Volume 19 | Issue 1 Article 5

1973

# Constitutional Law - Freedom of Speech - Liquor Licensing Regulations Governing Nightclub Entertainment Are a Rational Exercise of the State's Authority under the Twenty-First Amendment, Even Though Expression Protected by the First Amendment is Proscribed

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Recommended Citation

E. R. Harding, *Constitutional Law - Freedom of Speech - Liquor Licensing Regulations Governing Nightclub Entertainment Are a Rational Exercise of the State's Authority under the Twenty-First Amendment, Even Though Expression Protected by the First Amendment is Proscribed*, 19 Vill. L. Rev. 177 (1973).
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CONSTITUTIONAL LAW — FREEDOM OF SPEECH — LIQUOR LICENSING REGULATIONS GOVERNING NIGHTCLUB ENTERTAINMENT ARE A RATIONAL EXERCISE OF THE STATE'S AUTHORITY UNDER THE TWENTY-FIRST AMENDMENT, EVEN THOUGH EXPRESSION PROTECTED BY THE FIRST AMENDMENT IS PROSCRIBED.

*California v. LaRue* (U.S. 1972)

Plaintiffs, various nightclub owners and entertainers, brought suit against the director of the California Department of Alcoholic Beverage Control (the Department) challenging the constitutionality of statewide regulations governing entertainment on licensed premises and seeking injunctive relief.[1] A three-judge district court held that the regulations concerning films and live entertainment abridged expression protected by the first and fourteenth amendments and enjoined their enforcement.[2] On appeal, the Supreme Court reversed, *holding* that, in the context of state licensing of bars and nightclubs to sell liquor, regulation of live entertainment and film exhibition was valid as a rational exercise of

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1. LaRue v. California, 326 F. Supp. 340 (C.D. Cal. 1971), *rev'd,* 409 U.S. 109 (1972).

The California Constitution established the Department and authorized it to license and regulate the sale of alcoholic beverages in furtherance of the public welfare and morals. CAL. CONST. art. 20, § 22. In 1970, the Department held public hearings on "live entertainment" in bars and nightclubs and received testimony concerning such entertainment as "topless" and "bottomless" dancers, nude entertainment, and films depicting sexual acts. California v. LaRue, 409 U.S. 109, 110–11 (1972). Evidence received linked such entertainment to public sexual acts between customers and entertainers as well as to various sex crimes. *Id.* at 111. As a result the Department specifically restricted the content of films and live entertainment presented on licensed premises. *Id.;* California Department of Alcoholic Beverage Control Rules 143.2–5 (1970).

2. 326 F. Supp. at 350. Plaintiffs' challenge was directed primarily at California Department of Alcoholic Beverage Control rules 143.3 and 143.4. Rule 143.3(1) provides in pertinent part:

> No licensee shall permit any person to perform acts of or acts which simulate:
>
> (a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law.
>
> (b) Touching, caressing or fondling on the breast, buttocks, anus or genitals.
>
> (c) The displaying of the pubic hair, anus, vulva or genitals.

Rule 143.4 in relevant part prohibits:

> The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:
>
> (1) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
>
> (2) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.
>
> (3) Scenes wherein a person displays the vulva or the anus or the genitals.
>
> (4) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

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the state's broad authority under the twenty-first amendment,[3] even though expression protected by the first and fourteenth amendments was proscribed. *California v. LaRue,* 409 U.S. 109 (1972).

Because first amendment rights are afforded a "preferred position" in our constitutional scheme,[4] various judicial safeguards have been developed to insure their preservation. Thus, whenever first amendment rights are involved in legislation, "precision of regulation must be the touchstone,"[5] and although legislation may legitimately proscribe conduct unprotected by the first amendment, if it simultaneously prohibits protected conduct, it may be invalidated as overbroad.[6]

The protection afforded first amendment rights by the overbreadth doctrine is evident in a variety of fashions. For example, legitimate legislative concerns, which might well support other regulations, are insufficient to justify those which impinge upon first amendment rights, absent a demonstration of a compelling state interest justifying the infringement.[7] Furthermore, in assessing the due process afforded by procedural safeguards employed in a statute restraining speech, the Court will apply "close analysis and critical judgment" in light of the circumstances.[8] The Court has gone to great extremes, particularly in the area of film censorship, to formulate precisely those procedural standards required to insure adequate protection of expression.[9]

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3. 409 U.S. at 115, 118. *See* notes 27–33 and accompanying text *infra.*
U.S. CONST. amend. XXI, § 2 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.

