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Admissions Tax on Movie Theaters Infringes Freedom of Speech: A Novel Argument that has Worked...So Far

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CASENOTES AND COMMENTS

ADMISSIONS TAX ON MOVIE THEATERS INFRINGES FREEDOM OF SPEECH: A NOVEL ARGUMENT THAT HAS WORKED . . . SO FAR

I. INTRODUCTION

The city of Montclair has a problem. The city's movie theaters are drawing large crowds from neighboring communities.[1] Because of the theaters' operations, the city must expend an inordinate amount of public resources in sanitation services, road repair, fire and traffic services, and police and crowd control.[2] However, the sales tax revenue from the movie theaters' concession counters is insufficient to pay for all of these city services which the theater owners enjoy.[3] Since many of the theater patrons are not residents of Montclair,[4] the city is unable to impose on them an alternate means of collecting revenue, such as a property or income tax. As a result, the other Montclair taxpayers effectively subsidize the theater operations.

The City Council meets to discuss the problem. A proposed solution is to impose a tax on admissions[5] to all entertainment events within the city in order to pay for the public services which those entertainment businesses utilize.[6] Would such a tax be constitutional? Would your answer be different if the only entertainment events within the city affected by the tax were two movie theaters and two adult bookstores with viewing booths?

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1. *Public Hearing—Staff Report No. IX: Recommend Adoption of Ordinance No. 86-630 Creating an Admissions Tax,* [hereinafter *Hearing*], at 6, Montclair, Cal. (September 2, 1986).

2. *Minutes of the Regular Meeting of the Montclair City Council,* at 2, Montclair, Cal. (September 15, 1986) (testimony of City of Montclair Police Chief Caldwell, Fire Chief Scott Kenley, and Director of Public Works Sawtell).

3. *Hearing, supra* note 1, at 6.

4. *Id.*

5. A tax upon the receipts from the sale of admissions is a form of sales tax. *See generally* 68 AM. JUR. 2D *Sales and Use Taxes* § 62 (1973). The state can also require licenses of those who operate public amusements and entertainment. *See generally* 4 AM. JUR. 2D *Amusements and Exhibitions* §§ 29-34 (1962); Annotation, *Validity of License Tax or Fee on Show or Place of Amusement,* 58 A.L.R. 1340 (1929), 111 A.L.R. 778 (1937).

6. *Hearing, supra* note 1, at 6.

This issue was addressed in the recent California case, *United Artists Communications, Inc. v. City of Montclair*[7] (*"United Artists"*). In *United Artists,* the California Fourth District Court of Appeal held that an admissions tax imposed by the city of Montclair ("City") on sporting and entertainment events as applied to United Artists ("UA")[8] violated the first amendment of the United States Constitution.[9] The court relied on two cases for this result. First, the United States Supreme Court case, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*[10] (*"Minneapolis Star"*), which struck down a state tax on ink and paper as being an unjustified, discriminatory taxation of the press.[11] Second, the California case, *Festival Enterprises, Inc. v. City of Pleasant Hill*[12] (*"Festival Enterprises"*), which relied on *Minneapolis Star* to strike down an "admissions tax" as an unjustified discriminatory tax on theater owners.[13]

United Artists has potentially the most significant nationwide implications of any California case decided in 1989. The decision will surely be used by owners of movie theaters and other similar entertainment businesses to strike down admissions taxes in cities throughout California[14] and across the country[15] which have adopted them and rely on

7. 209 Cal. App. 3d 245, 257 Cal. Rptr. 124, *review denied, cert. denied,* — U.S. —, 110 S. Ct. 280 (1989).

8. In addition to United Artists, the other plaintiffs were Vista Theaters and General Theatre Corporation. *Id.* Hereinafter, all plaintiffs will be referred to collectively as "UA."

9. *United Artists,* 209 Cal. App. 3d at 253, 257 Cal. Rptr. at 128-29.

10. 460 U.S. 575 (1983).

11. *Id.* at 585.

12. 182 Cal. App. 3d 960, 227 Cal. Rptr. 601, *review denied,* (1986).

13. *Id.* at 962, 227 Cal. Rptr. at 601.

14. In 1986, when Montclair adopted its Ordinance, approximately twenty California cities imposed an admissions tax. *Hearing, supra* note 1, at 6. *See, e.g.,* Fox Bakersfield Theatre Corp. v. City of Bakersfield, 36 Cal. 2d 136, 222 P.2d 879 (1950) (discussing an admissions tax adopted by the City of Bakersfield, California).

15. Admissions taxes are not unique to California cities. *See, e.g.,* Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61 (1913) (upholding, on equal protection grounds, an admissions tax imposed by the City of Chicago, Illinois); Friends of Chamber Music v. City and County of Denver, 696 P.2d 309 (Colo. 1985) (Denver, Colorado, municipal ordinance); Deluxe Theatres, Inc. v. City of Englewood, 198 Colo. 85, 596 P.2d 771 (1979) (Englewood, Colorado, municipal ordinance); City of Boulder v. Regents of the Univ. of Colorado, 179 Colo. 420, 501 P.2d 123, *reh'g denied,* (1972) (Boulder, Colorado, municipal ordinance); Town of Cicero v. Fox Valley Trotting Club, Inc., 65 Ill. 3d 10, 357 N.E.2d 1118, 2 Ill. Dec. 675, *reh'g denied,* (1976) (Cicero, Illinois, municipal ordinance); Spotlight Miniature Golf, Inc. v. Department of Revenue, 279 S.W.2d 795, *reh'g denied,* (1955) (Kentucky state statute); Villa Nova Night Club, Inc. v. Comptroller of Treasury, 256 Md. 381, 260 A.2d 307 (1970) (Maryland state statute); Comptroller of the Treasury v. Burn Brae Dinner Theatre Co. Inc., 72 Md. App. 314, 528 A.2d 546 (1987) (Maryland state statute); Fridley Recreation & Service Co., v. Commissioner of Taxation, 292 Minn. 260, 194 N.W.2d 584 (1972) (Minnesota state statute); Beach v. Livingston, 248 S.C. 135, 149 S.E.2d 328 (1966) (South Carolina state statute); State v. Rope,

them for revenue.

