AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 9: Liberalism Divided – Democratic Rights/Free Speech

**Erznoznik v. City of Jacksonville, 422 U.S. 205** (1975)

*Richard Erznoznik was the manager of the University Drive-In Theatre in Jacksonville, Florida. In 1972, he was charged with violating a new city ordinance prohibiting the exhibition of a motion picture visible from a public street in which female buttocks and bare breasts were shown (the ordinance also barred the display of bare male buttocks or “human bare pubic regions”). The city demonstrated that the movies shown at the University Drive-In Theatre were visible from two public streets and a church parking lot, and that people often watched the movies from outside the theater. The trial court upheld the ordinance against a motion that it violated the First Amendment, and the Florida courts upheld that ruling. In a 6-3 decision, the U.S. Supreme Court reversed the state courts and struck down the ordinance as inconsistent with the First Amendment.*

JUSTICE POWELL delivered the opinion of the Court.

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Appellee's primary argument is that it may protect its citizens against unwilling exposure to materials that may be offensive. Jacksonville's ordinance, however, does not protect citizens from all movies that might offend; rather, it singles out films containing nudity, presumably because the lawmakers considered them especially offensive to passersby.

This Court has considered analogous issues -- pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors -- in a variety of contexts. . . . Such cases demand delicate balancing. . . .

Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. *Kovacs v. Cooper* (1949). But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. *Police Department of Chicago v. Mosley* (1972). Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. . . .

The plain, if at times disquieting, truth is that, in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." Rowan v. Post Office Dept. (1970). Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen v. California* (1971).

The Jacksonville ordinance discriminates among movies solely on the basis of content. Its effect is to deter drive-in theaters from showing movies containing any nudity, however innocent or even educational. This discrimination cannot be justified as a means of preventing significant intrusions on privacy. The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in theater is not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." Thus, we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content.

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In this case, assuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit, as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene, even as to minors. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. . .

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*Reversed*.

JUSTICE DOUGLAS, concurring.

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CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

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None of the cases upon which the Court relies remotely implies that the Court ever intended to establish inexorable limitations upon state power in this area. Many cases upheld the regulation of communicative activity and did not purport to define the limits of the power to do so. *Lehman v. City of Shaker Heights* (1974). Other cases relied upon by the Court were either expressly or impliedly decided upon equal protection grounds, and, although recognizing that First Amendment interests were involved, turned upon "the crucial question . . . whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Department of Chicago v. Mosley* (1972). . . .

A careful consideration of the diverse interests involved in this case illustrates, for me, the inadequacy of the Court's rigidly simplistic approach. In the first place, the conclusion that only a limited interest of persons on the public streets is at stake here can be supported only if one completely ignores the unique visual medium to which the Jacksonville ordinance is directed. Whatever validity the notion that passers-by may protect their sensibilities by averting their eyes may have when applied to words printed on an individual's jacket, Cohen v. California (1971), or a flag hung from a second-floor apartment window, Spence v. Washington (1974), it distorts reality to apply that notion to the out-size screen of a drive-in movie theater. . . .

. . . . [T]he screen of a drive-in movie theater is a unique type of eye-catching display that can be highly intrusive and distracting. Public authorities have a legitimate interest in regulating such displays under the police power; for example, even though traffic safety may not have been the only target of the ordinance in issue here, I think it not unreasonable for lawmakers to believe that public nudity on a giant screen, visible at night to hundreds of drivers of automobiles, may have a tendency to divert attention from their task and cause accidents.

. . . . Unlike persons reading books, passers-by cannot consider fragments of drive-in movies as a part of the "whole work" for the simple reason that they see, but do not hear, the performance; nor do drivers and passengers on nearby highways see the whole of the visual display. The communicative value of such fleeting exposure falls somewhere in the range of slight to nonexistent. Moreover, those persons who legitimately desire to consider the "work as a whole" are not foreclosed from doing so. The record show that the film from which appellant's prosecution arose was exhibited in several indoor theaters in the Jacksonville area. . . . The First Amendment interests involved in this case are trivial, at best.

On the other hand, assuming arguendo that there could be a play performed in a theater by nude actors involving genuine communication of ideas, the same conduct in a public park or street could be prosecuted under an ordinance prohibiting indecent exposure. This is so because the police power has long been interpreted to authorize the regulation of nudity in areas to which all members of the public have access, regardless of any incidental effect upon communication. A nudist colony, for example, cannot lawfully set up shop in Central Park or Lafayette Park, places established for the public generally. . . .

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JUSTICE WHITE, dissenting.

The Court asserts that the State may shield the public from selected types of speech and allegedly expressive conduct, such as nudity, only when the speaker or actor invades the privacy of the home or where the degree of captivity of an unwilling listener is such that it is impractical for him to avoid the exposure by averting his eyes. . . . If this broadside is to be taken literally, the State may not forbid "expressive" nudity on the public streets, in the public parks, or any other public place, since other persons in those places at that time have a "limited privacy interest," and may merely look the other way.

I am not ready to take this step with the Court. Moreover, by the Court's own analysis, the step is an unnecessary one. If the ordinance is unconstitutionally overbroad even as an exercise of the police power to protect children, it is fatally overbroad as to the population generally. I therefore dissent.