4. Thomas v. Collins, 323 U.S. 516, 530 (1945); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). *See* McKay, *The Preference for Freedom,* 34 N.Y.U. L. REV. 1182 (1959).

5. NAACP v. Button, 371 U.S. 415, 438 (1963). *See* Coates v. Cincinnati, 402 U.S. 611, 614 (1971); United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960). *Cf.* Cameron v. Johnson, 390 U.S. 611, 617 (1968); Cox v. Louisiana, 379 U.S. 559, 562 (1965).

6. In Shelton v. Tucker, 364 U.S. 479 (1960), the Court characterized this doctrine as follows:
> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

*Id.* at 488 (footnote omitted).

7. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 634 (1969); United States v. Robel, 389 U.S. 258, 268 (1967); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Bates v. Little Rock, 361 U.S. 516, 524 (1960). Furthermore, the Court has held that an individual has standing to challenge a statute imposing criminal sanctions on the basis of first amendment overbreadth, whether or not his particular conduct could have been legitimately prohibited by a properly drawn statute. Gooding v. Wilson, 405 U.S. 518 (1972); Freedman v. Maryland, 380 U.S. 51 (1965). It is not, however, necessary for a restriction on speech to impose criminal sanctions in order to come within the bounds of the overbreadth doctrine, for, if the statute unconstitutionally conditions first amendment rights, it may be invalidated on overbreadth grounds. *See, e.g.,* Keyishian v. Board of Regents, 385 U.S. 589, 605–10 (1967); Elfbrandt v. Russell, 384 U.S. 11, 18–19 (1966). *See generally* O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached,* 54 CALIF. L. REV. 443 (1966).

8. Speiser v. Randell, 357 U.S. 513, 520 (1958).

9. *See, e.g.,* Blount v. Rizzi, 400 U.S. 410 (1971); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); Freedman v. Maryland, 380 U.S. 51 (1965).

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It must be noted that to secure the benefits of these first amendment safeguards, however, the expression involved must be, in the first instance, constitutionally protected. To be protected, expression must possess a communicative element, in the sense of expressing an idea.[10] Although the spoken or written word is generally communicative, all such expressions do not qualify for first amendment protection.[11] Similarly, difficulties arise when the expression takes the form of public conduct, embodying both non-communicative and communicative elements.[12] In *United States v. O'Brien*,[13] the Court rejected the notion that all conduct through which an individual intends to express an idea falls within the purview of the first amendment. Apparently, the Court must first find a "sufficient" communicative element in order for first amendment principles to apply.[14]

When confronted with regulations promulgated by the California Department of Alcoholic Beverage Control restricting the content of live entertainment and films in bars and nightclubs,[15] the three-judge federal court in *LaRue* applied these traditional first amendment principles. It correctly concluded that, on their face, the regulations proscribed constitutionally protected theatrical entertainment and films in bars and nightclubs, and accordingly placed an unconstitutional condition upon the

10. Thus, in Roth v. United States, 354 U.S. 476 (1957), the Court stated:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . .
>
> All ideas having the slightest redeeming social importance . . . have the full protection of [the first amendment] . . . .

*Id.* at 484. *See also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952); Finnis, *"Reason and Passion:" The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 241 (1967). The Court has indicated that the distinction between expression which transmits ideas, as opposed to mere entertainment is "much too elusive" to be drawn. Winters v. New York, 333 U.S. 507, 510 (1948).

11. *See* Roth v. United States, 354 U.S. 476 (1957) (obscenity not protected speech); Beauharnis v. Illinois, 343 U.S. 250 (1952) (libelous utterances not protected speech).

