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Comment, The Substantive Fallacy of the Twenty-First Amendment: A Critique of *Oklahoma Telecasters Association v. Crisp*

I. Introduction

Oklahoma stringently restricts media advertising of alcoholic beverages, both by statute[1] and by state constitution.[2] State authority to restrict alcohol-related advertisements is based on inherent police power and on the twenty-first amendment,[3] which delegates to the states power to regulate the importation and distribution of alcoholic beverages within their borders.[4] In *Oklahoma Telecasters Association v. Crisp*,[5] television broadcasters and cable television operators challenged Oklahoma's advertising prohibitions, claiming that the restrictions violated their free speech rights and were inconsistent with equal protection principles.[6] The Tenth Circuit, reversing the district court, ruled that Oklahoma could restrict television and cable television advertisements promoting alcoholic beverages even when Oklahoma's regulations virtually banned television advertising of liquor in Oklahoma.[7]

The Tenth Circuit determined that the crucial issue on the merits was whether Oklahoma's advertising ban violated the plaintiffs' rights to engage in commercial speech.[8] Accordingly, the court decided the case on this issue and held that Oklahoma's regulations were a permissible infringement of plaintiffs' commercial speech rights.[9] On appeal, the Supreme Court will review the free speech issue, and will also consider whether Oklahoma's prohibitions are preempted by federal regulation of cable broadcasting.[10]

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1. Okla. Stat. tit. 37, § 516 (1981) provides:

   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 sign shall be more than four (4) inches in height or more than three (3) inches in width, and if more than one line is used the lines shall not be more than one (1) inch apart.

2. Okla. Const. art. XXVII, § 5 provides: "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."

3. U.S. Const. amend. XXI.

4. The pertinent section of the twenty-first amendment provides: "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." *Id.* § 2. *See also infra* notes 170-80 and accompanying text.

5. 699 F.2d 490 (10th Cir.), *cert. granted*, 104 S. Ct. 66 (1983).

6. 699 F.2d at 493. The equal protection claim was based on Oklahoma's inconsistent treatment of broadcast and print media. Newspapers and magazines published outside of Oklahoma but circulated within the state were permitted to carry advertisements of alcoholic beverages while this freedom was denied to telecasters. The trial court did not reach the equal protection issue, and therefore it was not before the Tenth Circuit on appeal. *Id.* at 490 n.1. A similar equal protection challenge failed in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

7. 699 F.2d at 502.

8. *Id.* at 498.

9. *Id.* at 502.

10. *See* Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 66 (1983) *granting cert. to* Oklahoma

II. *Oklahoma Telecasters Association v. Crisp*

A. *Background*

Pursuant to the Oklahoma Constitution and state statute,[11] television broadcasters in Oklahoma were required to "block out" television advertising for wine.[12] Failure to comply with this requirement, or the solicitation or acceptance of advertisements for alcohol, subjected broadcasters to possible criminal prosecution.[13] In 1980, the Attorney General of the State of Oklahoma issued an opinion stating that cable operators were subject to the prohibitions against alcoholic beverage advertising applicable to television broadcasters.[14] The Alcoholic Beverage Control Board, the state agency charged with primary responsibility for enforcing Oklahoma's alcohol control laws,[15] then notified cable operators of its intention to enforce compliance with the restrictions on liquor advertisements.[16]

Following the Board's notification, telecasters and cable operators filed separate suits against Crisp, in his capacity as director of the Board, requesting declaratory judgments that Oklahoma's advertising restrictions violated their constitutionally protected speech rights, and requesting injunctive relief preventing Oklahoma from enforcing its restrictions.[17] In nearly identical memorandum opinions and orders, the district court granted the plaintiffs' summary judgment motions and ruled that the power of the states to regulate liquor pursuant to the twenty-first amendment did not override the commercial speech rights of the telecasters and cable operators.[18]

B. *The District Court Opinion*

The district court applied the four-part commercial speech analysis set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[19] to

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Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983). The Supreme Court granted certiorari on three questions:

> 1) May a state adopt, consistently with protection of commercial speech under the First and Fourteenth Amendments, a sweeping ban on truthful, nonmisleading advertising for a lawful product?
>
> 2) May a state prevent, consistently with the First and Fourteenth Amendments, cable television operators from carrying out-of-state news and entertainment programs because those programs contain truthful, non-misleading advertising for wine?
>
> 3) Is a state's regulation of liquor advertising, as applied to out-of-state broadcast signals, valid in light of existing federal regulation of cable broadcasting?

52 U.S.L.W. 3230, (U.S. Oct. 4, 1983)(No. 82-1795).

11. *See supra* notes 1-2.

12. 699 F.2d at 492. Beer advertisements were not prohibited. Under OKLA. STAT. tit. 37, § 506(3) (1981), beer containing less than 3.2% alcohol is not subject to the restrictions of Oklahoma's alcoholic beverage control laws. Because television advertising of beer can refer to beer containing either more or less than 3.2% alcohol, beer advertising is permitted. *See* 699 F.2d at 492.

13. 699 F.2d at 492.

14. *Id.*

15. *See* OKLA. STAT. tit. 37, § 514 (1981).

16. 699 F.2d at 492.

17. *Id.* at 492-93.

18. *Id.* at 493.