This casenote examines the reasoning in *United Artists.* It will be argued that: (1) the court misinterpreted first amendment analysis; (2) *United Artists* is distinguishable from the above authorities it relied upon; and (3) the decision is unjust because it inequitably shifts a business' burden of paying for city services to the City's other taxpayers.

II. *UNITED ARTISTS COMMUNICATIONS, INC. V. CITY OF MONTCLAIR*

A. Statement of Facts

In 1986, the City passed an ordinance adopting the "Admissions Tax Law of the City of Montclair"[16] ("Ordinance"). The Ordinance imposed a six percent tax[17] on the price of an admission ticket[18] to any event. "Events" were defined as "motion pictures, theatrical performances, musical performances, operas, athletic contests, exhibitions of art or handicrafts or products, lectures, speeches, fairs, circuses, carnivals, menageries, or any other activity conducted for which an admission ticket is sold."[19] Certain events for charitable or religious purposes were exempt, so long as they were not for profit.[20]

The Ordinance included a purpose clause in order to "establish a fundamental relation between the tax and the object of the ordinance."[21] The purpose clause stated that the tax was "to raise revenue to assist in

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419 S.W.2d 890 (1967) (Texas state statute); Comptroller of Public Accounts v. Texas Boxing Enterprises, Inc., 331 S.W.2d 817 (1960) (Texas state statute); City of Portsmouth v. Portsmouth Catholic Elementary School P.T.A., 217 Va. 199, 227 S.E.2d 691 (1976) (Portsmouth, Virginia, municipal ordinance); Ropo, Inc. v. City of Seattle, 67 Wash. 2d 574, 409 P.2d 148 (1965), *reh'g denied,* (1966) (Seattle, Washington, municipal ordinance); Telemark Co., Inc. v. Wisconsin Department of Taxation, 28 Wis. 2d 637, 137 N.W.2d 407 (1965) (Wisconsin state ordinance).

16. MONTCLAIR, CAL., ORDINANCE NO. 86-630 (1986) ("AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MONTCLAIR ADDING ARTICLE 5 TO CHAPTER 5 OF TITLE 3 OF THE MONTCLAIR MUNICIPAL CODE RELATING TO AN ADMISSIONS TAX"). "This article shall be known as the 'Admissions Tax Law of the City of Montclair.' " *Id.* Section 3-5.501.

17. *Id.* Section 3-5.504 provides:

> When a charge or admission price for admission is paid for the right or privilege of being admitted to any premises, there is hereby levied and assessed, and there shall be paid and collected, a tax in an amount equal to six percent (6%), or the integrated sales tax rate in San Bernardino County attributable to all state and local sales taxes, whichever is greater, on the price of an admission ticket for the privilege of admission to any event held.

18. " 'Admission ticket' shall mean any charge whether or not so designated for the right or privilege to enter and occupy a seat or space . . . ." *Id.* Section 3-5.503(1).

19. *Id.* Section 3-5.503(2) (amended 1988).

20. MONTCLAIR, CAL., ORDINANCE NO. 86-630 § 3-5.529 (1986).

21. *Public Hearing—Staff Report No. VIII: Recommend Adoption of Ordinance No. 86-630 Creating an Admissions Tax,* at 4, Montclair, Cal. (Sept. 15, 1986).

covering the cost of providing municipal services required by businesses covered under this article."[22]

UA owned, operated and/or managed movie theaters located within the City.[23] There were other businesses within the City subject to the tax;[24] however, ninety percent of the tax was borne by UA's theaters and two adult bookstores with viewing booths.[25]

UA sued seeking declaratory and injunctive relief, arguing that the admissions tax impermissibly burdened first amendment protected activities without adequate justification.[26] The trial court found the tax constitutional and entered judgment for the City.[27] UA appealed.[28]

The California Court of Appeal reversed and held that the tax was unconstitutional as applied to UA.[29] The California Supreme Court denied review,[30] and the United States Supreme Court denied certiorari.[31]

B. The Trial Court's Holding and Reasoning

At trial, Judge Hyde declared the Montclair admissions tax constitutional without explanation.[32] However, it is reasonable to assume that Judge Hyde was persuaded by the prior ruling in *Edwards Theatres Circuit, Inc. v. City of Rancho Cucamonga*[33] (*"Rancho Cucamonga"*) since the City cited to that case extensively in its trial briefs.[34]

Rancho Cucamonga, like *United Artists,* involved a challenge to a

22. MONTCLAIR, CAL., ORDINANCE No. 86-630 § 3-5.502 (1986). The services intended to be covered included, litter control, street sweeping, sanitation collection, fire prevention, law enforcement, street maintenance and traffic control, among other things. *Hearing, supra* note 1, at 6.

23. *United Artists,* 209 Cal. App. 3d at 246-47, 257 Cal. Rptr. at 125.

24. The other businesses were the Holiday Skating Rink, the Laff Stop, the Grand Prix Raceway, four nightclubs/restaurants which charge cover charges, and two adult bookstores with viewing booths. *Id.*

25. *Id.*

26. *Id.* at 247, 257 Cal. Rptr. at 125.

