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A number of recent Supreme Court decisions have reinforced state regulatory power and have accorded renewed emphasis to the values of federalism. Some of these decisions, for example, have reinterpreted narrowly the scope of constitutional guarantees in the area of criminal justice.[1] Others have drawn the distinction between cases addressing individual rights and those concerned with the allocation of economic resources in order to reject attempts under the equal protection and due process clauses to reform areas of social legislation.[2] The use of these two basic analytical schemes can best be illustrated by considering briefly two recent Supreme Court decisions. In *San Antonio Independent School District v. Rodriguez*[3] the Court upheld a scheme of school financing that created economic inequality among school districts. The Court found that while education was a vital social concern,[4] it "is not among the rights afforded explicit protection under our Federal Constitution . . . [nor is there] any basis for saying that it is implicitly so protected."[5] In contrast to *Rodriguez*, and despite the absence of any clear constitutional directive, the Court in *Roe v. Wade*[6] held that a woman's right to seek an abortion was an element of privacy embodied in the liberty protected by the fourteenth amendment's due process clause.[7] That *Wade* pertained to individual rights[8] whereas *Rodriguez* concerned mere allocation of economic re-

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1. *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972) (sixth amendment); Kastigar v. United States, 406 U.S. 441 (1972) (fifth amendment); Harris v. New York, 401 U.S. 222 (1971) (fifth amendment).

2. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education); Lindsey v. Normet, 405 U.S. 56 (1972) (housing); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare).

3. 411 U.S. 1 (1973).

4. *Id.* at 30.

5. *Id.* at 35.

6. 410 U.S. 113, *petition for rehearing denied*, 410 U.S. 959 (1973).

7. *Id.* at 153 (majority opinion by Blackmun, J.) and 170 (Stewart, J., concurring). *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-36 (1973).

8. 410 U.S. at 152-56.

sources,[9] supplied the principal factor requiring different results in these two cases.

A recent Supreme Court decision, *California v. LaRue*,[10] has injected a third analytical approach allowing deference to state regulation even in cases involving individual rights. In *LaRue* the Court sustained regulations of the California Department of Alcoholic Beverage Control forbidding bars and night clubs holding liquor licenses from offering certain types of live performance and films.[11] Clearly, first amendment freedom was involved. The Court, however, did not resort to reinterpreting the protection afforded by this amendment as a means of sustaining the state regulation; instead it held that the twenty-first amendment[12] grants the states an otherwise unavailable power to curtail first amendment rights. The *LaRue* Court employed the significant concept that legislation adopted pursuant to a particular power retains its normal presumption of validity despite its prima facie infringement of individual

9. 411 U.S. at 35.

10. 409 U.S. 109 (1972). Liquor licensees and dancers at premises operated by licensees had sought a declaratory judgment invalidating certain regulations promulgated by the California Department of Alcoholic Beverage Control. *See* note 11 *infra*.

11. The following kinds of performances were prohibited:

(a) The performance of acts, or simulated acts, of 'sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law';

(b) The actual or simulated 'touching, caressing or fondling on the breast, buttocks, anus or genitals';

(c) The actual or simulated 'displaying of the pubic hair, anus, vulva or genitals';

(d) The permitting by a licensee of 'any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus'; and, by a companion section,

(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above. Rules 143.3 and 143.4.

409 U.S. at 111-12.

In footnote number 2, the court continued: "In addition to the regulations held unconstitutional by the court below, appellees originally challenged Rule 143.2 prohibiting topless waitresses, Rule 143.3(2) requiring certain entertainers to perform on a stage at a distance away from customers, and Rule 143.5 prohibiting any entertainment that violated local ordinances. At oral argument in that court they withdrew their objections to these rules, conceding 'that topless waitresses are not within the protection of the First Amendment; that local ordinances must be independently challenged depending upon their content; and that the requirement that certain entertainers must dance on a stage is not invalid.' 326 F. Supp. 348, 350-51." 409 U.S. at 111-12. *See* Escheat, Inc. v. Pierstorff, 354 F. Supp. 1120, 1123-24 (W.D. Wis. 1973), and Paladino v. City of Omaha, 471 F.2d 812, 814 (8th Cir. 1972), relying on *LaRue* in sustaining prohibitions on topless and other nude entertainment.

12. 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.

rights. Accordingly, it represents a new position of deference to state regulatory power and is inconsistent with the established principle that such infringements of individual rights create a presumption of unconstitutionality.[13]

While the twenty-first amendment rationale of *LaRue* appears to pose a threat to certain individual rights, that amendment has been recoguized by at least one state supreme court as a legitimate vehicle for combating racial discrimination in private clubs[14]—an area of discrimination generally regarded as beyond the reach of government and probably involving fundamental rights of association and privacy. Because of the dual potential of the state power found in the twenty-first amendment and the questionable desirability of the use of that power, this article evaluates the *LaRue* decision, explores its unusual twenty-first amendment rationale, considers alternative approaches the Court might have employed, and assesses the decision's future impact. Secondly, the article considers the capacity of the state—with or without *LaRue*—to curtail discriminatory membership policies of private organizations and includes a discussion of the related rights of privacy and association.

I. THE *LaRue* DECISION

While Justice Rehnquist's majority opinion in *LaRue* conceded that the challenged regulations prohibited on their face some performances which were "within the scope of constitutional protection of freedom of expression,"[15] it declined to find the regulations void for overbreadth. The performances in question had not been forbidden absolutely but simply excluded from establishments serving liquor.[16] Since the twenty-first amendment conferred "something more than the normal state authority" under the police power, "there was an added presumption of validity" which precluded the finding of a first amendment violation.[17] Accordingly, the Court

13. *See* Roe v. Wade, 410 U.S. 113, 155-56 (1973).

14. B.P.O.E. Lodge No. 2043 v. Ingraham, 297 A.2d 607 (Me. 1972) (State of Maine's denial of liquor license to racially discriminating private club sustained against equal protection, associational, and privacy claims), *appeal dismissed*, 411 U.S. 924 (1973).

15. 409 U.S. at 118. "[T]hese regulations . . . would proscribe some forms of visual presentation that would not be found obscene under *Roth* and subsequent decisions of this Court. . . . But we 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 United States v. O'Brien, [391 U.S. 367 (1968)]." *Id.* at 116.

16. *Id.* at 118.

17. *Id.* at 114, 118.

found rational and therefore valid the Beverage Control Department's proscription of sale of liquor by the drink simultaneously with lewd or naked performances because such performances tended to induce commission of various sex offenses.[18]

Noting that the applicable principle in *LaRue* was the same as that permitting a state to prohibit liquor from being sold in book stores or within a certain distance of a church,[19] Justice Stewart's concurring opinion further elaborated the idea that the twenty-first amendment conferred a broad power to specify the times, places, and circumstances under which liquor may be dispensed.[20] Any implication, however, that the twenty-first amendment overrode any other relevant provisions of the Constitution was disclaimed.[21]

The three dissenting opinions rejected the view that the twenty-first amendment permits dilution of first amendment rights. Justice Douglas concluded that the district court should have refrained from hearing the case in order to afford the California courts the opportunity to eliminate the overbreadth of the regulations.[22] Justice Brennan determined that by requiring the licensee to forego first amendment rights, the regulations placed an unconstitutional condition on the granting of a liquor license.[23] Justice Marshall adopted both the overbreadth[24] and unconstitutional conditions rationales[25] and stressed that there must be a uniform approach in evaluating the exercise of any power against the limitations of the first amendment.[26] Since nothing in the legislative history of the twenty-first amendment suggested that Congress had intended to curtail first amendment rights,[27] Marshall concluded that under the applicable compelling interest test, a rational basis for linking certain forms of entertainment to commission of sex crimes would not sustain the Beverage Control Department's regulations.[28]

A. LaRue's Twenty-first Amendment Rationale

Section two of the twenty-first amendment is the only presently

18. *Id.* at 118.
19. *Id.* at 119.
20. *Id.* at 120.
21. *Id.* at 120, n.*.
22. *Id.* at 122-23.
23. *Id.* at 123.
24. *Id.* at 123-33.
25. *Id.* at 136-37.
26. *Id.* at 135.
27. *Id.* at 134-35.
28. *Id.* at 130-33.

operative portion of the Constitution which the Supreme Court has construed as granting power to the states.[29] As such, it is unique in a federal system in which enumerated powers are delegated to the federal government and those not delegated are reserved, subject to constitutional limitations, to the states. The twenty-first amendment decisions referring to "power"[30] must be viewed, however, in the context of the amendment's language, its legislative history, and the facts of the cases. Section two of the amendment is phrased simply in terms of prohibiting interstate shipment of liquor into a state in violation of its laws. Legislative history reveals that the purpose of section two was to ensure that, after the elimination of national prohibition, states could effectively exercise their police powers over intoxicating liquors free from any inhibition flowing from the Constitution's commerce[31] or export-import[32] clauses.[33] Thus, while the Supreme Court's decisions speak of state "power" under the twenty-first amendment, they would more accurately refer to a "right" to exercise the state's normal police power unrestrained by certain otherwise operative portions of the Constitution.[34]

These otherwise operative portions have historically been those regulating the relationship of the states' police powers to those powers delegated to Congress, rather than those protecting the liberty of the individual against state encroachment. For example, in the first significant twenty-first amendment decision, *State Board of Equalization v. Young's Market*,[35] the Court examined the constitutionality of a California license fee required for the importation of beer into the state. Recognizing that the twenty-first amendment prevented the normal impact of the commerce clause, the Court held that since the state had the power to prohibit absolutely the importation of beer, it logically could exercise that power to a lesser

29. The eighteenth amendment, repealed by the twenty-first, granted Congress and the states concurrent power to enforce prohibition. U.S. CONST. amend. XVIII, § 2.