19. 447 U.S. 557 (1980). The four-part analysis for determining the validity of commercial speech regulation can be summarized as follows. First, the court inquires whether the commercial speech concerns a lawful activity without misleading the public. Second, the court must

determine the constitutional validity of Oklahoma's laws.[20] The district court concluded that the restrictions did not directly advance the state's asserted interest in reducing alcohol consumption, and were more extensive than necessary to meet the stated interest.[21] Plaintiffs' motions for summary judgment were therefore granted, and permanent injunctions were entered prohibiting Crisp and the Board from enforcing the regulations against either the cablecasters or the telecasters.[22]

C. *The Tenth Circuit Opinion*

On appeal to the Tenth Circuit, Crisp focused on the trial court's application of the *Central Hudson* analysis, and emphasized the significance of the Supreme Court's recent summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*[23] for lack of a substantial federal question.[24] In *Queensgate*, the Ohio Supreme Court had upheld the constitutionality of Ohio's restrictions on off-premises alcohol advertising in the face of a free speech attack.[25] Crisp argued that the summary dismissal of *Queensgate* was dispositive of the issues presented in *Oklahoma Telecasters*.[26]

While recognizing that preemption was a potential issue,[27] the Tenth Circuit did not address the preemption question. Rather, it agreed with Crisp that the precedential effect of *Queensgate*'s summary disposition was the critical issue on appeal.[28]

1. Controlling Effect of the Summary Dismissal of *Queensgate*

Hicks v. Miranda[29] is the leading case on the precedential effect of a summary dismissal for want of a substantial federal question. *Hicks* analyzed the precedential distinctions created by the fundamental differences between the Court's appellate jurisdiction and its certiorari jurisdiction.[30]

Supreme Court appellate jurisdiction exists when a state statute is challenged in state court on the grounds that the statute is incompatible with the Constitution, and the statute's validity is upheld.[31] Unlike certiorari jurisdiction, appellate jurisdiction is mandatory.[32] The Supreme Court is not,

find that the government asserts a substantial state interest. If the answers to the first two questions are positive, then the court proceeds to consider whether the speech regulation directly advances the asserted governmental interest, and whether the regulation is more extensive than necessary to meet the government interest. *See id.* at 564.

20. 699 F.2d at 493.
21. *Id.*
22. *Id.*
23. 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 103 S. Ct. 31 (1982).
24. 699 F.2d at 494.
25. 69 Ohio St. 2d at 366-67, 433 N.E.2d at 142.
26. 699 F.2d at 494.
27. *See id.* at 492. For a discussion of the preemption issues presented by *Oklahoma Telecasters, see infra* notes 148-73 and accompanying text.
28. 699 F.2d at 494.
29. 422 U.S. 332 (1975).
30. *See infra* notes 31-34 and accompanying text.
31. 28 U.S.C. § 1257(2) (1976).
32. *Hicks*, 422 U.S. at 344. The decision to assume jurisdiction via a writ of certiorari lies within the Court's discretion. SUP. CT. R. 17.1.

however, required to grant plenary review to an appealed case; the Court is only required to address the merits of the appeal.[33] Consequently, summary dismissal of an appeal for want of a substantial federal question is a decision on the merits and leaves the appealed judgment undisturbed.[34]

As precedent, summary dismissals are binding on lower courts confronted with the constitutional issues presented in the dismissed appeal.[35] Once an issue has been declared unsubstantial and not deserving of review, lower courts cannot disregard that pronouncement.[36] As a comment on the merits, however, the summary dismissal's effect is limited to the precise issues presented in the jurisdictional statement.[37] Lower courts are therefore prohibited from reaching an opposite conclusion on the precise constitutional conclusion affirmed by the Supreme Court, but are not bound by the affirmed court's reasoning.[38]

In considering the effect of *Queensgate*'s summary affirmance, the Tenth Circuit utilized the methodology set forth in Justice Brennan's concurrence to *Mandel v. Bradley*.[39] Justice Brennan outlined two considerations as relevant when determining the controlling effect of a summary dismissal. First, a court must examine the jurisdictional statement presented by the earlier case, and ascertain whether the constitutional questions presented in both cases are the same.[40] If both cases present the same constitutional issue, the court must determine that the prior judgment in fact rested upon decision of the constitutional questions, and "not even arguably upon some alternative nonconstitutional ground."[41]

The Tenth Circuit found that *Oklahoma Telecasters* involved substantially the same constitutional issues presented in *Queensgate*'s jurisdictional statement.[42] Under the court's analysis, both cases involved the state's power, pursuant to the twenty-first amendment, to attempt to limit alcohol-related problems by prohibiting "some, but not all, forms of liquor advertis-

33. 422 U.S. at 344.
34. *Id. Accord* Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).
35. *Mandel*, 432 U.S. at 176.
36. *Id.*
37. *Hicks*, 422 U.S. at 344-45.
38. *Mandel*, 432 U.S. at 176. In clarifying this area of law, the Court stated:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. . . . Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

Id.

39. 432 U.S. 173 (1977). *See* 699 F.2d at 496.
40. 432 U.S. at 180 (Brennan, J., concurring).
41. *Id.*
42. 699 F.2d at 496. The jurisdictional statement in *Queensgate* presented the following question for Supreme Court appellate review:

> Whether Regulation 4301:1-1-44 of the Ohio Liquor Control Commission, which prohibits a duly licensed retail liquor permit holder from advertising the retail price of alcoholic beverages in any medium visible from outside the permit premises, violates the First and Fourteenth Amendments of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity.

699 F.2d at 496-97.

ing."[43] The court also determined that the judgment in *Queensgate* in fact rested on the constitutional issues presented by the jurisdictional statement, and was not based on some nonconstitutional ground.[44] The Tenth Circuit concluded that it was therefore bound to follow *Queensgate* and uphold the constitutionality of Oklahoma's advertising restrictions.[45]

2. Interaction Between the Twenty-first Amendment and Commercial Speech

The decision to follow *Queensgate* did not terminate the Tenth Circuit's review. Responding to a Supreme Court admonition not to misunderstand the effect and use of a summary dismissal,[46] the court of appeals examined the merits of the broadcasters' challenges.