27. *United Artists,* 209 Cal. App. 3d at 248, 257 Cal. Rptr. at 125.

28. *Id.*

29. *Id.*, at 253, 257 Cal. Rptr. at 129.

30. *Id.*, at 245, 257 Cal. Rptr. 124, *review denied, cert. denied,* — U.S. —, 110 S. Ct. 280 (1989).

31. *Id.*

32. In the judgment filed December 1, 1987, Judge Hyde gave no explanation why he ruled as he did. *See* Judgment, United Artists, etc. v. City of Montclair, No. OCV 39705 (Cal. Super. Ct. 1987).

33. No. OCV 39736 (Cal. Super. Ct. 1987).

34. *See* Trial Statement of Defendants at 6, 18, United Artists, etc. v. City of Montclair, No. OCV 39705 (Cal. Super. Ct. 1987).

city's admissions tax.[35] In upholding the Rancho Cucamonga tax, the trial judge distinguished *Minneapolis Star,* reasoning that the Minnesota ink and paper tax was unconstitutional because it singled out the press without an adequate justification.[36] The Rancho Cucamonga tax, on the other hand, did not single out protected activities.[37] Since the tax applied to non-protected businesses as well as to protected ones,[38] the court held that the tax would pass constitutional muster.[39]

The *Rancho Cucamonga* court noted that municipal power to raise revenue for local purposes is not only appropriate, but vital.[40] Accordingly, the court upheld the Rancho Cucamonga admissions tax against the first amendment challenge.[41] Judge Hyde probably relied upon this reasoning when he upheld the Montclair admissions tax.

C. The Holding and Reasoning of the Court of Appeal

The California Court of Appeal reversed, declaring the Montclair Admissions Tax unconstitutional as applied to UA.[42] The Montclair admissions tax, like the use tax in *Minneapolis Star* and the admissions tax in *Festival Enterprises,* appeared to apply to a broad range of businesses.[43] However, the court of appeal stated that, in reality, the tax fell "disproportionately upon businesses engaged in protected speech: two movie theaters and two adult book stores with viewing booths."[44]

The court distinguished *Festival Enterprises* where the only businesses affected by the tax were movie theaters, protected by the first amendment.[45] In *United Artists,* the court found that in addition to the theaters, there were other businesses nominally subjected to the tax.[46] Yet, despite the existence of other potentially non-protected businesses affected by the tax, the appellate court found the Ordinance unconstitutional for three reasons.[47] First, as in *Minneapolis Star,* a disproportion-

35. Statement of Decision at 2, Edwards Theatres Circuits, Inc. v. Rancho Cucamonga, No. OCV 39736 (Cal. Super. Ct. 1987).

36. *Id.* at 7.

37. *Id.*

38. *Id.*

39. *Id.* at 11.

40. Statement of Decision at 11, Edwards Theatres Circuits, Inc. v. Rancho Cucamonga, No. OCV 39736 (Cal. Super. Ct. 1987).

41. *Id.*

42. *United Artists,* 209 Cal. App. 3d 245, 253, 257 Cal. Rptr. 124, 129, *review denied, cert. denied,* — U.S. —, 110 S. Ct. 280 (1989).

43. *Id.* at 252, 257 Cal. Rptr. at 128.

44. *Id.*

45. *Id.*

46. *Id.*

47. 209 Cal. App. 3d at 252, 257 Cal. Rptr. at 128.

ate amount of the tax (ninety percent) was paid by the few protected businesses.[48] Second, other businesses subject to the tax could avoid it.[49] Third, other businesses subject to the tax, such as the nightclubs, also appeared to be engaged in protected speech and that, according to the court, did not help the City's position.[50]

The court of appeal held that UA's uncontradicted evidence[51] proved that the Montclair Admissions Tax discriminated against those engaged in protected speech.[52] Despite its broadly-worded applicability, the tax fell almost exclusively on four businesses, all of which were engaged in protected speech.[53]

The court noted that "a statute challenged under the First Amendment 'must be tested by its operation and effect.' "[54] The tax had the effect of singling out protected businesses.[55] Accordingly, based on its interpretation of the holding of *Minneapolis Star* and *Festival Enterprises,* the court held the Montclair admissions tax unconstitutional as applied to UA.[56]

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48. *Id.*

49. *Id.* For example, the skating rink could drop its admission fee and increase its skate rental fee, the nightclubs could drop their admission fee and instead institute a minimum drink charge or dinner charge. *Id.* UA, on the other hand, was bound by its distribution agreements, and therefore did not have a readily available means to avoid the admissions tax. *Id.*

50. *Id.* This last argument seems to imply that the Ordinance is invalid because, rather than singling out a few protected businesses for burdensome taxation, it is aimed at a broad class of protected businesses for burdensome taxation.

51. 209 Cal. App. 3d at 248, 257 Cal. Rptr. at 125 (all facts of the case were stipulated).

52. *Id.* at 252-53, 257 Cal. Rptr. at 128. The court stated that the tax was not one of general applicability, as it was not targeted at all businesses. *Id.*

53. *Id.*

54. *Id.* at 253, 257 Cal. Rptr. at 128 (quoting Near v. Minnesota, 283 U.S. 697, 708 (1931) (emphasis omitted)).

55. *Id.*

56. 209 Cal. App. 3d at 253, 257 Cal. Rptr. at 129. The court also cited City of Alameda v. Premier Communications Network, Inc., 156 Cal. App. 3d 148, 202 Cal. Rptr. 684 (1984), as another instance where a California court had applied *Minneapolis Star* to declare a city ordinance unconstitutional. *United Artists,* 209 Cal. App. 3d at 249-50, 257 Cal. Rptr. at 126-27. In *Premier,* the Court of Appeal invalidated an ordinance to the extent that it imposed a business license tax on a provider of a television subscription service. *Premier,* 156 Cal. App. 3d at 157, 202 Cal. Rptr. at 690.

