# REPEAL OF THE EIGHTEENTH AMENDMENT

## TWENTY-FIRST AMENDMENT

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 The eighteenth article of amendment to the Constitution of the United States is hereby repealed.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

### Effect of Repeal

The operative effect of § 1, repealing the Eighteenth Amendment, is considered in the commentary dealing with that Amendment.

### Scope of Regulatory Power Conferred upon the States

***Discrimination as Between Domestic and Imported Products.***—In a series of interpretive decisions rendered shortly after ratification of this Amendment, the Court established the proposition that States are competent to adopt legislation discriminating against imported intoxicating liquors in favor of those of domestic origin and that such discrimination offends neither the commerce clause of Article I nor the equal protection and due process clauses of the Fourteenth Amendment. Thus, in *State Board of Equalization v. Young's Market Co.*,[1] a California statute was upheld which exacted a $500 annual license fee for the privilege of importing beer from other States and a $750 fee for the privilege of manufacturing beer; and in *Mahoney v. Triner Corp.*,[2] a Minnesota statute was sustained which prohibited a licensed manufacturer or

[1] 299 U.S. 59 (1936).
[2] 304 U.S. 401 (1938).

wholesaler from importing any brand of intoxicating liquor containing more than 25 percent alcohol by volume and ready for sale without further processing, unless such brand was registered in the United States Patent Office. Also validated in *Brewing Co. v. Liquor Comm'n*[3] and *Finch & Co. v. McKittrick*[4] were retaliation laws enacted by Michigan and Missouri, respectively, by the terms of which sales in each of these States of beer manufactured in a State already discriminating against beer produced in Michigan or Missouri were rendered unlawful.

Conceding, in *State Board of Equalization v. Young's Market Co.*,[5] that "prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for . . . the privilege of importation . . . even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the [seller's] place of business," the Court proclaimed that this Amendment "abrogated the right to import free, so far as concerns intoxicating liquors." Inasmuch as the States were viewed as having acquired therefrom an unconditioned authority to prohibit totally the importation of intoxicating beverages, it logically followed that any discriminatory restriction falling short of total exclusion was equally valid, notwithstanding the absence of any connection between such restriction and public health, safety or morals. As to the contention that the unequal treatment of imported beer would contravene the equal protection clause, the Court succinctly observed that a "classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[6]

In *Seagram & Sons v. Hostetter*[7] a case involving a state statute regulating the price of intoxicating liquors, the Court upheld the statute, asserting that the Twenty-first Amendment bestowed upon the States broad regulatory power over the liquor sales within their territories.[8] It was also noted that States are not totally bound by traditional commerce clause limitations when they restrict the importation of toxicants destined for use, distribution, or

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[3] 305 U.S. 391 (1939).

[4] 305 U.S. 395 (1939).

[5] 299 U.S. 59, 62 (1936).

[6] Id. at 63–64. In the three decisions rendered subsequently, the Court merely restated these conclusions. The contention that discriminatory regulation of imported liquors violated the due process clause was summarily rejected in Brewing Co. v. Liquor Comm'n, 305 U.S. 391, 394 (1939).

[7] 384 U.S. 35 (1966).

[8] Id. at 42. *See* United States v. Frankfort Distilleries, 324 U.S. 293, 299 (1945) and Nippert v. Richmond, 327 U.S. 416, 425 (1946).

consumption within their borders.[9] In such a situation the Twenty-first Amendment demands wide latitude for regulation by the State.[10] The Court added that there was nothing in the Twenty-first Amendment or any other part of the Constitution that required state laws regulating the liquor business to be motivated exclusively by a desire to promote temperance.[11]

Recent cases have undercut the expansive interpretation of state powers in the *Young's Market* and *Triner Corp.* cases. Twenty-first Amendment and Commerce Clause principles are to be harmonized where possible. The Court now phrases the question in terms of "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[12] "[T]he central power reserved by § 2 of the Twenty-first Amendment [is] that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'"[13] Because "[t]he central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition," the "central tenet" of the Commerce Clause will control to invalidate "mere economic protectionism," at least where the state cannot justify its tax or regulation as "designed to promote temperance or to carry out any other purpose of the . . . Amendment."[14]

***Regulation of Transportation and "Through" Shipments.***—When passing upon the constitutionality of legislation regulating the carriage of liquor interstate, a majority of the Justices seemed disposed to by-pass the Twenty-first Amendment and to resolve the issue exclusively in terms of the commerce clause and state power. This trend toward devaluation of the Twenty-first

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

[10] 384 U.S. at 35. The Court went on to assert that it was not deciding then whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the commerce clause. Id. at 42–43.