The crucial question on the merits was whether applying the advertising prohibitions to the broadcasters violated their constitutional rights of free speech.[47] Resolution of this question required the court to balance the plaintiffs' right to engage in commercial speech against Oklahoma's inherent power, as enhanced by the twenty-first amendment, to regulate advertisements dealing with alcoholic beverages.[48]

As a threshold matter, the court held that regulating alcohol-related commercials was an exercise of the authority granted by the twenty-first amendment.[49] This conclusion stemmed from recognition that states have the power, under the twenty-first amendment, to totally prohibit the sale of alcohol within their borders[50] and the power to regulate the circumstances under which liquor is sold.[51] Limiting advertisements directly related to the sale of alcohol was seen as a reasonable way of limiting alcohol abuse and its associated problems, and was therefore held to be a permissible subject of state regulation pursuant to the twenty-first amendment.[52] Because the regulations were enacted pursuant to police power conferred by the twenty-first amendment, they were entitled to an added presumption of validity.[53]

After establishing the nature of Oklahoma's advertising restrictions, the court considered the interaction between the authority delegated by the twenty-first amendment and first amendment protections. Conceding that the broadcasters were engaged in commercial speech entitled to some degree

43. 699 F.2d at 497.

44. *Id.*

45. *Id.*

46. *See Mandel*, 432 U.S. at 177. In *Mandel* the Court cautioned lower courts not to be so pre-occupied with a summary dismissal that they failed to recognize independent issues presented by a case sub judice. *Id.*

47. 699 F.2d at 498.

48. *Id.*

49. *Id.*

50. *Id.* (citing New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715 (1981) (per curiam); Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939)).

51. 699 F.2d at 498 (citing New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715 (1981)).

52. 699 F.2d at 498. *But see infra* notes 177-83 and accompanying text.

53. *Id.* (quoting New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 718 (1981)).

of constitutional protection,[54] the Tenth Circuit applied the four-part analysis enunciated in *Central Hudson*.[55] Guiding the court's application of the test was *Central Hudson*'s recognition that commercial speech, although constitutionally protected, is afforded less protection than other forms of speech.[56]

Disagreeing with the district court's determination that the advertising prohibitions did not directly advance the state's interest and were more extensive than necessary, the Tenth Circuit upheld Oklahoma's restrictions.[57] Examining the "direct advancement" strand of the *Central Hudson* inquiry, the court held that Oklahoma was not required to prove that its regulations in fact advanced its asserted interests.[58] Rather, the inquiry was whether the regulations could reasonably be said to advance the state's interest.[59] Because it was reasonable to believe that banning alcohol advertising could effect the state's interest in reducing alcohol consumption, the regulations directly advanced the state's interest.[60]

Turning to the trial court's conclusion that the regulations were more extensive than necessary to effect the state's goal, the Tenth Circuit noted that the basis for this conclusion was the fact that the advertising ban prohibited all rebroadcasting of alcohol-related advertisements.[61] Citing the plurality opinion in *Metromedia, Inc. v. City of San Diego*,[62] the court held that a total ban on the use of one medium of advertising did not, in and of itself, render a commercial speech regulation overbroad.[63] Given the availability of other mediums for advertising (notably printed publications and on-premises advertising), Oklahoma's law clearly did not eliminate dissemination of alcohol-related information.[64] In light of Oklahoma's enhanced police power under the twenty-first amendment,[65] and the forms of advertising which were permitted, Oklahoma's restrictions were not more unconstitutionally overextensive.[66] Thus, the restrictions satisfied the constitutional requirements of *Central Hudson*.[67]

III. Analysis of the Tenth Circuit's Holdings in *Oklahoma Telecasters*

A. *The Tenth Circuit's Reliance on* Queensgate *was Incorrect*

In *Oklahoma Telecasters* the Tenth Circuit relied directly on the Supreme

54. *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
55. 699 F.2d at 499-501. For an exposition of *Central Hudson*'s four-part inquiry, *see supra* note 19.
56. *Central Hudson*, 447 U.S. at 563. *See* 699 F.2d at 499, 502.
57. 699 F.2d at 502.
58. *Id.* at 501.
59. *Id.*
60. *Id.*
61. *Id.*
62. 453 U.S. 490 (1981).
63. *See* 699 F.2d at 501.
64. *Id.* at 502.
65. *See supra* notes 50-53 and accompanying text.
66. 699 F.2d at 502.
67. *Id.*

Court's summary dismissal of *Queensgate*.[68] Although the court ultimately examined the merits of the broadcasters' challenge, its primary holding found Oklahoma's advertising restrictions valid in light of the *Queensgate* dismissal.[69] As noted above, in order for a summary dismissal to be binding in a subsequent case the constitutional issues presented by both cases must be the same.[70] In *Mandel v. Bradley*,[71] the Court determined that because the facts of the case before the court were different than those in a case which had been summarily dismissed, the summary action was not binding in the subsequent case.[72] Similarly, major factual differences between *Queensgate* and *Oklahoma Telecasters* render *Queensgate* invalid as controlling precedent for *Oklahoma Telecasters*.

The Ohio regulation[73] at issue in *Queensgate* restricted the freedom of specified licensees to advertise alcohol prices on their licensed business premises,[74] and also prohibited those licensees from advertising a price advantage in relation to the alcohol they sold.[75] Those licensees, along with manufacturers and distributors, were still permitted to advertise the retail price of alcohol in any form of the media,[76] although permit holders were prohibited from off-premise advertising of the retail price of beer.[77] Clearly, the regulation of commercial advertising challenged in *Queensgate* was limited, and, as a whole, rather permissive. Conversely, the Oklahoma regulations operated as a virtual ban on advertising concerning alcoholic beverages.[78] Beer may be advertised because of Oklahoma's statutory definition of alcohol,[79] and magazines and periodicals containing alcohol-related advertisements are al-

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68. *See supra* notes 42-45 and accompanying text.

69. *See* 699 F.2d at 497.

70. *See supra* notes 35-38 and accompanying text.

71. 432 U.S. 173 (1977).

