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Constitutional Law - First and Twenty-First Amendments

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this case. At least two alternatives consistent with traditional first amendment analysis were available. The first was an analysis of whether the Human Relations Ordinance reflects a compelling governmental interest, making regulation of the column headings allowable. Secondly, the Court could have concluded that the column headings represented conduct and not expression and thus were not protected by the first amendment. Either would allow the Court a wider range of inquiry in order to insure greater protection of the exchange of ideas and at the same time, permit governmental regulation where there is a great societal need.

Ellen Edge Katz

CONSTITUTIONAL LAW—FIRST AND TWENTY-FIRST AMENDMENTS—The United States Supreme Court has held the regulations of the California Department of Alcoholic Beverage Control which prohibit certain sexual acts and the display of specific parts of the body, as entertainment in licensed establishments, do not, on their faces, violate the United States Constitution.

California v. La Rue, 409 U.S. 109 (1972).

In 1965, a dancer in a California nightclub entertained with her breasts exposed. The Supreme Court of California in *In Re Giannini*[1] held that she could not be convicted of either lewd conduct or indecent exposure in the absence of proof that her dance was obscene. The Department of Alcoholic Beverage Control, which is the administrative agency vested by the California constitution[2] with primary authority for licensing and regulating the sale of alcoholic beverages within the state, became concerned in the years following *Giannini* with the progression from "topless" dancers to "bottomless" dancers, nude entertainers, and the showing of films displaying sexual acts in bars and nightclubs

1. 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655, *cert. denied*, 395 U.S. 910 (1968).
2. CAL. CONST. art. 20, § 22. That section provides in part:
The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with the laws enacted by the Legislature, to license the manufacture, importation and sales of alcoholic beverages in this State. . . . The Department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals . . . .

which it had licensed. Public hearings were held and the commission heard of numerous incidents which had occurred in and around licensed establishments offering such entertainment. These incidents ranged from sexual contact between customers and dancers to acts of violence against police and citizens which took place immediately adjacent to these establishments.[3] The commission also heard testimony that statutory law had been unsuccessful in regulating this behavior because of a series of state and federal court decisions.[4] In 1970, the Department promulgated rules regulating the type of entertainment which might be presented in bars and nightclubs which it licensed. Holders of various liquor licenses and dancers at premises operated by such licensees brought an action in the United States district court, challenging these regulations as being, on their faces, violative of the first and fourteenth amendments.[5]

The majority of the three judge district court held that portions of the regulations were unconstitutional. It issued a declaratory judgment to that effect, and granted an injunction prohibiting enforcement. Those portions struck down by the court prohibited the following kinds of conduct on licensed premises:

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

(b) The actual or simulated "touching, caressing or fondling of the breasts, 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 or 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[6] quoted above.

The district court held that motion pictures and live performances are within the free speech guarantees of the first and fourteenth amend-

3. California v. La Rue, 409 U.S. 109, 111 (1972).
4. *Id.* at 126 n.4.
5. La Rue v. California, 326 F. Supp. 348 (C.D. Cal. 1971), *rev'd*, 409 U.S. 109 (1972).
6. For full text, *see* 326 F. Supp. at 358-60. Originally, rules prohibiting topless waitresses, entertainment which violated a city ordinance, and certain requirements that entertainers perform on a stage were also challenged. These objections were withdrawn at oral argument.

ments.[7] It therefore reasoned that the regulations had to be justified under the *Roth-Memoirs*[8] line of decisions as a prohibition of obscenity, or else as a regulation of conduct having a communicative element, in accordance with the standards set forth in *United States v. O'Brien*.[9] Finding that these regulations would bar some entertainment which could not be held legally obscene, and that the *O'Brien* tests were not satisfied, the court held that as direct prohibitions the regulations were overbroad and therefore unconstitutional. Relying primarily on *Sherbert v. Verner*[10] and *American Communications Association v. Douds*,[11] the court further concluded that California could not do indirectly that which it could not do directly; in this case, a state agency could not use its constitutional power to issue, renew, or revoke liquor licenses for the purpose of censoring entertainment.[12] The state appealed to the United States Supreme Court.[13]

The Supreme Court reversed the decision of the district court and upheld the regulations. Speaking for the majority, Mr. Justice Rehnquist held that both motion pictures and theatrical performances are within the protection of the first and fourteenth amendments. He agreed with the district court that these regulations proscribed both visual entertainment which is not protected by the first and fourteenth amendments because it is obscene, and visual entertainment which would not be found obscene under *Roth* and subsequent decisions of the Court, and is therefore protected. But the Court did not believe that the state regulatory authority in this case was limited to dealing with the problem it confronted in terms of obscenity. Justice Rehnquist said that as the mode of expression moves from the printed page

7. *Id.* at 353-55.