Premier Communications Network, Inc. is a provider of "Home Box Office," a pay television movie service. *Id.* at 152, 202 Cal. Rptr. at 686. "Premier, as a disseminator of motion pictures, news and other information and entertainment programming, engages in conduct protected by the First Amendment guaranties of freedom of speech and press." *Id.*, 202 Cal. Rptr. at 686.

The court in *Premier* held that since the ordinance placed a differential burden upon television subscription service businesses unjustified by any compelling interest of the City, the ordinance as applied to Premier violated the first amendment to the United States Constitution. *Id.* at 157, 202 Cal. Rptr. at 689-90.

III. BACKGROUND: THE RELATIONSHIP OF TAXATION TO THE FIRST AMENDMENT

A. The First Amendment Guarantee of Freedom of Speech

The first amendment prohibits Congress from making any laws which infringe on freedom of speech or of the press.[57] The fourteenth amendment similarly protects these fundamental rights from infringement by state action or municipal ordinances adopted under state authority.[58]

Many theories explain the tremendous value of the first amendment guarantee of freedom of speech. The right of free speech is designed and intended to remove government restraints from the forum of public discussion.[59] By protecting our right of free speech, the Constitution promotes political discourse, culture, and assures individual self-fulfillment free from government censorship.[60] Under Justice Holmes' famous "marketplace of ideas" theory, the first amendment enables society to find the truth: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."[61]

1. Protected vs. Unprotected Speech

Despite the absolute language of the first amendment, not all speech falls within its protection.[62] There are certain classes of speech which the United States Supreme Court has recognized as "unprotected," the regulation of which does not raise any constitutional problem.[63] Examples of unprotected speech include the "lewd and obscene,"[64] the "profane,"[65]

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57. U.S. CONST. amend. I. The full text reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

For sake of convenience, throughout the remainder of this casenote, "freedom of speech" will be used as an abbreviation to refer to each of the freedoms guaranteed by the first amendment (other than religion). This follows Professor Tribe's approach. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1 at 785 n.2 (1988).

58. The fourteenth amendment makes applicable to the states the rights guaranteed by the first. Douglas v. Jeanette, 319 U.S. 157, 162 (1943); Lovell v. Griffin, 303 U.S. 444, 450 (1938).

59. Cohen v. California, 403 U.S. 15, 24 (1971).

60. Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972). *See also* Cohen v. California, 403 U.S. 15, 26 (1971) ("[G]overnments might . . . seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.").

61. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

62. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

63. *Id.* at 571-72.

64. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973). The Court in *Miller* defined obscene material, which may be constitutionally banned, as that which meets the following three-part

the "libelous,"[66] and the "insulting or 'fighting' words."[67] These classes of speech have such slight social value that any benefit they may provide is outweighed by society's interest in order and morality.[68]

Exhibiting motion pictures is protected by the first and fourteenth amendments[69] because this is a significant medium for communicating ideas.[70] Even though motion pictures are produced and exhibited for a profit, profit motive does not prevent them from being a form of protected expression;[71] nor does it matter that they are intended to entertain as well as inform.[72]

2. Content-Based Government Regulation

Once it is determined that the speech in question is protected by the

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test: First, the average person applying contemporary community standards would find the material, taken as a whole, appeals to the prurient interest. Second, the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law. And third, the material, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24.

65. Chaplinsky v. New Hampshire, 315 U.S. at 572. *But see* Cohen v. California, 403 U.S. 15 (1971). A defendant had been convicted for wearing a jacket emblazoned with the words, "Fuck the Draft." *Id.* at 16. The Court found this was not obscene, i.e., not erotic, *id.* at 20, and reversed the conviction. *Id.* at 26.

66. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (public official can recover for libel relating to his official conduct, if he can show actual malice, i.e. that the statement was made with knowledge of its falsehood, or with reckless disregard for the truth). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (non-public official or figure can recover for libel without having to show that the statement was made with knowledge of its falsehood, or with reckless disregard for the truth).

67. Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942) (upholding a state law which the Court found did no more than prohibit face-to-face words plainly likely to cause a breach of the peace).

68. *Id.* at 572.

69. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1951). *See also* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) ("[M]otion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."). *Accord* Burton v. Municipal Court, 68 Cal. 2d 684, 689, 441 P.2d 281, 284, 68 Cal. Rptr. 721, 724 (1968) ("[E]xpression by means of motion pictures is included within the First and Fourteenth Amendments.").

70. Joseph Burstyn, Inc. v. Wilson, 343 U.S. at 501. "[Motion pictures] may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Id.* (citation omitted).

71. *Id.* at 501-02. The activities of the adult bookstores' viewing booths are probably also protected by the first and fourteenth amendments. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) ("[N]ude dancing is not without its First Amendment protections from official regulation."). *Accord* Morris v. Municipal Court, 32 Cal. 3d 553, 564, 652 P.2d 51, 57, 186 Cal. Rptr. 494, 500 (1982) ("A ban on nude dancing cannot be sustained on the theory that it regulates only conduct and does not impinge upon protected speech.").