72. *Id.* at 177. The Court stated: "The precedential significance of the summary action in [Tucker v. Salera, 424 U.S. 959 (1976)], however, is to be assessed in the light of all the facts in that case; and it is immediately apparent that those facts are very different from the facts of this case." 432 U.S. at 177. The factual differences stemmed from the different provisions of the laws challenged in each case. *See id.*

73. 5 OHIO ADMIN. CODE § 4301:1-1-44 (1978). This regulation provides in pertinent part:

> No alcoholic beverages shall be advertised in Ohio except in the manner set forth in 4301:1-03 and as hereinafter provided.
>
> (A) As to advertising on the premises, holders of Class C, D, and G permits shall not advertise the price per bottle or drink of any alcoholic beverage, or in any manner refer to price or price advantage except within their premises and in a manner not visible from the outside of said premises.
>
> (B) Manufacturers and distributors of alcoholic beverages are permitted to advertise their products in Ohio.
>
> Holders of Class C, D, and G permits shall be authorized to advertise in newspapers of general circulation, radio and television, on bill boards, calendars, in or on public conveyances and in regularly published magazines. Advertising may include the retail price of the original container or packages, but such advertising may not in any manner refer to price advantage.

Id.

74. *See id.*

75. *See id.*

76. *See id.*

77. OHIO REV. CODE ANN. § 4301.211 (Page 1982).

78. *See supra* notes 2, 12.

79. *See supra* note 12.

lowed if the publications are imported into Oklahoma.[80] These are the only types of liquor advertisements permitted by Oklahoma law.[81] Oklahoma's regulations are obviously very restrictive, almost totally prohibiting alcohol advertisements, whereas Ohio's regulations prohibit only very limited types of advertising.[82] Ohio's prohibitions are similar to reasonable time, place, and manner restrictions on speech because they restrict where and how permit holders are allowed to advertise rather than virtually banning this form of expression.[83] Thus, the scope of Oklahoma's advertising ban is one factual difference rendering *Queensgate* inapposite.[84]

The second significant factual difference is that the plaintiffs in *Queensgate* were liquor permit holders,[85] and as such were subject to rules and regulations issued by the state agency granting their license.[86] The licensees therefore exercised their privileges subject to the provisions under which the license was granted. In *Oklahoma Telecasters*, the plaintiffs were either television broadcasters licensed by the Federal Communications Commission[87] or cable operators operating under local franchises[88] and subject to federal regulation.[89] *Queensgate* and *Oklahoma Telecasters* therefore involve factually distinguishable regulatory relationships.

A state agency's regulation of its licensees will raise different constitutional issues than an agency's attempt to enforce subject matter restrictions against independent cable operators and television broadcasters. In *Queensgate*, the Ohio Supreme Court specifically found that the advertising regulations at issue were properly enacted and within the scope of the Liquor Control Commission's statutory authority to regulate its licensees.[90] The issue in *Queensgate*, then, was whether a state agency could regulate its licensees by restricting their commercial speech rights in a limited manner.[91] Indeed, this is precisely the issue set forth in the jurisdictional statement on appeal to the Supreme Court.[92]

Oklahoma Telecasters, unlike *Queensgate*, involves a state agency which has issued regulations governing federal licensees or local franchisees whose operating privileges were not granted by the Alcoholic Beverage Control Board. Further, unlike the regulations challenged in *Queensgate*, the Oklahoma regu-

80. 699 F.2d at 493 n.1.

81. *See id.* at 492, 493 n.1.

82. *Compare* OKLA. STAT. tit. 37, § 516 (1981) *with* 5 OHIO ADMIN. CODE § 4301:1-1-44 (1978).

83. *Cf.* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 650 (1981) (establishes four-part test for determining whether time, place, and manner restrictions on free speech will be permitted); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding reasonable time, place, and manner restriction for use of public streets).

84. *Cf.* Mandel v. Bradley, 432 U.S. 173, 177 (1977) (differing statutory schemes were factual difference precluding existing summary affirmance from constituting controlling precedent).

85. *Queensgate*, 69 Ohio St. 2d at 361, 433 N.E.2d at 139.

86. *See* OHIO REV. CODE ANN. § 4301.03 (Page 1982).

87. *See* 47 U.S.C. § 301 (1976 & Supp. V 1981).

88. *See* OKLA. CONST. art. XIII, § 5.

89. *See generally* United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

90. *Queensgate*, 69 Ohio St. 2d at 363-64, 433 N.E.2d at 140.

91. *See id.* at 366, 433 N.E.2d at 142.

92. *See supra* note 42.

lations prohibit any advertising of alcohol by the plaintiffs within the state of Oklahoma.[93] Finally, the Oklahoma regulations may be in direct conflict with federal law and regulations concerning cable television.[94] The two issues presented by the facts of *Oklahoma Telecasters* are therefore whether Oklahoma may issue regulations governing federal licensees in direct contrast to existing federal regulations, and whether Oklahoma may ban virtually all alcohol-related advertisements by a particular segment of the media. The difference in the extensiveness of the Ohio and Oklahoma regulations and the differing regulatory relationships between the agencies and plaintiffs in the two cases render the issues presented by *Queensgate* and *Oklahoma Telecasters* substantially different. Hence, the Tenth Circuit's reliance upon the summary dismissal of *Queensgate* was improper.

B. *Commercial Speech and the Twenty-first Amendment*

1. *Oklahoma Telecasters* Subordinates Commercial Speech to Twenty-first Amendment Police Power

This analysis of the Tenth Circuit's application of the *Central Hudson* test to Oklahoma's regulations focuses on the Tenth Circuit's conclusions that the regulations directly advanced the asserted governmental interest and were no more restrictive than necessary.[95] Oklahoma's asserted interest in limiting advertising was to reduce the sale and consumption of alcohol and thereby reduce the accompanying problems associated with alcohol abuse.[96] The Tenth Circuit found this interest to be substantial, and declared it to be "exceptionally strong" in view of the additional police power delegated by the twenty-first amendment.[97] Because Oklahoma's prohibitions reasonably related to reducing the sale and consumption of alcohol,[98] the court determined that, as a matter of law, Oklahoma's laws directly advanced its asserted interest.[99] The court's final inquiry under the *Central Hudson* analysis was whether the restrictions were more extensive than necessary to meet the governmental interests. Even though the prohibitions banned virtually all alcohol-related commercials by the plaintiffs, the court found that the regulations were not more extensive than necessary.[100] Although the court relied on the availability of other sources of advertising as one reason for upholding the regulation,[101] the primary theme of the court's decision was that commercial speech related to alcohol is entitled to minimal constitutional protection. *Central Hudson* was characterized as being primarily "a balancing test."[102] When the power granted by the twenty-first amendment was considered in conjunction with Oklahoma's inherent police power, the balance

