CALIFORNIA v. LARUE: POLICE POWER AND THE TWENTY-FIRST AMENDMENT

The California constitution vests an administrative agency, the Department of Alcoholic Beverage Control, with primary authority for the licensing of the sale of alcoholic beverages in that State and with the power to suspend or revoke a liquor license if the agency determines that continuation of the license would be contrary to public welfare or morals.[1] In 1970, the Department promulgated rules regulating the type of entertainment which might be presented in licensed bars and night clubs.[2] Shortly before the effective date of the regulations, various holders of state liquor licenses were joined by the Department of Alcoholic Beverage Control in requesting the federal district court to determine whether the regulations were invalid under the United States Constitution.[3] The district court upheld the claim of the license holders that the regulations in question unconstitutionally abridged the freedom of expression guaranteed to them by the first[4] and fourteenth amendments[5] to the United States Constitution. The district court reasoned that the state regulations had to be justified either as a prohibition of obscenity in accordance with the *Roth v. United States*[6] line of Supreme Court decisions,[7] or as a regulation of "conduct" having a communicative element under the standards laid down by the Supreme Court in *United States v.*

1. CAL. CONST. art. XX, § 22 (1970).

2. In essence, the regulations sought to prohibit explicitly sexual live entertainment and films in bars and other establishments licensed to dispense liquor by the drink. CAL. ADMIN. CODE tit. 4, §§ 143.2, 143.3, 143.4, 143.5 (1970).

3. Initially the license holders had unsuccessfully sought discretionary review of the rules in both the state court of appeals and in the Supreme Court of California. California v. LaRue, 409 U.S. 109, 112 (1972).

4. LaRue v. California, 326 F. Supp. 348, 358 (C.D. Cal. 1971).

5. *Id.*

6. 354 U.S. 476 (1957).

7. *See* Rabe v. Washington, 405 U.S. 313 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Ginsberg v. New York, 390 U.S. 629 (1968); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958).

O'Brien.[8] Concluding that the regulations would bar some entertainment which could not be called obscene under *Roth*,[9] and that the governmental interest being furthered by the regulations did not meet the tests laid down in *O'Brien*,[10] the court enjoined enforcement of the regulations.[11]

In *California v. LaRue*,[12] the United States Supreme Court, on appeal, reversed the district court's decision. Speaking for the majority, Justice Rehnquist agreed with the lower court's finding that the Department's regulations, on their face, would proscribe activity, some of which would not be found obscene under *Roth* and would restrict some "communication" which would be within the limits of the constitutional protection of freedom of expression.[13] Yet the majority did not agree that the regulations were therefore rendered unconstitutional. Justice Rehnquist contended that the district court had not given proper consideration to the fact that the challenged regulations were licensing laws,[14] and that in the area of liquor licensing the scope of the police power was extremely broad because of the passage of the twenty-first amendment to the United States Constitution[15] and the manner in which that amendment had been interpreted.[16] The Court concluded that there is an "added presumption"

8. 391 U.S. 367 (1968).

9. The basic test of obscenity affirmed in *Roth* is "[w]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489.

10. [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment Freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

11. LaRue v. California, 326 F. Supp. 348 (C.D. Cal. 1971).

12. 409 U.S. 109 (1972).

13. *Id.* at 116, 118.

14. Licensing laws are enacted pursuant to the police power. In the majority opinion, Justice Rehnquist cites this general power of states and municipalities authorizing legislation in furtherance of the public health, welfare and morals. *Id.* at 114.

15. § 1—"The eighteenth article of amendment to the Constitution is hereby repealed."

§ 2—"The transportation or importation into any State . . . for . . . use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

U.S. CONST. amend. XXI, §§ 1, 2.