8. In A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957). ". . . [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 326 F. Supp. at 353. Since the *La Rue* decision, the Court has re-examined the rules for determining obscenity. *See* United States v. 12 200-ft Reels, 413 U.S. 123 (1973); Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973. These decisions do not directly affect the holding of *La Rue*.

9. 391 U.S. 367 (1968). (1) It must be within the constitutional power of the governmental agency; (2) It must further an important or substantial governmental interest; (3) The governmental interest must be unrelated to the suppression of free expression; and (4) The incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest. 326 F. Supp. at 355.

10. 374 U.S. 398 (1963).

11. 339 U.S. 382 (1950).

12. 326 F. Supp. at 357-58.

13. California v. La Rue, 409 U.S. 109 (1972).

to involve conduct or action, the Court has often sustained limitations upon the time, manner, and place of such exercise of first amendment rights.[14]

The twenty-first amendment[15] was cited by the Court as conferring upon the states something more than the general police powers in matters involving the sale of alcoholic beverages. It was not held that the twenty-first amendment supercedes all other provisions of the Constitution in matters concerning the control of liquor, but the Court did indicate that the case for upholding a state regulation in this area is strengthened by that enactment.[16]

Justice Rehnquist said that the Department perceived a situation of legitimate concern which involved the sale of alcoholic beverages by the drink. It concluded that the sale of liquor by the drink and naked dancing and entertainment should not take place simultaneously. The Court held that this conclusion was not irrational.[17] Considering the wide latitude provided by the twenty-first amendment for the states in dealing with problems related to liquor, and the lack of a showing that lesser restrictions would have been effective to alleviate the problem, the Court concluded that the Department's choice of a prophylactic solution was a reasonable one.

The standards announced in *United States v. O'Brien*[18] for dealing with some forms of communicative conduct were held not to be applicable to *La Rue*. Justice Rehnquist said that the Court in *O'Brien* suggested that the extent to which conduct was protected by the first amendment depended on the presence of a communicative element. He characterized the performances at which these regulations were directed as "more gross sexuality than communication."[19] While he conceded that at least some of the performances prohibited by these regulations would contain sufficient communicative elements to be afforded constitutional protection in another setting, he saw as the critical factor that California had not forbidden these performances across the board. It merely proscribed such performances in establishments which it licensed to sell liquor by the drink.[20]

14. *Id.* at 116-17.
15. 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."
16. 409 U.S. at 115-16.
17. *Id.*
18. 391 U.S. 367 (1968).
19. 409 U.S. at 118.
20. *Id.* at 117-18.

The Court held, therefore, that the conclusion that certain sexual performances and the sale of liquor by the drink ought not to occur simultaneously was not irrational; and, given the added presumption in favor of validity of state regulation in this area which the Court found the twenty-first amendment to require, the Court held that the regulations were not on their faces violative of the Constitution. As a qualifying footnote to his opinion, Mr. Justice Rehnquist added, quoting from *Joseph E. Seagram & Sons v. Hostetter*,[21] "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."[22]

Mr. Justice Marshall, in a dissenting opinion, stated that he would affirm the decision of the district court. In his view, activities which are entitled to prima facie first amendment protection may be regulated in only the following ways:

(a) A state may restrict speech if it can show that the speech is "used in such circumstances and is of such a nature as to create a clear and present danger that it will bring about the substantive evils that [the state] has a right to prevent."[23]

(b) If a protected activity is obscene, it is no longer protected, and can be regulated by the state.[24]

(c) A state may enact a broad regulatory scheme which incidentally restricts first amendment rights. As long as the regulation is not speech related, and is otherwise constitutional, it is permissible.[25]

(d) The states may, in some circumstances, enact regulatory schemes that directly restrict the exercise of free speech or protected conduct. To be constitutional, such regulation must be supported by a "compelling" governmental purpose. That purpose must be unrelated to a mere hostility to the right being asserted and classifications which are based on the content of speech are especially disfavored by the Court.[26]

As a prohibition of obscenity, Justice Marshall found the California regulations to be overbroad, and therefore unconstitutional. The regulations created a system of per se rules to be applied regardless of context; they flatly prohibited performance of certain acts and the exposure

