NOTES

Theater License Fee Based on Film Content Violates Equal Protection and Free Speech Guarantees

In *Coleman v. Bradford*,[1] the Georgia Supreme Court struck down a licensing ordinance enacted by Chatham County to restrict the operation of adult theaters. The court ruled that the ordinance, which was based on the content of the films shown, was a violation of equal protection and an invalid prior restraint on constitutionally-protected speech.[2]

In 1970, Chatham County enacted an ordinance governing the operation of theaters in the county and levying upon them a $500 license fee. In 1974, the county adopted a second ordinance creating a license subclassification of "adult theaters," which were defined in §2(E) of the ordinance as: "Adult movie houses, which on a regular, continuing basis show nonobscene films rated X by the Motion Picture Coding Association of America, or any movie theater which promotes for public viewing on a regular and continuing basis so called 'adult films' depicting nudity or sexual conduct. . . ."[3] Operators of these establishments were assessed an annual license fee of $1,500 and were subject to regulations not imposed upon other theater operations: zoning restrictions,[4] requirements of good moral character, and a clear criminal record.

The appellee, owner and operator of the Showboat Cinema, applied for and obtained a regular theater license pursuant to the 1970 ordinance. After a hearing in which it was determined to be an "adult theater," the Showboat was ordered by the appellants, the Chatham County Commissioners, to get an adult theater license or to cease operation. Instead, the theater brought an action seeking an injunction to halt enforcement of the ordinance and a declaratory judgment ruling the ordinance unconstitutional. The Superior Court of Chatham County granted the injunction and the declaratory judgment, holding that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment because of its content-based classification, and that it imposed invalid prior restraints on first amendment rights because of its chilling effect on protected expression.

1. 238 Ga. 505, 233 S.E.2d 764 (1977).
2. *Id.* at 509-10, 233 S.E.2d at 768.
3. CHATHAM COUNTY, GA., CODE OF ORDINANCES §2(E) (1974).
4. The zoning provision prohibited adult theaters from operating within 200 yards of specified structures. It was enacted pursuant to GA. CODE ANN. §23-3402 (1971), which was declared unconstitutional in Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974).

On appeal, the Georgia Supreme Court affirmed, thereby strengthening the protection of that speech "which is often separated from obscenity only by a dim and uncertain line."[5] Previous attempts at restricting the operation of adult businesses have met similar disapproval by the court, although case law is scant since the problem is a relatively new one. A notable example of this zealous constitutional protection is *Sanders v. State*,[6] in which the court forbade closing down a bookstore as a public nuisance when an obscene publication is sold.[7] Also, municipal censorship boards have long been ruled a prior restraint on free expression.[8] The most viable alternative left would seem to be zoning aimed at preventing the deleterious effect of a concentrated area of adult businesses. Any such zoning provision must, however, be light-handed enough to meet the standards established by the court in *Sanders*.[9]

Equal protection demands that any classifications made within a licensing scheme must be reasonable and must relate to the object of the legislation.[10] Additionally, if an ordinance has the power of infringing on the sensitive area of first amendment freedoms, exceptional guidelines for determining its constitutionality are imposed. When the effect of a licensing ordinance is to limit the exercise of a fundamental interest, or the character of a licensing classification appears constitutionally suspect, a "strict scrutiny" by the court is triggered.[11] The court will measure the ordinance by the "*O'Brien* test," in which the government carries the burden of justification of such an ordinance by showing that passage was within its constitutional power, that its goal was to further a compelling public interest, that the governmental interest is unrelated to any incidental suppression of a constitutional right, and that the incidental restriction is no greater than is absolutely necessary to achieve the governmental interest.[12] In addition, the court will balance the extent to which the constitutional right is infringed upon against the state interest.[13]

The U.S. Supreme Court, in *Young v. American Mini-Theatres*,[14] mea-

5. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

6. 231 Ga. 608, 203 S.E.2d 153 (1974).

7. "One obscene book on the premises of a bookstore does not make an entire store obscene." *Id.* at 613, 203 S.E.2d at 157.

8. *See* note 26, *infra*.

9. "We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancerous obscenity." 231 Ga. at 614, 203 S.E.2d at 158.

10. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Wright v. Hirsch, 155 Ga. 229, 116 S.E. 795 (1922).

11. Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

12. United States v. O'Brien, 391 U.S. 367 (1968).

13. "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." Dunn v. Blumstein, 405 U.S. 330, 335 (1968).

14. 427 U.S. 50 (1976). *See* Note, *Regulating Location of "Adult Theaters" on Basis of*

sured a Detroit zoning ordinance against this strict scrutiny test. It found that an overriding public interest justified the incidental effect on first amendment rights. The ordinance in *Young*, by mandating "dispersal zoning," attacked the problems of neighborhood disintegration, crime, and health hazards, which often follow adult entertainment establishments into an area. The ordinance forbade "regulated uses"[15] from locating within a certain distance of another "regulated use." This classification, isolating a subclass of "adult theaters" on the basis of the content of the films, was held by only four of the Justices to be justified by a compelling state interest, although it had been presented as the major issue for decision. The impact of the *Young* decision as a major retreat from previous strong statements by the Court condemning content-based classification[16] is thus defused. This is illustrated by the Georgia court's refusal to even consider the equal-protection portion of the decision in *Young*.

The distinctions drawn in the Detroit and in the Chatham County ordinances between adult and non-adult theaters are similar, but the court in *Coleman* apparently found less justification for such a "suspect classification" than did the Court in *Young*. The majority in *Young*[17] found the need for such a legislative response imperative; although a similar situation existed in Chatham County, or was feared to be imminent, the Georgia Supreme Court found it inadequate to warrant an exoneration of a discriminatory ordinance.

