, the cases taken as a

References to the transcript of the hearings submitted by the Department to the District Court indicated that in licensed establishments where "topless" and "bottomless" dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

*Id.* at 111.

103. *Id.* at 118. The lower court found that the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) was not met since the government purpose was not unrelated to suppression. 326 F. Supp. 348 (C.D. Cal. 1971).

104. 409 U.S. at 117.
whole contribute to the overall assessment of the state authority granted by that measure. Although the twenty-first amendment extended state power beyond some federal commerce clause restrictions, that authority is limited in the face of more specific constitutional provisions. After explaining the current limitations imposed on the twenty-first amendment, it is now possible to consider a constitutional challenge to a state proscription of liquor advertising. Only recently has commercial speech been deemed worthy of limited first amendment protection. The question now arises whether the improved status of commercial speech will limit state police powers under the twenty-first amendment which currently authorize Oklahoma's prohibition of liquor advertising.

Any constitutional challenge to Article XXVII, section 5, clause 5 and title 37, section 516 of the Oklahoma Statutes should be based on first amendment protection of commercial speech as applied to the states through the due process clause of the fourteenth amendment. The state would undoubtedly defend by strongly asserting its regulatory power under the twenty-first amendment. It would argue that LaRue controlled any first amendment challenge and subordinated freedom of expression to state liquor regulations. Citing the early cases featuring the "untrammled power" of the states, a proponent of the Oklahoma advertising ban could show how the fourteenth amendment was virtually ignored by courts giving wide discretion to the wisdom of the individual states.

In addition, the state could be expected to argue that LaRue involved admittedly protected expression yet was relegated to the police powers of the twenty-first amendment. Arguably, the motivation in LaRue of curbing anti-social behavior compares favorably to Oklahoma's interest in preventing undue stimulation of liquor consumption. In addition, the state would urge that the statute should be sustained since, under Joseph E. Seagram & Sons, Inc. v. Hostetter, the state is to be accorded wide latitude in its choice of means to accomplish a permissible, if not favorable, end. The decrease of liquor consumption by preventing stimulation through extensive advertising

106. The position of the state is generally anticipated by the author's reliance on 10 Okla. Op. Att'y Gen. 225 (1977) which addressed the constitutional issue directly.
107. Id. at 227.
109. Id. at 48.
would be offered by the state as an acceptable means.\textsuperscript{110} The presumption of validity accorded state liquor regulations, which Justice Rehnquist announced in \textit{LaRue},\textsuperscript{111} gives additional weight to the position that all such regulatory measures are protected by the twenty-first amendment from constitutional challenges.

Opponents of state prohibitions on liquor advertising would predi-cate their rebuttal on federal limitations of state regulatory power in this area. Police powers enhanced by the twenty-first amendment, on which the state can be expected to rely heavily, are given a different interpretation by a case of Oklahoma origin. \textit{Craig v. Boren} clarifies the effect of the fourteenth amendment in the face of state authority to control liquor. That case recognizes the limited impact of the twenty-first amendment: “Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-First Amendment to other constitutional provisions becomes increasingly doubtful.”\textsuperscript{112} Sustaining an equal protection claim to a liquor regulatory measure, the Court emphasized that when individual rights were involved, state police powers have been sharply curtailed.\textsuperscript{113} If the potency of the fourteenth amendment has been upheld in protecting fundamental liberties, surely the most hallowed of individual rights, freedom of speech, is similarly sheltered from state infringement.

\textit{LaRue} can easily be distinguished in light of \textit{Craig v. Boren}, a subsequent case. First, the ordinance in \textit{LaRue} concerned the licensing of liquor establishments serving liquor-by-the-drink, clearly a legitimate state regulatory area. The Oklahoma provisions squarely address only the proscription on liquor advertising, however, with no mention of concerns more traditionally within the reach of the twenty-first amendment such as licensing or taxation. Oklahoma’s regulation is a speech prohibition concerning alcohol while the California statute involves a licensing ordinance which incidentally restricts expression. This is more than a difference in semantics; it is the distinction between what may be viewed as a valid time, place and manner restriction and an invalid form of content-based restriction. Governmental disagreement with the content of a message may not determine the time, place,

\begin{itemize}
\item \textsuperscript{110} See note 157 infra. But see Craig v. Boren, 429 U.S. 190, 199-200 n.7 (1976).
\item \textsuperscript{111} 409 U.S. at 118-19.
\item \textsuperscript{112} 429 U.S. at 206.
\item \textsuperscript{113} See discussion supra note 97 and accompanying text. “Cases involving individual rights protected by the Due Process Clause have been treated in sharp contrast.” \textit{Id.} at 207.
\end{itemize}
and manner restrictions imposed on that speech. However, a legitimate governmental interest, apart from the suppression of speech, may be the basis for imposing greater restrictions on speech due to its content. The Oklahoma proscription on liquor advertising goes beyond "regulation" of protected speech, instead requiring the wholesale elimination of commercial liquor messages. In this way, the Oklahoma statute goes far beyond any twenty-first amendment power enjoyed by a state in enacting liquor regulations such as that allowed in LaRue and is not deserving of the protection of that amendment.

Second, the speech prohibited in Oklahoma is afforded an intermediate level of first amendment protection. The Court in LaRue hinted at a sliding scale of speech protection for nearly-obscene forms of expression by analogizing to expressive conduct decisions. "But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." The Oklahoma prohibition does not affect only marginal forms of speech, it bans all commercial speech on a particular subject. It concerns no form of expressive conduct bordering on obscene or even unprotected behavior as in LaRue. Finally, in LaRue, Justice Rehnquist emphasized that nude performances were not forbidden across the board in the state. Their proscription as to offensive conduct applied only to the}

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114. *E.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 64 (1976); Police Dept. v. Mosley, 408 U.S. 92, 96 (1972). Relying on policies of self-fulfillment and representative government, the Court explained:

> Government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

*Id.*


116. *See* notes 144-49 *infra* and accompanying text.


118. 409 U.S. at 117.
performances in licensed liquor-by-the-drink establishments, so additional forums for that type of expression remained. Oklahoma, on the other hand, forbids all advertising of alcoholic beverages except for one small sign allotted to each liquor retailer. This content-based restriction does not comport with other decisions allowing speech regulation where alternative forums remained.\textsuperscript{119} No substitute forum exists for this stifled expression within the state since the statute reaches all in-state media.