16. 409 U.S. at 115-16.

in favor of the validity of state regulation in the area of liquor control which is *required* by the twenty-first amendment[17] and that, given such a presumption, the California regulations on their face could not be held to violate the United States Constitution.[18]

Does the history of liquor licensing in America justify the "added presumption" argument, as applied in *California v. LaRue*? *Crowley v. Christensen*,[19] a case decided by the United States Supreme Court in 1890, developed the basic assertion that control of the liquor business falls within the scope of traditional police powers.[20] In affirming the constitutionality of a San Francisco liquor license ordinance, the Court in *Crowley* relied solely on the broad police power of a state or municipality: "The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely."[21]

Yet despite the Supreme Court's strong defense of local liquor regulations enacted pursuant to the police power, the judiciary was unwilling to uphold the constitutionality of state laws which affected the *interstate transportation* of liquor. The Court recognized that when the United States Government was established, the states had surrendered control over the regulation of interstate commerce by adopting a constitution which delegated this authority to the federal government.[22] Thus, in *Bowman v. Chicago & Northwestern Ry.*,[23] the Supreme Court found an Iowa statute, which forbade common carriers to bring liquor into the State, to be in conflict with the commerce clause of the United States Constitution.[24]

The appellant in *Bowman* had argued that the right of the state, under the police power, to restrict intoxicating liquor within its

17. *Id.* at 118-19.

18. *Id.*

19. 137 U.S. 86 (1890).

20. The states have consistently held that the regulation of intoxicants is a valid exercise of its police power. This police power stands upon the basic principle that some rights must be and are surrendered or modified in entering into the social and political state as indispensable to the good government and due regulation and well being of society.

7 IDAHO L. REV. 131, 132 (1970). *See* 9 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 26 (3d ed. 1964). *See generally* 16 C.J.S. *Constitutional Law* §§ 174-98 (1956).

21. 137 U.S. at 91.

22. "The Congress shall have Power . . . [T]o regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8.

23. 125 U.S. 465 (1888).

24. *Id.* at 499.

borders implied the correlative right to control the importation of liquor, since the latter was necessary to the effective exercise of the former.[25] The Court, in rejecting this argument, acknowledged that the purpose of the law was merely "protecting its people against the evils of intemperance,"[26] and that extending the powers of the state beyond its territorial limits would be very convenient and useful.[27] But the Court refused to create an exception to the Constitution simply because a restriction on intoxicants was involved: "If the State of Iowa may prohibit the importation of intoxicating liquors . . . it may also include . . . any other article . . . it may deem deleterious."[28] Unwilling to establish such a precedent, the Court voided the law. Many state legislators objected to the Court's decision as a severe limitation on the ability of a state to enforce newly-passed prohibition laws.[29]

The passage of the Webb-Kenyon Act[30] in 1913 represented a crucial change in the law as evidenced by its subheading: An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.[31] The Webb-Kenyon Act was held to be a constitutional exercise of the power of Congress to permit state regulation of liquor in interstate commerce.[32] Congress had done what the Court in *Bowman* felt it could not do: amplify the police power of the state to permit the liquor industry to be regulated free from the restrictions of the commerce clause.[33]

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25. *Id.* at 498-99.
26. *Id.* at 493.
27. *Id.* at 499.
28. *Id.* at 494.
29. *See* CONSTITUTION OF THE UNITED STATES OF AMERICA 275 (ann. ed. 1964).
30. "The . . . transportation . . . [of any] intoxicating liquor . . . from one State . . . into any other State . . . [in] which . . . intoxicating liquor is intended to be . . . used . . . in violation of any law of such State . . . is prohibited." 27 U.S.C. § 122 (1970) (originally enacted as Act of Mar. 1, 1913, ch. 90, 37 Stat. 699).
31. The only previous legislation of note was the Wilson Act, which permitted state laws to regulate interstate shipment of liquor *after* arrival at its destination. 27 U.S.C. § 121 (1970) (originally enacted as Act of Aug. 8, 1890, ch. 728, 26 Stat. 313). But the Act was not interpreted as having altered the illegality of attempted state regulation of liquor while in interstate commerce. *See* CONSTITUTION OF THE UNITED STATES OF AMERICA 275 (ann. ed. 1964).
32. James Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917).
33. *See* Barbour v. Georgia, 249 U.S. 454 (1919); Crane v. Campbell, 245 U.S. 304 (1917); Seaboard Airline Ry. v. North Carolina, 245 U.S. 298 (1917); Adams Express Co. v. Kentucky, 238 U.S. 190 (1915).