72. Joseph Burstyn, Inc. v. Wilson, 343 U.S. at 501.

first amendment, determining whether the challenged government regulation is constitutional depends, in part, on whether the regulation is content-based or content-neutral. A regulation is content-based if it restricts speech because of its message, ideas, subject matter, or content.[73] If the regulation is found to be content-based, it is constitutional only if it survives strict scrutiny;[74] the government must show that its regulation is necessary to serve a compelling government interest[75] and is narrowly tailored to achieve that end.[76]

Governments rarely admit that their regulation is content-based. Thus, courts look at two aspects of the regulation in order to determine whether a challenged regulation is in fact content-based. First, a regulation is content-based if it is facially discriminatory, its language specifically targets the subject matter or content of the speech.[77] Second, even if the regulation is facially non-discriminatory, it is deemed content-based if the government intended the regulation to single out certain types of speech because of its subject matter or content.[78]

3. Content-Neutral Government Regulation

Where the government regulation of protected speech is content-neutral, targeted at something other than the subject matter of the speech, courts will apply a balancing test to determine the validity of the

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73. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980).

74. Widmar v. Vincent, 454 U.S. 263, 276 (1981). Strict scrutiny involves the most exacting level of judicial review; hardly any government action ever survives it. In the often-quoted words of Professor Gunther, the scrutiny is, " 'strict' in theory and 'fatal' in fact." Gunther, *The Supreme Court 1971 Term,* 86 HARV. L. REV. 1, 8 (1972).

75. 454 U.S. at 270. In *Widmar,* the Court held that the state's interest, achieving greater separation of church and state than already insured under the United States Constitution, *was not sufficiently compelling* to justify content-based discrimination against religious speech. *Id.* at 276.

76. *Id.* at 270. "Narrowly tailored" has generally meant that the regulation must be the least restrictive means of achieving the government's objective. *See, e.g.,* Schneider v. State, 308 U.S. 147 (1939) (invalidating ordinance which prohibited handing out literature on a public street). The city's objective, prevention of litter, could have been achieved by the less restrictive means of punishing those who actually throw papers on the street. *Id.* at 162. *But see* Ward v. Rock Against Racism, — U.S. —, 109 S. Ct. 2746 (1989) (upholding municipal sound amplification regulation). The Court held that so long as the means chosen are not substantially broader than necessary to achieve the government's interest, a regulation will not be invalid simply because that interest could be served by less restrictive means. *Id.* at 2758.

77. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1971) (invalidating ordinance which prohibited picketing in front of schools, except if the school was involved in a labor dispute).

78. *See, e.g.,* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (invalidating school regulation that prohibited wearing armbands). The Court found the regulation was intended to avoid political controversy about the Vietnam war. *Id.* at 509-10.

regulation.[79] A content-neutral regulation will be upheld if it is narrowly tailored to serve a significant government interest,[80] and leaves open ample alternative channels for communication.[81]

B. Taxation: The Rule of Minneapolis Star

A tax, like any other government regulation, may infringe on the guarantees of freedom of speech or the press. In 1983, the Supreme Court decided the landmark case of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue.*[82] The Court struck down a state use tax[83] on the cost of paper and ink products consumed in the production of publications.[84] The Court held that the tax violated the first amendment of the United States Constitution by singling out the press without any satisfactory justification.[85]

1. Content-Based Strict Scrutiny Test Applied

The Minnesota legislature had imposed a use tax on the cost of paper and ink products used in the production of a publication.[86] The first $100,000 worth of ink and paper consumed by a publication in any calendar year was exempt from the tax.[87] The effect of the $100,000 exemption was that only a handful of publishers paid any tax at all, and even fewer paid any significant amount of tax.[88] Therefore, the tax penalized

79. *See, e.g.,* Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding ordinance that prohibited operation of loudspeakers or any other instrument emitting loud noises on public streets). "[T]he need for reasonable protection . . . from the distracting noises of . . . such . . . devices justifies the ordinance." *Id.* at 89. *See also* Schneider v. State, 308 U.S. 147 (1939) (invalidating ordinance that prohibited distribution of literature on city streets). The city interest in keeping streets clean was insufficient to save the ordinance. *Id.* at 162. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 at 791-92 (1988).

80. "Significant government interest" is an intermediate level of judicial scrutiny. *See, e.g.,* Ward v. Rock Against Racism, — U.S. —, 109 S. Ct. 2746, 2753, 2760 (1989) (city's interest in avoiding excessive sound volume withstands a first amendment challenge); *See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 50-54 (1983) (school district's interest in preserving school mailboxes for their lawful purpose outweighs interest of a union denied access rights to those mailboxes); *See also* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980).

81. Ward v. Rock Against Racism, — U.S. —, 109 S. Ct. 2746, 2753 (1989); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980).

82. 460 U.S. 575 (1983).

83. A use tax is a value-based tax on the use, consumption, or storage of tangible property. BLACK'S LAW DICTIONARY 1383 (5th ed. 1979).

84. 460 U.S. at 592-93.

85. *Id.*

86. *Id.* at 577.

87. *Id.* at 578.

88. *Id.* at 591.

a few of the largest newspapers because the exemption selected this narrowly defined group to bear the full burden of the tax.[89]

The Supreme Court noted that the first amendment does not prohibit all regulation of the press.[90] Both state and federal governments can subject newspapers to generally applicable taxation without creating constitutional problems.[91] However, the Minnesota tax was not a generally applicable tax, but rather a special tax which applied only to certain publications protected by the first amendment.[92] The tax was facially discriminatory, singling out the press for special treatment.[93]

In addition to the fact that the tax was facially discriminatory, the Supreme Court inferred discriminatory intent. The Court was concerned that discriminatory taxation could be used by the government to check critical comment by the press.[94] Discriminatory treatment of the press *suggested* that the goal of the tax was to suppress expression, and such a goal was presumptively unconstitutional.[95] "When the State singles out the press . . . the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press . . . ."[96]

Thus, finding both a facially discriminatory tax and intent to discriminate against the press, the Court subjected the tax to strict scrutiny. "A tax that singles out the press . . . places a heavy burden upon the State to justify its action."[97] The discriminatory tax would be found invalid unless the state could assert a counterbalancing interest of compelling importance that it could not achieve without differential taxation.[98]

The tax failed the test. While Minnesota's main interest of raising

89. 460 U.S. at 592. Tailoring the tax to single out a few members of the press presented "such a potential for abuse that no interest suggested by Minnesota [could] justify the scheme." *Id.*

90. *Id.* at 581.