It would appear that \textit{LaRue} can be distinguished on its facts to defeat Oklahoma's ban on liquor advertising. However, the broader implication in \textit{Craig v. Boren} that significantly narrows the \textit{LaRue} grant of state authority is a preferable means of circumventing the ban. Infringement on protected speech and other fundamental rights will not be tolerated solely on the basis of enhanced state police powers under the twenty-first amendment. In this light, the applicability of \textit{LaRue} beyond the facts posed is diminished when confronted with challenges on the basis of individual rights. Under a federal constitutional challenge, the validity of the applicable provisions of the Oklahoma Constitution and Statutes would be questionable.

\textbf{III. COMMERCIAL SPEECH\textsuperscript{120}}

The constitutional guarantee of free speech does not include all types of speech. Only those forms of expression which have been deemed worthy of protection will be guarded from the intrusion of state regulations sanctioned by the twenty-first amendment.\textsuperscript{121} In other words, the Oklahoma ban on advertising can be held unconstitutional

\begin{enumerate}
\item \textsuperscript{119} See, \textit{e.g.}, \textit{Grayned v. City of Rockford}, 408 U.S. 104 (1972) (picketing near school in session); \textit{Cox v. Louisiana}, 379 U.S. 559 (1965) (courthouse demonstrations); \textit{Kovacs v. Cooper}, 336 U.S. 77 (1949) (sound trucks).
\item \textsuperscript{120} Any attempt to define commercial speech is difficult, if not futile. It embodies far more than speech which does "no more than propose a commercial transaction." \textit{Pittsburg Press Co. v. Human Relations Comm'n}, 413 U.S. 376, 385 (1973). Neither is economic motive the sole determiner of commercial speech. Both of these are factors but they are far from conclusive. The indefinite quality of the word "commercial" is possibly excelled only by the breadth of the word "speech."
\item \textsuperscript{121} Originally, the protected status of speech was determined by content. Fighting words, libel, obscenity, and commercial speech warranted no first amendment protection while all other forms of speech received full-scale protection. This two-tiered analysis was severely shaken after a series of decisions changed earlier interpretations of those categories. See \textit{Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.}, 425 U.S. 748 (1975) (commercial speech); \textit{Miller v. California}, 413 U.S. 15 (1973) (obscenity); \textit{New York Times Co. v. Sullivan}, 376 U.S. 254 (1964) (defamation); \textit{Roth v. United States}, 354 U.S. 476 (1957) (obscenity); \textit{Chaplinsky v. New Hampshire}, 315 U.S. 568 (1942) (fighting words); \textit{L. Tribe, American Constitutional Law} 602-08 (1978).
\end{enumerate}
only if the advertisement involved is a protected form of commercial speech. Until recently, such protection was not extended to most types of commercial communications. This particular variety of speech was deemed unworthy of the mandates of the first amendment solely because of its economic function. Contrasted against a judicial history of nonprotection, commercial speech emerged in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,122 as deserving of limited free speech protective measures, at least in certain instances. In the years that followed that decision, the precise status of the protection afforded commercial speech seemed uncertain.123 In an attempt to inject some specificity into this area, the philosophical justifications offered as distinctions between commercial speech and the fully-protected variety will be examined and hypothetical advertising situations will be reviewed.

A. Foundations for Separate Treatment of Commercial Speech

It has been stated that the fundamental “purpose of the first amendment was to assure an effective system of freedom of expression in a democratic society.”124 An absolutist interpretation of the amendment could reasonably find that protection from government interference extended to commercial speech as well as to the more traditionally guarded forms of expression.125 Despite the guarantee of free speech, commercial speech has been the stepchild of the Constitution solely because of its economic implications. Justifications for this inferior status based on content are familiar (if unconvincing):


125. But see *Breard v. City of Alexandria*, 341 U.S. 622, 650 n.* (1951) (Black, J., dissenting) (first amendment protection not extended to a “merchant” who goes from door to door “selling pots”).

Commercial speakers have extensive knowledge of both the market and of their products. They are well-situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.\textsuperscript{126}

None of these propositions are irrefutable when comparing a speaker encouraging the sale of his goods to a political speaker.\textsuperscript{127} In fact they may apply equally to both forms of expression, yet one is accorded the full protection of the Constitution while the other is not. One commentator has observed:

To be sure, none of these generalizations is airtight; all of them rest upon the obviously troublesome distinction that plagued the Chrestensen doctrine—the distinction between talk for profit, and talk for other purposes. But it is one thing to make eligibility for first amendment protection turn on a difficult line, and quite another to use the same line for the far less momentous purpose of recognizing shades of difference in the application of settled principles. That there are and will remain hard cases—is the coal company's ad proclaiming its concern for environment and warning of the hazards of nu-


A politician is arguably as knowledgeable of his own record and future intentions once he is elected as a seller of goods is of the tendencies of his products. The accuracy level of the two statements is essentially the same, if not greater for the politician, yet the veracity of speech proposing a commercial transaction is somehow to be more easily ascertained. \textit{Id.} at 386. Admittedly, not all examples of ideological speech are as simple, analytically, as the preceding one.

For instance, it is difficult, if not impossible, to determine the truth of any statement of opinion concerning the best course of action to be taken by the government. But, by the same token, by what criteria is the statement "this coffee has the richest flavor" to be judged? There seems to be little reason to expect a prospective commercial speaker to be any less intimidated by an overbroad statute than a political speaker. Farber states:

\textit{The existence of a chilling effect depends as much on the potential penalty as on the motivation for the speech. A five dollar fine in a political speech case is probably less of a deterrent than a jail sentence—or disbarment—in a commercial speech case. Advertisers are not always large corporations which can view legal sanctions as a normal, almost insurable, risk of doing business. Furthermore, powerful incentives of self-interest in noncommercial speech are not uncommon. Salacious slander can sell newspapers; lies can lead to lucrative political office. Quite apart from these rather unpleasant examples, it is not at all clear that greed is more effective than idealism in motivating people to risk government sanctions. One would at least hope that the contrary would be true.}

\textit{Id.}
clear fuel commercial speech or political expression?—is an insufficient reason either to return to the unprincipled extreme of excluding all commercial speech from first amendment protection, or to embrace the equally indefensible position that government cannot stop someone from selling 7-Up claiming it to be insulin.\textsuperscript{128}

The fact that one seeks to transmit a position concerning ideas and the other economic matters seems little reason to deprive a citizen of information in which his "interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."\textsuperscript{129}

The distinction between fully protected expression and partially protected commercial speech is more accurately explained by reference to theoretical considerations underpinning the first amendment: representative government, marketplace of ideas, and individual autonomy. These competing philosophies have been mentioned in several cases and scholarly works expounding on freedom of speech theories.\textsuperscript{130} The first consideration is whether the purpose of the first amendment is oriented toward protecting representative government by free debate of democratic philosophies toward a realization of the common good. It has been stated that:

\[ \text{[I]} \text{t is definable as the perceptions of the majority to men, and not otherwise. The social interest that the First Amendment vindicates is rather . . . the interest in the successful operation of the political process, so that the country may better be able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is founded in truth.} \]

