



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 12
Number 3 *New York State constitutional
Decisions: 1995 Compilation*

Article 31

1996

Freedom of Speech and Press

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [First Amendment Commons](#), and the [Fourteenth Amendment Commons](#)

Recommended Citation

(1996) "Freedom of Speech and Press," *Touro Law Review*. Vol. 12: No. 3, Article 31.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol12/iss3/31>

This New York State Constitutional Decisions is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

authority which acts to ‘restrain or abridge the liberty of speech or of the press.’”³⁰¹

Town of Huntington v. Pierce Arrow Realty Corp.³⁰²
(decided June 5, 1995)

Plaintiff, Town of Huntington, sought a preliminary injunction enjoining the defendants from continuing the operation of an “adult entertainment cabaret”³⁰³ within defendants’ restaurant and bar establishment.³⁰⁴ Plaintiff alleged that the defendants were in violation of a town zoning ordinance designed to restrict the location of premises which contain an “adult use”³⁰⁵ to designated areas within the Town of Huntington.³⁰⁶ The Supreme Court, Suffolk County, granted the preliminary injunction pending a determination of plaintiff’s action for a permanent injunction.³⁰⁷ The Appellate Division, Second Department,

301. O’Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 529 n.3, 523 N.E.2d 277, 281 n.3, 528 N.Y.S.2d 1, 4 n.3 (1988).

302. 627 N.Y.S.2d 787 (App. Div. 2d Dep’t 1995).

303. See TOWN OF HUNTINGTON CODE § 198-71[D][2] (1978). This section defines an “adult entertainment cabaret” as “[a] public or private establishment which present[s] topless dancers, strippers, male or female impersonators or exotic dancers or other similar entertainments and which establishment is customarily not open to the public generally but excludes any minor by reason of age.” *Id.*

304. *Pierce Arrow Realty*, 627 N.Y.S.2d at 788.

305. See TOWN OF HUNTINGTON CODE § 198-71[D][2] (1978). The following excerpt sets forth the relevant provisions of the Code which define the term “adult use”:

- (a) The appearance of any person on commercial premises for the purposes of financial consideration in such a manner or attire as to expose to view any portion of the pubic area, buttocks, vulva, genitals or breast below the top of the areola, or any simulation thereof.
- (b) The appearance of any person on such premises in attire generally considered to be garments worn underneath normal streetwear for purient or commercial purposes.

Id.

306. *Pierce Arrow Realty*, 627 N.Y.S.2d at 787.

307. *Id.*

reversed the order granting the preliminary injunction, holding that there was insufficient evidence to establish that the ordinance in question was enacted in conformance with freedom of speech requirements under both the Federal³⁰⁸ and New York State³⁰⁹ Constitutions.³¹⁰ Therefore, the court found the preliminary injunction order improper since the plaintiff, the Town of Huntington, failed to meet its burden of establishing the likelihood of their ultimate success on the merits.³¹¹

308. U.S. CONST. amend. I. The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

309. N.Y. CONST. art I, § 8. This section emphatically commands that: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

310. *Pierce Arrow Realty*, 627 N.Y.S.2d at 788.

311. *Id.* The court noted in its opinion that the Town of Huntington could seek preliminary injunctive relief without establishing special damages or injury to the public or the nonexistence of an adequate remedy. See N.Y. TOWN LAW § 268 (McKinney 1987). This section states in relevant part:

1. The town board may provide by ordinance for the enforcement of this article and of any ordinance or regulation made thereunder. A violation of this article or of such ordinance or regulation is hereby declared to be an offense . . . for the purpose of conferring jurisdiction upon courts and judicial officers generally, violations of this article or of such ordinance or regulation shall be deemed misdemeanors and for such purpose only all provisions of law relating to misdemeanors shall apply to such violations

2. In case any building or structure is . . . maintained, or any building, structure, or land is used . . . in violation of this article or of any ordinance or other regulation made under authority conferred thereby, the proper local authorities of the town, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful . . . maintenance, use or division of land, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure, or land or to prevent any illegal act, conduct, business or use in or about such premises