30. *See, e.g.*, Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 42 (1966); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 299 (1945); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 62 (1936). For a summary of the judicial history of the amendment see Comment, *The Concept of State Power Under the Twenty-First Amendment*, 40 TENN. L. REV. 465, 473-83 (1973).

31. U.S. CONST., art. I, § 8, cl. 3.

32. U.S. CONST., art. I, § 10, cl. 2.

33. *See* Justice Marshall's *LaRue* dissent, 409 U.S. at 134; Comment, *supra* note 30, at 466-73.

34. *See* Norman's On The Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1018-19 (3d Cir. 1971).

35. 299 U.S. 59 (1936).

extent by imposing a heavy fee on beer imports.[36] The *Young's Market* Court also rejected an equal protection challenge to the fee since the classification drawing a line between imported intoxicating liquors and liquors brewed within the state was specifically established by the twenty-first amendment.[37] The Court, however, disclaimed explicitly any implication that the amendment insulated state liquor regulation from all constitutional restraints.[38]

Subsequent to *Young's Market*, the Court considered other equal protection and due process attacks on state liquor regulations, but these attacks occurred almost entirely in the area of economic regulation.[39] The rational basis approach utilized by the Court to reject such attacks in these cases was no different from that which the Court has applied in other economic regulation cases not involving liquor regulation.[40] Significantly, only three decisions prior to *LaRue* arguably might fall within the individual rights classification, but these decisions provide no support for the *LaRue* majority's position. In *Goesaert v. Cleary*,[41] the Court rejected an equal protection challenge to a statute permitting women to serve as bartenders only if they were the wife or daughter of a male owner. The Court did not perceive the case as involving an individual's right to work at a lawful job,[42] nor did it consider that classification based upon sex might demand an extra degree of scrutiny.[43] Rather, the case was regarded purely as one of economic regulation. While Justice Frankfurter's majority opinion alluded to the twenty-first amendment and the long history of liquor regulation,[44] the opinion

36. *Id.* at 63.

37. *Id.* at 64.

38. *Id.*

39. Joseph E. Seagram & Sons, Inc., v. Hostetter, 384 U.S. 35, 46-50 (1966). *See, e.g.*, Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).

40. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423-25 (1952).

41. 335 U.S. 464 (1948).

42. *See* W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 105-51 (1956).

43. Frontiero v. Richardson, 93 S. Ct. 1764 (1973).

44. "The Fourteenth Amendment did not tear history up by the roots, and *the regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers.* Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in the vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. See the *Twenty-First Amendment* and *Carter v. Virginia*, 321 U.S. 131." 335 U.S. at 465-66 (emphasis supplied).

principally involved application of the extreme rational basis approach characteristic of its author.[45] There is no basis for inferring that Justice Frankfurter would have applied any closer scrutiny to a state statute that was enacted solely on the basis of the police power and regulating the ability of women to work in commercial laundries.[46]

The second individual rights case involving the twenty-first amendment is *Wisconsin v. Constantineau*,[47] referred to by Justice Rehnquist in his *LaRue* opinion.[48] In *Constantineau*, the Court held violative of due process a statute providing for the public posting, without notice or an opportunity to be heard, of names of persons who engaged in excessive drinking.[49] Noting that the "police power of the states over intoxicating liquors was extremely broad even prior to the twenty-first amendment," the Court nevertheless saw the only issue in the case as whether the designation of the petitioner as an "excessive drinker" would constitute such a stigma or badge of disgrace that due process required a hearing.[50] This is the normal focus of inquiry in any similar due process case.[51] Finally, in *Moose Lodge v. Irvis*,[52] the Court determined that enforcement of a state liquor licensing law should be enjoined as violative of equal protection insofar as it required a private club to comply with its racially discriminatory constitution and by-laws.[53] The Court expressed no concern that the presence of this requirement in a state liquor statute undermined in any way the applicability of the equal protection clause. Accordingly, consideration of relevant Supreme Court decisions reveals no principle requiring that the Court refrain from close scrutiny of liquor regulations touching upon individual rights.

Additionally, lower court decisions do not support the existence of such a principle. For example, in *Hornsby v. Allen*[54] an unsuccess-

45. "Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws." 335 U.S. at 466.

46. *See, e.g.*, Morey v. Doud, 354 U.S. 457, 472 (1957) (Frankfurter, J., dissenting).

47. 400 U.S. 433 (1971).

48. 409 U.S. at 115.

49. 400 U.S. at 434-35.

50. *Id.* at 436.

51. *See* Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

52. 407 U.S. 163 (1972).

53. 407 U.S. at 179.

54. 326 F.2d 605 (5th Cir. 1964).

ful liquor license applicant alleged that she had been denied due process and equal protection by the arbitrary refusal to issue her a license. In reversing the federal district court's order of dismissal, the Fifth Circuit observed that ". . . states do not escape the operation of the 14th Amendment in dealing with intoxicating beverages by reason of the 21st Amendment. . . . [A]lthough a state may, under the 21st Amendment, discriminate against imports of intoxicating beverages, the Amendment does not confer any other powers . . . ."[55] Another lower court decision making this point even more clearly is *Krauss v. Sacramento Inn*,[56] involving a female bartender statute identical to that considered many years before in *Goesaert*. The plaintiff raised no equal protection claim but instead relied on the Civil Rights Act of 1964.[57] The court determined that the twenty-first amendment insulated the state's regulation from commerce clause restrictions and consequently from the effects of the federal civil rights statute enacted under the commerce power.[58] As to the argument that the amendment was inapplicable because the statute bore no reasonable relation to the regulation of the liquor traffic, the court stated that this result was precluded by *Goesaert*.[59] It was noted, however, that this finding of twenty-first amendment validity would not have insulated the statute from a fourteenth amendment challenge.[60] Similarly, the lower court decision in *LaRue*[61] clearly addressed the twenty-first amendment argument. Relying on the *Constantineau* decision, the court reasoned that if the interest of the state cannot override the due process clause "it certainly cannot override the first amendment, which has always

55. *Id.* at 609. *But see* Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593 (S.D.N.Y. 1970). "While state regulation of traffic in liquor is of course subject to certain limits imposed by the Due Process and Equal Protection clauses of the Fourteenth Amendment, as well as by the Commerce Clause, nevertheless the state's regulatory power in this area is far broader than in the case of an ordinary lawful business essential to the conduct of human affairs." 317 F. Supp. at 600.

However, this statement was made in the context of finding that the defendant liquor licensee's refusal of service to women constituted unlawful state action because of the state's "significant" involvement in the licensee's business.

56. 314 F. Supp. 171 (E.D. Cal. 1970).

57. *Id.* at 173.

58. *Id.* at 178.

59. *Id.* at 177.

60. *Id.* at 177, n.5 and accompanying text. *Compare* United States v. Cantrell, 307 F. Supp. 259 (E.D. La. 1969) (striking down a racially motivated ordinance excluding servicemen from bars).

61. 326 F. Supp. 348 (C.D. Cal. 1971), *rev'd*, 409 U.S. 109 (1972).

received a 'preferred position' among the liberties granted to all of us."[62]

LaRue's principal defect is its reliance on the twenty-first amendment to create in the area of liquor regulation a super police power, unrestrained to some extent by constitutional safeguards of individual liberty. *LaRue* stands apart from the prior twenty-first amendment decisions such as *Joseph E. Seagram & Sons, Inc. v. Hostetter*[63] that simply insulated state liquor regulation from normal restrictions emanating from the delegation of certain powers to Congress. In *Hostetter*, a case concerning a challenge to a New York law requiring that liquor prices be "no higher than the lowest price" anywhere in the country, reliance on the twenty-first amendment power was critical. Although the police power alone might have been inadequate to sustain the legislation, given the burden on interstate commerce that the statute created,[64] the state's goal of eliminating "discrimination against and disadvantage of customers" was held properly to be rationally related to the twenty-first amendment, and any limitations flowing from the commerce clause were overriden.[65] In the case of the *LaRue* regulations, however, no comparable commerce clause vulnerability is present. Here the twenty-first amendment adds nothing to the regulatory power which the state otherwise possesses. Concededly, a rational relationship may exist between the state's appropriate objective under its police power or the twenty-first amendment—preventing otherwise illegal sexual acts from occurring in and near bars and nightclubs—and the regulation of entertainment in those establishments.[66] The issue of whether the first amendment forbids such regulations should, nevertheless, remain distinct. The court in *Krauss* emphasized this precise point when it differentiated between the question whether a particular regulation was within the scope of the state's regulatory power and the question whether the exercise of that power was consistent with the fourteenth amendment.[67]

62. *Id.* at 357. *See also* Bruno v. City of Kenosha, 333 F. Supp. 726, 729-30 (E.D. Wis. 1971), *vacated and remanded*, 93 S. Ct. 2222 (1973).