Discussion, the exchange of views, the ventilation of desires and demands—these are crucial to our politics. And so, for much the same reasons, is the effectiveness of the decisions reached by the political process . . . . It would follow, then, that the First Amendment should protect and indeed encourage speech so long as it serves to make the political process work, seeking to achieve objectives through the political

\textsuperscript{128} L. Tribe, American Constitutional Law 656 (1978) (citations omitted) (emphasis in original).


process by persuading a majority of voters; but not when it amounts to an effort to supplant, disrupt, or coerce the process . . . and also not when it constitutes a breach of an otherwise valid law, a violation of majority decisions embodied in law.¹³¹

Commercial speech and private sector topics of debate are not within the protection of the first amendment if promoting representative government is the only purpose for free speech. If the value of speech is to be measured by only this goal, then all forms of nonpolitical speech are quite possibly beyond the reach of the first amendment.¹³²

Under a second theory, the marketplace of ideas is touted as advancing knowledge and promoting truth. This perspective is best explained by Justice Holmes' belief that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹³³ This theory would assess more forms of speech as deserving of first amendment protections since the market would ultimately determine their viability.¹³⁴ Any reliance on the market mechanism for


¹³². See P. BREST, supra note 130, at 115. In Gitlow v. New York, 268 U.S. 652 (1925) in upholding criminal anarchy statutes the Court expressed the sentiments of the representative government purpose: "[A] state may penalize utterances which openly advocate the overthrow of the . . . United States . . . by violence or other unlawful means. In short, this freedom [of speech] does not deprive a State of the primary and essential right of self-preservation; which so long as human governments endure, they cannot be denied." Id. at 668 (citations omitted).


¹³⁴. However, there are occasions where the market cannot be relied upon to fully regulate speech. One such instance concerns fighting words. Where the expression is so outrageous that it tends to incite an immediate breach of the peace, there is no time for the market mechanism to neutralize the offensive speech. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); cf. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (defamation).

The Court's standard for prior restraint of expression similarly reflect heavy reliance on the marketplace as the true regulator of speech. Only in exceptional cases are prior restraints of protected speech upheld by the Court and then only when disclosure would immediately threaten national security. See New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (Pentagon Papers case); Near v. Minnesota, 283 U.S. 697, 716 (1931). But see Donaldson v. Read Magazine, 333 U.S. 178, 189-91 (1948) (upholding prior restraints on commercial speech); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding narrowly drawn parade permit law); FTC
speech regulation, however, introduces the bargaining power of individual citizens. Unfortunately, bargaining power (i.e. wealth) is not evenly distributed throughout the population. Therefore, a “highly paternalistic approach” must be adopted by the government in order to protect the less powerful from their own uninformed decisions unless bargaining power itself is equalized.135 Certainly, this inequity has been weighed strongly in favor of commercial speech to better inform the disadvantaged.136

Finally, a third philosophy which influences interpretation of the first amendment is the protection of individual autonomy. An outspoken advocate of this theory explains: “[S]uppression of belief, opinion and expression is an affront to the dignity of man, a negation of man’s essential nature.”137 Narrowly defined, this goes to the heart of free trade in ideas, such as political and artistic speech.

The interest which the State wishes to protect here is identical to that which the Court has previously held to be protected by the First Amendment: the right to adhere to one’s own beliefs and to refuse to support the dissemination of the personal and political views of others, regardless of how large a majority they may compose.138

However, the right of consumers to receive information is as worthy of protection as the orator’s right to expound since it is the self-fulfillment of the individual which is the determinant of first amendment protection.139 More expansively then, this theory protects the autonomy of an individual to receive and formulate an opinion concerning the information, political theory, artistic expression, or religious persuasion, as well as the ability to express that view originally.


136. Id. Writing for the majority, Mr. Justice Blackmun observed:

Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.

Id. at 763.


Many freedom of speech opinions openly weigh these competing theories.\textsuperscript{140} Other cases emphasize one philosophy without mention of additional considerations.\textsuperscript{141} The important point, however, is that the outcome of a particular case can be determined by the theory of speech utilized. Early cases following solely the representative government theory could ignore commercial speech viability\textsuperscript{142} while more recent cases have recognized that form of expression by relying on marketplace or autonomy considerations.\textsuperscript{143} An appreciation of the significance of the purposes behind these three theories will assist in the interpretation of the following decisions discussed in the commercial speech area. Specifically, these competing philosophies should be considered in determining the inherent value of liquor advertising.

B. Analytical Framework for Ascertaining First Amendment Status of Hypothetical Liquor Advertisements

From the unsettled middle-tier constitutional status previously occupied, commercial speech finally emerged with clearly-defined first amendment protection in 1980. In \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission},\textsuperscript{144} the Supreme Court announced a four-part test to determine whether government regulation of commercial speech was forbidden by the first amendment. In order to receive first amendment protection, a particular advertisement must satisfy all four steps. In announcing this intermediate level of protection, the opinion clearly distinguishes between the full measure of first amendment safeguards afforded the expression of ideas and the lesser degree given commercial speech. First, the Court must examine the content of the communication in deciding if it is within the protection of the Constitution. Those messages which are likely to deceive rather than inform, as well as those concerning an illegal activity are outside the first amend-

\textsuperscript{140} \textit{See}, \textit{e.g.}, Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring).
\textsuperscript{141} \textit{See}, \textit{e.g.}, Cohen v. California, 403 U.S. 15, 24 (1971) (individual autonomy); Stromberg v. California, 283 U.S. 359, 369 (1931) (representative government).
\textsuperscript{142} Valentine v. Chrestensen, 316 U.S. 52 (1942) (upholding a handbill prohibition when an entrepreneur distributed material with commercial speech on the other side). \textit{But see} Murdock v. Pennsylvania, 319 U.S. 105 (1943) (holding that a license tax for door-to-door sales was unconstitutional as applied to Jehovah's Witnesses' sale of religious pamphlets).
\textsuperscript{144} 447 U.S. 557 (1980) (holding that a statute which banned advertisements promoting the use of electricity by electric utilities was unconstitutional infringement on free speech despite legitimate government concern for the energy shortage).
ment. Second, the state’s interest must be deemed substantial and the manner of regulation should be proportionate to the interest asserted. Third, the substantial government interest must be directly advanced by the regulation. Measures providing only tenuous support for the state’s purpose will not be sustained. Fourth, the speech restriction must be narrowly drawn—if a more limited infringement on speech would serve the state’s interest as well, the regulation will not survive a constitutional challenge. 145