93. *See supra* note 2.
94. *See infra* notes 160-73 and accompanying text.
95. *See* 699 F.2d at 501-02.
96. *Id.* at 500.
97. *Id.*
98. *Id.* at 501.
99. *Id.*
100. *Id.*
101. *Id.* at 502. *See supra* notes 64-65 and accompanying text.
102. 699 F.2d at 502.

shifted in favor of the state, "permitting regulation of commercial speech that might not otherwise be permissible."[103] The court believed that this balance was mandated by the Supreme Court's summary dismissal of *Queensgate*.[104] Both conclusions, however, are incorrect.

2. Commercial Speech and the Twenty-first Amendment

Truthful advertisements for the sale of lawful products are a protected form of speech under the first amendment because freedom of speech necessarily protects the right to receive information and ideas.[105] Although commercial speech comes within the purview of the first amendment, it is given less protection than other forms of expression.[106] In *Central Hudson*, the Supreme Court developed an intermediate level of scrutiny for determining whether regulation of commercial speech passes constitutional muster.[107] For a regulation of commercial speech to be valid, the *Central Hudson* test requires that it directly advance a substantial governmental interest and not be more extensive than necessary to serve that interest.[108]

At the heart of this portion of this comment is the question of whether the twenty-first amendment's grant of authority to the states to regulate "the transportation or importation"[109] of alcohol includes the power to infringe upon commercial speech rights to a greater degree than if the twenty-first amendment was not involved. In *Oklahoma Telecasters* the Tenth Circuit found that the twenty-first amendment did confer power to regulate commercial speech to a degree which might otherwise be unconstitutional.[110] En banc, the Fifth Circuit has also concluded that restrictions enacted pursuant to a state's twenty-first amendment powers invoke a more relaxed standard of review than is normally applied in commercial speech cases.[111] Essentially, both the Fifth and Tenth Circuits have held that a "rational basis" standard should be used to review regulations regarding alcohol-related commercial speech, rather than the intermediate standard set forth in *Central Hudson*.[112]

Several Supreme Court cases demonstrate, however, that the twenty-first amendment does not necessarily enhance the constitutional significance of a state's interest. Analysis of these cases shows that the twenty-first amendment's effect must be evaluated by reference to the constitutionally protected rights threatened by state regulation. In each of the cases, the Court concluded that it should apply the standard of review customarily associated with the particular constitutional right threatened by state alco-

103. *Id.*

104. *Id.*

105. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764-70 (1976).

106. *Central Hudson*, 447 U.S. at 566.

107. *Id.*

108. *Id.*

109. *See supra* note 4.

110. *See supra* note 103 and accompanying text.

111. Dunagin v. City of Oxford, 718 F.2d 738, 745 (5th Cir. 1983) (en banc), *appeal filed*, 52 U.S.L.W. 3582 (U.S. Feb. 14, 1984) (No. 83-1221).

112. *Dunagin*, 718 F.2d at 745; *Oklahoma Telecasters*, 699 F.2d at 501-02.

hol restrictions. Further, an analysis of the Court's leading cases involving alcohol-related restrictions of speech contradicts the Tenth Circuit's conclusion that regulations promulgated pursuant to the twenty-first amendment are entitled to special deference.

3. *Oklahoma Telecasters'* Subordination of Commercial Speech is Not Justified by Supreme Court Precedent

In *Craig v. Boren*[113] the Court struck down an Oklahoma law which mandated different drinking ages for men and women, declaring the law to be a violation of the equal protection clause of the fourteenth amendment.[114] Oklahoma argued that pursuant to the twenty-first amendment it had "enhanced" police power to regulate the drinking age within the state, and that its statutory scheme was therefore not subject to normal equal protection strictures.[115] The Court expressly rejected Oklahoma's argument that the twenty-first amendment limited the operation of the fourteenth amendment, and held that invidious discrimination was not saved by virtue of the state's power to regulate liquor under the twenty-first amendment.[116] Examining the history of liquor regulation culminating in the twenty-first amendment, the Court concluded that the amendment "primarily created an exception to the normal operation of the Commerce Clause."[117]

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "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." . . . Any departures from this historical view have been limited and sporadic.[118]

The Court went on to apply the standard mandated by the equal protection clause.[119] Because the Oklahoma law made a gender-based distinction, strict scrutiny was not applied. Rather, the Court used an intermediate level of review similar to the standard used in *Central Hudson*.[120]

Similarly, in *Wisconsin v. Constantineau*[121] the Supreme Court implicitly rejected a claim that the power conferred by the twenty-first amendment limited constitutional due process protections. *Constantineau* involved a state statute authorizing public officials to publicly post a notice stating that alcohol sales to named persons were prohibited because the state had determined that those persons were public burdens when they drank alcohol.[122] The

113. 429 U.S. 190 (1976).
114. *Id.* at 210.
115. *See id.* at 204.
116. *Id.* at 205, 209.
117. *Id.* at 206.
118. *Id.* (quoting P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 258 (1975)).
119. *See* 429 U.S. at 210.
120. *See id.* at 197.
121. 400 U.S. 433 (1971).
122. *Id.* at 434.

statute failed to provide notice and opportunity for hearing prior to the public posting.[123] The fact that twenty-first amendment powers were involved did not stop the Court from applying strict due process standards in examining the statute.[124]

More recently, the Court decided *Larkin v. Grendel's Den, Inc.*,[125] which involved the establishment clause[126] and a state liquor zoning statute.[127] The statute authorized churches and schools to veto liquor license applications for places of business within 500 feet of the church or school.[128] The Court struck down the statute, declaring that the state may not exercise its power under the twenty-first amendment in a way that impinges upon the constitutional protections embodied in the establishment clause.[129] Application of the normal standard of review for cases arising under the establishment clause was therefore required.[130]

Finally, *California v. LaRue*[131] and *New York State Liquor Authority v. Bellanca*[132] do not support the conclusion that the twenty-first amendment limits the constitutional speech rights of non-licensee advertisers. Thus, the reliance on these cases by the Fifth[133] and Tenth[134] Circuits is misplaced.