63. 384 U.S. 35 (1966).

64. *Id.* at 41.

65. *Id.* at 42-43. Due process and equal protection arguments were rejected on traditional deference to legislative judgment grounds. *Id.* at 46-51.

66. The Court rejected the contention that ". . . the same results could have been accomplished by requiring that patrons already well on the way to intoxication be excluded from the licensed premises." There was said to be a ". . . wide latitude as to choice of means to accomplish a permissible end . . . ." 409 U.S. 116 (1972).

67. Unfortunately, *LaRue* is not the only recent instance in which the Supreme Court

B. *Three Alternative Approaches to LaRue*

1. Locational Restraint

Both the *LaRue* majority and Justice Stewart's concurring opinions emphasize that there was only a locational prohibition, as opposed to an absolute prohibition, of the performances described by the California regulation. Numerous decisions have sustained reasonable regulation of the time, place, and manner of the exercise of first amendment rights, and seem to offer an alternative rationale that could easily supplant the twenty-first amendment as a basis for the *LaRue* result. Two key differences between *LaRue* and other speech regulation cases, however, make reliance on a theory emphasizing locational restraint tenuous. First, the decisions sustaining reasonable regulation have related to the so-called public forum, not

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has subsumed a first amendment issue into a discussion of the scope of a power. In Kleindienst v. Mandel, 408 U.S. 753 (1972), the Court considered the first amendment right of scholars in the United States to hear, speak, and debate in person with an alien Marxist scholar who sought a non-immigrant visa to enter the country. The Attorney General had denied a waiver of the prohibition on entry into the United States of aliens who advocate Communism. In an opinion by Justice Blackmun, the Court recognized a first amendment right to receive information, but declined to balance this right against the plenary power of Congress to make policies and rules for the exclusion of aliens. 408 U.S. at 762-65. As in *LaRue*, only a rational relationship of means and legitimate ends was demanded. 408 U.S. at 770. The Court's approach in *LaRue* and *Mandel* might be termed a "preferred" powers analogue to the concept of preferred freedoms. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Legislation rationally related to the subject matter of these powers is accorded a presumption of legitimacy despite the fact that such legislation arguably limits first amendment or other constitutional rights. This analytical short circuiting is dangerous to the continued vitality of these rights. The issues of content of power and limitation on power should be kept distinct in all cases, regardless of the power on which reliance is placed. Justice Harlan's concurring opinion in Reid v. Covert, 354 U.S. 1, 65 (1957), addressing the ability of Congress to specify court-martial trials in criminal cases involving the wives of U.S. servicemen accompanying their husbands overseas, makes this clear:

> [It is] useful to break down the issue before us into two questions: First, is there a rational connection between the trial of these army wives by court-martial and the power of Congress to make rules for the governance of the land and naval forces; in other words, is there any initial power at all? Second, if there is such a rational connection, to what extent does this statute, though reasonably calculated to subserve an enumerated power, collide with other express limitations on congressional power . . . .

354 U.S. at 70.

In United States v. Robel, 389 U.S. 258 (1967), concerning the legitimacy under the first amendment of a congressional exercise of the war power, the Court stressed that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." 389 U.S. at 263. As the *Robel* Court recognized, specific instances in which the war power is exercised often involve exigencies which form a compelling basis for overriding constitutional rights. Such a basis, nevertheless, must be demonstrated in each instance in which the power is invoked. *LaRue* and *Mandel*, by focusing on the particular sources of governmental power, unwisely allow the evasion of such a showing.

to a private place of business.[68] Secondly, and perhaps more important, an essential element in the public-forum cases is the requirement that regulations not discriminate on the basis of the content of the proposed speech.[69] In *LaRue* the content of the speech was the essence of the regulation. To rely, therefore, on the locational restraint doctrine to regulate the content of speech would be to ignore a basic tenet of that doctrine.

2. Conditional Restraint

Related to the locational argument is the contention that the legislation in fact does not prohibit speech at all, but merely conditions the continuance of a liquor license on compliance with the entertainment regulations. As emphasized by the Marshall and Brennan dissents, this approach collides with the proposition that receipt of a governmental benefit may not be conditioned upon the relinquishment of a constitutional right.[70] Despite the appeal of the unconstitutional conditions rationale, there are circumstances in which a relationship with the government may justify a restriction of otherwise available constitutional rights.[71] In *LaRue* the relationship involves a license which permits dispensing of alcohol, a potent drug whose consumption may make criminal behavior, including sexual offenses, more likely.[72] In this context, the California regulations perhaps could be justified as designed to limit performances

68. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963) (state capital grounds); Cox v. New Hampshire, 312 U.S. 569 (1941) (public street).

69. *See, e.g.*, Bachellar v. Maryland, 397 U.S. 564 (1970); Cox v. Louisiana, 379 U.S. 536, 556-58 (1965).

70. Less than a year before its *LaRue* decision the Court stated:

> For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

Perry v. Sindermann, 408 U.S. 593, 597 (1972), *cited in* Justice Marshall's *LaRue* dissent, 409 U.S. at 136-37.

71. *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2890-91 (1973); Broadrick v. Oklahoma, 93 S. Ct. 2908, 2913 (1973); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1448 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1600 (1960).

72. *See* U.S. President's Commission on Law Enforcement and Administration of Criminal Justice, Task Force Report: Drunkenness, 13, 13-14, 41 (1967). *LaRue* noted the occurrence of the following crimes: "Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises." 409 U.S. at 111.

which might provoke criminal acts in an audience whose normal self-restraint would be diminished. Although Justice Marshall's *LaRue* dissent, citing the Report of the Commission on Obscenity and Pornography, observes that "the empirical link between sex-related entertainment and the criminal activity popularly associated with it has never been proved and, indeed, has now largely been discredited,"[73] the studies cited make no allowance for the possible effect of intoxication on reaction to such entertainment. While this rationale offers a plausible basis for the California regulations, it was not, despite implications to the contrary in the *LaRue* majority's opinion, relied on by the Beverage Control Department.[74]

3. Overbreadth and Related Standards

To answer the dissenters' overbreadth argument, the *LaRue* majority cited the unusually broad power of the states under the twenty-first amendment. They carefully disclaimed, however, any contention that the twenty-first amendment places all entertainment in establishments holding liquor licenses outside the protection of the first and fourteenth amendments. The Court then conceded only grudgingly that performances prohibited by the California regulations would ordinarily have been entitled to first amendment protection. Justice Rehnquist pointedly observed that the per-

73. 409 U.S. at 131. *See also* Stanley v. Georgia, 394 U.S. 557, 566 (1969) (Marshall, J.), finding "little empirical basis" for this link and emphasizing that, at least in the case of private consumption of information, crime must be prevented by education and punishment for violations. *But see* Paris Adult Theater I v. Slaton, 93 S. Ct. 2628, 2635 (1973) in which the Court cited the views of the Obscenity Commission's 3 dissenting members: "The Hill-Link Minority Report . . . indicates there is at least an arguable correlation between obscene material and crime."

74. 409 U.S. at 111. Quoting from the district court's description of testimony presented to the Alcoholic Beverage Control Board, Justice Rehnquist pointed out that "the story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers." 409 U.S. at 111. These words originally appeared, however, in the district court's explanation of the Department's rule, unchallenged by plaintiffs, requiring "certain entertainers to perform on a stage at least six feet away from any customer." 326 F. Supp. at 352. Furthermore, it has been noted that "the rules to which objection was withdrawn [by the plaintiffs] would have prohibited most if not all of the incidents of legitimate concern to the Department referred to by Justice Rehnquist." Comment, *The Concept of State Power Under the Twenty-first Amendment*, 40 TENN. L. REV. 465, 486 (1973). Significantly, the district court went on to state that "[a] fair reading of the transcript of the hearings requires the conclusion that the Department not only desired to prohibit sexual conduct between dancers and customers, but wanted to establish a set of rules which would circumvent United States and California Supreme Court decisions relating to obscenity. . . . 326 F. Supp. at 352. *See also* California v. LaRue, 409 U.S. 111, 126 n.4 (1973) (Marshall, J., dissenting) (pointing out the district court's finding that the Board's purpose was impermissibly based on mere hostility to the right asserted).

formances in question "partake more of gross sexuality than of communication" and are hardly "the constitutional equivalent of a performance by a scantily clad ballet troupe."[75] The language reflects the willingness of some justices—a willingness expressed in several opinions prior to *LaRue*—to permit state enforcement of more extensive anti-obscenity controls[76] and to afford less protection to speech deemed to be of marginal social utility.[77] Although the dissenters claimed that the Beverage Department's regulations could be used to prohibit the showing of a serious film such as *Ulysses*[78] or the performance of a Shakespearean play,[79] the factual context prompting the adoption of the regulations made such a strained construction appear highly unlikely.[80] If the theoretical risk to such expression ever became a reality, there would be time enough for the Court to respond.