Clearly, the Central Hudson decision did not answer all of the constitutional questions plaguing the commercial speech area. The Court was curiously silent concerning the qualities necessary for a substantial state interest. It did, however, provide some guidelines for the resolution of some problems. For example, the overbreadth doctrine remains inapplicable to commercial speech cases since, due to the greater durability, overbroad state regulations were less likely to chill that type of expression. 146 Speculation, though, even if to a lesser degree, continues in this comparatively new constitutional area as it has from Valentine, 147 through Virginia Board of Pharmacy, 148 up to the present. 149

The following section will pose several hypothetical advertisements within judicially distinguishable categories violating the Oklahoma Constitution and Statute. Each hypothetical will then be examined in light of the most recent line of Supreme Court cases interpreting the commercial speech doctrine.

1. Informational Speech

A retailer of liquor, complying with all state licensing requirements, pays the local newspaper to run a truthful advertisement naming three national brands of alcoholic beverages with corresponding sizes and prices, together with the location of the store.

Clearly, this type of speech is protected. “The First Amendment’s concern for commercial speech is based on the informational function of advertising.” 150 It is neither inaccurate nor deceptive. The admit-

145. Id. at 566.
147. 316 U.S. 52 (1942).
149. See note 121 supra.
tedly truthful information makes no misleading claims about the products offered for sale. The activity it concerns—the sale of alcohol for private consumption—is certainly not illegal, although liquor as an industry is highly regulated. The Court notes in *Central Hudson* that the protection of the first amendment has been extended to the advertising of several enterprises, which are subject to extensive state regulation such as utility companies, optometrists, lawyers and pharmacists. However, if the retailer had not complied with such state licensing requirements as would make the sale of liquor illegal, then the speech would fall beyond first amendment protection. Certainly, the store owner is economically motivated. In placing the advertisement he is proposing a commercial transaction to purchase liquor by stating the prices of various types and sizes. But the informational nature of this communication “furthers a societal interest in the fullest possible dissemination of information.” Consumers of that product should be allowed to shop comparatively just as consumers of prescription drugs and other products may. Economic motivation alone will no longer disqualify the store owner from the protection of the first amendment. Additionally, even if the newspaper advertisement might be considered tasteless by some portions of the populace, it does not lose its status of protection:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, and the aggregate, be intelligent and well informed. To this end the free flow of commercial information is indispensable.

Once the expression is deemed protectable, however, it must be

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151. This comment assumes that the sales by the retail liquor stores are for private consumption totally within the laws of the state. It does not address open saloon liquor sales or public consumption. *See* Okla. Const. art. XXVII, § 4; Okla. Stat. tit. 37, § 8 (Supp. 1 1980).


153. *Id.* at 561-62, 567.


balanced against the remaining analytical stages concerning the state's interest in suppression. In anticipating the purposes advanced for state provisions, speculation is unavoidable. However, there are official pronouncements concerning the state's motivation behind the liquor advertising prohibition. In an early case challenging the constitutionality of the provisions in question, the court noted that the state proposed restricting the consumption of alcohol as the justification for the ban on liquor advertising. The legislature appears to have advanced a similar purpose for the regulations as evidenced by a statute covering the same topic: "The Board may prohibit . . . the advertising of alcoholic liquor in this state to prevent deception of the consumer, to prevent the undue stimulation of the consumption of alcoholic liquor and . . . prohibit all such advertising that is . . . offensive to morals and good taste." Since the purposes cited in the case are essentially contained in the statutory language, only those found in the statute will be examined.

Searching for a substantial state interest which is proportionate to the regulatory measure, the first state justification, to prevent deception, can be discarded immediately. To prevent consumer deception is certainly a valid purpose; however, any issue concerning the tendency to mislead is treated when determining the extent of first amendment protection to that particular communication. The court will determine at the outset (step one) whether the communication is "more likely to deceive the public than inform it." If an advertisement is determined to be deceptive or misleading, the requirement of a substantial

156. Accord, United States v. Frankfort Distilleries, 324 U.S. 293, 301 (1944) (Frankfurter, J., concurring) ("[I]t is a precarious business for an outsider to be confident about the legal policy of a state").

157. State ex rel. West v. State Capitol Co., 24 Okla. 252, 103 P. 1021, 1023 (1909): It is common knowledge that it is the use of intoxicating liquors as a beverage that is deemed harmful, and is the mischief sought to be prevented by the legislation. The prohibition of the sale and keeping for sale of intoxicating liquors is only a means. The end sought for is the prevention, or at least the diminution, of the drinking of intoxicating liquors by the people of the state . . . Read in connection with the other legislation, its evident purpose is to further the ulterior purpose of all that legislation, viz., to diminish the use of intoxicating liquors as a beverage.

158. OKLA. STAT. tit. 37, § 516 (1971).

159. Id. The general purposes of the Alcoholic Beverage Control Act are set out in id. at § 503: "This Act shall be deemed an exercise of the police power of the State of Oklahoma for the protection of the welfare, health, peace, temperance and safety of the people of the State, and all the provisions hereof shall be construed for the accomplishment of that purpose."


government interest is not applicable since the message is not within constitutional protections.\textsuperscript{162}

Concerning the state's second purpose, to prevent the undue stimulation of liquor consumption by prohibiting all liquor advertising, Justice Blackmun comments:

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information to make a free choice.\textsuperscript{163}

In reality then, this particular form of choice manipulation attempts to alter the market to achieve morally desirable results rather than allowing the marketplace of ideas to operate freely and responsible individuals to make such decisions for themselves.

This type of paternalistic approach has been abandoned where the government prevents the dissemination of information needed to make a free choice solely on the grounds that unfortunate consequences may result from those public choices. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."\textsuperscript{164} By dictating what information the citizens of Oklahoma may receive, the legislature has interfered with the consumer's right to receive advertising\textsuperscript{165} as well as the ability to make an informed decision.\textsuperscript{166} Both of these involve an affront to individual integrity and autonomy. Such a sweeping method used to advance the state's substantial interest in this case is not direct enough to sustain it from a first amendment challenge. A more acceptable measure might be the impo-

\textsuperscript{162.} Id.
\textsuperscript{163.} Id. at 574-75 (Blackmun, J., concurring).
\textsuperscript{165.} Id. at 757; cf. Miranda v. Arizona, 384 U.S. 436 (1966) (defendants held in custody must be informed of certain constitutional rights before a knowing waiver can be given). But see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 782 (1976) (Rehnquist, J., dissenting) (right to receive information is not at issue since consumers may call or visit the pharmacy for price quotations, rather it is the right of non-party pharmacists to publish the prices).
\textsuperscript{166.} See 425 U.S. at 765.
sition of a high tax on all retail liquor sales or a restriction on available liquor supplies. Since the paternalistic justification for the state regulation failed under the third phase of the *Central Hudson* test in that it did not directly advance the asserted state interests, it is unnecessary to address the fourth criterion, its viability as a narrowly drawn restriction.