The Webb-Kenyon Act seemed to lose its significance in 1920 when the federal government, pursuant to the eighteenth amendment to the Constitution,[34] imposed a national prohibition on alcoholic beverages.[35] After fourteen troubled years, however, the attempt at nationwide control of liquor was discarded.[36] The Seventy-fourth Congress of the United States debated at length the problem of liquor legislation[37] before proposing for ratification the twenty-first amendment to the Constitution. The eighteenth amendment had shifted regulatory power away from the states and toward the federal government.[38] Senator Blaine, the initial sponsor of the twenty-first amendment, stated that his proposal was a *restoration* of power to the states, "[T]he right to regulate commerce respecting a single commodity—namely, intoxicating liquor."[39] He explained that the amendment was intended "to assure the so-called dry States against the importation of intoxicating liquor into those states . . . *to write permanently into the Constitution a prohibition along that line.*"[40] Congressional debates do not indicate that Senator Blaine, or any of the supporters of the twenty-first amendment, intended the proposal to be a grant of new power to the states in the area of liquor regulation. The legislative purpose, rather, was to revitalize the basic police

34. "[T]he . . . sale, or transportation of intoxicating liquors within . . . the United States . . . for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII, § 1.

35. [T]he eighteenth amendment would never have been adopted had it not been for the open, brazen, corrupt, persistent defiance of the laws of dry States by the liquor interests outside those States. At the time the eighteenth amendment was adopted, 33 States had prohibition in some form. The people had declared they wanted to be rid of this evil . . . .

76 CONG. REC. 4172 (1933) (remarks of Senator Borah).

36. The Volstead Act of Oct. 28, 1919, ch. 83, 41 Stat. 305, adopted to enforce the eighteenth amendment, was rendered inoperative by the ratification in 1933 of the twenty-first amendment to the Constitution. *See generally* 76 CONG. REC. 64-4225 (1933).

37. *See generally* 76 CONG. REC. 64-4225 (1933).

38. "The problem confronting us . . . is to choose between two alternative courses. Either the control of . . . liquor traffic is to remain in the federal Government or is to be restored to the States." 76 CONG. REC. 4148 (1933) (remarks of Senator Wagner). This was true despite the fact that in McCormick & Co. v. Brown, 286 U.S. 131 (1932), the Court had observed that the Webb-Kenyon Act had been neither repealed nor modified by the eighteenth amendment and, as a result, states could continue to regulate interstate commerce in intoxicating liquors. *Id.* at 140, 141.

39. 76 CONG. REC. 4141 (1933).

40. *Id.* (emphasis added).

power of the states as augmented by the Webb-Kenyon Act and to remove this power from the shadows of Prohibition by recasting the power in the form of a constitutional amendment.[41]

The first significant judicial test of the twenty-first amendment came in *State Board of Equalization v. Young's Market Co.*[42] California had, pursuant to the new amendment, imposed a license fee on importers of liquor into the State. The United States Supreme Court observed that the fee was a direct, state-imposed burden on interstate commerce inconsistent with the commerce clause[43] but upheld the law under the twenty-first amendment.[44] The decision thus acknowledged that congressional enactments, beginning with the Wilson and Webb-Kenyon Acts and culminating in the passage of the twenty-first amendment, had broadened the police power in the area of liquor legislation to extend to state action which otherwise would have been precluded by the commerce clause.[45] *Young's Market* could therefore be read as a judicial assertion that the twenty-first amendment, as an addition to the Constitution, gave legislation regulating liquor an "added presumption of validity," which arises when such legislation is challenged under the commerce clause.[46] But Justice Rehnquist in *California v. LaRue* suggests that the Court in *Young's Market* felt that the twenty-first amendment may have broadened the power to control alcohol in terms of the entire Constitution.[47]

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41. *Compare* note 15 *supra with* note 30 *supra.* In further support of the argument that the amendment was intended as a constitutional incorporation of the act, *see, e.g.,* Dugan v. Bridges, 16 F. Supp. 694, 706 (D.N.H. 1936); de Ganahl, *The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-First Amendment,* 8 GEO. WASH. L. REV. 819, 822-23 (1940); Johnson & Kessler, *The Liquor License System—Its Origin and Constitutional Development,* 15 N.Y.U.L.Q. REV. 380, 418 (1938); Kallenbach, *Interstate Commerce in Intoxicating Liquors under the Twenty-First Amendment,* 14 TEMP. L.Q. 474, 476 (1940); 38 COLUM. L. REV. 644 (1938); 50 HARV. L. REV. 353, 354 (1936).