Several members of the *LaRue* majority previously had criticized "excessive" reliance on the overbreadth doctrine,[81] and given their perception that the regulations proscribed primarily nonprotected expression, and their views that any expression protected in this case was marginal in character,[82] there may have been little

75. 409 U.S. at 118. In a footnote, the opinion stated:

> Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in Seagram & Sons v. Hostetter, 384 U.S. 35, 52 (1966), is equally in point here: "Although 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. We deal here only with the statute on its face. And we hold that, so considered, the legislation is constitutionally valid."

Id. at 119 n.5.

76. *See* Rosenfeld v. New Jersey, 408 U.S. 901, 902 (1972) (Burger, C.J., dissenting); *id.* at 903 (Powell, J., dissenting); *id.* at 909 (Rehnquist, J., dissenting).

77. *See* Hartstein v. Missouri, 404 U.S. 988 (1971) (Burger, C.J., Blackmun & White, JJ., dissenting); Hoyt v. Minnesota, 399 U.S. 524 (1970) (Burger, C.J., Blackmun & Harlan, JJ., dissenting).

78. "The regulations thus treat on the same level a serious movie such as 'Ulysses' and a crudely made 'stag film'. They ban not only ohviously pornographic photographs, but also great sculpture from antiquity." 409 U.S. at 127 (Marshall, J., dissenting).

79. "It is conceivable tbat a licensee might produce in a garden served by him a play—Shakespearean perbaps or one in a more modern setting—in which, for example, 'fondling' in the sense of the rules appears." 409 U.S. at 121 (Douglas, J., dissenting).

80. The focus of the Department's concern was "the progrsssion in a few years time from 'topless' dancers to 'bottomless' dancers and other forms of 'live entertaimment' in bars and nightclubs wbich it licensed." 409 U.S. at 110.

81. Rosenfeld v. New Jersey, 408 U.S. 901, 907-08 (1972) (dissenting opinion of Powell, J., in which Burger, C.J., & Blackmun, J., joined); Gooding v. Wilson, 405 U.S. 518, 532 (1972) (Burger, C.J. & Blackmun, J., dissenting); Coates v. City of Cincinnati, 402 U.S. 611, 617 (1971) (Burger, C.J., Wbite, & Blackmun, JJ., dissenting).

82. The Court bas recognized that there is material which borders on the obscene and

impetus to apply the overbreadth principles. Thus, even without the majority's reliance on the twenty-first amendment, the overbreadth attack could have been rejected on the basis that the regulations posed no substantial risk of deterring the exercise of protected speech. Significantly, shortly after *LaRue* the Court expressly curtailed the use of the overbreadth rationale by adopting the "substantial" overbreadth test.[83] In applying the new test, the Court explained that "particularly where conduct and not merely speech is involved . . . overbreadth of a statute must not only be real but substantial as well, [furthermore, it must be] judged in relation to the statute's plainly legitimate sweep . . . and may be cured through a case-by-case analysis."[84]

Alternatively, the Court could have sustained the regulations by revising its standards governing permissible control of sexually oriented material under the first amendment. In a cluster of 5-4 decisions rendered at the close of the 1972-73 term,[85] the Court adopted this approach, clearing the way for vigorous state and local attacks on obscenity. A major facet of these decisions was their discarding explicitly the "utterly without redeeming social value" test[86] in favor of one which asks "whether the work, taken as a whole, lacks *serious* literary, artistic, political, or scientific value."[87] The court, citing *LaRue*,[88] observed that "[s]ex and nudity may not be exploited without limit by films or pictures exhibited in places of

which may be protected in some contexts and not in others. *See* Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2634 n.4 (1973); Ginsburg v. United States, 383 U.S. 463, 475 (1965); Roth v. United States, 354 U.S. 476, 491-92 (1957). Moreover, where conduct is involved in the expression of ideas, the Court has recognized a greater latitude for regulation. United States v. O'Brien, 391 U.S. 367 (1968).

83. United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2898 (1973); Broadrick v. Oklahoma, 93 S. Ct. 2908, 2915-18 (1973). These decisions involved declaratory judgment actions testing the constitutionality of the Hatch Act and a similar Oklahoma law restricting political activity by governmental employees.

84. Broadrick v. Oklahoma, 93 S. Ct. 2908, 2918 (1973).

85. Miller v. California, 93 S. Ct. 2607 (1973); Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628 (1973); United States v. Twelve 200-Ft. Reels of Super 8mm Film, 93 S. Ct. 2665 (1973); United States v. Orito, 93 S. Ct. 2674 (1973); Kaplan v. California, 93 S. Ct. 2680 (1973).

86. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (opinion of Brennan, J., in which Warren, C.J., & Fortas, J., joined). In Redrup v. New York, 386 U.S. 767 (1967), involving a per curiam disposition of 3 obscenity cases, the Court noted 3 legitimate state interests in the regulation of obscenity: protection of juveniles, prevention of assaults on individual privacy, and prevention of pandering. Subsequent decisions upsetting obscenity convictions were rendered on a per curiam basis citing *Redrup*. *See* Miller v. California, 93 S. Ct. 2607, 2614 n.3 (1973).

87. Miller v. California, 93 S. Ct. 2607, 2615 (1973).

88. *Id.* at 2616 n.8.

public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places."[89] The citation to *LaRue* is rather odd given the *LaRue* majority's concession that a portion of the performances proscribed by the California regulations was constitutionally privileged. Rather than demanding "substantial overbreadth" or redefining obscenity, *LaRue* had held that the twenty-first amendment permitted the state to impinge on a liquor licensee's right to offer entertainment that ordinarily would be barely within the protection of the first amendment. Coupling the *LaRue* holding with subsequent overbreadth and obscenity decisions, it becomes clear that Justice Rehnquist's twenty-first amendment rationale merely camouflaged narrowed views of substantive first amendment rights.[90] Given the explicit adoption of these views in recent decisions, it might be thought that *LaRue*'s twenty-first amendment rationale will have little future impact. There are, however, some contexts in which this may not be true.

C. *Future Impact of LaRue*

In *Cook v. Peto*,[91] a three-judge district court invalidated liquor control regulations that permitted enforcement officers to confiscate allegedly obscene materials from a licensee's premises without a prior hearing to determine the obscenity issue.[92] While the district court's decision appeared to be clearly mandated by prior Supreme Court holdings,[93] the Supreme Court vacated the *Peto* judgment on appeal and remanded for further consideration in light of *LaRue*.[94] Shortly after taking this action, the Court confronted another procedural due process liquor licensing question in *City of Kenosha v.*

89. *Id.* at 2615-16.

90. The Court in Miller v. California, 93 S. Ct. 2607 (1973), provided "a few plain examples of what a state statute could define for regulation . . . (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 2615. These examples were strikingly similar to the regulations sustained in *LaRue*. Note 11 *supra*. The Court's outlining of the valid state law immediately was followed by reference to *LaRue*. *See* text *supra* at 1048-49.

91. 339 F. Supp. 1300 (S.D. Ohio 1971), *vacated*, 409 U.S. 1071 (1972) (remanded for reconsideration in light of *LaRue*).

92. The regulations provided that no permit holder "shall knowingly or willfully allow in . . . his . . . premises . . . any indecent, profane, or ohscene . . . literature, pictures, or advertising materials . . . ." *Id.* at 1301-02.

93. Blount v. Rizzi, 400 U.S. 410 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Marcus v. Search Warrant of Property, 367 U.S. 717 (1961).

94. 409 U.S. 1071 (1972).