The final justification advanced by the state for prohibiting advertising is that it offends morals and good taste. It is doubtful whether good taste could seriously be asserted today as a legitimate state interest. Granted, morals are important to a state. However, that justification could be advanced for any number of morally oriented regulations, many of which would violate the citizen's fundamental rights to privacy and association. Due to the vagueness of any morality/good taste interest, it is doubtful that it would be deemed a substantial state interest which was directly advanced by the statute and therefore cannot justify the wholesale suppression of certain types of commercial speech.

2. Deceptive-Misleading Speech

The same liquor retailer purchases advertising space in the local newspaper reading, “Help relieve that nagging winter cold—HOT TODDY SPECIAL” then goes on to list brand names, sizes and prices of the ingredients needed to make a hot toddy. The advertisement includes the address of the retail establishment.

The protected status of this particular advertisement depends solely on its tendency to deceive the public. The medicinal value of a hot toddy is certainly often-touted though not technically proven. However, it is accommodation for deception, not actual truth, which affects commercial speech particularly. False speech has never been accorded the protection of the first amendment regardless of its commercial aspect. In *Virginia Board of Pharmacy* the court explained:

Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We fore-

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see no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.\textsuperscript{170}

The language of the particular advertisement in question should be helpful in uncovering the potential for public deception. Use of the words "help relieve" would seem to be readily distinguishable from an ad proclaiming "HOT TODDIES CURE COLDS EFFECTIVELY." The latter seems to be a definitive quality statement as well as one which seems to assure the reader of scientific proof which, unless substantiated, may deprive that slogan of first amendment protection. The original example, however, appears to be sufficiently indefinite as to leave only a general impression in the minds of the public. It is more in the nature of an opinion that hot toddies relieve cold symptoms rather than an empirical statement of fact. The Supreme Court has declared: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."\textsuperscript{171} Considering the informational content of the remainder of the advertisement, the hot toddy phrase seems less likely to deceive the public than inform it. Nor does it concern an unlawful activity. Hence the advertisement is guarded by the first amendment from unwarranted state regulation.\textsuperscript{172}

The governmental interests asserted to defend a first amendment challenge to the Oklahoma liquor advertising ban would more than likely be the same under this example as under the informational speech challenge. Specifically, the state would seek to avoid consumer deception and undue stimulation of liquor consumption as well as advancing morality and good taste. These interests were incapable of defeating fully protected informational speech. For the same reasons, those purposes are not sufficient to infringe on protected speech such as the hot toddy advertisement.

It should be recognized that according to the marketplace theory


\textsuperscript{172} Commercial speech messages appear to be treated separately according to content. Valentine v. Chrestensen, 316 U.S. 52 (1942) (even though one side of a leaflet contained political statements while the other advertised a commercial exhibition, it was deemed unprotected as commercial speech). For example, if a handbill was five-sixths informational and the other sixth deceptive, the entire handbill would be unprotected. \textit{But cf.} Miller v. California, 413 U.S. 15 (1973) (in determining whether a work is obscene, it must be examined as a whole).
of speech protection, even deceptive advertisements would probably be entitled to first amendment safeguards. The market mechanism could be expected to flush out the deception in such a statement rather than relying on government censorship. Prohibiting deceptive speech does not follow individual autonomy either, since the personal evaluation of the citizen is not the determining factor in its acceptance. It would appear, then, that the Court's decision to withhold first amendment protection from commercial speech which is more likely to deceive than inform is not primarily founded on either of these philosophies.

3. Trade Name

The liquor retailer placed an advertisement containing either the informational or the possibly deceptive speech as set out in the two previous examples. To this advertisement however, he added the words "Joe's Liquor Store" as a trade name. Treatment of trade names in the area of commercial speech follows closely the principles governing deception. In the only recent commercial speech case to consider trade names, the Court stated:

[It is] a form of commercial speech that has no intrinsic meaning. A Trade Name conveys no information about the price and nature of the services offered . . . until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality.174

In that case, the Court upheld a Texas statute forbidding optometrists to utilize trade names, explaining that the possibilities for manipulation of the quality-trade name association were too great.175

Friedman is easily distinguished from the case at hand since the liquor retailer sells products, usually nationally marketed brands, rather than services. The quality difference between the sale of Brand X whiskey at Joe's and the sale of that same Brand X whiskey at another retailer is not bound up with every product he sells in the mind of the consumer, since every other retailer markets substantially the same items. Since these are prepackaged by the manufacturer, individual retailers have little influence over the differences between shipments

175. Id. at 12, 13.
which are passed on to the customer. Granted, there might be certain aspects of a particular retail outlet which distinguish it from all others—the marketing of house brands of liquor or specializing in rare wines, for instance. The association between the trade name and this particular specialty might even become quite well-developed. If that retailer were to retain the trade name, yet discontinue the special practice, the consumer would still not be unduly burdened by the association—he would merely find another liquor store which provided the additional service. Certainly, the clients of an optometrist, operating under a trade name, are much more adversely affected when they return to the office of the same trade name and meet with greatly diminished quality after a change in personnel.176

Since trade names in the liquor retailing business are not deceptive or illegal, they, too, should be afforded the protections of the first amendment. The interests of the state could be expected to be the same as those offered in the preceding examples. As a result, the state regulation could not withstand a first amendment challenge since it does not directly or permissibly advance the state interest.