The court in *Coleman* also rejected the argument that borderline nonobscene speech is less deserving of protection than speech which carries a social, political, or philosophical message. It refused to allow the creation of a "gray area" subclassification of unworthy yet not quite obscene films, finding that although they may be "trashy" and in "bad taste,"[18] they are still protected by the Constitution.

The court further differentiated *Coleman* from *Young* by finding in *Coleman* an impermissible prior restraint on speech. Freedom of speech is not absolute; the right is subject to reasonable regulation.[19] The burden, however, is on the party seeking to uphold the regulation to show that it is justified by an adequate public interest.[20] The court, with a close scru-

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15. "Regulated uses" included adult theaters and book stores, topless cabarets, bars, hotels and motels, pool halls, secondhand stores, shoeshine parlors, and taxi dance halls. 427 U.S. at 52 n.3.

16. *See, e.g.*, Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972); Erzoznik v. City of Jacksonville, 422 U.S. 205 (1975).

17. Justice Powell concurred in the decision, finding the oppressive effects of the ordinance to be minimal, the necessity for its implementation great, and broad zoning powers vested in the local government. 427 U.S. 50, 73.

18. 238 Ga. 505, 510, 233 S.E.2d 764, 768.

19. Near v. Minnesota, 283 U.S. 697 (1931).

20. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Chester Branch NAACP v. City of Chester, 253 F. Supp. 707, 712 (E.D. Pa. 1966).

tiny, will subject the regulation to the four-pronged *O'Brien* test, and will then balance the limitation on speech against the governmental interest.[21] The Georgia court found more prior restraints in the Chatham county ordinance than in the Detroit zoning law, although as pointed out by Justice Jordan in his dissent, an adult theater can presumably afford a higher licensing fee than a regular theater because of the higher admission price charged by the adult theaters. Also, the cost of regulating and policing an adult theater might be higher than with a regular theater. Another prior restraint, the zoning provision, was rendered unusable by the decision in *Sanders,* which declared Ga. Code Ann. §23-3402 (1971), upon which the zoning provision was based, unconstitutional. The only other "numerous, extensive, and imprecise licensing standards" constituting a prior restraint are character criteria, which are not uncommon in licensing schemes.[22]

The court also found that the community interest in the regulation of adult theaters was inadequate to support the restrictions, and that freedom of access, while not totally suppressed, was sufficiently impaired to warrant striking down the ordinance. Thus, in spite of strong parallels with the fact situation in *Young,* the court chose not to back down from its abhorrence of prior restraints, previously expressed in *Sanders.*

The court said initially it found *Young* not controlling because *Young* dealt with a zoning rather than a licensing ordinance. Although the courts have been reluctant to interfere with local discretion in handling zoning,[23] the intrusion into a pure zoning case of first amendment considerations forces the courts to abandon their traditional reluctance to interfere in these matters and to examine the regulation with strict scrutiny.[24] Therefore, the fact that licensing rather than zoning is the method of regulation should not have been accorded the weight that it was in *Coleman.*

The court further distinguished *Young* by finding those restraints less in number and magnitude than in *Coleman.* As previously stated, the court did not adequately explain its statement; it would seem that an extremely complex zoning ordinance would in fact be more inhibiting than a $1,000 excess fee, in light of the profitability of the business. The zoning requirement of *Coleman* was unconstitutional and could not be enforced, and the character requirements were not excessive or unusual.

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21. *See* note 12, *supra,* and accompanying text.

22. *See, e.g.,* MACON, GA., CODE OF ORDINANCES, ch. 10, §8-3097.4 (1976); WARNER ROBINS, GA., CODE OF ORDINANCES, ch. 4, §4-59 (1975).

23. *See, e.g.,* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

24. The Court in *Young* subjected the ordinance to the balancing test accorded infringements on first amendment rights, even after it averred that the First Amendment was not offended. Justice Powell noted in his concurrence that: "This is the first case in this Court in which the interests in free expression protected by the First and Fourteenth Amendments have been implicated by a municipality's commercial zoning ordinances." He pointed out that the State still has the burden of justification, and espoused use of the *O'Brien* four-part test and "searching constitutional scrutiny." 427 U.S. at 76.

The court has, in effect, refused to relax constitutional safeguards afforded protected speech. It is doing so in the face of four U.S. Supreme Court Justices' "drastic departure from established principles of First Amendment law,"[25] sanctioning a "gray area" of expression not entitled to full protection. It is doing so in the face of an increasing public concern over the effect of adult establishments on the health, safety, and morality of the community. In refusing to sacrifice constitutional principles to social pressure over an admittedly thorny and rapidly worsening problem, the Georgia court is taking a crucial role in the guardianship of the First Amendment against erosion from above and below.[26] One might wish, however, that the challenge of *Young* had been met head-on, and its reasoning clearly and convincingly repudiated, rather than facilely disposed of as uncontrolling.

Any future local legislative response to the problem of proliferating adult businesses must consider and carefully skirt the court's protection of nonobscene expression. *Coleman* establishes that it will be difficult, if not impossible, for a licensing scheme based on differentiating adult and regular theaters to pass the court's constitutional inquiry. The decision in *Coleman* portends a searching scrutiny by the court, whether or not such schemes would pass U.S. Supreme Court muster.

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25. *Id.* at 84. (Stewart, J., *dissenting).*

26. This is not the first instance of the Georgia Supreme Court protectively cloaking the First Amendment when the U.S. Supreme Court has declined to do so. In K. Gordon Murray Productions v. Floyd, 217 Ga. 784, 125 S.E.2d 207 (1962), it found it necessary to bypass the U.S. Constitution to find in the Georgia Constitution the authority to prevent municipal censorship of commercial films.