Bruno.[95] In that case, the city had refused to renew several retail liquor licenses on the ground that the licensees had permitted nude entertainment. Relying on recent Supreme Court decisions, the district court held that since the hearing which had been held prior to the denial of renewal was "legislative" in character, that hearing violated due process.[96] The Supreme Court, in addition to remanding for consideration of a significant jurisdictional matter,[97] directed a reappraisal of the due process issue. It pointed out that the district court had not had the benefit of the Court's decisions in *Board of Regents v. Roth*[98] and *Perry v. Sindermann*,[99] delineating the scope of the property and liberty protected by due process.[100] As to *LaRue*'s possible impact, the Court stated:

> There we held again that while the Twenty-first Amendment did not abrogate a requirement of procedural due process, [citing *Constantineau*] it did grant the States broad authority over the distribution and sale of liquor. We also held that regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances were facially constitutional.[101]

It would be unfortunate if *LaRue's* twenty-first amendment rationale were relied on to deprive liquor licensees of due process safeguards. In both *Peto* and *Bruno* first amendment rights were at stake, and in such cases the Supreme Court would adhere normally to stringent requirements of due process. The *Roth* decision, cited by the Court in its remand of *Bruno*, contained the following observation: "When a State would directly impinge upon interests in free speech . . . this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech . . . interest is clearly protected under substantive First Amendment standards."[102]

In *Escheat, Inc. v. Pierstorff*,[103] a post *LaRue* decision, a three-judge district court confronted the situation of revocation of a liquor

95. 93 S. Ct. 2222 (1973).

96. 333 F. Supp. 726 (E.D. Wis. 1971). The opinion of the 3-judge district court is reported as Misurelli v. City of Racine, 346 F. Supp. 43, 47-49 (1972).

97. The Court determined that a city was not a "person" under 42 U.S.C. § 1983, even where only equitable relief is sought. Thus the district court erroneously had concluded that it had jurisdiction under 28 U.S.C. § 1343. On remand, the district court was to consider whether it had jurisdiction under 28 U.S.C. § 1331. 93 S. Ct. at 2225-27.

98. 408 U.S. 564 (1972).

99. 408 U.S. 593 (1972).

100. 93 S. Ct. at 2227.

101. *Id.*

102. 408 U.S. at 575 n.14.

103. 354 F. Supp. 1120 (W.D. Wis. 1973).

license for permitting nude entertainment. The court, finding that the due process standards set forth in *Bruno* had been fulfilled,[104] went on to consider the claim that where a license revocation significantly affects the licensee's capacity to present performances arguably covered by the first amendment, there must be judicial review initiated by the revoking authority.[105] Finding that even after *LaRue* the entertainment in question might be entitled to first amendment protection,[106] the court granted a preliminary injunction against the license revocation.[107]

LaRue's determination that the twenty-first amendment permits the states to control otherwise marginally protected expression does not sanction elimination of the procedural due process standards safeguarding protected expression. For example, it is inconceivable that a liquor license could be revoked without a hearing on the grounds that a political satirist appearing at a night club had used some mildly off-color language.

Nothing in the recent cluster of obscenity decisions expressly indicated that the Court would be as ready to relax procedural safeguards for first amendment rights as it was to redefine and reduce their substance.[108] In fact, two recent Supreme Court decisions have specifically addressed procedural problems. Emphasizing its concern with prior restraint of the right of expression, the Court in *Roaden v. Kentucky*[109] invalidated a warrantless seizure of an allegedly obscene film incident to arresting the film's exhibitor.[110] In the second decision, *Heller v. New York*,[111] the Court reaffirmed but distinguished the two major prior decisions[112] concerning seizure of allegedly obscene materials.[113] Although there had been no prior adversary hearing, the Court sustained seizure of a copy of a film where the seizure was solely for evidentiary purposes.[114] The opinion emphasized the facts that a neutral judge had viewed the film in its entirety before issuing a warrant, that a prompt adversary hear-

104. *Id.* at 1124 n.3.
105. *Id.* at 1124.
106. *Id.* at 1125-26.
107. *Id.* at 1127.
108. *See* Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2634 (1973).
109. 93 S. Ct. 2796 (1973).
110. *Id.* at 2801.
111. 93 S. Ct. 2789 (1973).
112. A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Marcus v. Search Warrant of Property, 367 U.S. 717 (1961).
113. 93 S. Ct. at 2794.
114. *Id.*

ing was available subsequent to the seizure, and that there was no showing that seizure of one copy of the film prevented its exhibition prior to a final determination of the obscenity issue.[115]

Certainly, there is no basis for contending that the Court's curtailment of substantive first amendment protection in the obscenity area requires or supports a parallel diminution of procedural rights. If anything, the enhanced zeal of local officials to "clean up" the community should be restrained by even stricter judicial enforcement of procedural safeguards. Moreover, there is no justification for a separate set of more lenient procedural rules, sanctioned by the twenty-first amendment, for use in cases in which liquor regulation is involved. Even accepting arguendo the validity of the *LaRue* rationale, the considerations set forth as providing a rational basis for greater state control are inoperative in the case of procedural due process requirements. For example, it is difficult to see what bearing *LaRue* can have on the issue in *Peto* of whether the state may seize reading materials from a retail liquor establishment solely on the basis of the ad hoc judgment of the state's liquor agents.

Putting aside the involvement of first amendment rights in the question of procedural due process for liquor licensees, the issues that are articulated in the *Bruno* opinion still must be faced. In *Roth* and *Sindermann*, cited in *Bruno*, the Court held that a teacher who did not enjoy de jure or de facto tenure generally had no due process property right in his position.[116] The standard applied was whether the person alleging the property interest has "a legitimate claim or entitlement to it [arising out] of existing rules or understandings that stem from an independent source such as state law."[117] Applying this standard to the case of a liquor licensee, there is little doubt that the states have created this entitlement through regulations allowing liquor license suspension or revocation only for violation of stated rules, and by establishment of objective criteria for the granting of such licenses.[118] In the more difficult *Bruno* situa-

115. *Id.* at 2795.

116. 408 U.S. at 576-77; 408 U.S. at 599-600. A hearing would be required if the grounds for dismissal "might seriously damage [the individual's] standing and associations in his community" or "[impose] on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573. In some circumstances, the grounds for denial, revocation, suspension, or nonrenewal of a liquor license might be of this character. See statutory provisions cited at note 118, *infra*.

117. 408 U.S. at 577.

118. *See, e.g.*, MASS. ANN. LAWS ch. 138, §§ 12-15 (granting of licenses), 23, 23A (suspension of licenses), 30C (termination of licenses), 64 (forfeiture of licenses) (1972); OHIO REV. CODE ANN. §§ 4301.25-.29 (suspension and cancellation of licenses), 4303.01-.26 (granting of

tion of nonrenewal, the defacto tenure rationale of *Sindermann* is in point since the scheme of liquor regulation would create in the licensee the reasonable expectation that his business would not be destroyed absent circumstances similar to those justifying cancellation or suspension. Siguificantly, the Fifth Circuit had recognized application of due process to liquor licensing prior to *LaRue*[119] and has continued to do so notwithstanding that decision.[120]

The Supreme Court has rejected the kinds of justifications relating to cost and inconvenience which the state might raise in defense of dispensing with adjudicative hearings in liquor licensing cases.[121] This trend has gone so far that it is fair to say that only something approaching a compelling state interest will justify a denial of procedural due process.[122] The policy determination that

licenses), 4303.271 (renewal of licenses) (Anderson 1965); WIS. STAT. ANN. §§ 176.041 (expiration of licenses), 176.05 (granting of licenses), 176.09 (application for licenses), 176.11-12 (revocation of licenses), 176.70 (application and revocation) (1957), *as amended in part*, WIS. STAT. ANN. §§ 176.05, 176.70 (Cum. Supp. 1973). "The stake of the plaintiffs is both their occupations and their investments for denial of the renewal of a liquor license bars them not only from selling liquor but substantially impairs the value of their taverns." Misurelli v. City of Racine, 346 F. Supp. 43, 48 (1972). In Bell v. Burson, 402 U.S. 535 (1971), applying the requirement of procedural due process to suspension of an automobile drivers license, the Court stated:

> Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelibood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without tbat procedural due process required by the Fourteenth Amendment. . . . This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege."

402 U.S. at 439. *See* K. DAVIS, ADMINISTRATIVE LAW § 7.13, at 184-86 (3d ed. 1972). Noting the trend toward affording procedural due process and condemning those state and lower federal court decisions denying this right to liquor and other licensees, Davis remarks:

> The privilege doctrine has been often applied to licenses concerning alcoholic beverages, dance halls, pool rooms, theaters, and other kinds of entertainment. The reason, according to the opinions, is that the licensed activity can be constitutionally prohibited. But no court has ever given a satisfactory explanation of why procedural fairness should be denied to those whose businesses can be constitutionally prohibited.

Id. at 185.

119. Hornsby v. Allen, 326 F.2d 605, 609 (5th Cir. 1964). *But see* Lewis v. City of Grand Rapids, 356 F.2d 276, 277 (6th Cir. 1966). Significantly, both these circuit court decisions were rendered prior to the major Supreme Court procedural due process decisions relied on by the district court in *Bruno*.

120. Block v. Thompson, 472 F.2d 587 (5th Cir. 1973).

121. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 90-93 (1972); Stanley v. Illinois, 405 U.S. 645, 656 (1972); Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970). For a specific discussion of these factors in the context of liquor licenses see Misurelli v. City of Racine, 346 F. Supp. 43, 48 (E.D. Wis. 1972).