Id. See, e.g., *Town of East Hampton v. Buffa*, 157 A.D.2d 714, 715, 549 N.Y.S.2d 813, 815 (2d Dep't 1990) (citing *Town of Islip v. Clark*, 90 A.D.2d 500, 501, 454 N.Y.S.2d 893, 894 (2d Dep't 1982)). Furthermore, the Third Department, in *Town of Esopus v. Fausto Simoes & Assocs.*, held that "while it is not necessary by virtue of Town Law § 268 that plaintiff show irreparable harm as a condition of obtaining injunctive relief, whether immediate relief of

The court specifically found that the Town of Huntington failed to establish whether the "adult use" ordinance provided reasonable alternative locations at which the owners could operate their cabaret.³¹² Furthermore, the court also found an absence of evidence showing that the ordinance was reasonably limited to establishments which were found to have secondary detrimental effects on the surrounding community.³¹³

The defendants, Pierce Arrow Realty Corporation, have operated their restaurant and bar since 1981 as an adult entertainment cabaret.³¹⁴ Subsequent to the establishment of defendants' business, the Town of Huntington, enacted the zoning ordinance in question on January 22, 1991. The ordinance sought to restrict and limit the location of "adult use" premises, such as the defendants' restaurant and bar, to certain areas within the town of Huntington.³¹⁵ The defendants herein challenged the constitutional validity of such a zoning ordinance under both the First Amendment of the Federal Constitution and Article 1, section 8 of the New York State Constitution.³¹⁶

In overturning the grant of the preliminary injunction, the Second Department found "the record . . . devoid of any evidence that would tend to establish that the ordinance in question was enacted in conformance with various requirements of the Federal and State Constitutions."³¹⁷ In reaching its conclusion, the Second Department applied federal law, relying

this nature should be extended is still a matter governed by equitable principles." 145 A.D.2d 840, 841-42, 535 N.Y.S.2d 827, 829 (1988).

312. *Pierce Arrow Realty*, 627 N.Y.S.2d at 788.

313. *Id.* In addition, the court held further that the Town of Huntington did not proffer any evidence in their application for injunctive relief as to whether the owners of the cabaret were entitled to a reasonable "amortization period." *Id.* See *Village of Valatie v. Smith*, 83 N.Y.2d 396, 400, 632 N.E.2d 1264, 1266, 610 N.Y.S.2d 941, 943 (1994) (defining reasonable amortization period as "a period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements").

314. *Pierce Arrow Realty*, 627 N.Y.S.2d at 787.

315. *Id.*

316. *Id.* at 788.

317. *Id.*

upon several United States Supreme Court cases and only one New York case, all of which dealt with ordinances or regulations impinging upon freedom of speech or expression in the commercial arena.³¹⁸

For example, the court relied on *Schad v. Mount Ephraim*,³¹⁹ where the Supreme Court invalidated a zoning ordinance which banned all live entertainment in a commercial zone. The Court held that “[b]y excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibit[ed] a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments” and, therefore, was overbroad and not a valid content-neutral time, place, and manner restriction.³²⁰ In *City of Renton v. Playtime Theaters, Inc.*³²¹ the United States Supreme Court enunciated the

318. *Id. See, e.g.,* Paris Adult Bookstore II v. City of Dallas, 493 U.S. 215 (1990); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); Schad v. Mount Ephraim, 452 U.S. 61 (1981); Town of Islip v. Caviglia, 141 A.D.2d 148, 532 N.Y.S.2d 783 (1988), *aff’d*, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989).

319. 452 U.S. 61 (1981). In *Schad*, the Supreme Court invalidated a zoning ordinance which sought to ban all live entertainment in a commercial zone under the First Amendment. *Id.* at 65. The appellants, who operated an adult bookstore, introduced a coin-operated mechanism in the bookstore which permitted customers to watch a nude live dancer performing behind a glass partition. *Id.* at 62. The Court reasoned that the “First Amendment requires that there be sufficient justification for the exclusion of a broad category of protected expression as one of the permitted commercial uses in the Borough” which does not “appear on the face of the ordinance since the ordinance itself is ambiguous with respect to whether live entertainment is permitted.” *Id.* at 67. Therefore, under a time, place, and manner restriction analysis, the Court determined that the ordinance in question was not “narrowly drawn to respond to what might be the distinctive problems arising from certain types of live entertainment;” nor did the ordinance leave open “adequate alternative channels of communication.” *Id.* at 74, 76.

320. *Id.* at 65.

