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Constitutional Law—Police Power—Unlawful Interference with Business

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permissible governmental penetration where forms of expression are involved. In line with this view, the majority finds that it is a valid exercise of state power to prohibit the exhibition of obscene matter, but an attempt to curb expression by labeling it "indecent," and giving the term its own independent meaning, would present grave constitutional problems when viewed in the light of Supreme Court decisions striking down censorship based upon standards as vague and broad as "indecent."[25] The only avenue of interpretation open to the Court of Appeals would be to interpret the term as it did, thereby giving the word a meaning found acceptable by the highest court, and at the same time avoiding any constitutional questions which would arise if the motion picture were to be denied a license solely on the ground that it was "indecent." The majority also pointed to the accepted practice of applying section 1141 of the Penal Law to motion pictures; that is, to enable the Board of Regents to define the terms "obscene, lewd, lascivious, indecent," when judging a motion picture. Under section 1141, these terms have been defined and the test has become, obscenity, and the attempted use of section 1140-b to help the Board of Regents find a clearer meaning for "indecent," and to give it a meaning different than that placed under section 1141 cannot be justified. The limited purpose and reach of section 1140-b was not meant to extend to motion pictures, nor was it even meant to help define a word as broad as "indecent." The Board of Regents attempted to stretch the statute beyond the limits of its logic, by what appears to be a strained interpretation of the legislative history.

The majority has succeeded in preserving section 122 of the Education Law, in order to apply it under the proper circumstances to a motion picture which any reasonable member of the community would say was totally lacking in social value, and which treated sex in a manner appealing mainly to prurient interest. It has properly declared that, when forms of expression are to be subjected to censorship, the Court should be the final state arbiter on the delicate constitutional questions involved when a film is labeled obscene. The Court should not, and cannot accept any administrative determination as the final word on the subject.

Police Power—Unlawful Interference With Business

The police power endows the legislature with a wide range of discretion in the enactment of legislation.[26] Ordinarily, if it appears that the object of the legislation in question is to promote the public health, safety, or welfare, and that the means adopted by the legislature are reasonably calculated to reach this end, the legislation must be sustained.[27]

25. See note 3 *supra*.
26. Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937).
27. People v. Perutta, 253 N.Y. 305, 171 N.E. 72 (1930).

Trio Distributor Corp. v. City of Albany,[28] involved a city ordinance[29] which, in effect, required plaintiff's ice cream salesmen to carry an extra man on their trucks whose sole duty was to protect children from passing traffic while the driver was making sales. In an action to declare the ordinance unconstitutional, the Court of Appeals reversed the Appellate Division,[30] and held (4-3) that the ordinance was void as a prohibition under the guise of regulation, and also for failing to provide clear standards of conduct.

The majority based its finding of unconstitutionality on several factors. First, the motive of the City Council was brought into question by pointing to other attempts at regulation of this particular business which had previously been struck down as being unreasonable,[31] and observing that only a few minor accidents had occurred in connection with the plaintiff's business in the past few years. Also, the Court relied on the fact that the duties of the extra attendant had been described but that no authority had been given to him, thus bringing his utility into question, and ultimately going to the appropriateness of the means chosen by the council. Finally, an analogy was drawn with *Good Humor Corp. v. City of New York*.[32] In that case the Court of Appeals voided a New York ordinance which flatly prohibited the conduct of the plaintiff's business for the admitted reason that, although he did not pay local taxes, he was competing with local merchants. The alternative grounds relied on by the Court was the statute's failure to provide a clear standard of conduct in that it failed to clearly define the class to which it should be applied, and did not specify the course of conduct to be followed by the extra attendant which it required.

The dissent, on the other hand, employed the traditional presumptions of constitutionality of such legislation,[33] pointing out that the protection of children is a legitimate object under the police power,[34] and finding that the means adopted by the legislature were reasonably calculated to reach this object.

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28. 2 N.Y.2d 690, 163 N.Y.S.2d 585 (1957).

29. The ordinance in question, as set forth at 2 N.Y.2d 692, 163 N.Y.S.2d 586, provides:

> When any person shall vend or peddle from a vehicle in the public streets and places in the City of Albany, and, in the pursuit of such business or activity, children shall collect, assemble or gather about such vehicle for the purpose of making purchases, such person so vending and peddling, and the pursuit of such occupation, shall be accomplished by an attendant whose sole duty and occupation shall be to protect and safeguard the children from injury and the hazards of street vehicle traffic and he shall maintain a constant look-out for approaching vehicles and shall warn the children and guard them from injury.

30. 2 A.D.2d 326, 156 N.Y.S.2d 912 (3rd Dep't 1956).

31. Schrager v. City of Albany, 197 Misc. 903, 99 N.Y.S.2d 697 (Sup. Ct. 1950).

32. Good Humor Corp. v. City of New York, 290 N.Y. 312, 49 N.E.2d 153 (1943).

33. People v. Chas. Schweinler Press, 214 N.Y. 395, 108 N.E. 636 (1916).

34. People v. George, 170 Misc. 707, 9 N.Y.S.2d 937 (County Ct. 1939), *aff'd*, 208 N.Y. 843, 21 N.E.2d 888 (1939).

The shotgun approach used by the majority renders the opinion somewhat confusing in that no one set of facts can be pointed to as a basis for voiding the ordinance and thus it is difficult to determine exactly what type of test was applied. In contrast, the logic of the dissent is clear and cogent. The result reached by the majority is probably the more desirable when viewed with a practical eye, but such an approach is fraught with the dangers which arise from flexible judicial determinations.

Constitutionality Of Minimum Wage Law Provision

Article 19 of the Labor Law[35] sets forth the law concerning minimum wage standards for women and minors the purpose of which is to provide adequate maintenance for and to protect the health of women and minors. Section 663(a) of that article is a supplemental provision designed to effectuate the aim of the whole article by protecting the minimum wage standards established for women and minors. It is therein declared that no male twenty-one years of age or over shall be employed in an occupation at less than the minimum wage standards fixed for women and minors in that occupation. The purpose of this section is clearly to prevent unemployment of this protected class because of wage competition from men.

The constitutionality of this section was challenged for the first time in *N. H. Lyons & Co. v. Corsi*[36] Plaintiff brought action for an injunction and a judgment declaring invalid an order of the Industrial Commissioner establishing minimum wages for women and minors in the hotel industry. He claimed that the enforcement of a minimum wage under §663(a) for the men he employed in his cheap "flophouse" where the employment of women was forbidden by municipal regulation was unconstitutional as a general minimum wage act for men, or, in the alternative, that this section was unconstitutional as applied to him. The Court of Appeals,[37] affirming the lower courts' decisions,[38] held that §663(a) was not a general minimum wage act for men, and that any objection as to application should have been appealed under §662 of the act.[39]

While it can no longer be disputed that a general minimum wage law for men is constitutional,[40] it remains that this is not such a wage law since it affects men only in those occupations where a minimum wage rate for women and minors has been established. However, this section, as the Court found, has a reasonable relation to the enforcement of the general policy of protecting women and minors

35. N.Y. LABOR LAW §§650-666.
36. 3 N.Y.2d 60, 163 N.Y.S.2d 677 (1957).
37. *Ibid.*
38. 203 Misc. 160, 116 N.Y.S.2d 520 (Sup. Ct. 1955); 286 App. Div. 1065, 146 N.Y.S.2d 663 (1st Dep't 1955).
39. N.Y. LABOR LAW §662.
40. United States v. Darby, 312 U.S. 100 (1940).