42. 299 U.S. 59 (1936).

43. The State conceded that the fee was imposed strictly for the privilege of importing within its borders.

44. 299 U.S. at 62.

45. *See, e.g.,* 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); Note, *The Twenty-First Amendment Versus the Interstate Commerce Clause,* 55 YALE L.J. 815 (1946).

46. *See The Twenty-First Amendment Versus the Interstate Commerce Clause, supra* note 45.

47. 409 U.S. at 114-15.

In *Young's Market* the Court had replied to the appellee's equal protection argument that: "[T]he Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."[48] Yet the Court plainly indicated that it was not implying that the twenty-first amendment freed states and municipalities in this area of regulation from compliance with other constitutional limitations on the police power.[49] In addition, that Court made it clear that the fourteenth amendment challenge was not simply being voided because the twenty-first amendment was involved. The Court had found, rather, that the California law, *as specifically applied,* was reasonable and therefore did not violate the fourteenth amendment.[50]

In three subsequent cases upholding state liquor importation statutes, the Supreme Court cited *Young's Market* as controlling.[51] A trend away from reliance on the twenty-first amendment, however, was signaled in *Ziffrin, Inc. v. Reeves.*[52] In *Ziffrin,* though sustaining a Kentucky liquor law against the same objections raised in *Young's Market,* the Court chose to defend the Kentucky act as being simply "within the police power of the state,"[53] and did not mention the *Young's Market* opinion. Even in cases in which the challenge to liquor regulations rested on the commerce clause alone, the Court either ignored[54] or disregarded[55] the twenty-first amendment in sustaining such regulations under the police power.

Judicial restraints upon the twenty-first amendment were furthered in the 1940's by a number of important cases.[56] Following these deci-

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48. 299 U.S. at 64.

49. The plaintiffs insist that to sustain the exaction of the importer's license-fee would involve a declaration that the Amendment has, in respect to liquor, freed the States from all restrictions upon the police power to be found in other provisions of the Constitution. *The question for decision requires no such generalization.*

299 U.S. at 64 (emphasis added).

50. 299 U.S. at 64.

51. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).

52. 308 U.S. 132 (1939).

53. *Id.* at 139.

54. Duckworth v. Arkansas, 314 U.S. 390 (1941).

55. Carter v. Virginia, 321 U.S. 131 (1944).

56. Goesaert v. Cleary, 335 U.S. 464 (1948) (twenty-first amendment did not enter into an equal protection argument regarding the hiring of female bartenders); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945)

sions the Supreme Court heard no noteworthy cases in the area until 1964.[57] In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,[58] the Court reaffirmed the rule that under the twenty-first amendment states and municipalities have broad power to regulate transportation of intoxicants through their territory.[59] Yet, in overturning an injunction brought by the New York State Liquor Authority, the Court found the commerce clause, not the twenty-first amendment, to be controlling.[60] In *Department of Revenue v. James B. Beam Distilling Co.*,[61] a law enacted pursuant to the twenty-first amendment was found by the Court to be in conflict with the export-import clause of the Constitution.[62]

A 1966 case, *Joseph E. Seagram & Sons, Inc. v. Hostetter*,[63] distinguished *Idlewild* and *Beam*, however, and upheld state liquor regulation under the twenty-first amendment as placing no unconstitutional burden on interstate commerce.[64] In citing, among others, the decision in *Young's Market*,[65] the Supreme Court in *Seagram* seemed anxious to re-establish the notion that the twenty-first amendment represents a constitutional broadening of police power in that area of liquor regulation which might otherwise be controlled by the

(twenty-first amendment did not affect a suit being brought under the Sherman Anti-Trust Act); Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944) (twenty-first amendment did not justify state confiscation of liquor being shipped to a military reservation); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) (twenty-first amendment did not extend a state's jurisdiction into a national park); Barnett v. Bowles, 151 F.2d 77 (Emer. Ct. App. 1945) (twenty-first amendment did not limit federal price controls, pursuant to the war power, on retail sales of liquor).