12. *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (handbill distribution); Schacht v. United States, 398 U.S. 58 (1970) (street skit); Street v. New York, 394 U.S. 576 (1969) (flag burning); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (wearing of black arm bands); United States v. O'Brien, 391 U.S. 367 (1968) (draft card burning); Edwards v. South Carolina, 372 U.S. 229 (1963) (protest demonstration); Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957) (labor picketing).

13. 391 U.S. 367 (1968).

14. *Id.* at 376. Given a sufficient communicative element to bring the first amendment into play, the Court specified the conditions under which state regulation of the non-communicative element can impose an *incidental* restriction on the protected communicative element:

> [Such] government regulation is sufficiently justified if [1] it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedom is *no greater* than is essential to the furtherance of that interest.

*Id.* at 377 (emphasis added).

15. *See* note 2 *supra*.

granting of a license.[16] Specifically, it noted that the regulations could not be justified merely as a prohibition of obscenity since the Department did not even remotely purport to apply the constitutional test of obscenity in proscribing performances and films containing content of a sexual nature.[17]

The Department contended that live entertainment was not speech within the meaning of the first amendment and that, therefore, the regulations could be justified as regulations of conduct under the *O'Brien* rationale.[18] The district court rejected these assertions, noting that the regulations on their face prohibited theatrical entertainment, which is entitled to first amendment protection unless obscene.[19] Furthermore, even granting the applicability of the *O'Brien* standards, the court concluded they were not fulfilled, stating that "[t]he resulting restrictions on First Amendment freedoms is considerably greater than is essential to the furtherance of any legitimate state interest . . . ."[20]

In the face of this first amendment overbreadth, it seemed apparent to the lower court that the regulations were invalid absent the required showing of a compelling state interest.[21] The state argued that its substantial interest in protecting public welfare and morals from B-girls, prostitution, and narcotics, and its interest in protecting minors justified the restrictions,[22] but the court summarily rejected this argument, stating that "[n]arcotic and prostitution violations may of course be prosecuted

16. 326 F. Supp. at 357. *See* notes 4–14 and accompanying text *supra*. It should be noted that, on appeal, the Supreme Court in *LaRue* specifically concurred with the lower court's conclusion that constitutionally protected speech was proscribed. 409 U.S. at 116.

17. 326 F. Supp. at 355. The Supreme Court first articulated the constitutional test for obscenity in Roth v. United States, 354 U.S. 476 (1957), as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. In *Roth*, the court indicated that the mere fact that material contains sexual content does not automatically cause it to lose constitutional protection. *Id.* at 487. *See also* Jacobellis v. Ohio, 378 U.S. 184, 191 (1964). Until recently, subsequent cases attempted to refine the *Roth* obscenity test, but this effort resulted in confusion due to the widely divergent views of the justices. *See, e.g.*, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184, 191 (1964); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962). Nonetheless, the three-judge court in *LaRue* found, among other things, that the regulations did not even fulfill the *Roth* requirement that the material be viewed in its entirety. 326 F. Supp. at 355. It should be noted that the Court, after *LaRue*, redefined and attempted to clarify obscenity standards in an opinion supported by a majority of the justices. Miller v. California, 93 S. Ct. 2607 (1973).

18. 326 F. Supp. at 355. *See* notes 13 & 14 and accompanying text *supra*.

19. 326 F. Supp. at 355. *See, e.g.*, Schacht v. United States, 398 U.S. 58 (1970) (first amendment applies to actor during dramatic performance); *In re* Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968) (performance by topless dancer entitled to first amendment protection unless obscene).

20. 326 F. Supp. at 355.

21. *Id.* at 355–56.