91. *Id. See also* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) ("[O]wners of newspapers are [not] immune from any of the ordinary forms of taxation for support of the government.").

92. 460 U.S. at 581. A tax need not fall exclusively upon activities protected by the first amendment in order to fall within the scope of *Minneapolis Star.* In Acara v. Cloud Books, Inc., 478 U.S. 697 (1986), the Court, in discussing its decision in *Minneapolis Star,* stated: "We imposed a greater burden of justification on the State even though the tax was imposed on a nonexpressive activity, since the burden of the tax inevitably fell disproportionately—in fact, almost exclusively—upon the shoulders of newspapers exercising the constitutionally protected freedom of the press." *Id.* at 704.

93. *Minneapolis Star,* 460 U.S. at 581-82.

94. *Id.* at 585.

95. *Id.*

96. *Id.*

97. *Id.* at 592-93.

98. *Minneapolis Star,* 460 U.S. at 585.

revenue is critical to any government, standing alone it did not justify differential taxation of the press.[99] Minnesota could have raised revenue through a general business tax, thus avoiding the censorial threat implicit in a tax that singles out the press.[100] Since Minnesota had offered no compelling justification for its tax on the use of ink and paper, the Court held that the tax violated the first amendment.[101]

2. The Rule of *Minneapolis Star* Extended to Admissions Taxes on Movie Theaters

In 1986, the First District of the California Court of Appeal in *Festival Enterprises, Inc. v. City of Pleasant Hill*[102] struck down as unconstitutional an admissions tax as applied to theater owners.[103] The city of Pleasant Hill had enacted a five percent tax on the admission price of "sporting events, movie theatres, concerts, shows, museums, performances, displays and exhibitions within the city."[104] The court of appeal held that the tax imposed "an impermissible burden on protected speech in violation of . . . the first and fourteenth amendments of the United States Constitution."[105] In so holding, the court relied on the authority of *Minneapolis Star,* noting that "special deference must be paid to businesses engaged in protected speech."[106] The court reiterated that commercial motion pictures are protected speech.[107] Although the ordinance was broadly worded to apply to other forms of entertainment, in reality, the tax singled out the theaters owned by Festival Enterprises; they were

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99. *Id.* at 586.

100. *Id.*

101. *Id.* at 593. *See also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (invalidating sales tax on general interest magazines, that exempted newspapers and religious, professional, trade, and sports journals). The discrimination in *Minneapolis Star* took two forms. First, the use tax treated the press differently from other enterprises. Second, by the $100,000 exemption, the tax targeted a small group of newspapers. Both types of discrimination were present here, even though there was no evidence of improper censorial motive. Selective taxation of the press—either singling out the press as a whole, or targeting individual entities of the press—poses a particular danger of abuse by the state. The Arkansas exemption operated much like the $100,000 exemption in the Minnesota use tax because it treated some magazines less favorably than others. Thus, in order to justify its differential taxation, the state had to show that its regulation was necessary to achieve a compelling state interest and was narrowly drawn to achieve that end. Arkansas failed to meet this heavy burden. *Id.* at 228-34.

102. 182 Cal. App. 3d 960, 227 Cal. Rptr. 601, *review denied,* (1986).

103. *Id.* at 962, 227 Cal. Rptr. at 601.

104. *Id.*, 227 Cal. Rptr. at 602.

105. *Id.*, 227 Cal. Rptr. at 601.

106. *Id.* at 964, 227 Cal. Rptr. at 602 (citing *Minneapolis Star,* 460 U.S. at 585).

107. 182 Cal. App. 3d at 963, 227 Cal. Rptr. at 602 (citing Joseph Burstyn, Inc. v. Wilson 343 U.S. 495, 502 (1952)).

the only businesses in the city subject to the tax.[108] The city admitted that it did not know when, if ever, any other business besides the theaters would appear and become subject to the tax.[109]

The court stated that motion picture exhibition, a protected activity, cannot be singled out for discriminatory tax treatment, "unless the state asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."[110] The city's only interest in enacting the tax was to provide revenue for street repairs.[111] Citing *Minneapolis Star,* the court invalidated the tax.[112] However, in dicta, the court implied that the tax might have been upheld if it was justified by increased use of city services required by the theaters' operation, i.e. police protection, street repair, or sanitation collection.[113]

IV. ANALYSIS OF *UNITED ARTISTS*

A. Preliminary First Amendment Analysis

UA's activity in the instant case, movie theater operation, is protected by the first and fourteenth amendments.[114] Given that UA is engaged in protected speech, the question becomes whether the admissions tax is targeted at the subject matter or content of UA's activities, and is thus content-based.[115]

The Montclair admissions tax is not facially discriminatory. By its language it covers a broad range of entertainment events without regard

108. *Id.*

109. *Id.*

110. *Id.* at 964, 227 Cal. Rptr. at 602 (quoting *Minneapolis Star,* 460 U.S. at 585).

111. *Id.* at 962-63, 227 Cal. Rptr. at 602.

112. 182 Cal. App. 3d at 964-66, 227 Cal. Rptr. at 602-04.

113. *Id.* at 964, 227 Cal. Rptr. at 603.

