Mercer Law Review

Volume 28
Number 2 *Brainerd Currie Memorial Edition*

Article 18

3-1977

Regulating Location of 'Adult Theaters' On Basis of Film Content Is Constitutional

Alan Parker Layne

Regulating Location of 'Adult Theaters' On Basis of Film Content Is Constitutional

In *Young v. American Mini Theaters,*[1] the U.S. Supreme Court, in a 5-4 decision, upheld a Detroit zoning ordinance that regulated the location of theaters exhibiting adult films. The Court rejected due-process and equal-protection arguments and concluded that First-Amendment principles were not offended even though the classification was based upon the content of the films.

On November 2, 1972, Detroit amended an "Anti Skid Row" ordinance enacted approximately ten years earlier.[2] The 1972 amendment prohibited the location of "adult theaters" within 1,000 feet of any two other regulated uses.[3] Theaters exhibiting material that was "distinguished or characterized by an emphasis on matter depicting, describing, or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' " were defined by the ordinance as adult theaters.

The respondents operated two adult theaters which were in violation of the ordinance. They sought declaratory and injunctive relief in a U.S. District Court. The District Court upheld the ordinances and granted the council's motion for summary judgment.[4] The Sixth Circuit Court of Appeals, however, held that the ordinance was a prior restraint on speech and a violation of the Equal Protection Clause of the Fourteenth Amendment.[5]

The scope of a municipality's zoning power has traditionally been very broad.[6] The authority of a municipality to enact comprehensive zoning ordinances has long been recognized as an exercise of the state's police power to protect the "health, safety, morals and general welfare" of the community and therefore constitutionally valid.[7] Zoning ordinances are

1. ___ U.S. ___, 96 S. Ct. 2440 (1976).

2. The amended ordinance required that adult theaters be dispersed rather than concentrated. This was based upon a finding by the Detroit Common Council that the concentration of adult theaters with other regulated uses, coupled with the significant growth of adult theaters, had resulted in serious injury to neighborhoods. 96 S. Ct. at 2444-45. There were actually two amendatory ordinances, but one was changed by the time the case reached the Supreme Court and was not challenged there.

3. *Id.* at 2443. There are ten types of regulated uses, which include bars, hotels, pool halls, shoeshine parlors, adult bookstores and adult theaters.

4. Nortown Theaters, Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974).

5. American Mini Theaters, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975).

6. *See* Berman v. Parker, 348 U.S. 26 (1954), which held that the concept of general welfare was broad enough to protect physical, spiritual, aesthetic and monetary values.

7. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 305 (1926).

generally challenged under the Fifth Amendment as an unconstitutional taking without compensation; they are rarely challenged on other constitutional grounds.[8] *Young* was the first case in which the Supreme Court considered a municipality's commercial zoning ordinance in light of the interests of freedom of expression, protected by the First and Fourteenth Amendments.[9] Previous decisions by the Court, however, have considered similar aspects of First-Amendment freedoms in other contexts.[10]

In *Village of Belle Terre v. Boraas*,[11] the Supreme Court, in a 5-4 decision, sustained against equal-protection and First-Amendment challenges an ordinance that restricted land use to one-family dwellings. The Court subordinated the First-Amendment freedoms of association and privacy to the municipality's objectives of enchancing the quality of life in Belle Terre. In *Young*, the Court extended this analysis by subordinating freedom of speech to the prevention of neighborhood deterioration. Finding that the ordinance did not significantly interfere with the First Amendment, the Court deferred to the city's attempt "to preserve the quality of urban life"[12] in Detroit.

As a general rule, the state's disapproval of the content of speech may not affect its authority to regulate the time, place or manner of its presentation.[13] This maxim was controlling in *Police Department of Chicago v. Mosley*,[14] in which the Court unanimously struck down an ordinance that prohibited picketing within 150 feet of a school. The Court said the ordinance violated equal-protection and First-Amendment rights, because an exception allowed the peaceful picketing of any school involved in a labor dispute. Justice Marshall's opinion for the Court stressed that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[15] In *Young*, the Court distinguished this holding on the facts. It noted that a literal reading of this statement without reference to the specific facts of the case was out of context and would prohibit any regulation of speech.[16] The *Young* decision upheld a content-based classification that regulated but did not prohibit protected speech.

Justice Stevens, writing for the majority,[17] rejected the respondent's due-

8. Recent Decisions, *Zoning*, 10 GA. L. REV. 275, 278 n.12 (1975).

9. 96 S. Ct. at 2455.

10. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), in which the Court invalidated an ordinance prohibiting drive-in theaters from exhibiting films showing nudity if the films were visible from public streets. The Court said the ordinance was an unconstitutional attempt to regulate the content of expression.

11. 416 U.S. 1 (1964).

12. 96 S. Ct. at 2453.

13. *Id.* at 2449.

14. 408 U.S. 92 (1972).

15. *Id.* at 95.

16. 96 S. Ct. at 2450.

17. *Id.* at 2443. Justices Burger, White, Rehnquist and Powell concurred in the judgment.

process contention that the ordinance was impermissibly vague. The Court found it unnecessary to entertain this challenge, because the ordinance was unquestionably applicable to the two adult theaters.[18] The majority was not persuaded that the ordinance would deter the exhibition of films protected by the First Amendment. Because the market for adult films as a whole was basically unrestrained, the Court refused to find the ordinance invalid as a prior restraint on protected speech.

The Court also rejected the respondents' equal-protection challenge, which relied upon the mandate against content-based classifications in *Mosley*.[19] Content-based classifications were held constitutionally permissible as long as they regulated protected speech in a neutral manner. Four justices decided that the city's interest in preserving the quality of its neighborhoods justified the distinction between adult and non-adult theaters and that the ordinance constituted a reasonable means to prevent deterioration caused by the concentration of adult theaters without infringing on speech protected by the First Amendment.[20]

Justice Powell, concurring in the judgment,[21] said the ordinance was an innovative land-use regulation that only incidentally and only to a limited extent implicated the First Amendment. The free access of the public to protected expression, the primary concern of the First Amendment, was not interrupted. Justice Powell felt that the ordinance met the test formulated in *United States v. O'Brien*[22] for regulating conduct that has communicative content. This test was satisfied because the ordinance regulated merely the places in which adult films may be exhibited; it did not interfere with content or regulate expression.

Justice Stewart in his dissent[23] concluded that the ordinance was a prior restraint that used content-based classifications to restrict the locations in which non-obscene films could be exhibited. He contended that the majority had relegated protected speech to a diminished status because it might be objectionable to some. The manner in which the ordinance regulated protected speech was not neutral with respect to content, Justice Stewart said; under the First Amendment, the belief that certain content produces distasteful effects does not justify state interference with that content.

Justice Powell excepted to Justice Stevens' equal-protection analysis and filed a concurring opinion.

18. *Id.* at 2446.

19. 96 S. Ct. at 2450.

20. *Id.* at 2453.

21. *Id.*

22. 391 U.S. 367 (1968). Under this test, a governmental regulation is justified despite its incidental impact on the First Amendment "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 . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

23. *Id.* at 2459. Joined by Justices Brennan, Marshall and Blackmun.

Justice Blackmun[24] found the ordinance impermissibly vague, because there were no guidelines to determine the status of films that were sexually explicit only in part. This problem was compounded by forcing a theater operator to determine not only his status but also the status of other regulated uses. Faced with the possibility of criminal sanctions, Justice Blackmun felt the result would be a chilling of constitutionally protected speech.

Classifications of speech based on content are inherently inconsistent with regulation that is neutral toward content. Failing to realize this, the Court in *Young* reached a justifiable decision in an illogical fashion. Justice Stevens based his analysis on the premise that a content-based classification within a zoning ordinance could regulate protected speech in a neutral manner without violating either the Equal Protection Clause or the First Amendment. Concluding that political discourse is worthy of greater protection than sexually oriented films, the plurality diminished the protection of non-obscene films because "few of us would march our sons and daughters off to war to preserve the citizens' right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."[25] Following this analysis, a municipality's mores, as formulated in a commercial zoning ordinance, can determine the degree of protection afforded "protected" speech. A test based on popular acceptance is inconsistent with government's obligation of neutral regulation of protected speech. Justice Powell's analysis is preferable, because it does not delineate degrees of protection for non-obscene speech. The use of the *O'Brien* test recognizes the incidental First-Amendment implications of the ordinance without requiring a determination that the portrayal of sexual themes is less worthy of First-Amendment protection than political debate and discourse. If the decision in *Young* can be justified, it can be so only under Justice Powell's view that the regulation is a progressive land-use ordinance that has only limited First-Amendment implications, not under Justice Stevens' view that there is under the Constitution a lesser interest in protecting sexually oriented films.

ALAN PARKER LAYNE

24. *Id.* at 2461. Joined by Justices Stewart, Brennan and Marshall.
25. *Id.* at 2452.