In *LaRue* the Court upheld regulations, promulgated by California's Department of Alcoholic Beverage Control, which prohibited nude dancing and other sexually explicit conduct in establishments holding liquor licenses.[135] Emphasizing that the prohibition applied only to licensed establishments,[136] the court found that the regulations were a permissible exercise of state police power.[137] California's regulation was aimed not at an expression of speech per se, but on conduct associated with the dispensation of alcohol.[138] Thus, the regulation was only incidentally a burden on protected speech.[139] Clearly, *LaRue* does not establish that twenty-first amendment police power generally overrides speech rights when alcohol-related legislation is challenged. At most, *LaRue* establishes that state power to regulate the actual sale of alcohol provides a state with power to regulate speech-related conduct.

Similarly, in *Bellanca* the Court concentrated on the fact that the state

123. *Id.* at 435.
124. *See id.* at 436-37.
125. 103 S. Ct. 505 (1982).
126. U.S. CONST. amend. I, cl. 1 provides in part that "Congress shall make no law respecting an establishment of religion. . . ."
127. MASS. GEN. LAWS ANN. ch. 138, § 16C (West 1974).
128. *Id.*
129. 103 S. Ct. at 510 n.5.
130. *See id.* at 510.
131. 409 U.S. 109 (1972).
132. 452 U.S. 714 (1981).
133. *See* Dunagin v. City of Oxford, 718 F.2d 738, 744-45 (5th Cir. 1983) (en banc).
134. *See Oklahoma Telecasters*, 699 F.2d at 499.
135. 409 U.S. at 118.
136. The Court's analysis began by noting that the challenged regulations were presented "not in the context of censoring a dramatic performance in a theater, *but rather in a context of licensing bars and nightclubs to sell liquor by the drink.*" *Id.* at 114. (emphasis supplied).
137. *Id.* at 116, 118.
138. *See id.* at 117-18.
139. *See id.* at 117.

regulations applied only to the premises of state liquor authority licensees.[140] The Court's analysis was couched in terms of the state's power to determine *where* alcoholic beverages could be sold.[141] Given the state's unquestioned power to regulate the conditions under which alcohol was sold, the state's interest in public safety outweighed the speech values associated with topless dancing.[142] Like *LaRue, Bellanca* only establishes a state's power to regulate conduct on a licensee's premises.

Summing up the preceding discussion, it seems clear that the Supreme Court's cases do not support the conclusion that regulation pursuant to the twenty-first amendment enjoys any special exception from general constitutional principles. Moreover, speech restrictions resulting from twenty-first amendment regulation have been upheld primarily because the restrictions applied directly to licensees, and involved only de minimis restrictions on speech rights.[143] The Oklahoma prohibitions, conversely, are aimed directly at speech content, and act as a complete ban on alcohol-related advertisements by non-licensee broadcasters not engaged in selling alcohol. Further, no alternative forums are available for the plaintiffs.[144] The Supreme Court indicated in *Central Hudson* that such complete bans on otherwise protected commercial speech may be presumptively unconstitutional.

> We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. . . . Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.[145]

In light of the preceding discussion, the conclusion of the Fifth and Tenth Circuits that the twenty-first amendment permits a state to enact otherwise unconstitutional regulations appears unsupportable. Further, *Queensgate* does not mandate the conclusion that commercial speech values are readily subordinated to twenty-first amendment regulation. As noted, a summary affirmance should not be read to adopt any new ratio decendendi.[146] *LaRue* and *Bellanca*, which are the most directly relevant Supreme Court decisions, did not contain any general discussion of commercial speech/twenty-first amendment interaction. Rather, those decisions address a state's power to regulate its licensees.[147] *Queensgate* is properly read as

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140. 452 U.S. at 715-17.

141. The Court stated that "[t]he 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." *Id.* at 717.

142. *Id.* at 718.

143. *See supra* notes 135-42 and accompanying text.

144. Given Oklahoma's complete statutory ban on commercial advertising of alcohol, *see supra* note 1, this argument takes on additional force if plaintiffs are making a facial challenge to the statute, because a facial challenge would obviate the mitigating effects of beer and magazine advertising. The reported opinion does not clearly delineate the posture of the plaintiffs' challenge.

145. *Central Hudson*, 447 U.S. at 566 n.9.

146. *See supra* notes 37-38 and accompanying text.

147. *See supra* notes 135-42 and accompanying text.

applying the limited holdings of *LaRue* and *Bellanca*, rather than as establishing general propositions concerning the interaction of two constitutional amendments. Hence, there is no basis for concluding that Oklahoma's "otherwise unconstitutional" restrictions are validated by twenty-first amendment police power.

IV. FEDERAL PREEMPTION OF OKLAHOMA'S ADVERTISING RESTRICTIONS

The Tenth Circuit recognized that Oklahoma's laws might conflict with federal regulations, but did not discuss the issue.[148] Nonetheless, one of the issues on appeal to the Supreme Court is whether Oklahoma's restrictions on advertising by cable operators are preempted by federal law.[149] This section will analyze the cable operators' preemption challenge.

A. *Federal Preemption*

The Constitution's supremacy clause[150] provides that the Constitution and the laws of the United States "shall be the supreme Law of the Land."[151] When Congress exercises its granted powers, federal legislation can supercede, or preempt, state law.[152] Federal regulations, as well as federal statutes, have preemptive force.[153]

Federal law can preempt state law in three ways. Most obviously, state law may be expressly preempted,[154] or the plan or scheme of federal regulation may evince a congressional intent to preempt a field entirely.[155] Usually, however, congressional enactments in a particular area do not expressly end all state authority. Where state and federal rules coexist, state law is preempted only when it conflicts with federal law.[156] State law conflicts with federal law when state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[157] or when "compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."[158]

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148. *Oklahoma Telecasters*, 699 F.2d at 492.