122. *See* Vlandis v. Kline, 93 S. Ct. 2230, 2237 (1973) (rejecting state justifications for application of a continuing conclusive presumption of nonresidency to state university students who were nonresidents at the time of their admission).

liquor and nude entertainment do not mix certainly does not dictate the procedure to be followed in deciding whether, for example, a license should be renewed. Only the unacceptable approach that automatically credits the state with a compelling interest in enforcing any regulation relating to control of liquor could explain such results, and this proposition was rejected by the Court in *Constantineau*.

II. THE LARUE RATIONALE AND PROHIBITIONS OF PRIVATE CLUB DISCRIMINATION

Beyond *LaRue*'s implications regarding state control of expression, the case may offer the possibility of enhanced state power to discourage discrimination by private clubs holding liquor licenses. In *B.P.O.E. Lodge No. 2043 v. Ingraham*,[123] a post *LaRue* decision, the Supreme Judicial Court of Maine upheld the constitutionality of requiring a fraternal lodge to observe a nondiscriminatory membership policy as a condition of retaining its liquor license. The Lodge had argued that "private persons have the [right] . . . to associate in private with whom they wish however arbitrary their choices,"[124] and that the state's nondiscrimination licensing requirement placed an unconstitutional price upon the exercise of this constitutional right.[125] Rejecting these contentions, the court's opinion first noted that no direct prohibition of association was involved.[126] Instead, without specific reference to *LaRue*—decided less than a week earlier—the court stressed the plenary and untrammeled nature of the state's power to regulate all matters involving the production and sale of alcoholic beverages.[127] Avoiding a strict scrutiny approach, the court defined the constitutional issue as "whether the State requirement bore some rational relationship to a legitimate state purpose."[128] Although the court accepted the premise of the Supreme Court's decision in *Moose Lodge v. Irvis*

123. 297 A.2d 607 (Me. 1972), *appeal dismissed*, 411 U.S. 924 (1973). In July, 1973, the B.P.O.E. (Benovolent and Protective Order of Elks of the United States of America, hereinafter, "Elks") rescinded the "whites-only" clause. The action of the group's Chicago convention was subject to approval by a majority of the organization's lodges. Citing "legal pressure" and "changing social attitudes," the Elk's grand exalted ruler stated that he expected approval of the change by October, 1973. Wall Street Journal, July 20, 1973, at 1, col. 3.

124. 297 A.2d at 610.

125. *Id. See The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 75 n.34 (1972).

126. 297 A.2d at 611.

127. *Id.* at 611-13.

128. *Id.* at 613.

that the "club's arbitrary discriminatory membership policy remains private action . . . not subject to the mandates of . . . equal protection of the laws," it recognized that the question here, however, was "whether the Fourteenth Amendment *prohibits* the State from making the *choice*" to condition liquor licenses on nondiscrimination.[129] The court concluded that it did not. Accordingly, the court applied the rationality test and found that the state policy had two rational purposes: (1) eliminating irrational racial restrictions on the sale of liquor,[130] and (2) ensuring that the state did not appear to be condoning and indirectly encouraging invidious discrimination.[131] An appeal to the Supreme Court was dismissed for want of a substantial federal question.[132] Three Justices dissented from this dismissal but on grounds unrelated to the questions of associational and privacy rights.[133]

Whether the twenty-first amendment's new role as a preferred power was of any consequence in the Supreme Court's dismissal is subject only to speculation.[134] Unfortunately, the Court has not dealt definitively with the scope of the constitutional rights of association and privacy and the extent to which they are available to private organizations that exclude applicants for memberships on the basis of race, religion, sex, or national origin. Some guidelines, however, are available from decisions that interpret the civil rights acts, answer questions of state action, or deal with laws conditioning governmental benefits on nondiscrimination. These decisions will be explored to assess the value of *LaRue* as an anti-discrimination tool.

A. "Private" Discrimination and the Civil Rights Acts

The public accommodations section of the Civil Rights Act of 1964 expressly excludes "private clubs" from its coverage.[135] Constitutional questions of association and privacy can arise under the 1964 Act, therefore, only if the statutory exemption is narrower than the protection the Constitution affords these rights. Since this con-

129. *Id.* at 614.
130. *Id.* at 615.
131. *Id.* at 615-16.
132. B.P.O.E. Lodge No. 2043 v. Ingraham, 411 U.S. 924 (1973).
133. The dissent by Justice Douglas, in which Justices Stewart and Blackmun concurred, found a substantial equal protection issue in the Maine statute's exemption for "organizations which are oriented to a particular religion or which are ethnic in character." *Id.* at 924. (Douglas, J., dissenting).
134. See materials cited note 193 *infra*. *See also* note 67 *supra*.
135. 42 U.S.C. § 2000a(e) (1970).

tention has not been made, however, the Supreme Court has not faced this issue. Instead, any constitutional considerations have been subsumed under discussions of statutory interpretation.[136] Similarly, the Court has not had to confront directly the constitutional issue in cases arising under 42 U.S.C. section 1982, even though that statute contains no express private club exemption.[137] Although the Court held in *Sullivan v. Little Huntington Park*[138] that section 1982 applied to access to a privately organized community park and playground facility, it expressly determined that a private club was not involved in that case since the park was open to every white person living in the relevant geographic area.[139] More recently, in *Tillman v. Wheaton-Haven Recreational Association*,[140] the Court expressly disclaimed resolving the private club discrimination issue.[141]

While the Supreme Court cases involving federal civil rights legislation have not expressly addressed the constitutional rights of association and privacy enjoyed by private clubs, some lower federal courts have considered this problem in dicta. For example, after determining in *Wright v. Cork Club*[142] that the club was a place of public accommodation, the court stated that ". . . any truly private organization or association, such as a country club, a social club, a business partnership, or a political association would be beyond the bounds of government regulation with regard to membership. . . ." Moreover, the court argued, "to allow such a governmental intrusion would violate not only the First Amendment, but the very essence of the Bill of Rights."[143]

B. Private Discrimination and the State Action Cases

A second category of decisions discussing the constitutional implications of discriminatory membership policies consists of cases in which allegations of unconstitutional state involvement in these practices have been presented. In *Bell v. Maryland*,[144] one of the sit-

136. For a summary of the criteria employed to determine "private cluh" status, see Note, *Private Club Discrimination*, 1970 WIS. L. REV. 595, 596-97.

137. 42 U.S.C. § 1982 (1970).

138. 396 U.S. 229 (1969).

139. *Id.* at 236.

140. 410 U.S. 431 (1973).

141. *Id.* at 438.

142. 315 F. Supp. 1143 (S.D. Tex. 1970).

143. *Id.* at 1156-57. *See also* Wesley v. City of Savannah, 294 F. Supp. 698 (S.D. Ga. 1969).

144. 378 U.S. 226 (1964).

in trespass cases concerning businesses open to the general public, Justice Goldberg's concurring opinion acknowledged somewhat reluctantly that private clubs are entitled to be bigoted: "Prejudice and bigotry in any form are regrettable but it is the constitutional right of every person to close his home or club to any person or to choose his intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties."[145] The more recent case of *Moose Lodge No. 107 v. Irvis*,[146] distinguished by the Maine court in *Ingraham*, concerned whether providing a liquor license to a lodge of a fraternal order which practiced racial discrimination in its membership and guest policies constituted impermissible state action. The federal district court had declared invalid the Lodge's license as long as the lodge—even though a private organization—followed a policy of racial discrimination.[147] Except to the extent that the Pennsylvania regulations compelled the Lodge to adhere to its own discriminatory by-laws,[148] the Court rejected Irvis's state action claim that the state liquor licensing procedure provided the requisite state action[149] and characterized the lodge as "a private social club in a private building."[150] There was no symbiotic relationship between the club and the state,[151] nor was there any suggestion in the record that the Pennsylvania liquor statutes and regulations were intended either overtly or covertly to encourage discrimination.[152]

The Court's rejection of Irvis's state action claim may have been based to some degree on an unarticulated belief that a holding of state action would have resulted in the impairment of important rights of association and privacy.[153] Justice Douglas's dissenting opinion,[154] in which Justice Marshall concurred, explicitly dealt with this concern:

145. *Id.* at 313. Chief Justice Warren and Justice Douglas joined in this concurrence. *See also* Evans v. Newton, 382 U.S. 296, 298-99 (1966).

146. 407 U.S. 163 (1972). Irvis had been a guest in the Lodge and was denied service at the bar because of his race. He conceded that tbe Lodge was a bona fide private club, but for its involvement witb the Pennsylvania liquor licensing autbority. *Id.* at 171, 179 n.1.

147. Moose Lodge No. 107 v. Irvis, 318 F. Supp. 1246 (M.D. Pa. 1970).

148. 407 U.S. 177-78.