4. Promotional speech

Suppose that Joe's Liquor Store places an advertisement with a locally published and distributed magazine. The full page spread contains a picture of a glamorous couple drinking from champagne glasses. The only printing states: "To the Good Life—Drink More Champagne, Joe's Liquor Store." This advertisement obviously has minimal informational value—it functions solely to encourage a particular course of action by the reader, the promotion177 of liquor consumption. But the bare economic motives of the advertisement alone will not deprive this type of commercial speech of constitutional safeguards.178 Indeed, Justice Rehnquist, dissenting in Virginia Pharmacy, argued that, under the majority opinion, promotional advertising similar to the champagne example would be totally unrestricted if not untruthful or misleading.179 However, a later case warned that promotional advertising may be sub-

176. Id. at 13, 16.
177. For the purposes of this discussion, advertising will be deemed promotional if it is "intended to stimulate the purchase of" liquor. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 559 (1980).
179. Id. at 788-89 (Rehnquist, J., dissenting):
ject to "some limited supplementation, by way of warning or disclaimer or the like."\(^\text{180}\)

Determining the protection given this message, it must be examined for its possible deceptive effect on the public as well as any illegal practice it might concern. Nothing indicates that illegality might be involved. As for deception, the effect might be to form a loose association between champagne and a prosperous future in the mind of the public. But it is hard to predict that more than a few readers would be so gullible as to believe that drinking champagne results in one acquiring the personal and financial well-being generally associated with "the good life". Therefore, there does not seem to be a "significant possibility"\(^\text{181}\) that the slogan will mislead the general public. Since the message is neither deceptive nor pertaining to an illegal activity by the standards of *Central Hudson*, it is deserving of first amendment commercial speech protection.

Although the same state interests will probably be asserted to defend the constitutionality of the regulation, the outcome differs significantly in the absence of any informational content. The state's interest in undue stimulation of alcohol consumption takes on a new meaning when no information which could assist the consumer in his choice is suppressed by the regulations. No longer would the advertising prescription manipulate the choices of its citizens through information

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\(^{181}\) Friedman v. Rogers, 440 U.S. 1, 13 (1979).
availability. In refusing to allow promotional advertising, the state is not promoting its own goal by "keeping the public in ignorance." Instead, it could be viewed as removing unnecessary liquor stimulation from the channels of communication. Hence, the state interest gains credibility with a change in the nature of the advertisement.

In addressing whether the restriction directly advances state interests, it is difficult to assume the existence of specific behavioral correlations. Certainly the state would be required to produce evidence that the prohibition on advertising provides more than tenuous support in furthering the state's aim to curb liquor consumption. Assuming that such a correlation could be proven, the burden is still on the state to show that its interest could not be served by a more limited restriction. It is in this category that a prohibition on all liquor advertising must be defeated. Even if promotional speech of this nature should be regulated, a total ban on all advertising is certainly an excessive measure since a far more limited restriction could be equally effective in promoting the purpose of the state. A warning of the hazardous effects of alcohol on the printed page of the advertisement or a narrowly drawn ban on only certain types of promotional advertising could serve the state equally well without the harsh consequences of total prohibition. In this way, the regulatory technique would extend only so far as the interest promoted and first amendment considerations would be observed.

5. Political Speech

Joe's Liquor Store purchases advertising space in the local newspaper again. The message reads, "Support the Liquor Industry—vote for liquor by the drink. Joe's Liquor Store."

Even though this advertisement has some incidental promotional aspects, it clearly expresses a position on a current political controversy. It does more than "simply propose a commercial transaction" as does purely commercial speech. Instead it involves the free discussion of a controversial government policy—"the heart of the First Amend-

185. The definition of commercial speech is not so definite as some cases would imply. See note 120 supra and accompanying text.
The restriction of liquor retail advertising cannot be justified on the basis that liquor retailers are not entitled to publish opinions on political issues which affect that particular industry. The Supreme Court has recognized that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual." This advertisement is then entitled to the full protection of political speech, not just the intermediate level of scrutiny afforded commercial speech.

Since the Oklahoma advertisement restricts fully protected speech, it may not be sustained unless it is (1) a reasonable time, place or manner restriction, (2) a permissible subject-matter regulation, or (3) a narrowly tailored means of serving a compelling state interest. In addressing the validity of time, place and manner restrictions, the court has maintained that they must be "applicable to all speech irrespective of content." The state does not suppress the views of those other than liquor retailers on this particular subject. In this way, the ban on liquor advertising is not constitutionally justified on the basis of subject matter or time, place and manner restrictions.

The compelling government interests advanced by the advertising ban would presumably be the same justifications offered above. These were not substantial enough in those cases to justify the broad imple-


[To] accord full First Amendment protection to all promotional advertising that includes claims "relating to . . . questions frequently discussed and debated by our political leaders" . . . would blur further the line the Court has sought to draw in commercial speech cases. It would grant broad constitutional protection to any advertising that links a product to a current public debate.

189. Erznoznik v. City of Jacksonville, 422 U.S. 205, 209-10 (1975). The Court explained:

[When] the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. As Mr. Justice Harlan cautioned: "The ability of government, consonant with the Constitution, to shut off disclosure solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."

Id. (citations omitted) (citing Cohen v. California, 403 U.S. 15, 21 (1971)).
mentation measure adopted by the state. For the same reasons, the interests will not withstand the higher level of judicial scrutiny for protected speech—they are not narrowly drawn, compelling state interests. For this reason, the Oklahoma alcohol advertising prohibition cannot be sustained in the face of a constitutional challenge based on fully protected speech.

6. Different Mediums

Joe now begins an advertising campaign primarily using his champagne advertisement ("To the Good Life—Drink More Champagne, Joe's Liquor Store") on billboards, television and radio stations throughout the area.

Many times the Court has recognized the "validity of time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication." Of course, the state statute in this case does not leave any alternative channels available so it cannot be regarded as valid in that respect. However, if the statutory proscription were limited solely to outdoor and electronic broadcast advertising of alcoholic beverages, entirely different problems are presented.

The advertisements are all assumed to be protected forms of commercial speech—that is, truthful, not deceptive or misleading and not regarding an illegal activity. Rather than the content of the advertisements, it is the particular characteristics of these omnipresent media which might enhance the state's interest in regulation.

The protection of children from constant exposure to the promotion of liquor consumption could certainly be considered a substantial state interest. Adults may "effectively avoid further bombardment..."
of their sensibilities simply by averting their eyes."195 Children, however, would be unable to escape either medium in such a manner simply because they would not know to do so. Arguably, a child's ingestion of subliminal messages delivered in promotional advertisements begins long before development of the capacity to classify information as acceptable or not. It is these children then, whom the state has a particular interest in protecting, as they are far less able to protect themselves, more of a captive audience to the conscious and subconscious effects of promotional liquor advertising.196

The regulation must directly advance the asserted governmental interest. In upholding the constitutionality of prohibiting cigarette advertising on radio and television197 the Court found "[s]ubstantial evidence showed that the most persuasive advertising was being conducted on radio and television, and that these broadcasts were particularly effective in reaching a very large audience of young people."198 Although statistical studies would be required to correlate liquor advertising and children's attitudes toward that commodity, it seems credible to assume that such studies would produce results similar to the statistics concerning cigarette advertising. Billboards also seem to sufficiently put the message "in the air" to directly influence children. Even though a written message is included, reading that message is not essential to communicate the meaning. A picture of a happy, prosperous couple drinking from funny-shaped glasses can communicate as favorable an impression to a youngster as a spoken message from a radio.199 Speculation on such an important matter, however, is insufficient. Studies would be necessary to confirm the ad-


196. Cf. Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (upheld statute where public transit commercial advertising was allowed although political advertising was not, on grounds that riders would be "captive"). But cf. Federal Communications Comm'n v. Pacifica Foundation, 438 U.S. 726 (1977) (George Carlin's 'Seven Dirty Words' radio broadcast essentially holds an audience captive).