[11] Id. at 47.

[12] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984).

[13] 467 U.S. at 715 (quoting California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)).

[14] Bacchus Imports, Ltd., v. Dias, 468 U.S. 263, 276 (1984). *See also* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) (attempt to regulate prices of out-of-state sales); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (state's limited interest in banning wine commercials carried on cable TV while permitting various other forms of liquor advertisement is outweighed by federal interest in promoting access to cable TV); and 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) (retail price maintenance in violation of Sherman Act).

Amendment was set in motion by *Ziffrin, Inc. v. Reeves*[15] wherein a Kentucky statute, forbidding the transportation of intoxicating liquors by carriers other than licensed common carriers, was enforced as to an Indiana corporation, engaged in delivering liquor obtained from Kentucky distillers to consignees in Illinois but licensed only as a contract carrier under the Federal Motor Carriers Act. After acknowledging that "the Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause,"[16] the Court then proceeded to found its ruling largely upon decisions antedating the Amendment which sustained similar state regulations as a legitimate exercise of the police power not unduly burdening interstate commerce. In the light of the cases enumerated in the preceding paragraph, wherein the Twenty-first Amendment was construed as according a plenary power to the States, such extended emphasis on the police power and the commerce clause would seem to have been unnecessary. Thereafter, a total eclipse of the Twenty-first Amendment was recorded in *Duckworth v. Arkansas*[17] and *Carter v. Virginia*,[18] wherein, without even considering that Amendment, a majority of the Court upheld, as not contravening the commerce clause, statutes regulating the transport through the State of liquor cargoes originating and ending outside the regulating State's boundaries.[19]

***Regulation of Imports Destined for a Federal Area***.—Intoxicating beverages brought into a State for ultimate delivery at a National Park located therein but over which the United States retained exclusive jurisdiction has been construed as not constituting "transportation . . . into [a] State for delivery and use therein" within the meaning of § 2 of the Amendment. The importation having had as its objective delivery and use in a federal area over which the State retained no jurisdiction, the increased powers which the State acquired from the Twenty-first Amendment were declared to be inapplicable. California therefore could not extend the importation license and other regulatory requirements of its Al-

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[15] 308 U.S. 132 (1939).

[16] Id. at 138.

[17] 314 U.S. 390 (1941).

[18] 321 U.S. 131 (1944). *See also* Cartlidge v. Raincey, 168 F.2d 841 (5th Cir. 1948), cert. denied, 335 U.S. 885 (1948).

[19] Arkansas required a permit for the transportation of liquor across its territory, but granted the same upon application and payment of a nominal fee. Virginia required carriers engaged in similar through-shipments to use the most direct route, carry a bill of lading describing that route, and post a $1000 bond conditioned on lawful transportation; and also stipulated that the true consignee be named in the bill of lading and be one having the legal right to receive the shipment at destination.

coholic Beverage Control Act to a retail liquor dealer doing business in the Park.[20] On the other hand, a state may apply nondiscriminatory liquor regulations to sales at federal enclaves under concurrent federal and state jurisdiction, and may require that liquor sold at such federal enclaves be labelled as being restricted for use only within the enclave.[21]

***Foreign Imports, Exports; Taxation, Regulation.***—The Twenty-first Amendment did not repeal the export-import clause, Art. I, § 10, cl. 2, nor obliterate the commerce clause, Art. I, § 8, cl. 3. Accordingly, a State cannot tax imported Scotch whiskey while it remains "in unbroken packages in the hands of the original importer and prior to [his] resale or use" thereof.[22] Likewise, New York is precluded from terminating the business of an airport dealer who, under sanction of federal customs laws, acquired "tax-free liquors for export" from out-of-state sources for resale exclusively to airline passengers, with delivery deferred until the latter arrive at foreign destinations.[23] Similarly, a state "affirmation law" prohibiting wholesalers from charging lower prices on out-of-state sales than those already approved for in-state sales is invalid as a direct regulation of interstate commerce. "The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country . . . or another State."[24]

***Effect of Section 2 upon Other Constitutional Provisions.***—Nothwithstanding the 1936 assertion that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth,"[25] the Court has now in a series of