21. 384 U.S. 35 (1966).
22. 409 U.S. at 119 n.5, *quoting* 384 U.S. at 52.
23. 409 U.S. at 119, *citing* Schenk v. United States, 249 U.S. 47, 52 (1919); *cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951).
24. 409 U.S. at 119 n.9.
25. *Id.* at 137-38.
26. *Id.* at 138.

of certain parts of the body in entertainment that was presented in bars and nightclubs.[27]

The state argued that what was being denied here was not the right to present constitutionally protected entertainment, but the privilege of selling liquor by the drink in connection therewith. Californians were free to present the entertainment without criminal sanction. Even Justice Marshall conceded that California could have denied or revoked liquor licenses for any number of reasons. There were some reasons, however, for which a privilege may not be denied. In his view, a benefit may not be denied a person by a state on a basis that infringes his constitutionally protected interests—especially his freedom of speech.[28] Cases in which unconstitutional conditions on welfare benefits,[29] unemployment compensation,[30] tax exemptions,[31] public employment,[32] bar admissions,[33] and mailing privileges[34] have been invalidated were cited by Justice Marshall. In none of these were criminal penalties involved.

As a regulation on the time, place or manner of the exercise of first amendment rights, Justice Marshall considered that the constitutionally permissible purpose to be served by the restrictions was too remote to be considered compelling. The evils of which the commission heard in the hearings could be prohibited directly. In his view, the state must adopt this less restrictive alternative unless it can make a demonstration that the protected activity and the criminal conduct are so closely linked that only through restriction of one can the other be stopped. He could find no such demonstration in the instant case. In effect, Justice Marshall did not find the sweep of the twenty-first amendment so broad as did the majority. He saw that amendment as giving the states no power to regulate liquor in a fashion that would otherwise be unconstitutional, except in those areas relating to importation. The

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27. *Id.* at 123-26.
28. *Id.* at 136, *citing* Perry v. Sindermann, 408 U.S. 593, 597 (1972).
29. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); *but cf.* Wyman v. James, 400 U.S. 309 (1971).
30. *See* Sherbert v. Verner, 374 U.S. 398 (1963).
31. *See* Speiser v. Randall, 357 U.S. 513 (1958).
32. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1960).
33. *See, e.g.*, Baird v. State Bar, 401 U.S. 1 (1971); Konigsberg v. State Bar, 353 U.S. 252 (1957); Schare v. Board of Bar Examiners, 353 U.S. 232 (1957). *But cf.* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971); Konigsberg v. State Bar, 366 U.S. 36 (1961).
34. *See, e.g.*, Blout v. Rizzi, 400 U.S. 410 (1971); Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

twenty-first amendment granted to the states no more than the right to regulate the interstate commerce of this one item, alcoholic beverages. He said that recent decisions of the Court indicate that the power to regulate the distribution of alcohol may not be used in a manner inconsistent with the equal protection clause[35] or the requirements of due process.[36] He could find no justification for the proposition that it could be exercised in a manner that conflicted with the first amendment.

Mr. Justice Marshall was startled at the majority's suggestion that the regulations were constitutional on their faces even though specific future applications may engender concrete problems of constitutional dimensions. What the Department sought to prevent by the rules was irrelevant to him; the fact was that they prohibited both protected and unprotected performances. On the basis of this overbreadth, Justice Marshall would have held the regulations unconstitutional.[37]

The Supreme Court's decision in *La Rue* has major significance in three respects. First, it marks a substantial broadening of the scope of the twenty-first amendment. Second, the Court for the first time held directly that theatrical performances and dance are entitled to prima facie first amendment protection. Finally, the Court's approach to the problem of possible statutory overbreadth indicates that the recent trend in the use of the overbreadth doctrine is undergoing re-examination.

I. The Scope of the Twenty-first Amendment[38]

The twenty-first amendment was based on the existing Webb-Kenyon Act[39] for the purpose of permanently embedding in the Constitution the principles of that act. That purpose was to divest the importation of liquor of its interstate commerce protections in certain circumstances, so as to allow dry states to regulate the flow of liquors across their borders. This had the effect of giving dry states federal protection against importation of liquor into the states.[40]

35. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972).
36. *See* Wisconsin v. Constantineau, 400 U.S. 433 (1971).
37. 409 U.S. at 125 n.3.
38. 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."
39. Act of March 1, 1913, ch. 90, 37 Stat. 699.
40. 409 U.S. at 134 n.14.