149. *Id.* at 177.

150. *Id.* at 175.

151. *Id.*

152. *Id.* at 176.

153. *See* Note, *Private Clubs: Freedom of Association Overlooked In Effort To Guarantee Equal Protection*, 23 SYRACUSE L. REV. 905, 915-16 (1972) (criticizing federal district court's finding of state action in *Moose Lodge*).

154. 407 U.S. 163, 179 (1972).

> My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs and groups. The associational rights which our system honors permits all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established.[155]

Subsequently, in *Bennett v. Dyer's Chop House, Inc.*,[156] a federal district court distinguished the *Moose Lodge* decision on the precise ground that the lodge had been found to be private. Noting that Dyer's was not a private club but a corporation for profit open to the public during all of its business hours,[157] the court concluded that a restaurant holding a liquor license was acting under color of state law in enforcing a policy that excluded all female patrons from the bar and restaurant during certain hours of the day. The finding of state action rested on "the basis of the control exerted by the State of Ohio through its Department of Liquor Control and the relationship between the defendant and this department."[158] As did Justice Douglas in his *Moose Lodge* dissent, the court predicated its finding of state action not only on the extensive state control over liquor licensees but also on the fact that a liquor licensee was the recipient of a valuable limited monopoly right.[159]

While the *Bennett* court focused on the distinction between a Moose Lodge and a restaurant, it did not elaborate on the distinction's significance. Furthermore, the articulated basis of the contrary *Moose Lodge* opinion—that "where the impetus for the discrimination is private, the State must have significantly involved itself with invidious discriminations"[160]—does not dictate the result in *Bennett*. The absence from *Bennett* of any significant associational or privacy interests is one factor, however, that would both support and explain the *Bennett* result.[161]

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155. *Id.* at 179-80. Justice Douglas nevertheless dissented because there were only a fixed number of liquor licenses available to private clubs in Pennsylvania, and the quota for the area in which the Lodge was located had been exhausted. Therefore, he concluded, the State was "putting the weight of its liquor license, concededly a valued and important adjunct to a private club, behind racial discrimination." 407 U.S. at 183.

156. 350 F. Supp. 153 (N.D. Ohio 1972).

157. *Id.* at 155.

158. *Id.* at 154.

159. *Id.*

160. Moose Lodge v. Irvis, 407 U.S. 163, 173 (1972) *citing* Reitman v. Mulkey, 387 U.S. 369, 380 (1967).

161. In Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551 (1972), Justice Powell's majority opinion expressly recognized that a determination of state action could involve the balancing of constitutional rights. The issue in *Lloyd* was whether a shopping center's handbill distribution ban could be applied constitutionally to anti-war leafletters. A finding of state action

In a related development subsequent to the Supreme Court's *Moose Lodge* decision, the Pennsylvania Supreme Court held that under the Pennsylvania Human Relations Act, the Moose Lodge dining room and bar was a place of public accommodation as to guests.[162] Only six days after the *LaRue* decision, an appeal to the Supreme Court alleging violations of the Moose Lodge members' rights of privacy and association was dismissed for want of a substantial federal question.[163] Given the basis of the Pennsylvania decision, however, to attribute too much significance to the Supreme Court's dismissal would be inappropriate. The Pennsylvania court found that opening Lodge facilities to gnests of members, subject only to the limitation that the guests be Caucasian, constituted a limited waiver of the Lodge's interests in privacy and exclusiveness of association.[164] The Pennsylvania court's opinion in no way attempted to resolve the issue whether there would be a constitutional bar to a law prohibiting a discriminatory membership policy.[165]

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would have made the first amendment applicable, thus limiting the discretion of the shopping center's corporate owner in determining the use of the property. In concluding that state action was not involved, the Court saw a need to balance first amendment rights against the property rights protected by due process:

> In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant in this case. . . . There is the further proscription in the Fifth Amendment against the taking of 'private property . . . for public use, without just compensation.'
>
> . . . .
>
> [T]he Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens must be protected.

407 U.S. at 567-70.

See also Seidenberg v. McSorley's Old Ale House, Inc., 317 F. Supp. 593, 597 (S.D.N.Y. 1970).

162. Commonwealth Human Rel. Comm'n v. Loyal Order of Moose, 294 A.2d 594 (Pa.), *appeal dismissed*, 409 U.S. 1052 (1972).

163. 409 U.S. 1052 (1972).

164. "There is, of course, no question that when the lodge leases its facilities to nonmembers, a place of public accommodation exists and the lodge does in fact follow a nondiscriminatory policy in such circumstances. The opening of the facilities to guests of members is a difference in degree rather than in character, and each constitutes a step beyond the limited area of immunity granted by the Human Relations Act." 448 Pa. 451, ____, 294 A.2d 594, 598 (1971), *appeal dismissed*, 409 U.S. 1052 (1972). Justice Douglas's *Moose Lodge* dissent noted that Irvis had not argued that the equal protection clause was triggered by the lodge's role as a center of community activity. Thus the Supreme Court's opinion left this question open. 407 U.S. 163, 179-80 n.1 (1972).

165. "That is not to say that under the act the lodge may not discriminate in whatever manner it pleases in determining its qualifications for membership." 448 Pa. at ____, 294 A.2d at 598.

C. Conditioning Governmental Benefits on Nondiscrimination

In *Green v. Connally*,[166] affirmed summarily by the Supreme Court,[167] a three-judge federal district court held that the Internal Revenue Code did not accord tax exempt status to racially discriminatory private schools, nor did it accord charitable deduction status to gifts made to such schools. The holding rested in part on a desire to avoid serious constitutional questions that otherwise would have arisen since the tax exemptions and deductions might be considered the equivalent of direct federal aid to segregated institutions.[168] Noting that "freedom from governmental 'regimentation' or interference is not to be equated with a right of support,"[169] particularly where the condition imposed on receipt of the support prohibited racial discrimination,[170] the court rejected the argument that construing the Code to condition favorable tax treatment on nondiscrimination unconstitutionally burdened freedom of association. The *Green* court recognized that government interest in the elimination of racial discrimination "stands on the highest constitutional ground" and dominates other constitutional interests.[171] Thus when other constitutional interests—including the fundamental interests in freedom of association and the right of privacy—collide with the government's interest in nondiscrimination, the other interests must give way. However, the court disclaimed any intention to resolve the issue whether the interest in eliminating racial discrimination was sufficiently compelling to justify outright prohibition of racial discrimination in private schools.[172]

More recently, in *Norwood v. Harrison*,[173] the Supreme Court invalidated a state program for lending textbooks to students in public and private schools because the program failed to impose a condition of nondiscrimination on private school participation. In responding to the argument that it would be a denial of equal pro-

166. 330 F. Supp. 1150 (D.D.C. 1971).

167. Coit v. Green, 404 U.S. 997 (1971).

168. 330 F. Supp. at 1164-65.

169. *Id.* at 1166. *But see* Buchanan, *Federal Regulation of Private Racial Prejudice: A Study of Law in Search of Morality*, 56 IOWA L. REV. 473, 521-22 (1971).

170. 330 F. Supp. at 1166.

171. "There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on the highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. That government interest is dominant over other constitutional interests to the extent there is a complete and unavoidable conflict." *Id.* at 1167.

172. *Id.* at 1168.

173. 93 S. Ct. 2804 (1973).

tection to bar private schools which discriminate on racial grounds from state assistance, the Court stated:

> That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.
>
> . . . .
>
> [A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been afforded affirmative constitutional protection.[174]

Thus, in the case of direct or indirect financial assistance to private schools, imposition of a requirement of nondiscrimination is mandatory because failure to do so would involve the government in subsidizing racial discrimination and would constitute unconstitutional state action.

The rights of association and privacy, however, lie on a spectrum and are not equally significant in all cases.[175] Illustrative of this point is the fact that, although the court in *Green* stressed that it left unresolved the issue whether there would be a compelling interest supporting an outright ban on private school discrimination,[176] it relied on the Supreme Court's decision in *Railway Mail Association v. Corsi*.[177] In *Corsi*, the Court sustained a state law prohibiting racial discrimination in union membership or services against a challenge that the statute violated freedom of association.[178] The union in *Corsi* exemplifies a nominally private association in which a public function predominates. Unions exercise monopoly power by reason of governmental sufferance, and accordingly, their operation is subject justifiably to extensive regulation, including a prohibition of racial discrimination.[179] Just a year prior to *Corsi*, the Supreme Court had, in fact, construed the Railway Labor Act to require that railroad labor unions conduct themselves in a nondiscriminatory fashion.[180] Observing that the railroad union was "clothed with power not unlike that of a legislature which is subject to constitu-

174. *Id.* at 2809, 2813.

175. *See* Note, *Developing Legal Vistas for the Discouragement of Private Club Discrimination*, 58 IOWA L. REV. 108, 135-38 (1972); Note, *Private Club Discrimination, supra* note 136, at 601-02

176. 330 F. Supp. at 1166.