114. *See supra* notes 69-72 and accompanying text. UA's activity is also protected by the California Constitution. "A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. 1, § 2.

For prudential reasons, the better view is that where both the state and federal constitutions are implicated, a court should interpret the state constitution first. This principle has been recognized by the United States Supreme Court. *See, e.g.,* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This principle has also been recognized in state courts. *See, e.g.,* Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 261-63, 625 P.2d 779, 783-84, 172 Cal. Rptr. 866, 870-71 (1981). *See generally* S. Mosk, *The State Courts,* American Law: The Third Century (1976).

The court of appeal in *United Artists* failed to consider the California Constitution. Accordingly, a full analysis of this case under the state constitution is beyond the scope of this casenote.

115. The tax is content-based if it is facially discriminatory, specifically targeted, by its language, at the subject matter or content of the activities. Alternatively, even if the tax is facially non-discriminatory, it is content-based if the City intended to single out UA because of the subject matter or content of its activities. *See supra* notes 77-78 and accompanying text.

to subject matter.[116] However, the tax has the effect of singling out UA for taxation; ninety percent of the tax is borne by UA.[117] Thus, the issue becomes whether this is sufficient to infer discriminatory intent. The tax is content-based only if there was an intent by the City to discriminate against UA because of the subject matter of its activities.[118]

Two possibilities for further analysis of the case are now presented. Either, as in *Minneapolis Star,* infer the City's intent to discriminate against the subject matter of UA's activities, and thereby find the tax content-based.[119] If the tax is content-based, it is invalid unless it survives strict scrutiny;[120] the tax must be necessary to serve a compelling government interest and narrowly drawn to achieve that end.[121] Or, if there is no reason to infer an intent by the City to discriminate against the subject matter of UA's activities, the tax should be found content-neutral. If the tax is content-neutral, a balancing test should be applied; the tax is valid if it is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels for communication.[122]

B. The City Did Not Intend to Discriminate Against the Subject Matter of UA's Activities

The Supreme Court in *Minneapolis Star* inferred intent because of the concern that discriminatory taxation could be used by the government to check critical comment by the press.[123] Discriminatory treatment, unless justified by some special characteristic of the press, *suggested* that the goal of the tax was to suppress expression.[124]

However, this concern of government censorship which made it proper for the Court to infer discriminatory intent in *Minneapolis Star* is absent in *United Artists.* Movie theaters, unlike newspapers, are not a typical avenue for critical comment of the government. Unlike a newspaper editorial, a controversial film shown at a movie theater is not a credible threat to the City Council of Montclair, such that they would find a need to exercise censorship in the form of a discriminatory tax. Unlike a facially discriminatory tax that singles out the press, a facially

116. *See supra* note 19 and accompanying text.
117. *See supra* notes 24-25 and accompanying text.
118. *See supra* note 78 and accompanying text.
119. *See supra* notes 94-96 and accompanying text.
120. *See supra* note 74 and accompanying text.
121. *See supra* notes 75-76 and accompanying text.
122. *See supra* notes 79-81 and accompanying text.
123. 460 U.S. 575, 585 (1983).
124. *Id.*

neutral admissions tax that has the effect of singling out movie theaters does not credibly suggest that the goal of the tax is suppression of expression.

There is a second reason not to infer discriminatory intent in *United Artists.* In *Minneapolis Star,* the ink and paper tax was unrelated to special characteristics of the press and that *suggested* that the goal of the tax was to suppress expression.[125] In *United Artists,* however, the Montclair admissions tax *is* justified by special characteristics of theater operations, making it difficult to suggest that the goal of the tax was to suppress expression. Movie theaters require certain public services, including litter control, street sweeping, sanitation collection, fire prevention, law enforcement, traffic control, and potentially crowd control. The Montclair admissions tax was imposed for the specific purpose of providing these public services to the businesses taxed.[126] This further distinguishes the Montclair tax from the tax invalidated in *Minneapolis Star.*[127]

Thus, the Ordinance cannot be found to be content-based. It is not a facially discriminatory tax, nor is there evidence of government intent to use the tax to suppress expression. Therefore, the rule of *Minneapolis Star* should not apply to *United Artists;* the Ordinance should not have been subjected to the strict scrutiny test imposed on content-based regulations. The Ordinance should have been found content-neutral and analyzed accordingly.

C. Analysis of the Admissions Tax as Content-Neutral

Rather than applying strict scrutiny as did the court in *United Artists,* the tax should have been subjected to the lesser level of scrutiny imposed on content-neutral regulations. The tax was not targeted at the content of UA's activities, but rather at the problem of paying for City services used by UA.[128] As mentioned above, a content-neutral government regulation is constitutional, provided that it is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels for communication.[129]

Under this intermediate level of scrutiny, the Montclair Ordinance

125. *See id.* at 585-86. The purpose of the ink and paper tax, raising revenue, was insufficient, standing alone, to justify special treatment of the press. *Id.*

126. *See supra* notes 21-22 and accompanying text.

127. In determining whether a rule applicable to one protected activity should be extended to another, each must be assessed for first amendment purposes by standards suited to it, for each may present its own problems. Southwestern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

128. *See supra* notes 21-22 and accompanying text.

129. *See supra* notes 79-81 and accompanying text.

is valid. The City adopted the Ordinance to serve a significant government interest. The tax is necessary to achieve an equitable distribution of the benefits of public services and a corresponding equitable burden of paying for them. This interest can only be achieved through differential taxation. As noted above, the movie theaters now enjoy the benefits of certain government services, yet without differential taxation, the burden of paying for them will fall upon the other taxpayers in the City.[130]

The Ordinance was narrowly tailored to serve this interest. The purpose clause clearly stated that the Ordinance was enacted to pay for the city services utilized by the movie theaters.[131] The Ordinance imposed a nominal, six percent tax on the price of admission to achieve this interest.[132] It did not employ means substantially broader than necessary to achieve this interest;[133] for example, it did not impose an outright ban on movie theaters.