198. Id. at 585-86.

verse effects of radio, television and billboard advertising before a Court will uphold such a regulatory measure.

Finally, the regulation must be so narrowly drawn that it is no more extensive than necessary to further the state's interest. It is in this area that a total ban on television and radio might be invalidated. Complete proscription of even outdoor and electronic media assumes that children watch television and listen to a radio twenty-four hours a day. While this may be true in certain instances, a narrower ban on liquor advertising during the day and through prime time broadcasts would eliminate most of the exposure to youngsters while still allowing a comparable adult forum for the commercials. The same might be true of billboard advertisements not containing pictures. The regulation can go only so far as is reasonable to protect children from liquor promotion. Informational advertisements might reasonably be allowed in all media since it does not have the promotional aspect of the commercial in question. Whatever measure is eventually adopted, it is clear that invalidating the present provisions of the Oklahoma Constitution and Statutes as violating the first amendment does not necessarily mean all state interests in liquor advertising must go unrestricted. Less intrusive measures are available to accomplish state purposes.

It seems appropriate to note that the Supreme Court has not yet ruled on the relationship between commercial speech and electronic broadcasting since an intermediate level of protection has been given that variety of communication. Commentators have asserted that the ban on cigarette advertising would not be sustained under the present level of scrutiny. Arguably, there seem to be few substantial reasons for any distinction between print and electronic media concerning commercial speech. If so, then outdoor, radio and television liquor advertisements would be constitutionally equated with court decisions affecting the print media.


[A]n advertisement proposing an unlawful transaction may be forbidden on the theory that the harm threatened is within the government's power to prevent—and that more speech cannot be expected to avert it . . . . So long as infliction of the injury is something that government has not attempted to make unlawful, however, such a rationale is unavailable. Thus decisions suggesting that government may forbid the advertising of harmful commodities while leaving people free to purchase them if they wish plainly go beyond the theory suggested here.

Id. (emphasis added) (footnotes omitted).
7. Cable Television

Joe's Liquor Store now decides to air his promotional commercial only on the local cable television station.

An Oklahoma Attorney General opinion addressed precisely this point in early 1980. Equating this private broadcast with regularly broadcast television, the Attorney General concluded: "There is no reason to believe that cable television should be treated any differently than regular broadcast television." The opinion did leave room for modification of the rules by noting that "distinctions between cable television and regularly broadcast television, if any, are issues of fact not properly addressed by an Attorney General's Opinion."

In *Cablecom-General, Inc. v. Crisp*, Oklahoma cable companies sought to enjoin the director of the Alcoholic Beverage Control Board from enforcing the Oklahoma ban on liquor advertising against those entities. Without this injunction, cable companies are forbidden by federal statute from deleting or altering the signal transmitted while they are required by state law to intercept all nationally broadcast alcohol commercials. Besides raising the liquor advertising issue, this case raises serious federalism and supremacy clause questions as well as challenges on the factual distinctions between cable and broadcast television. In order to avoid the consequences of this "Catch-22" situation, Oklahoma cable television operators may be forced to cease carrying all distant independent signals, the *sine qua non* of their telecasts. This drastic solution will in itself violate federal law which requires the transmission of certain signals in some instances.

Although cable television is a comparatively new entity and the subject of little case law at present, the differences seem great between it and regularly scheduled television. Conventional television is transmitted through limited public airwaves and is received by anyone with a television set. A cable television signal on the other hand, is subscribed to by individual television owners from private broadcasting companies. Thus, cable reception is much more of a private decision

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202. *Id.* at 3.
203. *Id.* “The prohibition of advertising alcoholic beverages via regulatory broadcast television applies similarly to advertising by cable television companies.” *Id.* at 4-5.
205. 47 C.F.R. § 76.55(b) (1980).
206. A preliminary injunction has been issued to prevent enforcement of the state advertising proscription while the case awaits trial.
207. 47 C.F.R. §§ 76.57(a), 76.59(a) (1980).
by the individual. The superiority of the privacy of the home\textsuperscript{208} and the individual's right to receive such advertisements\textsuperscript{209} make a difference between permissible government regulation of regularly scheduled broadcasts and that allowed for cable television.\textsuperscript{210} This particular form of broadcast seems to present a far more difficult constitutional issue against government restriction than conventional television.

\textsuperscript{208} See Griswold v. Connecticut, 381 U.S. 479 (1965) (state may not infringe on the privacy of individual by forbidding dispensation of contraceptive devices); Stanley v. Georgia, 394 U.S. 557 (1969) (unconstitutional to prohibit the possession of obscene material for private use in the home).


\textsuperscript{210} When one compares the factual situation involved in the cable television industry's attempting to block out commercials with factual records of local subsidiaries of national networks, one finds the two to be very different indeed. The cable operators are not normally importing network signals. They offer independent stations who have no reason to cooperate in providing the needed notices of upcoming liquor advertisements. Broadcast television is not legally prohibited from deleting signals, as is cable television. Where over-the-air television is dealing with only one incoming signal, cable television operates with upwards of forty-five signals at one time.

In 1972, the Federal Communications Commission issued the “Cable Television Report and Order.” Cable Television Report and Order, 37 Fed. Reg. 3252 (1972). The report dealt with a proposal to allow cable operators to delete the distant signal commercials and substitute local advertisements. The National Association of Broadcasters “judged the commercial substitution proposal to be confiscatory, technically, and economically unworkable, and inconsistent with the realities of the marketplace.” \textit{Id.} at 3256.

A further factual characteristic that distinguishes cable television from the broadcast media is the passive nature of the cablecasting as opposed to the active broadcasting of television and radio. In Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968), the copyright holder of several motion pictures alleged copyright infringement against a cable television company, when it carried the signal of those broadcast stations granted rights to broadcast the movies. The Court held the cable system did not “perform” the copyrighted works. \textit{Id.} at 395. In drawing a line between broadcasting and viewing, the Court held the cable company fell within the viewing area. Specifically, it was stated that:

\begin{quote}
Essentially a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signal; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an “active” role in making reception possible in a given area, but so do ordinary television sets and antennas.
\end{quote}

\textit{Id.} at 399 (footnotes omitted). The Court continued:

The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators like viewers and unlike broadcasters, do not perform the programs that they receive and carry.