22. *Id.* at 355. The asserted interest in protecting minors seems spurious in light of a pre-trial order setting forth as undisputed facts that dancing could not be viewed from outside the premises, that those who entered were forewarned of the type of entertainment within, and that there was no pandering. *Id.* at 355–56.

under criminal statutes, but certainly cannot be used as a vehicle to impose censorship . . . ."[23]

The state further attempted to justify the regulations as a legitimate exercise of the power vested in it by the twenty-first amendment.[24] The court, however, distinguished the cases relied upon by the state as dealing with the relationship of the twenty-first amendment to the commerce and import-export clauses of the United States Constitution.[25] Thus, the court concluded that the interests reflected by the twenty-first amendment could not override those protected by the first amendment, especially in light of the latter's preferred position.[26]

Notwithstanding the above reasoning, the Supreme Court in *LaRue* sustained the regulations on their face as a valid exercise of the state's power under the twenty-first amendment.[27] The Court began its analysis by reference to *Seagram & Sons v. Hostetter*,[28] wherein it was broadly stated that "[c]onsideration of *any* State law regulating intoxicating beverages must begin with the [second section of the] Twenty-first Amendment . . . ."[29] Writing for the Court, Mr. Justice Rehnquist expounded on the authority conferred by the amendment, stating that it "strengthened" the state's regulatory power by "conferring *something more than*" the traditional state police power.[30] The Court expressed no doubt that the regulations in issue were clearly within the purview of the amendment, stating that "[g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment *requires*, we cannot hold that the regulations on their face violate the Federal Constitution."[31] Thus, two essentially novel concepts are embodied in the Court's analysis: first, the Court clearly established, for

23. *Id.* at 355.
24. *Id.* at 356–57.
25. *Id.* at 357. The commerce clause of the Constitution gives Congress the power to "regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cl. 2. The import-export clause prohibits the states from levying imposts or duties on imports or exports without congressional consent, except to the extent "absolutely necessary" for the execution of its inspection laws. U.S. CONST. art. I, § 10, cl. 2. *See* notes 37–49 and accompanying text *infra*.
26. 326 F. Supp. at 357. In reaching this conclusion, the court relied upon Wisconsin v. Constantineau, 400 U.S. 433 (1971), which held that the fundamental notice and hearing requirements of the due process clause of the fourteenth amendment were applicable to a statute providing for the public posting of names of persons who had engaged in excessive drinking. The court reasoned that "if [the twenty-first amendment] cannot override that clause, it certainly cannot override the First Amendment . . . ." 326 F. Supp. at 357. It is submitted, however, that *Constantineau* did not address itself to the relationship of the twenty-first amendment to the fourteenth amendment, since the only reference to the twenty-first amendment was in the following passage:

> We have no doubt as to the power of a State to deal with the evils described in the Act. The police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment.

400 U.S. at 436 (citation omitted). *But see* California v. LaRue, 409 U.S. 109, 115, 120 n.* (latter page reference to Stewart, J., concurring).
27. 409 U.S. at 118–19.
28. 384 U.S. 35 (1966).
29. *Id.* at 41 (emphasis added).
30. 409 U.S. at 114 (emphasis added).
31. *Id.* at 118–19 (emphasis added).

the first time, that state liquor licensing regulations restricting the forms of entertainment in local establishments selling liquor by the drink are based on the state's power under the twenty-first amendment;[32] second, the Court held that such regulations are valid on their face, even though they proscribe expression protected by the first amendment, since the twenty-first amendment strengthened the state's ability to regulate and gave an added presumption to the validity of the regulations.[33]

The *LaRue* Court assumed that the California regulations were within the purview of the twenty-first amendment; only Justice Stewart, in his concurring opinion, developed a basis for the assumption. He reasoned that in licensing specific establishments to sell liquor, the state did not interfere with the first amendment activities of those establishments; that is, the establishments were still entirely free to engage in the activities, but without an accompanying sale of liquor.[34] Thus, he concluded that "[the state] would simply be controlling the *distribution* of liquor, as it has every right to do under the Twenty-first Amendment."[35] Applying this reasoning, it can be argued that the Department was simply precluding establishments which presented the proscribed performances only from serving liquor, and not from presenting the proscribed entertainment. This position, although not specifically developed by the majority, is supported by language in its opinion:

> [T]he critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.[36]

It is submitted that the application of the twenty-first amendment in the instant case is not warranted by either the language of the amendment, its history, logic, or existing precedent. The language of the amendment operates to grant a state the power to enact laws designed to regulate the transportation or importation of intoxicating beverages. It affords no basis for the conclusion that licensing regulations concerning local retail sales are within the ambit of the amendment. As Justice Marshall indicated in his dissent, the amendment refers only to importation, and its legislative history indicates that it was intended only to give "dry" states the ability to "control the flow of liquor across their boundaries," free from traditional commerce clause limitations.[37]