Notwithstanding the amendment's stated purpose, the first Supreme Court case to interpret the twenty-first amendment, *State Board of Equalization v. Young's Market Co.*,[41] held that it granted the states plenary power over liquor, and upheld an otherwise invalid state license tax upon importers of beer from other states. The Court there said that the words of the amendment grant to the state the power to prohibit all importation of alcohol, and that the state may adopt a lesser degree of regulation than total prohibition. In *Mahoney v. Joseph Triner Corp.*,[42] the Court declared that the state's power over importation was plenary, even to the extent of unreasonableness. *Ziffrin v. Reeves*[43] held that a state may exercise wide discretion as to the means employed in protecting her people against the evil incidents of liquor. There, the Court reasoned that a state may prohibit liquor totally within its borders, and may adopt what measures are appropriate to effectuate that end. The state may also adopt as a regulation something less than total prohibition, so it is therefore permissible for the state to allow the transportation, possession, sale, manufacture, or consumption of alcohol only under definitely prescribed conditions.

In 1963, the Court limited the twenty-first amendment's supercession of the commerce clause to situations in which state laws regulate the importation of intoxicants destined for use or consumption within the state;[44] and, in 1966, the Court reiterated the fact that the twenty-first amendment granted to the states broad regulatory power over liquor traffic within their borders, and that the states in so doing were totally unconfined by traditional commerce clause limitations.[45]

In examining state regulation of liquor with respect to constitutional requirements other than the commerce clause, however, the Court has found the twenty-first amendment to be of little import. As pointed out by Justice Marshall, the general state police power to regulate matters concerning liquor, it has been held, may not be exercised in a manner that conflicts with the equal protection clause or the requirements of due process.[46] Neither may it be exercised in a manner con-

41. 299 U.S. 59 (1936).
42. 304 U.S. 401 (1937).
43. 308 U.S. 132 (1939).
44. Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1963).
45. Joseph E. Seagram & Sons v. Hostetter, 348 U.S. 35 (1966). *See generally* 17 VAND. L. REV. 1524 (1964); 55 YALE L.J. 815 (1946).
46. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971). *But cf.* Goesaert v. Cleary, 335 U.S. 464 (1948). A Michigan statute required that all bartenders in cities of 50,000 population or more be licensed. The statute prohibited any female from obtaining such a license, however, unless she was

flicting with the export-import clause[47] nor to prevent shipment of liquor to a federal compound totally within the borders of the state.[48]

The majority in *La Rue* did not hold that the twenty-first amendment empowered a state to do that which the first amendment prohibits. It did hold, however, that the twenty-first amendment gives rise to a presumption in favor of the validity of regulation in this area.[49] This presumption was apparently sufficient to alter the scope of the Court's inquiry into a state action which restricted the exercise of free speech rights. Rather than requiring the state to make a showing of a "compelling governmental interest" to support such restriction, the Court upheld the regulation merely upon a showing of reasonableness.[50]

II. The Scope of First Amendment Protection

The first amendment provides, in part, that ". . . Congress shall make no law . . . abridging the freedom of speech, or the press . . . ." The due process clause of the fourteenth amendment protects citizens of each state from unwarranted state interference with the exercise of first amendment rights. These protections have been interpreted by the Court to apply to forms of expression other than pure speech and the printed page. Proceeding on a case-by-case basis, the Court has included within the protection of the first amendment motion pictures,[51] symbolic speech,[52] labor picketing,[53] and protest marches.[54] The Court has held, however, that although these forms of expression are all entitled to protection, different modes of expression present different problems. It does not necessarily follow that each mode is

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the wife or daughter of the owner of the establishment in which she was to work. This was challenged under the equal protection clause of the fourteenth amendment. The Court said that the twenty-first amendment does not supercede the fourteenth, even in the area of regulation of liquor; but in recognition of the special problems connected with the sale of liquor, the Court could not hold that the regulation presented an unreasonable classification. *See also* Note, *The Twenty-First Amendment Grants States Plenary Power Over the Liquor Industry Notwithstanding the Dictates of the Equal Employment Provisions of the Civil Rights Act of 1964*, 8 HOUSTON L. REV. 587 (1971).

47. Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1963).

48. Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938).

49. 409 U.S. at 119.

50. *See* text corresponding to note 87 *infra*.

51. Burstyn v. Wilson, 343 U.S. 495 (1952). *See generally* Note, *Motion Pictures and the First Amendment*, 60 YALE L.J. 696 (1951).

52. *See, e.g.*, Board of Educ. v. Barnette, 319 U.S. 624 (1943).

53. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 8 (1939). *See generally* International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957).

54. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559 (1964).

subject to the precise rules laid down for dealing with some other mode.[55] The Court has held that as expression moves from the printed page and takes the form of conduct, such communicative conduct may be subject to some state regulation.[56]

The regulations at issue in *La Rue* deal with three forms of expression: motion pictures, dance, and other live performances. As stated above, the Court held in *Joseph Burstyn, Inc. v. Wilson*,[57] that motion pictures were entitled to first amendment protection. However, the Court had never directly ruled on the issues of dance and live theatrical performances prior to the *La Rue*[58] decision, where it was specifically held that theatrical performances are entitled to first amendment protection, and strongly implied that dance is protected as well.[59]

Previously, state and lower federal courts had been in general agreement that live theatrical performances were entitled to some degree of first amendment protection. The split of authority was on the issue of whether such performances could be dissected into speech and nonspeech components. The District Court for the Northern District of Georgia, for example, held that the nonverbal elements of a play may not be regulated on a different basis than the verbal elements.[60] The court said that a play must be considered as a unit for the purpose of determining obscenity. In a contrary holding, the District Court for the Eastern District of Tennessee, dealing with the same play, held that the speech and nonspeech elements could be separated for the purposes of determining obscenity.[61] That court said that speech elements must be judged in the context of the play as a whole, and the *Roth-Memoirs* tests applied on that basis. The nonspeech elements of the play were to be judged independently. They could be found obscene when ex-

55. Burstyn v. Wilson, 343 U.S. 495 (1952).
56. California v. La Rue, 409 U.S. 109, 117 (1972).
57. 343 U.S. 495 (1952).
58. The Court in *La Rue* cites Schacht v. United States, 398 U.S. 58 (1969), as authority for the proposition that live theatrical performances are protected. But that case held only that Congress could not prohibit the wearing of a military uniform by an actor who said things critical of the military on stage, while allowing the wearing of the uniform if he did not. The Court said, "An actor, like anyone else in our country, enjoys a constitutional right to freedom of speech, including the right to openly criticize the government." *Id.* at 63.
59. The court of appeals of Arizona construed the language in *La Rue* as holding that dance was an activity entitled to prima facie first amendment protection, and struck down an ordinance prohibiting topless dancing in any circumstances. *See* Yauch v. Arizona, 19 Ariz. App. 175, 505 P.2d 1066 (1973).
60. Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. 634 (N.D. Ga. 1971).
61. Southeastern Promotions, Ltd. v. Conrad, 341 F. Supp. 465 (E.D. Tenn. 1972). *See also* Note, *Dissection of Theatrical Plays into Speech and Conduct Components: An Exception to the Roth Rule?*, 4 SETON HALL L. REV. 379 (1972).

amined individually, and yet not necessarily be obscene when viewed in the context of the entire play.

The issue of whether dance is per se protected by the first amendment has been the subject of much litigation in state and federal courts. Most of the cases have involved nude and partially nude dancing in bars and nightclubs. Approaches used by various courts generally place the degree of protection to be given to such dance in one or more of five general categories:

(a) The right to sell liquor is a temporary privilege granted by the state. Since it is a business attended by danger to the community, it may be permitted under such circumstances as will limit to the utmost its evil. Therefore, revocation of a liquor license on grounds that entertainment presented was lewd and immoral is justified as a reasonable exercise of supervisory power. No showing of obscenity is required.[62]

(b) Topless dancing in bars is conduct particularly devoid of communicative elements, as is pure conduct. As such, it is not entitled to first amendment protections per se.[63]

(c) Where expression is used not to disseminate opinion or information, but to sell a product, such expression is not entitled to stringent first amendment protection.[64] As a sales promotion device, topless dancing is subject to state regulation. Neither the *Roth-Memoirs* standards for dealing with obscenity, nor the *O'Brien* standards are applicable.[65]

(d) Dance is an activity which has both speech and nonspeech elements. In circumstances where the speech elements are merely inci-

62. In the Matter of Club "D" Lane, Inc., 112 N.J. 577, 272 A.2d 302 (1971); Tahiti Bar, Inc., Liquor License Case, 395 Pa. 355, 142 A.2d 491 (1959), *appeal dismissed*, 361 U.S. 85 (1959).

63. Hodges v. Fitle, 332 F. Supp. 504 (D. Neb. 1971) (involving revocation of a liquor license for displaying topless dancers. The ordinance of the City of Omaha provided for the revocation or suspension of liquor license if ". . . the licensee, his manager or agent, shall allow any live person to appear . . . in any licensed premises in a state of nudity . . ."); Jones v. City of Birmingham, 45 Ala. 86, 224 So. 2d 922, *cert. denied*, 396 U.S. 1011 (1969) (prosecution under a statute prohibiting ". . . any person to publicly engage or participate in . . . any indecent, obscene, lewd, filthy, vulgar, or lascivious scene, act, posture, or performance, or for any person in charge . . . of any building or premises to permit the same to be done therein . . . .").

64. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52 (1942).

65. Hodges v. Fitle, 332 F. Supp. 504 (D. Neb. 1971); City of Portland v. Derrington, 253 Ore. 289, 451 P.2d 111 (1966), *cert. denied*, 396 U.S. 901 (1969) (involving prosecution of a topless dancer under the Portland Police Code which makes it ". . . unlawful for any female person to appear or be in a place where food or alcoholic beverage is offered for sale for consumption on the premises, so costumed or dressed that one or both breasts are wholly or substantially exposed to public view").

dental to the activity, the activity is not protected; the states may prescribe permissible degrees of nudity in bars, and are not limited in so doing to the standards for obscenity. In circumstances where the speech elements are significant, however, the *Roth-Memoirs* tests will have to be met.[66]

(e) Dance is a constitutionally protected form of expression, and nude or partially nude dancing may not be prohibited without a showing of obscenity.[67]

The majority in *La Rue* treated dance and other live performances in bars and nightclubs as one question. It did not rule directly on the issue of whether this entertainment can be separated into speech and nonspeech elements for the purpose of determining obscenity. It held that the state was not limited in this case to dealing with the problem in terms of obscenity at all.

Justice Rehnquist conceded that at least some of the performances at which the regulations were directed are constitutionally protected, but he said that they "partake more of gross sexuality than of communication."[68] He cited *O'Brien* as holding that the extent to which conduct is protected depends on the presence of a communicative element.[69] Because these performances were prohibited only in bars and nightclubs, and not across the board, they were upheld. What this provides, in effect, is a sliding scale of protection depending on the extent of the communicative element contained in the performance.

This result is a significant departure from the holding in *O'Brien.* There, it was recognized that the presence of communicative and noncommunicative elements may exist on a sliding scale, in relationship of one to the other, within a single activity. The Court held that there is a point on this scale at which the first amendment line is drawn;

66. Paladino v. City of Omaha, 335 F. Supp. 897 (D. Neb. 1972) (involving revocation of a liquor license for displaying topless dancers in violation of an Omaha City Ordinance); Hoffman v. Carson, 49 Ala. 3d 1078, 250 So. 2d 891 (1971) (involving prosecution under a Florida indecent exposure statute); Majors Liquors, Inc. v. City of Omaha, 188 Neb. 628, 198 N.W.2d 483 (1972) (involving revocation of a liquor license for displaying topless dancers in violation of an Omaha city ordinance).

67. *In re* Gianinni, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655, *cert. denied,* 395 U.S. 910 (1968) (involving prosecution of a topless dancer under an indecent exposure statute); Glancy v. County of Sacramento, 94 Cal. Rptr. 864, 17 Cal. App. 3d 504 (1971) (involving prosecution of a bottomless waitress under a county ordinance which declared that any person is ". . . guilty of a misdemeanor who . . . exposes his or her private parts or buttocks . . . while participating in any live act . . . in any public place . . . or serving food or drink or both to any customer").

68. 409 U.S. at 118.

69. 391 U.S. at 376.

conduct on one side is protected, and on the other side it is not. Once this threshold is reached, the full force of the first amendment applies.[70]

III. The Overbreadth Doctrine

Perhaps the most significant aspect of *La Rue* is the majority's approach to the problem that possible future applications of the regulations might present issues of constitutional dimension. The problem of which the Court speaks is the problem of possible statutory overbreadth.[71] Because the fourteenth amendment requires that the full force of the first amendment apply to the states in the area of freedom of expression, the states are severely limited in the exercise of their general police power when dealing with matters affecting speech. The Court has precisely defined the circumstances under which freedom of speech may be restricted, and has also defined, with slightly less precision, circumstances under which conduct having both speech and non-speech elements may be regulated. A state regulation which prohibits both activities which are protected by the first amendment and activities which are not protected is said to be "overbroad." A state regulation which regulates activities which are prima facie protected, and so regulates them in both circumstances which warrant regulation and those which do not, is also "overbroad."[72]

The Court has developed two alternative methods for dealing with overbroad statutes. The more traditional approach is to deal with them on a "case-by-case" basis, allowing the statute to operate in circumstances which the Constitution permits, and prohibiting its application to protected activities.[73] A more drastic approach is to declare the statute unconstitutional "on its face" because of its adverse affects on the exercise of freedom of expression.[74]

If a statute is declared unconstitutional on its face, the statute is void and may not be applied to any situation. In dealing with a claim of first amendment privilege using the case-by-case approach, the Court first examines a statute on the basis of due process requirements. The

70. In *O'Brien*, the Court assumed that the threshold had been reached, and did not establish a test to determine at what point to draw the line.

