YOUNG v. AMERICAN MINI THEATRES, INC.: CREATING LEVELS OF PROTECTED SPEECH

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> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require . . . additional restrictions in respect of the use and occupation of private lands in urban communities . . . for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.[1]

Introduction

The scope of the First Amendment right of expression has expanded and contracted as the values and needs of American communities have changed.[2] Speech and published statements have always been entitled to the full protection of the First Amendment.[3] Films have also been found to come under the protection of the First Amendment because they are a means of expression.[4] The Court has held that speech may not be regulated on the

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1. City of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926).

2. The fate of one type of expression, sex-oriented material, has been varied and confused. In Roth v. United States, 354 U.S. 476, 485 (1957), the Court held that obscenity was not protected by the First Amendment. The opinion expressly excepted from this holding materials portraying sex with artistic, literary, or scientific merit. Depiction of sex in such circumstances is acceptable to allow persons "to cope with the exigencies of their period." *Id.* at 488 (citing Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940)). In Miller v. California, 413 U.S. 15 (1973), the Court adopted a standard that, in effect, left the determination of obscenity to local communities. "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-58 (1973), the Court held that the states have a legitimate interest in the regulation of the sale and distribution of obscene materials available to the public, including adult theaters barring minors. All these cases, however, granted non-obscene sexual expression the full protection of the First Amendment.

3. See text accompanying notes 142-59 *infra*.

4. Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

basis of content although all speech, including films, may be subject to reasonable time, place, and manner restrictions.[5] Adult theaters have a marked effect on the surrounding area; thus the time, place, and manner of their exhibition has been closely controlled. Regulation of adult materials has been permitted to further a municipality's interest in the morality of its citizens[6] and the quality of its neighborhoods.[7] Cities have been able to regulate the location of adult theaters using zoning ordinances, which traditionally have been granted great deference by the Supreme Court, even when constitutional rights were involved.[8] This power has been extended in *Young v. American Mini Theatres, Inc.*,[9] wherein the Court held that adult films, even though not obscene according to the standards set by the Supreme Court,[10] may be more strictly regulated than other forms of protected First Amendment expression.

In *American Mini Theatres*, the Court rejected vagueness, prior restraint, and equal protection challenges to Detroit, Michigan zoning ordinances that regulated the location of adult theaters in order to minimize their effect on the surrounding neighborhoods. Although a conflict existed between the Detroit ordinances and First Amendment freedoms because the location of adult theaters was regulated while that of non-adult theaters was not, the Court substantially ignored the zoning issue, and decided the case primarily on First Amendment grounds. Such an approach sets a precedent that permits all municipalities to regulate adult entertainment in ways more intrusive than previously allowed through zoning ordinances that burden sex-oriented expression.[11] In holding that protected adult materials may be

5. *Cf.* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (ordinance prohibiting all but labor picketing within 150 feet of a school held violative of equal protection on grounds that labor picketing is no less disruptive than other kinds). "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Id.*

6. Times Film Corp. v. Chicago, 365 U.S. 43 (1961).

7. "In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests 'other than those of the advocates are involved'. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-58 (1973).

8. *See* City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The Court rejected the Fifth Amendment as a ground for the invalidation of a zoning ordinance because of the deprivation of property without due process. *See also* Note, *Zoning Ordinance Which Classifies and Regulates Adult Movie Theatres And Bookstores Solely on the Basis of the Content of the Materials Which They Purvey Held Violative of Equal Protection Clause*, 44 FORDHAM L. REV. 657, 659 (1975); Note, *Equal Protection and Exclusionary Zoning: Boraas v. Village of Belle Terre*, 60 VA. L. REV. 137, 176 (1974).

9. 427 U.S. 50 (1976).

10. See note 2 *supra*.

11. *See, e.g.*, San Francisco Chronicle, Aug. 20, 1976, at 3, col. 4, indicating that San Jose, California intends to adopt an ordinance similar to that of Detroit, including a

regulated more strictly than protected non-adult materials, the Court allows unequal treatment of protected speech. *American Mini Theatres* could imply that all speech protected by the First Amendment may be assigned different values relative to the value of political speech.