321. 475 U.S. 41 (1986). The respondents operated two movie theaters in the City of Renton which showed adult films, thus categorizing the theater as an “adult motion picture theater.” *Id.* at 44. Under the city’s zoning ordinance, an “adult motion picture theater” was defined as “[a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[z]ed by an emphasis on

applicable test for reasonable content-neutral time, place, and manner restrictions on commercial speech³²² which has been followed under the Federal Constitution as in *Paris Adult Bookstore II v. City of Dallas*³²³ and the New York State

matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas'. . . for observation by patrons therein." *Id.* at 44 (citations omitted). The ordinance in question prohibited these "adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school." *Id.* at 44. The respondents challenged the ordinance on First and Fourteenth Amendment grounds. *Id.* at 45. However, the Supreme Court upheld the ordinance as a reasonable content-neutral time, place, and manner restriction which was designed to serve a substantial governmental interest without unreasonably limiting alternative avenues of communication. *Id.* at 54-55. The Court summarily held that

[T]he Renton ordinance represents a valid governmental response to the 'admittedly serious problems' created by adult theaters. Renton has not used 'the power to zone as a pretext for suppressing expression,' but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. Here . . . the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the First Amendment.

Id. at 54-55 (citations omitted).

322. Regulations which are deemed reasonable content-neutral time, place, and manner restrictions on commercial speech are justified without reference to the content of the regulated speech, relating only to the time, place, and manner of expression, and "are valid if the governmental interest to be achieved outweighs the resulting interference with free expression." *Caviglia*, 73 N.Y.2d at 556-57, 540 N.E.2d at 221, 542 N.Y.S.2d at 145. *See also City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

323. 493 U.S. 215 (1990). The defendants challenged, on First Amendment grounds, a city ordinance which sought to impose certain regulations on "sexually oriented businesses" as defined in the ordinance as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center." *Id.* at 220 (citations omitted). The City of Dallas enacted the ordinance to regulate sexually oriented businesses through "a scheme incorporating zoning, licensing, and inspections" aimed at "eradicating the secondary effects of crime and urban blight." *Id.* at 220-21. In viewing the ordinance as a content-neutral time, place, and manner restriction under *City of Renton v. Playtime Theaters*, the Supreme Court affirmed the lower court's

Constitution as in *Town of Islip v. Caviglia*.³²⁴ In *Pierce Arrow Realty*, since the Town of Huntington failed to establish such elements, the court denied the Town's request for a preliminary injunction to enjoin the defendants from operating their restaurant and bar as an adult entertainment cabaret.³²⁵

decision upholding that portion of the ordinance relating to zoning on the ground that it was "'designed to serve a substantial governmental interest' and allowed for 'reasonable alternative avenues of communication.'" *Id.* at 222 (citation omitted).

324. 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989). The petitioner, Town of Islip, enacted a zoning ordinance which differentiated between certain "adult uses" and limited operation of these adult uses to areas zoned Industrial I. *Id.* at 548, 540 N.E.2d at 216, 542 N.Y.S.2d at 140. Respondent, Caviglia, owned and operated the Happy Hour Bookstore outside the zone of Industrial I in the heart of the downtown district of the Village of Bay Shore. *Id.* at 550, 540 N.E.2d at 217, 542 N.Y.S.2d at 141. This bookstore excluded minors by reason of age and therefore fell within the definition of "adult use" under the ordinance. *Id.* The respondents challenged the ordinance on First Amendment grounds as violating their constitutional right to freedom of expression. *Id.* In upholding the constitutional validity of the zoning ordinance, the court recognized that "[b]ecause zoning ordinances are legislative acts they enjoy a strong presumption of constitutionality and if there is a reasonable relation between the end sought to be achieved and the means adopted to achieve it the regulation will be upheld." *Id.* at 550-51, 540 N.E.2d at 217, 542 N.Y.S.2d at 141 (citation omitted). Furthermore, utilizing the rule as formulated in *City of Renton v. Playtime Theaters, Inc.*, the court of appeals found that petitioner's ordinance met the "Federal constitutional requirements under the *Renton* test." *Id.* at 552, 540 N.E.2d at 218, 542 N.Y.S.2d at 142. Specifically, the court held that the ordinance was "an appropriate method for addressing existing problems; it [wa]s not overinclusive and it d[id] not unduly restrict adult uses to limited or unsuitable areas of the Town." *Id.* at 560, 540 N.E.2d at 223, 542 N.Y.S.2d at 147-48. Moreover, the ordinance was "'no broader than needed' for the intended purpose and d[id] not violate the State Constitution." *Id.* at 560, 540 N.E.2d at 224, 542 N.Y.S.2d at 148 (citations omitted).