57. *See* Note, *The Evolving Scope of State Power Under the Twenty-First Amendment: The 1964 Liquor Cases*, 19 RUTGERS L. REV. 759 (1965).

58. 377 U.S. 324 (1964).

59. *Id.* at 330.

60. *Id.* at 332. "Both the Twenty-First Amendment and the Commerce Clauses are part of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.* at 334. The Court concluded that the commerce clause controlled. Justice Rehnquist in *LaRue* quotes this passage from *Idlewild* to illustrate the strength of state regulation under the twenty-first amendment. 409 U.S. at 115.

61. 377 U.S. 341 (1964).

62. *Id.* at 346.

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

64. *Id.* at 41.

65. *Id.* at 42.

commerce clause. *Seagram* thus revived the basic contention of *Young's Market* that the twenty-first amendment gives to legislation regulating liquor an "added presumption of validity" *which arises when such legislation is challenged under the commerce clause.* This "presumption," though clearly not irrebuttable does deserve consideration in any case involving state or municipal regulation of intoxicating beverages.

It is, therefore, not surprising that Justice Rehnquist in *California v. LaRue* raised the issue of an "added presumption of validity" in the area of liquor legislation.[66] Yet nothing in the history of this field would suggest that the "presumption" is applicable, *except* where liquor regulations are challenged under the commerce clause. The Court's attempt in *California v. LaRue* to extend the "presumption of validity" to liquor legislation which has nothing to do with the commerce clause is neither justified by the twenty-first amendment nor by those cases which have interpreted the amendment.

Laws controlling intoxicating liquor, like any other legislation enacted pursuant to the police power, must reasonably comply with the constitutional limitations imposed on the exercise of such power.[67] The Supreme Court has consistently held that even though a governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental liberties when the end could be more narrowly achieved.[68] In his dissenting opinion in *California v. LaRue,* Justice Marshall[69] applied this test to the California liquor regulations and found that the regulations were unconstitutional because "over-broad,"[70] as applicable on their face, to "scantilly clad ballet troupes" as they are to "Bacchanalian revelries."[71] Justice Marshall concluded that the regulations lacked the precision which is required when first amendment rights are involved.[72] Yet Justice Rehnquist, despite his concession that the

66. 409 U.S. at 118-19.

67. *See, e.g.,* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Shelton v. Tucker, 364 U.S. 479 (1960); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

68. *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

69. 409 U.S. at 123.

70. *Id.* at 125.

71. *Id.* at 125 n.3.

72. *Id.* at 125-26. *See generally* Freund, *Competing Freedoms in American Constitutional Law,* 13 U. CHI. CONF. SER. 26, 32-33 (1953), Richardson, *Freedom of Expression and the Function of Courts,* 65 HARV. L. REV. 1, 6, 23-24 (1951).

regulations on their face do proscribe "communication," some of which is protected by the first amendment, affirmed the California rules, even though "specific future applications of the statute may engender concrete problems of constitutional dimension."[73]

The Court's willingness to uphold the regulations, despite the strong contention that they are "overbroad," rests on the mistaken belief that simply because the California laws seek to control the use of alcoholic beverages they are entitled to an "added presumption of validity."[74] By affirming on their face California's new liquor licensing laws, the Supreme Court in *California v. LaRue* has greatly broadened the potential power of state and municipal liquor licensing agencies to legislate, not only pursuant to the police power but perhaps free from the limitations which the Court and the Constitution had heretofore placed upon that power.[75]

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73. 409 U.S. at 119 n.5 *citing* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 52 (1966).

74. 409 U.S. at 118-19.

75. *See* Crownover v. Musick, 9 Cal. 3d. 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973).