149. *See supra* note 10.

150. U.S. CONST. art. VI, cl. 2. This section provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

151. *Id.*

152. *See generally* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 103 S. Ct. 1713, 1722 (1983).

153. Fidelity Fed. Sav. & Loan v. De La Cuesta, 458 U.S. 141 (1982).

154. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

155. *Pacific Gas*, 103 S. Ct. at 1722; *Fidelity Federal*, 458 U.S. at 153.

156. *Pacific Gas*, 103 S. Ct. at 1722.

157. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

158. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

B. *Conflict Between Federal Law and Oklahoma's Advertising Restrictions*

1. Potential Preemption Through Copyright Laws

The cable operators in *Oklahoma Telecasters* are governed by both federal and state laws. Forseeable conflicts between those bodies of law indicate that Oklahoma's advertising ban may be preempted insofar as it is applicable to cable operators.

Cable television systems are subscription services that pick up broadcasts originated by others (primary transmissions) and rebroadcast them (secondary transmissions) to paying subscribers.[159] Copyright laws protect copyrights upon secondary transmission by prohibiting cable systems from making any alteration in a program or a commercial.[160] Any change, deletion, or addition is actionable as an infringement of a copyright.[161] These statutory provisions reflect congressional awareness of the probability that retransmission of distant non-network programming causes damage to the copyright owner because the program is distributed in areas in which it has not been licensed.[162] To protect the copyright holder, Congress decided that secondary transmissions to the public by a cable system ought to be subject to a compulsory license.[163] Such a license ensures the copyright owner a fair share of royalties from the rebroadcast of the copyrighted work, whether it be a program or a commercial.[164] The protection against infringement actions provided by the license is conditioned upon compliance with specified procedures, including reporting requirements,[165] payment of the royalty fee,[166] and compliance with the ban on the substitution or deletion of commercial advertising.[167]

Oklahoma's "blocking out" requirement[168] potentially conflicts with the compulsory licensing[169] program of the federal copyright laws. A cable

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159. *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157, 161 (1968).

160. 17 U.S.C. § 111(c)(3) (1982) provides in pertinent part:

> (c) Secondary Transmissions by Cable Systems.
>
> The secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement . . . if the content of the particular program in which the performance or display is embodied, *or any commercial advertising* or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, *is in any way willfully altered by the cable system through changes, deletions, or additions*, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research. . . .

(emphasis supplied).

161. *Id.*

162. *See, e.g.*, H.R. REP. NO. 1476, 94th Cong., 2d Sess. 88-91 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5702-04.

163. *Id.* at 89, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5703-04.

164. *Id., reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5703-04.

165. 17 U.S.C. § 111(d)(1)-(2) (1982).

166. 17 U.S.C. § 111(d)(4) (1982).

167. 17 U.S.C. § 111(c)(3) (1982).

168. *See supra* note 12 and accompanying text.

169. Cable system operators are required to obtain the rebroadcast license, *see* 17 U.S.C. § 111(c)(1) (1982), and are therefore necessarily subject to the ban on deletion contained in 17 U.S.C. § 111(c)(3) (1982).

operator's freedom to choose its programming prevents the conclusion that federal copyright law necessarily precludes application of Oklahoma's advertising restriction to cable systems. Unfortunately for Oklahoma, in certain circumstances federal regulations require cable systems to carry specified programming.[170] The copyright laws will, in those circumstances, preempt the operation of Oklahoma's advertising laws.

2. Potential Preemption Through Federal Regulation of Cable Systems

Federal regulation of cable systems directly conflicts with Oklahoma's ban on televised alcohol advertising. Federal Communications Commission (FCC) regulations require that cable systems carrying required television broadcast signals[171] must carry the signals without deletion or alteration of any programming, including commercial segments.[172] Because much of Oklahoma may be subject to the mandatory signal requirements,[173] Oklahoma's advertising prohibition can directly conflict with federal regulations.

As a practical matter, it is impossible for most cable operators in Oklahoma to conform to both the federal and state regulations. Oklahoma's laws require Oklahoma's cable operators to inspect all of the primary transmissions they receive, and "block out" alcohol commercials. Clearly, Oklahoma's restrictions on alcohol-related advertisements are void to the extent that they will prohibit cable operators from adhering to federal law. The applicable provisions of the Copyright Act and the FCC cable regulations which forbid signal alteration by cable operators therefore may preempt the Oklahoma laws prohibiting transmission of alcohol commercials.

V. Commerce Clause Restrictions on Oklahoma's Alcohol Advertising Restrictions

If the cable operators or television broadcasters are engaged in interstate commerce they will be afforded the protection of the commerce clause.[174] The twenty-first amendment removes the subject of alcohol from the reach of the commerce clause to the extent necessary to allow states to control the transportation or importation of alcohol within their borders.[175] Although this burden on interstate commerce is allowed, interstate businesses dealing with liquor are entitled to some commerce clause protections; the twenty-first amendment "does not pro tanto repeal the commerce

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170. *See infra* note 171.

171. Cable systems can be required to carry signals of broadcasters within specified broadcast proximities. 47 C.F.R. § 76.57, -.59, -.61 (1983). Oklahoma's television market is easily reached by out-of-state broadcasters, potentially making Oklahoma's cablecasters subject to the FCC's mandatory signal requirements.

172. *See* 47 C.F.R. § 76.55(b) (1983).

173. *See supra* note 171.