325. *Pierce Arrow Realty*, 627 N.Y.S.2d at 787-88. In Justice Blackmun's concurring opinion in *Schad v. Mount Ephraim*, he articulated the burden which a municipality faces when exercising its zoning power to regulate commercial speech:

[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment. In order for a reviewing court to determine

The appropriate test for reasonable content-neutral time, place and manner restrictions on commercial speech is similar under an analysis of both the New York State³²⁶ and federal constitutions.³²⁷ In order to hold commercial speech regulations constitutional, four elements must be established pursuant to the test set forth in *City of Renton v. Playtime Theaters, Inc.*³²⁸ First, the “predominant purpose” of the ordinance must not seek to regulate the content of the speech or expression but to regulate the “secondary effects” of such uses on the surrounding community.³²⁹ Second, the ordinance must be designed in such a

whether a zoning restriction that impinges on free speech is ‘narrowly drawn [to] further a sufficiently substantial governmental interest,’ . . . the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as *de minimis*.

452 U.S. 61, 77 (citations omitted).

326. In *Caviglia*, the court noted that “[s]tate courts are bound by Supreme Court decisions defining Federal constitutional rights but those rulings establish a minimum standard which State courts may surpass so long as their holdings do not conflict with Federal law.” *Caviglia*, 73 N.Y.2d at 556, 540 N.E.2d at 221, 542 N.Y.S.2d at 145. Furthermore, the court held that “New York may interpret its own Constitution to extend greater protections to its residents.” *Id.* Moreover, the court recognized that “New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community.” *Id.* (citations omitted).

327. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Cf. Caviglia*, 73 N.Y.2d at 544, 540 N.E.2d at 215, 542 N.Y.S.2d at 139 (applying the *Renton* test to alleged violations of both Federal and New York State constitutional claims of freedom of speech and expression).

328. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

329. *See, e.g., Playtime Theaters*, 475 U.S. at 48 (finding the predominant purpose behind the enactment of a zoning ordinance regulating the locale of certain adult movie theaters to be the avoidance of unwanted secondary effects by preventing “crime, protect[ing] the city’s retail trade, maintain[ing] property values, and generally ‘protect[ing] and preserv[ing] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life’”) (citations omitted); *Paris Adult Bookstore II*, 493 U.S. at 220 (finding the predominant purpose behind the enactment of an ordinance regulating “sexually oriented business” to be the “eradicat[ion of] the secondary effects of crime and urban blight”); *Schad*, 452 U.S. at 73 (holding that the predominant purpose behind a zoning ordinance banning all live entertainment

way as to serve a "substantial governmental interest."³³⁰ Third, the ordinance must be "narrowly tailored" to affect only those uses that produce the unwanted secondary effects.³³¹ Finally, the ordinance must allow for "reasonable alternative avenues of communication."³³²

In applying the *Renton* test to the case at bar, the Second Department did not find any evidence which could establish that the third or fourth elements of the test were satisfied.³³³ The Town did not provide any facts or supporting evidence to show that "its ordinance was reasonably limited to those establishments

was to "avoid the problems that may be associated with live entertainment, such as parking, trash, police protection and medical facilities"); *Caviglia*, 73 N.Y.2d at 552, 540 N.E.2d at 218, 542 N.Y.S.2d at 142 (finding the "predominant purpose" behind an "adult use" zoning ordinance to be the "eliminat[ion of] the secondary effects of adult uses and [the] attempt[ed] . . . control [of] future development in the business districts").

330. *Playtime Theaters*, 475 U.S. at 50 (recognizing the "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect") (citations omitted); *Caviglia*, 73 N.Y.2d at 553, 540 N.E.2d at 219, 542 N.Y.S.2d at 143 (finding that the Town of Islip had a substantial "governmental interest" in the "eradication of the effects of urban blight and neighborhood deterioration and furtherance of the . . . quality of life for the Town's residents").