This note first discusses the ordinances passed by the city of Detroit and delineates their apparent scope. The issues raised by the parties and the holdings of the lower courts are summarized. A detailed discussion of the Supreme Court opinion follows, dealing with the three primary constitutional issues raised: vagueness, prior restraint, and equal protection. Each of these sections begins with a statement of the claims presented and the Court's holding, followed by a summary of the applicable constitutional doctrines and an analysis of the Court's holding. Finally, the note discusses possible zoning problems raised by this case.

I. Background

A. The Ordinances

Supporters of a 1962 Detroit zoning ordinance contended that concentration of certain types of businesses lowered the quality of the neighborhoods in which the businesses were located. To prevent this, the ordinance provided that no two "harmful" businesses could be situated within 1,000 feet of one another.[12] In an attempt further to control concentrations of such uses, the city in 1972 enacted two amendments to the ordinance.[13] The first amendment defined the terms "Adult Motion Picture Theatre"[14] and "Adult Mini Motion Picture Theatre,"[15] adding them to the list of uses already regulated, and described sexual areas and activities which, if exhi-

provision that no sex-oriented business may be located within 1,000 feet of any residentially-owned property. Due to San Jose's overwhelmingly residential character, the effect of such an ordinance would be to prevent the opening of any new sex-oriented businesses. *See also* N.Y. Times, Nov. 28, 1976, at 1, col. 1.

12. DETROIT, MICH., OFFICIAL ZONING ORDINANCE § 66.0000, as amended in 1972. Other included uses were adult bookstores, establishments where liquor is sold on the premises, hotels and motels, pawnshops, pool or billiard halls, public lodging houses, second-hand stores, shoeshine parlours, and taxi dance halls.

13. *Id.* DETROIT, MICH., OFFICIAL ZONING ORDINANCE, No. 742-G (1972) (amending No. 390-G), and DETROIT, MICH., MUNICIPAL CODE, No. 743-G (1972) (amending Ch. 5, art. 2).

14. An Adult Motion Picture Theatre is an "enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to, 'Specified Sexual Activities,' or 'Specified Anatomical Areas' for observation by patrons therein." DETROIT, MICH., OFFICIAL ZONING ORDINANCE, No. 742-G, § 32.0007 (1972) (amending No. 390-G). See note 16 *infra* for a definition of "Specified Sexual Activities" and "Specified Anatomical Areas."

15. An Adult Mini Motion Picture Theatre is described similarly to an Adult Motion Picture Theatre, see note 14 *supra*, but seats less than 50 persons. DETROIT, MICH., OFFICIAL ZONING ORDINANCE, No. 742-G, § 32.0007 (1972) (amending No. 390-G).

bited in a film, would cause a theater to be labeled "adult."[16] An "adult" theater was one that was used to exhibit films that were "distinguished or characterized by an emphasis" on sex-oriented material.[17] The amendment, however, permitted a waiver of the 1,000 foot provision if the proposed use did not encourage deterioration of the neighborhood, if the use was not "contrary to the public interest or injurious to nearby properties,"[18] and if the use observed the spirit and intent of the ordinance.[19] The second amendment made it unlawful for anyone to operate any "Adult Motion Picture Theatre," "Adult Mini Motion Picture Theatre," or "Drive-in Theatre" unless he had received a license as required by the official zoning ordinance and the City Code of Detroit.[20]

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16. "Specified Sexual Activities" are defined as: "(1) Human Genitals in a state of sexual stimulation or arousal, (2) Acts of human masturbation, sexual intercourse or sodomy, (3) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast." DETROIT, MICH., OFFICIAL ZONING ORDINANCE, No. 742-G, § 66.0101 (1972) (amending No. 390-G). "Specified Anatomical Areas" were defined as: "(1) Less than completely and opaquely covered: (a) human genitals or pubic region, (b) buttocks and (c) female breast below a point immediately above the top of the areoia; and (2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered." DETROIT, MICH., OFFICIAL ZONING ORDINANCE, No. 742-G, § 32.0007 (1972) (amending No. 390-G).