177. 326 U.S. 88 (1945).

178. 330 F. Supp. at 1167.

179. *See* Johnson v. Capital City Lodge No. 74, Fraternal Order of Police, 477 F.2d 601 (4th Cir. 1973).

180. Steele v. Louisville & N.R.R. Co., 323 U.S. 192 (1944).

tional limitations,"[181] the Court was concerned in that case, as it was in *Green*, with the serious problem of unconstitutional state action which otherwise would have been present. Illustrating the other side of the associational rights spectrum, it would not be equally justifiable for the government to prohibit racial discrimination in the selection of people one invites to one's home. Thus, in *McGlotten v. Connally*,[182] the court distinguished provisions of the Internal Revenue Code allowing certain deductions such as home mortgage interest from those providing tax exemptions for charitable organizations:

> The public nature of the activity delegated to the organization in question, the degree of control the government has retained as to the purposes and organizations which may benefit, and the aura of Governmental approval inherent in any exempt ruling by the Internal Revenue Service, all serve to distinguish the benefits at issue from the general run of deductions available under the Internal Revenue Code.[183]

These two situations demonstrate that each case requires a weighing of the rights of association and privacy involved. Recognizing, however, the strong and perhaps atypical public interest in education and unions, the dissimilar situation of private clubs demands further consideration.

Several decisions have addressed laws that accord tax advantages to private clubs and fraternal orders but do not require a policy of nondiscrimination. Consequently, these decisions have confronted the "serious constitutional question" of state action avoided in *Green*. In *Falkenstein v. Department of Revenue, State of Oregon*,[184] the Supreme Court dismissed for want of jurisdiction an appeal from a three-judge district court decision[185] invalidating Oregon's granting of tax exemptions to fraternal organizations having racially discriminatory membership policies. The State unsuccessfully argued that the tax exemption was the equivalent of the liquor license in *Moose Lodge* and consequently did not constitute state action.[186] The court distinguished the liquor license situation as not involving a symbiotic relationship from which both the organization and the state benefit.[187] In *Falkenstein*, the state required as a condition of obtaining tax exempt status that the organization

181. *Id.* at 198.
182. 338 F. Supp. 448 (D.D.C. 1972).
183. *Id.* at 457.
184. 409 U.S. 1099 (1973).
185. Falkenstein v. Department of Revenue, 350 F. Supp. 887 (D. Ore. 1972).
186. *Id.* at 888.
187. *Id.*

engage in benevolent and charitable activities on which the state in effect placed its seal of approval.[188] Another three-judge federal district court, in *Pitts v. Department of Revenue for State of Wisconsin*,[189] applied a similar rationale to strike down Wisconsin tax exemptions granted to racially discriminatory organizations. Significantly, as in the *Green* decision, the court emphasized that this was not a case in which a termination of the actual discriminatory conduct was sought. "Here," the court pointed out, "it is only the state encouragement which the plaintiffs want eliminated."[190] Furthermore, the court in *Pitts* viewed the rights to be balanced as "a right to equal protection of the laws against a right of certain organizations to discriminate in their membership on the basis of race and, in the process, obtain tax exemptions which obviously encourage their activities, including racial discrimination, by providing indirect financial aid."[191]

Falkenstein, Pitts, and *McGlotten* indicate that, as in the case of private schools, the balance to be struck favors equal protection. In *Moose Lodge*, however, the Supreme Court appears to have struck a different balance for dealing with private clubs, finding that the government's liquor licensing procedure did not constitute sufficient involvement in private activity to warrant a finding of state action that would require suspension of the license. Nevertheless, even where the Court is unwilling to find state action, there is considerable merit to the argument that the state is constitutionally entitled to adopt voluntarily a policy of disassociating itself from racial discrimination. Imposition of a nondiscrimination condition upon receipt of a liquor license results in less interference with associational rights than direct regulation. Therefore, it might be proper for the state to impose such a condition where it could not mandate nondiscrimination as such. Certainly, the state has a strong interest in enforcing regulations that prevent the public from concluding that the state has approved racial discrimination or is contributing de facto to its support. This result follows from the constitutional prohibition on the state's actually giving approval or support,[192] and

188. *Id.* at 889.

189. 333 F. Supp. 662 (E.D. Wis. 1971).

190. *Id.* at 666.

191. *Id.* at 669.

192. *See* Reitman v. Mulkey, 387 U.S. 369, 380-81 (1967). Conditioning the retention of a liquor license on curtailment of the right of free speech, as in *LaRue*, generally would not have this justification. A possible exception concerns a regulation attempting to condition such retention on observance of a prohibition on "racist" entertainment in night clubs. *Compare* Beauharnais v. Illinois, 343 U.S. 250 (1952) (sustaining a group libel statute making

provides a valid line of reasoning that explains the Court's refusal to hear the appeal in *Igraham*. Nevertheless, it is conceivable that deference to state power under the twenty-first amendment was a factor in the Court's action.[193]

CONCLUSION

A thorough understanding of *LaRue* is essential in order to avoid further undesirable reliance on its twenty-first amendment rationale. The Court's focus on this amendment can be best understood as a temporary expedient only slightly camouflaging a movement toward a narrower definition of expression protected by the first amendment. Unfortunately, that camouflage has produced considerable confusion concerning the relationship of the twenty-first amendment to constitutional safeguards of individual rights. The emerging danger of *LaRue* is that it may be viewed as sanctioning further impingement on individual rights whenever there is any tangential connection with the twenty-first amendment. The Supreme Court's dismissal in *Ingraham* and its remands in *Peto* and *Bruno* may encourage this view.

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criminal the dissemination of material disparaging as a class citizens of any race, color, creed, or religion), *with* Brandenburg v. Ohio, 395 U.S. 444 (1969) (reversing conviction of a Ku Klux Klan leader arising out of a racist and antisemetic speech). This situation is somewhat comparable to the hypothetical case posed but not resolved in *Green* as to "whether tax-exemption or tax-deduction status may be available to a religious school that practices acts of racial restriction because of the requirments of religion." 330 F. Supp. at 1169. *See also* Bob Jones Univ. v. Connally, 472 F.2d 903 (4th Cir. 1973), *cert. granted*, 42 U.S.L.W. 3175 (Oct. 9, 1973) (No. 72-1470). The answer to the *Green* hypothetical is likely to be no. *See* Norwood v. Harrison, *supra* note 171, at 2810, n.7. Nevertheless, the actual and apparent government support and approval is stronger in the case of the tax benefits.

193. The state of Maine's memorandum in support of its motion to dismiss the Elk's appeal relied in part on the argument that the twenty-first amendment, as interpreted in *LaRue*, augmented the state's regulatory power. Appellee's Motion to Dismiss or Affirm at 7-8, B.P.O.E. Lodge No. 2043 v. Ingraham, 411 U.S. 924 (1973). It should be noted that Justice Douglas's dissent from the dismissal was solely on the basis of equal protection and ignored the large portion of the appeal addressed to alleged infringement of the rights of association and privacy. 411 U.S. at 926-28. In *Moose Lodge*, however, these rights were of such great concern to him that he would have concurred with the majority except for the fact that the Pennsylvania liquor licenses were issued only in limited numbers and thus created a state sanctioned monopoly in which all citizens have an interest. 407 U.S. at 182. The Elks Lodge in *Ingraham*, however, enjoyed no such monopolistic position since additional liquor licenses readily could be obtained. Telephone interview with Charles Larouche, Assistant Attorney General of Maine, Sept. 14, 1973. Therefore, Justice Douglas was confronted with the Moose Lodge situations minus the state approved monopolization of liquor distribution—a situation in which the rights of association and privacy would seem to predominate. Yet Justice Douglas did not even mention these rights in his *Ingraham* dissent. Since *LaRue* occurred between *Moose Lodge* and *Ingraham*, it stands out as one possible explanation for Justice Douglas's abandonment of the associational and privacy arguments.

Approaching *LaRue* from a broader perspective, it is ironic that, in the term in which it and the obscenity decisions were rendered, the Court in *Roe v. Wade*[194] engaged in the most far reaching overriding of state police power since *Lochner*.[195] Significantly, even though the *Wade* result limited drastically the state's power in an important area of social concern,[196] the result was accomplished solely by reason of the Court's unsupported impressions of due process. In the area of obscenity control, however, the Court was willing to constrict the right of free speech—a right specifically guaranteed as a fundamental principle of our political system. The twenty-first amendment rationale for such constriction was aberrational and should not provide a future basis for sustaining otherwise unconstitutional state interference with individual rights.

194. Roe v. Wade, 410 U.S. 113 (1973).

195. 198 U.S. 45 (1905). *See* Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628, 2661-62 (1973) (Brennan, J., joined by Stewart & Marshall, JJ. dissenting).

196. 410 U.S. at 153. *See also id.* at 170 (Stewart, J., concurring).