331. *Playtime Theaters*, 475 U.S. at 52 (finding the adult use zoning ordinance "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects"). *But see Schad*, 452 U.S. at 74 (holding that a zoning ordinance which bans all live entertainment in a commercial zone was not "narrowly drawn to respond to what might be the distinctive problems arising from certain types of live entertainment").

332. *Playtime Theaters*, 475 U.S. at 50. The Court in *Playtime* also held that the zoning ordinance provided reasonable alternative locations by leaving "more than five percent of the entire land area of Renton, open to use as adult theater sites . . . , [consisting] of ample, accessible real estate, including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads.'" *Id.* at 53 (citations omitted). *See also Caviglia*, 73 N.Y.2d at 554-55, 540 N.E.2d at 220, 542 N.Y.S.2d at 144 (finding that the adult use Industrial I zoning ordinance provides over 6,000 acres of land in Industrial I for alternative locations which includes "85.6 miles of running frontage on open roads which are situated on lots over 500 feet from a church, park, playground or residential zone").

333. *Pierce Arrow Realty*, 627 N.Y.S.2d at 788.

found to have a secondary detrimental effect on the community.”³³⁴ The court reasoned further that “the Town did not produce proof, by testimony or affidavit, as to whether, prior to its enactment of the ordinance in question, it had conducted any studies, . . . concerning the deleterious effect upon the quality of life in its business community caused by the presence of adult-use establishments.”³³⁵ Furthermore, the Town did not address whether the ordinance provided reasonable alternative locations within the town for adult-use establishments.³³⁶ Thus, in failing to establish the third and fourth factors, the applicable standard of reasonable content-neutral time, place and manner restrictions was not met by the Town of Huntington.³³⁷

Therefore, the court held that “[u]nder these circumstances, it cannot be said that the Town established the likelihood of its success on the merits,” inferring that the zoning ordinance as applied to the defendants herein did not conform to the constitutional requirements under either the Federal or State constitutional rights for freedom of speech or expression.³³⁸

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* Moreover, the Town of Huntington did not address in its application for preliminary injunctive relief whether the defendants were entitled to a reasonable amortization period to compensate them for their preexisting use of their property. *Id.* See also *Village of Valatie v. Smith*, 83 N.Y.2d 396, 401, 632 N.E.2d 1264, 1267, 632 N.Y.S.2d 941, 944 (1994); *Caviglia*, 73 N.Y.2d at 561, 540 N.E.2d at 224, 542 N.Y.S.2d at 148 (holding that “[p]resumptively, amortization provisions are valid unless the owner can demonstrate that the loss suffered is so substantial that it outweighs the public benefit gained by the exercise of the police power”).

338. *Pierce Arrow Realty*, 627 N.Y.S.2d at 788.

SUPREME COURT

NEW YORK COUNTY

Brentrup v. Culk³³⁹
(decided November 30, 1995)

Petitioner, the children's guardian ad litem, brought a motion seeking closure of the courtroom during a custodial proceeding.³⁴⁰ Petitioner argued that the interest and attention of both the public and the media would be harmful and humiliating to the children and an intrusion into the family's private life.³⁴¹ However, the supreme court rejected petitioner's argument, finding that the "[c]omplete closure of the courtroom in this matter would be neither narrowly tailored nor the least intrusive manner in which to address the possibility of real harm to the children."³⁴² In reaching its determination, the court recognized that the right of the public and the press to attend court proceedings is constitutionally protected under both the First Amendment of the United States Constitution³⁴³ and article 1, section 8 of the New York Constitution,³⁴⁴ and, therefore, such a right will only be impinged where "there are compelling reasons for closure."³⁴⁵

The courtroom proceeding at issue in this case involved the custody of the children of the Culk³³⁹ family, several of whom are

339. 635 N.Y.S.2d 1016 (Sup. Ct. New York County 1995).

340. *Id.* at 1018.

341. *Id.* at 1019.

342. *Id.*

343. U.S. CONST. amend. I. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

344. N.Y. CONST. art I, § 8. This section provides in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

345. *Brentrup*, 635 N.Y.S.2d at 1017 (citing *Merrick v. Merrick*, 154 Misc. 2d 559, 562, 585 N.Y.S.2d 989, 991 (Sup. Ct. New York County 1992), *aff'd*, 190 A.D.2d 516, 593 N.Y.S.2d 192 (1st Dep't 1993)).