174. U.S. CONST. art. I, § 8, cl. 3. This section provides that "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

175. *See* Craig v. Boren, 429 U.S. 190, 205-06 (1976). *See generally* Annot., 34 L. Ed. 2d 805 (1972).

clause."[176] Commerce clause implications were not considered by the Tenth Circuit in deciding *Oklahoma Telecasters*. The following brief analysis is provided as further evidence that commercial speech rights cannot be readily subordinated to twenty-first amendment regulation.

In *Hostetter v. Idlewild Bon Voyage Liquor Corp*.[177] the Supreme Court held that New York could not regulate liquor destined for foreign ports and under the control of the Federal Bureau of Customs.[178] Because there was no showing that the liquor subject to regulation would be diverted into New York, the state had no twenty-first amendment regulatory power.[179] *Hostetter* did not read the twenty-first amendment literally; a state's power was limited to "transportation and importation" of liquor which would affect a state's population.[180]

Several years later the Court affirmed a decision declaring that liquor involved in foreign commerce was protected by the commerce clause.[181] The lower court had held that where liquor was not being imported for "delivery and use" within the state, state regulation could not be predicated on the twenty-first amendment.[182]

In light of the restricted scope of twenty-first amendment police power recognized by the Supreme Court, where the object of regulation does not import or transport alcohol for delivery or use within a state, the state's twenty-first amendment power to interfere with interstate commerce is significantly attenuated.[183] Because Oklahoma's advertising ban affects parties merely broadcasting information about alcohol, it constitutes regulation beyond the recognized scope of a state's exclusive power under the twenty-first amendment.[184] The regulation must therefore closely conform to commerce clause principles generally applicable to state laws affecting interstate commerce.[185] State regulations may interfere with interstate commerce to a certain extent, but state prohibitions cannot be oppressive.[186] In this case,

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176. 429 U.S. at 206.

177. 377 U.S. 324 (1964).

178. *Id*. at 333-34.

179. *Id*.

180. *Id*. at 333.

181. *See* Lordi v. Epstein, 389 U.S. 29 (1967) (per curiam), *aff'g*, 261 F. Supp. 921 (D.N.J. 1966).

182. 261 F. Supp. at 982.

183. *Cf*. Craig v. Boren, 429 U.S. 190, 206 (1976) (state power outside recognized scope of twenty-first amendment extremely limited).

184. *See supra* notes 177-82 and accompanying text.

185. *Cf*. Craig v. Boren, 429 U.S. 190, 206 (1976): ("[T]he Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision 'be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.' " (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964)). *See also supra* notes 113-47 and accompanying text.

186. *E.g*., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). In *Bibb*, the Court struck down an Illinois statute requiring a certain type of rear fender mudguard on trucks and trailers operating within the state. While recognizing that states have broad powers to regulate safety on intrastate highways, the Court held that the Illinois statute placed too heavy a burden on interstate commerce because Illinois' regulation would subject shippers to other states' contradictory regulations, *id*. at 527, and would therefore cause significant interference with the free flow of interstate commerce. *Id*. at 529-30.

Oklahoma's restrictions create an unreasonable burden upon interstate cable operators and television broadcasters.

Oklahoma's regulations affect not only cable operators and television broadcasters in Oklahoma, but also affect out-of-state operators whose broadcasts are transmitted into Oklahoma. A television network might broadcast into several states, but because the broadcast would be transmitted into Oklahoma the company would be required to delete all alcohol commercials in order to comply with Oklahoma's laws. This would require out-of-state television companies to preview and alter every broadcast, to change their advertising policies, or to limit their marketing areas. Similarly, cable operators might find themselves in the same position, although they service much smaller areas than television broadcasters. A cable company located outside the state may have subscribers in Oklahoma. If so, the cable operator, under Oklahoma law, would have to alter its particular transmissions, change its advertising policies, or limit its available market. Thus, Oklahoma's regulations are arguably an impermissible burden on interstate commerce.

VI. SUMMARY

The Tenth Circuit's reliance on the summary dismissal of *Queensgate* was incorrect. *Queensgate* involved a state agency narrowly limiting the commercial speech rights of its licensees:[187] *Oklahoma Telecasters* involved a state agency broadly limiting the commercial speech rights of independent actors.[188] Because the Tenth Circuit failed to treat *Queensgate* with the precision required by Supreme Court decisions,[189] it wrongly held that *Queensgate* was controlling.

Analysis of the commercial speech question involves a more complicated issue. Oklahoma's interest, when viewed in conjunction with a constitutional amendment directly supporting that interest, may well be enhanced. Nonetheless, the conclusion that the twenty-first amendment justifies an otherwise unconstitutional regulation of commercial speech, by creating a lesser standard for judicial review, is a substantive fallacy. Case law demonstrates that although the twenty-first amendment may enhance a state's interest in regulating alcohol-related activities, a court's constitutional methodology remains unchanged.[190] Thus, Oklahoma's advertising ban must be evaluated under general commercial speech principles; evaluated under those principles, the regulations must fall.[191]

Further, in light of the federal regulations and laws applicable to cable operators, Oklahoma's advertising prohibitions may be preempted with respect to cable operators. When Oklahoma's statute directly conflicts with federal law,[192] it must give way.

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187. *See supra* notes 73-77 and accompanying text.
188. *See supra* notes 78, 87-88, 93 and accompanying text.
189. *See supra* notes 35-38 and accompanying text.
190. *See supra* notes 113-42 and accompanying text.
191. *See supra* notes 143-47 and accompanying text.
192. *See supra* notes 159-73 and accompanying text.

Finally, commerce clause principles indicate that Oklahoma's laws are of questionable validity. Oklahoma's prohibitions do not relate to the process of bringing alcohol into Oklahoma, but rather seek to regulate speech about alcohol legally brought into Oklahoma. Oklahoma's advertising prohibition is therefore not entitled to the special deference granted laws within the clear contemplation of the twenty-first amendment. Instead, the prohibition should be subjected to ordinary commerce clause analysis. Under such an analysis, Oklahoma's advertising ban must fall as an unreasonable burden on interstate commerce.[193]

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193. *See supra* notes 175-86 and accompanying text.