\textit{Id.} at 400-01 (footnotes omitted).
IV. CONCLUSION

Unquestionably, Oklahoma’s liquor industry is highly regulated. The twenty-first amendment authorizes extensive state involvement in all phases of alcoholic beverage distribution under section two. Although broadly sweeping language is contained in that provision, it was not intended to repeal the Bill of Rights in all transactions concerning liquor. Instead, the application of state powers under the twenty-first amendment is appropriately confined to situations more immediately concerned with the transportation or importation of alcoholic beverages. The interest of the state in controlling liquor does not outweigh the individual’s right to protected speech under the first amendment. Despite the expansive wording in early commerce clause cases and later language in *California v. LaRue,* federal constitutional safeguards do not immediately fade in importance in the face of state liquor regulations. Especially solicitous in the area of individual rights, the Supreme Court is particularly unwilling to uphold overly invasive state authority over intoxicating beverages.

Commercial speech, such as advertising, has been given an intermediate level of first amendment protection. To be upheld, a regulation on protected speech would have to directly advance a substantial governmental interest and be no more extensive than is necessary to serve that interest. Oklahoma’s statutory proscription is a broad, sweeping measure which is vaguely related to dubious governmental interests. It provides no alternative forum for any type of alcohol commercials. Hence, it appears that the Oklahoma statutory and constitutional provisions would be held unconstitutional as applied to most types of liquor advertisements.

Theoretical considerations of free speech would seem to favor this result. With warnings possibly placed on liquor advertisements, the marketplace of ideas can freely be allowed to regulate discourse concerning alcohol. Similarly, increased advertising would function to equalize the bargaining power of those evaluating the information and purchasing the commodity. By furthering the considerations of individual autonomy, the personal integrity of those desiring to advertise as well as those receiving the advertisements will be more appropriately observed. Oklahoma citizens may be trusted to decide for themselves their desire for retail liquor purchases rather than having consumption

levels indirectly manipulated by state regulation of the free flow of information to consumers.

V. POSTSCRIPT

Since the final revision of this comment, three United States Supreme Court cases have been decided which affect the arguments contained herein. In New York State Liquor Authority v. Bellanca, night club owners challenged on first amendment grounds a statute prohibiting topless or nude dancing in establishments selling liquor by the drink. Reversing the state court holding that the statute was unconstitutional, the Supreme Court, in a per curiam opinion, held that the first amendment protection afforded these live performances was not sufficient to outweigh state interests in liquor control under the twenty-first amendment. The Court stated that, “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.” Justice Stevens’ dissent properly chastised the majority for expanding the LaRue balancing test beyond its logical limits without explicit proof of a substantial governmental interest, arguing that the twenty-first amendment did not offer wholesale state power to invade all first amendment rights in establishments where liquor is served. Justice Stevens intimated the reasoning used in the majority opinion could accommodate the state prohibition of expression of current political controversies in bars serving liquor. Although Bellanca can be broadly interpreted to conform with Justice Stevens’ warning, it may also be narrowly construed to merely expand the LaRue holding to include less offensive forms of expression. The opinion contains fairly broad language interpreting the twenty-first amendment, but the LaRue balancing test seems to be maintained in reaching the holding.

In a plurality opinion, Metromedia, Inc. v. City of San Diego, the Court held that a municipal prohibition on billboards, the content of which did not fall within certain prescribed exceptions, was invalid on its face on first amendment grounds. The ordinance prohibited all noncommercial speech and certain commercial speech messages which did not advertise “on-site” sales or services. The opinion stressed that

214. Id. at 2601.
215. Id. at 2604.
not only does commercial speech receive different treatment than non-commercial speech, but that particular forms of commercial speech may themselves be entitled to different standards—their own law.\textsuperscript{217} Applying the \textit{Central Hudson}\textsuperscript{218} test for commercial speech restrictions, Mr. Justice White stated that the ban was not invalid merely because it distinguished between “on-site” and “off-site” commercial speech. However, the plurality found that the exclusion of noncommercial messages, when some types of commercial speech are allowed, was a violation of the first and fourteenth amendments. Concurring in the judgment, Mr. Justice Brennan, joined by Mr. Justice Blackmun, concluded that San Diego’s ordinance did not meet first amendment requirements with respect to both commercial and noncommercial aspects. Specifically, the concurring opinion remarked that the plurality’s indication that the Constitution sanctioned a total ban on billboard commercial speech so long as noncommercial speech remained uninhibited is erroneous. Such a distinction would give city officials the ability to determine the commercial status of the advertisement. This distinction is not as clearcut as one would imagine, as Mr. Justice Brennan demonstrated with examples not dissimilar to those examined in the previous textual discussion.\textsuperscript{219} The \textit{Metromedia} decision, and the five supporting opinions, must be closely examined in order to accurately address the \textit{Central Hudson} test for commercial speech protection and the distinctions between treatment for commercial and noncommercial speech.

In \textit{Schad v. Borough of Mount Ephraim},\textsuperscript{220} the Court addressed a first amendment challenge to a zoning ordinance which excluded all live entertainment throughout the borough. The operators of an adult bookstore which offered coin-operated viewing of nonobscene, live, nude dancing was fined for violation of a zoning ordinance which excluded all live entertainment. The Court overturned their convictions. Distinguishing \textit{Schad} from \textit{Young v. American Mini Theatres, Inc.},\textsuperscript{221} the Court found the need for additional parking, police protection, and medical facilities an insufficiently compelling reason to ban live entertainment.\textsuperscript{222} The Court’s holding in \textit{Schad} narrows the effect of

\textsuperscript{217} \textit{Id.} at 4928.
\textsuperscript{218} 447 U.S. 557 (1980).
\textsuperscript{219} Notes 150-210 \textit{supra} and accompanying text.
\textsuperscript{220} 101 S. Ct. 2176 (1981).
\textsuperscript{221} 427 U.S. 50 (1976).
\textsuperscript{222} 101 S. Ct. at 2184-86.
Young so that government infringement on first amendment rights in furtherance of zoning powers is justified only upon an actual showing that the municipal threat outweighs the established interests in protecting nonobscene expression. Schad does not reverse the well-established trend of weighing nearly-obscene or offensive expression differently from more protected forms of expression.

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