71. The vice of statutory vagueness, in the area of first amendment protection, is often intimately related to the vice of overbreadth. *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

72. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

73. *See, e.g.*, Whitney v. California, 274 U.S. 357 (1927).

74. Thornhill v. Alabama, 310 U.S. 88 (1939).

due process provisions of the fourteenth amendment protect citizens of a state from an unreasonable, arbitrary, or capricious exercise of the general police power. If the statute is held to be constitutional under the due process clause, it then remains for the Court to determine whether the particular conduct at issue was protected by the first amendment.[75] This procedure allows the Court to define, one by one, the circumstances in which the statute may operate consistently with the first amendment and those in which it may not. The primary rationale for this approach is that constitutional adjudication tends to err unless confined to the evaluation of factual data generated by a particular case. A second rationale is the doctrine that constitutional issues should be decided as narrowly as possible. This is based on the concept that the courts should avoid confrontation with the legislature whenever possible. When such a confrontation is not avoidable, it should be as limited as possible.[76] In applying the case-by-case approach the courts assume that privileged claimants will be vindicated and claimants whose activities are not protected will not be shielded by constitutional safeguards which do not apply to their cases.

In attacking a statute on its face, it is not necessary that the party claiming the statute is overbroad show that his conduct was privileged.[77] The Court has held that the claim of overbreadth is available to a claimant whose conduct was itself subject to regulation under a properly narrow scheme. All that the claimant must show is that the statute is unconstitutionally overbroad, and if so found, it may not be applied. Facial examination of statutes has been applied by different justices in different ways, but the basic rationale for its use has always been the same—the preferred position of first amendment rights. The argument is that the very existence of an overbroad statute has a "chilling effect" on the exercise of first amendment rights. A statute that has an overbroad scope operates as a deterrent to the exercise of rights that are prohibited by the statute but would be found protected if tested through the courts.[78] In weighing the valid state interest to be achieved by a statute against the chilling effect on free expression, the

75. Whitney v. California, 274 U.S. 357 (1927).

76. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 847-52 (1970).

77. Dombrowski v. Pfister, 380 U.S. 479, 486 (1964).

78. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852-59 (1970).

Court has declared statutes void on their faces for the following reasons:[79]

(a) because the means employed bore little relation to the interest sought to be advanced[80]; or

(b) because the state interest could be attained by alternate means that would impose less drastic restrictions on the individual's personal liberty[81]; or

(c) because the state interest served was deemed insufficient to justify the extensive restrictions.[82]

The doctrine that a statute affecting free expression is unconstitutional on its face if overbroad is the approach that has been much favored by the Court in recent years. This has been particularly true in the Court's attitude toward statutes that regulate time, place, and manner for expression.[83] The Court has made it clear that when speech and nonspeech elements combine in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element may justify incidental limitations on first amendment rights.[84] When dealing with a statute that, on its face, does not regulate speech, but rather deals with conduct, and, when the governmental interest which supports the statute is other than the suppression of free expression, the Court will deal on a case-by-case basis with the application of such a statute to a situation that involves communication.[85] When dealing with a statute that directly regulates activities entitled to prima facie first amendment protection, however, the Court has required that "precision be the touchstone."[86] The Court has held that only a compelling governmental interest will justify regulations on the time, place, and manner of expression, and only regulations reasonably related to those interests will be permitted.[87] Further, it has held that the regulations must be narrowly tailored to further that interest. In

79. Isreal, *Elfbrandt v. Russell: The Demise of the Oath*, 1966 SUP. CT. REV. 193, 217-19.
80. NAACP v. Button, 371 U.S. 415 (1963); Talley v. California, 362 U.S. 60 (1960); Lovell v. Griffin, 304 U.S. 444 (1938).
81. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Shelton v. Tucker, 364 U.S. 479 (1960); Saia v. New York, 334 U.S. 558 (1948).
82. Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).
83. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559 (1964).
84. United States v. O'Brien, 391 U.S. 367, 376-77 (1968).
85. *Id.*
86. NAACP v. Button, 371 U.S. 415, 438 (1963).
87. *Id.* at 438. *See also* Sherbert v. Verner, 374 U.S. 398, 408 (1963); Bates v. Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 464 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945).

other words, regulations of this type must be written in terms such that they are capable of applications only in circumstances which the Constitution allows.[88] Overbroad regulations will be struck down on their faces.