17. DETROIT, MICH., OFFICIAL ZONING ORDINANCE, No. 742-G (1972) (amending No. 390-G), and DETROIT, MICH., MUNICIPAL CODE, No. 743-G (1972) (amending Ch. 5, art. 2). The amendment also made it unlawful to establish any Adult Bookstore, Adult Motion Picture Theatre, or Specified Class "D" Cabaret within 500 feet of any building containing a residential dwelling or rooming unit. (A Class "D" Cabaret features topless dancers, strippers, male or female impersonators, or similar entertainers. No. 742-G, § 32,0023 (1972) (amending No. 390-G)). The prohibition could be waived if the businessman filed with the city plan commission a petition approving the proposed use signed by 51% of the persons owning, residing, or doing business within a 500-foot radius of the proposed use. The petitioner was to attempt to contact all eligible locations, and to maintain a list of all addresses at which contact was made. DETROIT, MICH., OFFICIAL ZONING ORDINANCE, No. 742-G, § 66.0103 (1972) (amending No. 390-G.) A United States district court, in Nortown Theatres, Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974), invalidated the 500-foot radius provision. Thus, this issue was not before the Supreme Court in *American Mini Theatres*.

18. DETROIT, MICH., OFFICIAL ZONING ORDINANCE, § 66.0101 (a) (1972).

19. Waiver was permitted if the City Plan Commission made the following findings:

"a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.

b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal.

d) That all applicable regulations of this Ordinance will be observed." DETROIT, MICH., OFFICIAL ZONING ORDINANCE, § 66.0101 (1972).

20. The municipal code provided: "The Mayor may refuse to issue a license for the operation of any business regulated by this article, and may revoke any license already

The effect of the city's ordinances is to require every adult theater operator to obtain a waiver prior to establishing a theater within 1,000 feet of another regulated use. Similarly, an adult theater, as a regulated use, cannot operate within 1,000 feet of another regulated use unless the owner first obtains a waiver. Even theater owners who only show a single film that is "characterized by an emphasis" on sexual matters theoretically become adult theater operators and therefore are subject to the ordinances.[21] Failure to comply with the ordinances subjects the owner to criminal penalties.[22]

B. Judicial History

American Mini Theatres and Pussy Cat Theatres of Michigan were denied licenses as adult theaters because of their failure to comply with the 1,000 foot separation requirement.[23] They were, however, licensed as ordinary non-adult theaters. The theater owners brought suit in the United States District Court for the Eastern District of Michigan, and asserted that the Detroit ordinances violated their constitutional rights under the First and Fourteenth Amendments to the Federal Constitution because (1) the language of the ordinances is so vague as to deny them due process of law, (2) the ordinances are prior restraints and invade the area of protection provided by the First Amendment, and (3) the ordinances deprive the plaintiffs of the equal protection of the law afforded to other theater operators.[24]

The district court held that the ordinances were framed with sufficient specificity,[25] and that the city clearly had the power to license and zone the

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issued upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years of any criminal statute of the State, or of any ordinance of this city regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees or persons residing or doing business nearby." DETROIT, MICH., MUNICIPAL CODE, No. 743-G, § 5-2-3 (1972) (amending Ch. 5, art. 2).

21. Justice Blackmun, in his dissent in *American Mini Theatres* noted this by stating: "Neither does it instruct him on how to tell whether, assuming the films in question are thus 'distinguished or characterized,' his theater is being 'used for presenting' such films. That phrase could mean *ever* used, *often* used, or *predominantly* used, to name a few possibilities." 427 U.S. at 89.

22. A violation of the zoning ordinance subjects the person to a fine of not more than $500.00, or imprisonment for no more than 90 days. Each day a violation continues constitutes a separate offense. DETROIT, MICH., OFFICIAL ZONING ORDINANCE, No. 742-G, § 69.0000 (1972) (amending No. 390-G.) Michigan statutes also allow a court to declare a building a nuisance per se and authorize officials to abate the nuisance if it is found that the use to which the building is put is in violation of a municipal zoning ordinance. MICH. COMP. LAWS ANN. § 125.587 (1948).

23. 427 U.S. at 55.

24. *Id.* at 58.