While Justice Marshall was correct in his characterization of the legislative history,[38] it should be noted that the Court had interpreted

32. *See* notes 35–46 and accompanying text *infra*.
33. 409 U.S. at 115, 118.
34. 409 U.S. at 119–20 (Stewart, J., concurring).
35. *Id.* at 120 (emphasis added).
36. *Id.* at 118.
37. 409 U.S. at 134 (Marshall, J., dissenting).
38. *See* 76 CONG. REC. 4140–43 (1933). *See also* Note, *The Twenty-first Amendment Versus the Interstate Commerce Clause*, 55 YALE L.J. 815, 816–18 (1946); 7 GEO. WASH. L. REV. 402, 407 (1939); 37 MICH. L. REV. 957, 959 (1939).

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the amendment more broadly.[39] The conclusion remains, however, that historical reference supports the proposition that the twenty-first amendment was not intended to extend to regulation of local distribution. Even prior to the adoption of the amendment, the states had broad power to regulate local distribution of liquor.[40] Logically, it seems most unlikely that a constitutional amendment would be proposed and adopted to duplicate broad powers which the states already possessed.[41] Rather, the amendment apparently was intended to supplement the already existing broad state power with the *additional* power to regulate, unfettered by the commerce clause, the importation of intoxicants for delivery or use within the state's borders.[42] The fact that no prior decision of the Court had directly held licensing regulations concerning retail distribution to be within the purview of the twenty-first amendment lends further support to this conclusion.[43] Only broad language in several opinions, taken out of context, supports such a proposition.[44] It was to such language that a federal district court, in *Krauss v. Sacramento Inn,*[45] turned in reaching a conclusion analogous to *LaRue.* Other courts, recognizing the dichotomy of state power in this area and the limited significance of earlier broad language, refused to extend the coverage of the twenty-first amendment.[46] The *LaRue* Court, however, has now dissipated any doubt as to the applicability of the amendment to local distribution.

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39. *See, e.g.,* Carter v. Virginia, 321 U.S. 131 (1944); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

40. In Crane v. Campbell, 245 U.S. 304 (1917), the Court stated:

> It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment.

*Id.* at 307 (citations omitted). *See* 8 HOUSTON L. REV. 587 (1971).

41. *See* note 42 *infra. See also* 8 HOUSTON L. REV. 587, 589–90 (1971).

42. At the time the proposed amendment was being considered by the Senate, Senator Blaine stated:

> [T]he State is not surrendering any power that it possesses, but rather, by reason of this provision, in effect acquires power that it has not at this time.

76 CONG. REC. 4141 (1933).

43. Krauss v. Sacramento Inn, 314 F. Supp. 171, 178 (E.D. Cal. 1970).

44. For example, in Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), the Court stated:

> [T]he scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or to prevent the traffic and distribution of intoxicants within its borders has remained unquestioned.

*Id.* at 330. *See* Seagram & Sons v. Hostetter, 384 U.S. 35, 42 (1966); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 299 (1945).

45. 314 F. Supp. 171, 175–78 (E.D. Cal. 1970).

46. *See, e.g.,* Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). The Supreme Court itself seems to have recognized the dichotomy of power. In Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964), the Court stated:

> We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the *importation* of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, *either,* of Kentucky's plenary power to regulate and control . . . the distribution, use, or consumption of intoxicants within her territory after they have been imported.

*Id.* at 346 (emphasis added).