Finally, the tax does not unduly constrict channels for communication. A six percent tax on the price of admission, 42 cents on a $7.00 ticket, has a minor effect, if any, on UA's ability to attract movie theater patrons, who ultimately bear the burden of the tax.[134] Movie theater patrons will not be dissuaded from attending UA's Montclair theaters because of the tax. The cost of transportation (gasoline, bus fare, etc.) to a theater in another city that has no admissions tax offsets this additional 42 cents. Thus, patrons will probably not abandon Montclair as a movie theater destination.

Nor can it be argued that the tax will result in movie patrons turning to alternate, less expensive forms of entertainment, such as home videos. Most people who opt to watch home videos for $2.00-$4.00 per show, because going out to the movies is substantially more expensive, will probably do so whether the latter costs $7.00 or $7.42. Thus, UA is not in danger of losing its current audience to home videos because of the admissions tax.

Accordingly, the balancing of UA's right of freedom of speech against Montclair's significant interest in protecting the rights of other city taxpayers favors the City. To enforce UA's right of freedom of speech while disregarding the rights of other taxpayers is harsh and arbi-

130. *See supra* notes 2-3 and accompanying text.

131. MONTCLAIR, CAL., ORDINANCE NO. 86-630 § 3-5.502 (1986).

132. MONTCLAIR, CAL., ORDINANCE NO. 86-630 § 3-5.504 (1986).

133. *See* discussion of Ward v. Rock Against Racism, *supra* note 76.

134. The Theatre Association of California, Inc. argued that any admissions tax would be passed on to the theaters' patrons. Stipulation of Facts, exhibit 7G, United Artists, etc. v. City of Montclair, No. OCV 39705 (Cal. Super. Ct. 1987).

trary in itself.[135] Therefore, under the test for a content-neutral government regulation, the Ordinance should have been found constitutional.

D. *The Montclair Ordinance Is Distinguishable from the Tax Invalidated in Festival Enterprises*

The City's justification for its admissions tax, raising revenue to pay for the city services utilized by the entertainment businesses, also distinguishes it from the tax invalidated in *Festival Enterprises.*[136] The tax in *Festival Enterprises* was not imposed for any purpose justified by the special characteristics of movie theaters; rather it was for general revenue purposes only.[137] As noted previously, dicta in *Festival Enterprises* indicated that the court would have upheld an admissions tax imposed for the purpose Montclair stated, raising revenue specifically to pay for the city services utilized by the businesses taxed.[138]

V. IMPLICATIONS AND POLICY CONSIDERATIONS

The decision in *United Artists* is unjust because it inequitably distributes the burden of paying for city services among Montclair's taxpayers. A consequence of the case is that the bulk of the burden of paying for the city services enjoyed by the theaters will have to be borne by the other taxpayers within the City. Fairness dictates that the beneficiaries of city services, in this case movie theater owners, should somehow contribute to the cost.

United Artists has additional financial consequences for California cities and cities in other states that choose to follow this decision. The decision will deprive many smaller cities of needed revenue from admissions taxes, while permitting other, larger cities to continue to impose such taxes based solely on the fact that those cities contain popular, non-first amendment protected entertainment events.[139]

United Artists has implications not only for exhibitors of motion pictures and adult bookstores with viewing booths, but logically extends to

135. *See* Kovacs v. Cooper, 336 U.S. 77, 88 (1949). *See also,* Ward v. Rock Against Racism, — U.S. —, 109 S. Ct. 2746, 2760 (1989) (upholding city ordinance designed to protect residents from excessive sound volume from musical performances held in a park).

136. 182 Cal. App. 3d 960, 227 Cal. Rptr. 601, *review denied,* (1986).

137. *See supra* note 111 and accompanying text.

138. *See supra* note 113 and accompanying text.

139. For example, the city of Inglewood, California, whose primary entertainment facility, The Forum, hosts mostly sporting events. Sporting events are arguably unprotected by the first amendment. Therefore, it would appear likely that Inglewood could impose an admissions tax that would be valid under the reasoning of the court in *United Artists.*

all first amendment protected entertainment events[140] for which an admission fee is charged. For example, performance art, art museums, musical performances, theater, opera, amusement parks, etc., are all forms of entertainment protected by the first amendment.[141] Accordingly, the reasoning in *United Artists* applies equally as well to an admissions tax imposed on any of them.

VII. CONCLUSION

In invalidating the Montclair admissions tax, the California Court of Appeal cited as its authority *Minneapolis Star* and *Festival Enterprises.*[142] However, the Montclair tax is distinguishable from the taxes invalidated in both of those cases. First, the Montclair tax is justified by the special characteristics of movie theater operations and is not for general revenue purposes. Second, the threat of government censorship of critical comment, which justified invalidating the Minnesota tax on ink and paper, is not a credible threat in *United Artists.* Third, the City's interest in achieving an equitable distribution of the burden of paying for city services is of significant importance that cannot be achieved without differential taxation. Since the Ordinance was narrowly tailored to serve that interest, it should have been upheld.

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140. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (entertainment falls within the first amendment guarantee).

141. *See id.*

142. *United Artists,* 209 Cal. App. 3d 245, 253, 257 Cal. Rptr. 124, 129, *review denied, cert. denied,* — U.S. —, 110 S. Ct. 280 (1989).

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