25. Nortown Theatres, Inc. v. Gribbs, 373 F. Supp. 363, 367-68 (E.D. Mich. 1974).

location of businesses.[26] Further, the court found that the distinction between adult theaters and non-adult theaters on the basis of the content of the films exhibited did serve to restrain conduct protected by the First Amendment.[27] Because the city had demonstrated a compelling interest in the preservation of neighborhoods, however, and because the burden on expression was only indirectly related to the purpose of the ordinances, the court held there was only a slight infringement of the First Amendment.[28]

A three-judge court, the United States Court of Appeals for the Sixth Circuit, reversed, relying primarily on the proposition that government regulation of expression must be content-neutral.[29] The ordinances violated the equal protection clause of the Fourteenth Amendment because although Detroit had demonstrated a compelling interest[30] in preserving neighborhood values,[31] the court found the amendments to be an impermissible means of achieving this objective.[32] Other less burdensome alternatives were available.[33] The court held that the ordinances also violated the plaintiffs' First

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26. *Id.* at 366.

27. *Id.* at 369, 370.

28. *Id.* at 369-71.

29. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1020 (6th Cir. 1975). The court cited Police Dep't v. Mosley, 408 U.S. 92 (1972) as support for this conclusion. The Court held in *Mosley* that an ordinance prohibiting all picketing within 150 feet of a school, except labor picketing, violated the equal protection clause because there was no reason to suppose labor picketing was less disruptive than other types of picketing.

30. The court cited United States v. O'Brien, 391 U.S. 367 (1968), which stated: "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 376-77.

The Court has often distinguished between "pure" speech and speech that involves conduct, or a non-communicative element. An example of pure speech would be a political speech that did not incite to violence; an example of conduct that involves expression is picketing. Exhibition of films involves both speech and conduct. Pure speech has been afforded greater protection on the ground that talk is generally less harmful than conduct. Of course, all speech involves some form of conduct, or a non-communicative element. Therefore, all speech should be equally subject to regulation provided there is a showing of a compelling governmental interest, regardless of the degree of non-communicative elements present, on the basis of the effects of the expression.

31. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1018 (6th Cir. 1975).

32. *Id.* at 1019-20.

33. "The City could legally regulate movie theatres and bookstores under its police powers by providing that such establishments be operated only in particular areas. It

Amendment rights by imposing a prior restraint on expression.[34] One of the three judges dissented, arguing that the ordinances did not regulate the content of expression, but rather regulated the right to locate a business based on the potential adverse effects of its location.[35] The dissent thereby implied that the burden on First Amendment rights was no greater than necessary to further the compelling governmental interest.[36]

II. Supreme Court Opinion

The Supreme Court upheld the Detroit ordinances. Justice Stevens, writing for the majority, rejected each of the constitutional claims presented by the theater owners: vagueness, prior restraint in violation of the First Amendment, and violation of the equal protection clause.[37] Justice Powell concurred in only two parts of the opinion. He would have decided the equal protection claim by recognizing the ordinances as valid time, place, and manner restrictions justified by the strong governmental interest in the quality of neighborhoods.[38] Justice Stewart dissented, stating that the ordinances impermissibly regulated the exhibition of films on the basis of content.[39] Also dissenting, Justice Blackmun maintained that the ordinances were vague and overbroad, and should therefore have been invalidated.[40]

A. Vagueness and Overbreadth

1. The Supreme Court's Disposition

The theater owners claimed that the ordinances were vague in two respects. First, theater owners could not determine how much of the described sexual activity would be permissible in a film before the exhibition would be "characterized by an emphasis" on such matter. Second, the ordinances failed to specify adequate procedures for obtaining a waiver of the 1,000 foot provision. In the absence of such guidelines, it was argued that decisions as to the granting of waivers would be ad hoc and subjective.[41]

might also have validly provided that such establishments be operated only during certain hours." 518 F.2d at 1020. When a statute sweeps too broadly, restricting First Amendment rights unduly, it may be invalidated if there is a less restrictive alternative available. Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971, 1011-16 (1974).

34. 518 F.2d at 1018-21.
35. *Id.* at 1023 (Celebrezze, J., dissenting).
36. *Id.* at 1024-25.
37. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).
38. *Id.* at 73-84 (Powell, J., concurring in the judgment and portions of the opinion).
39. *Id.* at 84-88 (Stewart, J., dissenting).
40. *Id.* at 88-96 (Blackmun, J., dissenting).
41. *Id.* at 58. Although the Court treated the case as involving only the rights of the theater owners themselves, the rights of viewers of adult films were also involved. Because adult films could be shown frequently only in licensed adult theaters, the Detroit ordinances also restricted viewers' First Amendment rights.

