

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.”³⁵ This recurrence to the greater-includes-the-lesser-power argument, relatively rare in recent years,³⁶ would if it were broadly applied give the states in the area of regulation of alcoholic beverages a review-free discretion of unknown scope.

In *44 Liquormart, Inc. v. Rhode Island*,³⁷ the Court disavowed *LaRue* and *Bellanca*, and reaffirmed that, “although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a state’s regulatory power over the delivery or use of intoxicating beverages within its borders, ‘the Amendment does not license the States to ignore their obligations under other provisions of the Constitution,’”³⁸ and therefore does not afford a basis for state legislation infringing freedom of expression protected by the First Amendment. There is no reason, the Court asserted, for distinguishing between freedom of expression and the other constitutional guarantees (e.g., those protected by the Establishment and Equal Protection Clauses) held to be insulated from state impairment pursuant to powers conferred by the Twenty-first Amendment. The Court hastened to add by way of dictum that states retain adequate police powers to regulate “grossly sexual exhibitions in premises licensed to serve alcoholic beverages.” “Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations.”³⁹

Effect on Federal Regulation

The Twenty-first Amendment does not oust all federal regulatory power affecting transportation or sale of alcoholic beverages.

³⁵ *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717 (1981).

³⁶ For a rejection of the argument in another context, contemporaneously with *Bellanca*, see *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657–68 (1981). For use of the argument in the commercial speech context, see *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345–46 (1986); this use of the argument in *Posadas* was disavowed in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). See also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), not addressing the commercial speech issue but holding state regulation of liquor advertisements on cable TV to be preempted, in spite of the Twenty-first Amendment, by federal policies promoting access to cable TV).

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

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

³⁹ 517 U.S. at 515.