

Question 2: Constitutional Law

In an effort to “clean up Columbia County,” the County Board of Supervisors recently passed an ordinance, providing as follows:

- “(1) A Review Panel is hereby established to review all sexually graphic material prior to sale by any person or entity in Columbia County.
(2) Subject to subsection (3), no person or entity in Columbia County may sell any sexually graphic material.
(3) A person or entity in Columbia County may sell an item of sexually graphic material if (a) the person or entity first submits the item to the Review Panel and (b) the Review Panel, in the exercise of its sole discretion, determines that the item is not pornographic.
(4) Any person or entity in Columbia County that fails to comply with subsection (2) or (3) is guilty of a misdemeanor, and is punishable by incarceration in jail for one year or by imposition of a \$5,000 fine, or by both.”

Videorama, Inc., a local video store, has brought an action claiming that the ordinance violates the First Amendment to the United States Constitution.

What arguments may Videorama, Inc. reasonably make in support of its claim, and is it likely to succeed? Discuss.

Response Provided By Pass Your Bar (Hugh Reed):

Videorama Inc. will likely succeed in its claim that the ordinance violates its First Amendment Rights under the U.S. Constitution. It may argue the following in support of its claim:

- a. The Review Panel is unconstitutional under the First and Fourteenth Amendment;
- b. Punishment by a legislative body amounts to a bill of attainder;
- c. Restriction on Videorama’s sale of goods is an unreasonable restraint freedom of expression under the First Amendment; and
- d. The existence of the federal commerce power may restrict state action from discriminating against or unduly burdening interstate commerce.

First and Fourteenth Amendment:

Under our tripartite form of government, legislative bodies pass laws, the executive executes, and our judiciary interprets laws. The Fourteenth Amendment provides that no state shall make or enforce laws which shall abridge the privileges and immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property without due process of law...The Due Process Clause has been used by the Supreme Court to selectively incorporate and make applicable to the states each right in the Bill of Rights that is of fundamental importance, including all rights in the First Amendment. One function of the Due Process Clause is to limit the substantive power of the states to regulate certain areas of human rights. If it is a fundamental right, then the Court uses a strict scrutiny standard; if it is a non-fundamental right, such as economic regulation, the court uses a mere rational basis standard. Further governmental units are broadly defined for purposes of determining the existence of “state action.” Not only actions taken by the state, but those taken by any of its subdivisions will count as state action. For purposes of due process and equal protection (but not for purposes of the privileges and immunities clause) a corporation is a citizen.

Here, the ordinance provides that a review panel will decide what is pornographic, clearly a judicial interpretation of the law and out of the purview of either the legislative or the executive function. The attempt by the ordinance to regulate sexually graphic materials and to submit them to a review panel that will decide in its “sole discretion” whether or not it is pornographic is an infringement of the judicial power by the legislature. Videorama, Inc., as a corporation is entitled to all rights guaranteed to citizens by the 1st and 14th Amendment.

Therefore, the ordinance is likely to be found unconstitutional.

Bill of Attainder:

Bills of attainder are unconstitutional. The rationale for the ban on bills of attainder rests in the concept of separation of powers. The process of deciding which individuals should be subject to punishment is inherently a judicial process and must be performed by the judicial branch, not by the legislature. Legislative punishment without benefit of trial is unconstitutional. Further, even courts may not incarcerate individuals in excess of six months without the benefit of a trial by jury.

Here, the legislature attempts to punish those who fail to comply with the ordinance without benefit of a trial.

Therefore, the ordinance will fail as an unlawful bill of attainder.

First Amendment Freedom of Expression:

The First Amendment of the United States provides in part that Congress shall make no law abridging the freedom of speech, or of the press...these rights are often grouped together as freedom of expression. As noted supra, it is made applicable to the states and selectively incorporated via the Due Process Clause of the Fourteenth Amendment. Courts often distinguish between content-based and content-neutral regulations on expression. If the government action is content-based, the action will generally be subjected to strict scrutiny, and the action will be struck down. On the other hand, if the action is content neutral, the government's action is subjected to a much easier test and will generally be upheld. Not all content based expression, however, is protected. Speech that is not protected falls into the unprotected categories, i.e., DO FICA: Defamation, Obscenity, Fighting Words, Imminent violence (words of), Crime, and Advertising (commercial advertising that is false or misleading).

Obscenity, as noted supra, is the type of speech unprotected by the First Amendment. The Supreme Court formulated its own definition of obscenity: whether the average person, applying contemporary community standards, the dominant theme of the materials, taken as a whole, appeals to the prurient interests. While sex, per se, is not obscene, the materials must lack SLAPS: Serious, Literary, Artistic, Political, and/or Scientific value. The mere private possession of obscene materials by adults may not be made criminal...however, even private possession of obscene materials involving child pornography are always obscene.

Here, the ordinance attempts to restrict freedom of expression by Videorama by its distribution of sexually graphic materials which may or may not be pornographic and attempts to fine and even incarcerate anyone failing to comply with the ordinance.

Therefore, the attempted restriction of distribution and the attempted exercise of a judicial function by the County Board of Supervisors is an unconstitutional restriction of Videorama's 1st Amendment rights.

Dormant Commerce Clause:

Under the Dormant Commerce Clause, the Supreme Court has ruled that the mere existence of the federal commerce power restricts states from discriminating against, or unduly burdening interstate commerce. A state regulation that affects interstate commerce must satisfy each of the three requirements in order to avoid violating the Dormant Commerce Clause: i) the regulation must pursue a legitimate state end; ii) the regulation must be rationally related to that legitimate state end; and iii) the regulatory burden imposed by the state in interstate commerce must be outweighed by the state's interest in enforcing its regulation. While a state may pursue its police powers in passing regulations that affect interstate commerce, either directly or indirectly, the Supreme Court has ruled that in any regulation that has a discriminatory effect must then be subjected to a balancing test between the discriminatory effect and the extent to which less burdensome or less discriminatory alternatives are available. Finally, the Tenth Amendment, i.e.,...powers not delegated to the federal government are reserved to the states...has no effect as an independent check upon federal power under the Commerce Clause.

Here, the ordinance intends to limit the sale of materials which may or may not be pornographic. While obscenity is not protected by the 1st Amendment, as discussed supra, "sexually graphic materials", may or may not be obscene...to be decided by a court in light of contemporary community standards.

Therefore, the County Board's efforts to regulate trade may be unconstitutional under the Dormant Commerce Clause. The attempted regulation of placing trade barriers upon the importing of goods into the state by the County Board is likely to be found unconstitutional.

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