The Court initially focused on whether the theater owners had notice that their behavior was covered by the ordinances. Both theater owners had stipulated that they owned adult theaters as defined by the ordinances. Neither theater owner had applied for a waiver of the provision in regard to his establishment, nor alleged any basis for anticipating one. Therefore, the Court reasoned that the theater owners had notice that their behavior was covered, and could not assert standing to challenge the ordinances on their own behalf.

Although the Court stated that these theater owners unquestionably fell within the coverage of the ordinances,[42] the owners alternatively alleged that they had standing to assert the rights of third parties whose behavior might be inhibited by the ordinances.[43] In an extensive footnote, the Court listed the recognized exceptions to traditional rules of standing.[44] Among the exceptions the Court listed are those situations in which a statute is overbroad in its attempt to regulate the time, place, and manner of expression, and those cases in which officials have enjoyed wide discretion in licensing procedures.[45] These exceptions reflect the Court's concern that an overbroad statute may deter persons from exercising their constitutional rights. The Court noted that restrictions have been placed on the ability to raise overbreadth claims:[46] it has said that the statute's deterrent effect on expression

42. *Id.* at 58-59. To be valid, a statute need not have every element of uncertainty removed. The Supreme Court has noted that "[T]here are limitations in the English language with respect to being both specific and managably brief," and has stated that as long as the prohibitions "are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with," the statute should not be declared unconstitutional. Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 578-79 (1973).

43. 427 U.S. at 59.

44. *Id.* at 59 n.17. The Court's list is taken from Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973).

45. A vague statute is always overbroad. Thus, the overbreadth cases cited by the Court should be applicable to the vagueness challenge raised in *American Mini Theatres*. Overbreadth claims primarily have been entertained in cases involving "only spoken words," Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Street v. New York, 394 U.S. 576 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), but cases involving conduct are heard also. Overbreadth claims have been allowed when a statute has attempted to regulate the time, place, and manner of expressive conduct. Grayned v. City of Rockford, 408 U.S. 104 (1972); Cameron v. Johnson, 390 U.S. 611 (1968); Zwickler v. Koota, 389 U.S. 241 (1967); Thornhill v. Alabama, 310 U.S. 88 (1940). The Court also protects rights of association that might be burdened by an overbroad statute. Keyishian v. Board of Regents, 385 U.S. 589 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Shelton v. Tucker, 364 U.S. 479 (1960). Vagueness and overbreadth claims are also heard under the more lenient standing requirements when officials have enjoyed wide discretion in licensing procedures. Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Kunz v. New York, 340 U.S. 290 (1951); Lovell v. Griffin, 303 U.S. 444 (1938).

46. 427 U.S. at 59 n.17. "[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that

must be "real and substantial."[47] If the statute is "readily subject to a narrowing construction by the state courts,"[48] it may not be challenged. Because the only vague element in the Detroit ordinances concerned the amount of sexual activity portrayed before a film would be "characterized by an emphasis" on sex-oriented material, the Court found no substantial deterrent effect. Any doubt could be readily answered by a state court construction narrowing the coverage of the ordinances. The possibility that a state court might narrow the ordinances could justify a federal court's abstention from interference in a pending state criminal proceeding. But because no such proceeding was pending, the Supreme Court in *American Mini Theatres* found that abstention was inapposite.[49]

its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

47. 427 U.S. at 60 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975)).