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

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

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

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

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

[25] State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 64 (1936). In Craig v. Boren, 429 U.S. 190, 206–07 (1976), this case and others like it are distin-

cases acknowledged that § 2 of the Twenty-first Amendment did not repeal provisions of the Constitution adopted before ratification of the Twenty-first, save for the severe cabining of commerce clause application to the liquor traffic, but it has formulated no consistent rationale for a determination of the effect of the later provision upon earlier ones. In *Craig v. Boren*,[26] the Court invalidated a state law that prescribed different minimum drinking ages for men and women as violating the equal protection clause. To the State's Twenty-first Amendment argument, the Court replied that the Amendment "primarily created an exception to the normal operation of the Commerce Clause" and that its "relevance . . . to other constitutional provisions" is doubtful. "'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.'"[27] The square holding on this point is "that the operation of the Twenty-first Amendment does not alter the application of the equal protection standards that would otherwise govern this case."[28] Other decisions reach the same result but without discussing the application of the Amendment.[29] Similarly, a state "may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment."[30]

That these cases do not draw a bright line between the commerce clause and other constitutional provisions is evident from *California v. LaRue*.[31] There, the Court sustained the facial constitutionality of regulations barring a lengthy list of actual or simulated sexual activities and motion picture portrayals of these activities in establishments licensed to sell liquor by the drink. In an action attacking the validity of the regulations as applied to ban nude dancing in bars, the Court considered at some length the material

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guished as involving the importation of intoxicants into a State, an area of increased state regulatory power, and as involving purely economic regulation traditionally meriting only restrained review. Neither distinguishing element, of course, addresses the precise language quoted. For consideration of equal protection analysis in an analogous situation, the statutory exemption of state insurance regulations from commerce clause purview, see Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 655–74 (1981).

[26] 429 U.S. 190 (1976).

[27] Id. at 206 (quoting P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING—CASES AND MATERIALS 258 (1975).

[28] Id. at 209–10.

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

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

[31] 409 U.S. 109 (1972).

adduced at the public hearings which resulted in the rules demonstrating the anti-social consequences of the activities in the bars. It conceded that the regulations reached expression that would not be deemed legally obscene under prevailing standards and reached expressive conduct that would not be prohibitable under prevailing standards,[32] but the Court thought that the constitutional protection of conduct that partakes "more of gross sexuality than of communication" was outweighed by the State's interest in maintaining order and decency. Moreover, the Court continued, the second section of the Twenty-first Amendment gave an "added presumption in favor of the validity" of the regulations as applied to prohibit questioned activities in places serving liquor by the drink.[33]

A much broader ruling was forthcoming when the Court considered the constitutionality of a state regulation banning topless dancing in bars. "Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs."[34] This recurrence to the greater-includes-the-lesser-power argument, relatively rare in recent years,[35] would if it were broadly applied give the States in the area of regulation of alcoholic beverages a review-free discretion of unknown scope.

**Effect on Federal Regulation**

The Twenty-first Amendment of itself did not, it was held, bar a prosecution under the Sherman Antitrust Act of producers, wholesalers, and retailers charged with conspiring to fix and maintain retail prices of alcoholic beverages in Colorado.[36] In a concur-

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

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

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

[35] For a rejection of the argument in another context, contemporaneously with *Bellanca*, see Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 657–68 (1981). And for utilization of the argument in the commercial speech context, *see* Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345–46 (1986). *But see* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), not addressing the commercial speech issue but holding state regulation of liquor advertisements on cable TV to be preempted, in spite of the Twenty-first Amendment, by federal policies promoting access to cable TV).

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

ring opinion, supported by Justice Roberts, Justice Frankfurter took the position that if the State of Colorado had in fact "authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. . . . [Since] the Sherman Law . . . can have no greater potency than the Commerce Clause itself, it must equally yield to state power drawn from the Twenty-first Amendment."[37]

Following a review of the cases in this area, the Court has observed "that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'"[38] Invalidating under the Sherman Act a state fair trade scheme imposing a resale price maintenance policy for wine, the Court balanced the federal interest in free enterprise expressed through the antitrust laws against the asserted state interests in promoting temperance and orderly marketing conditions. Since the state courts had found the policy under attack promoted neither interest signficantly, the Supreme Court experienced no difficulty in concluding that the federal interest prevailed. Whether more substantial state interests or means more suited to promoting the state interests would survive attack under federal legislation must await further litigation.

Congress may condition receipt of federal highway funds on a state's agreeing to raise the minimum drinking age to 21, the Twenty-first Amendment not constituting an "independent constitutional bar" to this sort of spending power exercise even though Congress may lack the power to achieve its purpose directly.[39]

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

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

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