As the facial examination for overbreadth became the rule in examining statutes directly affecting freedom of expression, the Court has in some instances applied the test for overbreadth without looking to see which form of adjudication, facial or case-by-case, was most suited to dealing with the issue. At one time the Court felt that the drastic approach was justified only if not doing so would have a serious chilling effect on first amendment rights.[89] More recent cases have indicated that a finding of overbreadth is conclusive, and the statute must be held void on its face. Some of these cases rejected the case-by-case approach for reasons that had little to do with chilling effects.[90]

There have been indications, prior to *La Rue*, that the Court is re-examining the overbreadth doctrine. In *Younger v. Harris*,[91] the Court severely limited the doctrine that federal courts should enjoin state proceedings on the basis that the statute involved was unconstitutional on its face. While the holding in that case was limited to a situation in which the state proceeding had already commenced, the Court indicated a similar preference for abstention even in the absence of a pending state proceeding. *Gooding v. Wilson*[92] was indicative of the difference of opinion that existed on the Court in 1971. In dealing with a Georgia breach of the peace statute, Mr. Justice Brennan spoke for the majority: ". . . [the statute] punishes only spoken words. It can therefore withstand appellee's attack upon facial constitutionality only if, as authoritatively construed by the Georgia courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the first amendment."[93] In other words, the statute must be

88. Gooding v. Wilson, 405 U.S. 518, 522 (1971). *See also* United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Brown v. Louisiana, 383 U.S. 131, 143-50 (1966) (Brennan, J., concurring); NAACP v. Button, 371 U.S. 415 (1963).

89. *See generally* Note, *Chilling Effects in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

90. NAACP v. Button, 371 U.S. 415, 435 (1962). The Court feared that the statute might be used selectively against unpopular causes, and that lower courts might not resolve statutory ambiguities in favor of adequate protection of first amendment rights.

91. *Compare* Younger v. Harris, 401 U.S. 37 (1971), *with* Dombrowski v. Pfister, 380 U.S. 479 (1964). *See* Kennedy, *I Used To Love You, But It's All Over Now: Abstention and the Federal Courts' Retreat from their Role as Primary Guardian of First Amendment Freedoms*, 45 S. CAL. L. REV. 847 (1972).

92. 405 U.S. 518 (1971).

93. *Id.* at 520.

carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.[94] Chief Justice Burger, in a dissenting opinion, said:

> As the Court itself recognizes, if the First Amendment overbreadth doctrine serves any legitimate purpose, it is to allow the Court to invalidate statutes because their language demonstrates their potential for sweeping improper applications posing significant likelihood of deterring important First Amendment speech—not because of some insubstantial or imagined potential for occassional and isolated applications which go beyond constitutional bounds . . . . The Court makes a mechanical and, I suggest insensitive, application of the overbreadth doctrine today.[95]

In *La Rue*, Justice Rehnquist said that by pretrial stipulation, respondents admitted that they had offered entertainment that was proscribed by the Department's regulations. The Court had before it testimony as to the substance of that entertainment. Also, by pre-trial stipulation, the Department indicated its intent to take disciplinary action against these licensees. Justice Rehnquist concluded that this represented a concrete and present constitutional controversy[96] and therefore the district court had jurisdiction in the case. By framing the jurisdictional issue in this way, the Court had a specific course of conduct to examine. By looking to the public hearings and statements by the Department, Justice Rehnquist found that this was typical of the type of conduct at which the regulations could be expected to be aimed in the future.

Justice Rehnquist agreed with the minority that, on their faces, the regulations would prohibit some entertainment that was clearly protected. He indicated that even in the context of licensing the sale of liquor, California could not constitutionally prohibit all entertainment that would seem to come within the definitions of the rules, if it allowed entertainment in bars at all. He said, however, that if California should apply these rules in such a manner "it will be time enough to consider such problems when they arise."[97]

This decision indicates that the view of the overbreadth doctrine that would automatically hold void on its face a statute suffering from any degree of overbreadth no longer commands a majority of the Court.

94. *Id.* at 522.
95. *Id.* at 530-31 (Burger, CJ., dissenting).
96. 409 U.S. at 113 n.3.
97. *Id.* at 119 n.5.

IV. Conclusion

The decision in *La Rue* holds that in the setting of a bar or night-club, the twenty-first amendment empowers a state to regulate some activities that are entitled to prima facie constitutional protection. The permissible scope and extent of such power is left to be decided on a case-by-case basis. The Court, however, has given little indication as to what sort of standard is to be used.

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