Having reached the conclusion that the amendment applied to local distribution, the Court additionally found that the amendment strengthened the state's ability to regulate by lending an "added presumption" of validity to the challenged regulations. The Court relied upon *Hostetter v. Idlewild Bon Voyage Liquor Corp.*[47] wherein it stated:

> 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.[48]

In light of the *LaRue* Court's analysis, one can conclude that "First Amendment" may be inserted in lieu of "Commerce Clause" in the *Hostetter* Court's language. Thus, in the context of the issues and interests at stake in *LaRue,* a mutual consideration of both amendments operated to alter state power so as to insulate a regulation which, on its face, would otherwise be found constitutionally infirm on the ground of first amendment overbreadth.[49]

The significance of the *LaRue* Court's analysis is manifested in its failure to apply traditional first amendment precepts when testing the validity of regulations which concededly proscribed constitutionally protected expression in bars and nightclubs. The Court stated:

> [W]e do not believe that the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in *O'Brien* . . . .[50]

Furthermore, in stating that "wide latitude" must be afforded the state agency which is the "repository of the State's power under the Twenty-first Amendment,"[51] the Court clearly indicated that in this case the added presumption of validity provided by the twenty-first amendment enabled it to avoid any consideration of first amendment overbreadth. Having granted the state this novel discretion, the Court consequently sustained the regulations on the basis of their reasonableness, concluding that the Department's decision that "certain *sexual performances* and the dispensation of liquor by the drink" should not occur simultaneously on licensed premises was not an "irrational one."[52]

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47. 377 U.S. 324 (1964).

48. *Id.* at 332.

49. *See* notes 15–25 and accompanying text *supra.* Justice Marshall sweepingly criticized the majority's reasoning, claiming it had made the twenty-first amendment "a pro tanto repealer of the rest of the Constitution." 409 U.S. at 135. However, this statement is manifestly unfair, for the majority opinion plainly stated that the amendment did not operate to supersede all other provisions of the Constitution in the area of liquor regulations. 409 U.S. at 115, *citing* Wisconsin v. Constantineau, 400 U.S. 433 (1971). *But see* note 26 *supra.*

50. 409 U.S. at 116.

51. *Id.*

52. 409 U.S. at 118 (emphasis added).

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It must be noted that there are two significant limitations built into this newly afforded discretion. The nature of the expression itself represents one such limitation. In assessing the reasonableness of the regulations, the Court focused on the sexual import of the conduct involved, stating that "[t]he substance of the regulations . . . prohibit . . . 'performances' that partake more of gross sexuality than of communication."[53] The Court indicated that the scope of permissible state regulation significantly increased when the expression involved the commission of public acts which might violate legitimate penal statutes.[54] It seems clear that the rationale of *LaRue* would not, of necessity, extend to regulation of other expression. Regulations denying a liquor license to establishments where, for example, political expression occurred would be on a different footing. It is highly unlikely that any added presumption of validity provided by the twenty-first amendment could cure such regulations of their first amendment deficiency.

The second limitation on the state's discretion is expressed in a footnote, wherein the Court, quoting *Seagram & Sons,* stated:

> "[A]lthough it is possible that specific future applications of the statute may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. . . ."[55]

While the Court made it quite plain that even though sexual performances might be protected expression, they could be proscribed in the context of licensing bars and nightclubs,[56] its caveat leaves open the door for review of cases wherein there has been clear abuse of the state's newly acquired discretion.

In conclusion, one must inquire why the Court chose to go to such extremes to avoid a first amendment analysis. If, as demonstrated by the legislative history, the application of the twenty-first amendment to the regulations was unclear in the first instance, it is certainly far-fetched to assert that the amendment gave the regulation an added presumption of validity, sufficient, under the circumstances involved, to overcome overbreadth objections. Furthermore, the alternative of straightforward application of first amendment principles is seemingly innocuous. At the worst, the regulations would have been declared overbroad on their face. Since the Department's objective was to regulate the gross sexual activity between entertainers and customers,[57] it could have reformulated its regulations to specifically proscribe such conduct in licensed establish-

53. *Id.*
54. *Id.* at 117.
55. *Id.* at 119 n.5, *quoting* 384 U.S. at 52.
56. 409 U.S. at 118. *See* text accompanying note 36 *supra.* In contrast, Justice Douglas, who dissented in *LaRue* on the ground that the lower court should have abstained until the state courts had given the regulations an authoritative construction, indicated that should the regulations be construed as prohibiting protected expression, he would find the regulations unconstitutional. 409 U.S. at 121.
57. 409 U.S. at 111.