48. *Id.*

49. 427 U.S. at 60-61. The Court attempted to bolster its refusal to consider the vagueness arguments of the theater owners by alluding to the doctrine of federal nonintervention, by which federal courts decline to intervene in state criminal proceedings before the state court has rendered a judgment. Such deference is grounded on concerns of federalism, comity, and equity jurisprudence. In Dombrowski v. Pfister, 380 U.S. 479 (1965), however, the Court intervened to grant declaratory and injunctive relief. In that case, Louisiana state officials prosecuted and threatened to prosecute a civil rights organization under Louisiana's Subversive Activities and Communist Propaganda Control Laws. The Court held, *inter alia*, that because the statute was overbroad, prosecution or the threat of it had a chilling effect on protected First Amendment speech, and protracted criminal litigation might not vindicate the plaintiffs' constitutional rights. *Id.* at 486, 490-91. In addition, the statute could only be narrowed on a case-by-case basis. The organization was allowed standing to challenge the statute without a determination whether its conduct could be regulated by a statute drawn with the requisite specificity because the injury it suffered was deemed irreparable. *Id.* at 489. In Younger v. Harris, 401 U.S. 37 (1971), the Court began to limit the scope of the federal intervention doctrine. It would not intervene to grant injunctive relief in a *pending* state criminal proceeding unless the damage was irreparable as well as "great and immediate." *Id.* at 46. The "chilling effect" of a state criminal statute alone was considered insufficient to warrant intervention. *Id.* at 50. In Samuels v. Mackell, 401 U.S. 66 (1971), the Court held that the same equitable principles determine whether intervention is proper in a pending state criminal prosecution involving declaratory relief. The principles of *Younger* and *Mackell* were not applied, however, to *threatened* prosecutions in Steffel v. Thompson, 416 U.S. 452 (1974). Declaratory relief against a threatened state prosecution is permissible without the showing of bad faith prosecution required by *Dombrowski* as long as the plaintiff demonstrates a genuine threat of enforcement. *Id.* at 462. In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the Court held that federal courts should refrain from intervening in quasi-criminal nuisance proceedings even though a party might eventually have the right

Justice Powell concurred in this part of the Court's opinion.[50] Justice Blackmun dissented, contending that an exhibitor of adult films would not know whether his behavior was covered by the statute, which therefore deters protected conduct. He concluded that the ordinances had a substantial deterrent effect, that they were not readily subject to a narrowing construction by the state courts, and that adult material was entitled to the same protection as all other expression protected by the First Amendment.[51]

2. *Vagueness and Overbreadth Doctrines*

The concept of vagueness derives from the Fourteenth Amendment due process requirement of notice. Although challenges to vague laws may be raised for several purposes, this note will discuss only the First Amendment principles of vagueness and overbreadth that are incorporated into the Fourteenth Amendment. A vague criminal statute is one that impinges on First Amendment expression by failing to provide adequate standards by which a person of average intelligence may judge his conduct.[52] A statute is overbroad when it sweeps within its coverage protected as well as unprotected

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to appeal in the federal courts on a federal claim. *Id.* at 605-11. The Court in Young v. American Mini Theatres, 427 U.S. 50, 61 (1976), discussed only *Dombrowski*, and reasoned that although an exhibitor might have doubts about whether a film was "characterized by an emphasis" on sexual material, the threat was not sufficient to justify the exceptional discretion exercised in granting review in *Dombrowski*. *Dombrowski* is distinguishable, however, because in *American Mini Theatres* no criminal proceeding was pending; there was only the threat of criminal prosecutions. The theater owners were entitled to review even without a showing of bad faith prosecution, at least for declaratory relief, under *Steffel*. In Juidice v. Vail, 45 U.S.L.W. 4269 (U.S. Mar. 22, 1977), the Court held that the principles of *Younger* and *Huffman* are not confined to criminal and civil proceedings. The strong federalism and comity concerns apply also to prevent federal intervention in a state contempt proceeding. *Id.* at 4271-72. It is unclear whether the Court would extend these holdings to situations where injunctive relief is requested in the face of threatened prosecutions without a showing of bad faith prosecution.

50. 427 U.S. at 73.

51. *Id.* at 94-96.

52. Buckley v. Valeo, 424 U.S. 1, 41 n.48 (1976). Justice Marshall, in Grayned v. City of Rockford, 408 U.S. 104 (1972), explained the three vices of vagueness. "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abuts upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of those freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " *Id.* at 108-09 (citations omitted). *See also* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 68 (1960).

speech.[53] The concern in both vagueness and overbreadth cases is that the sweeping nature of the statute might have a chilling effect because those whose speech is protected would be hesitant to exercise their right of expression for fear of being prosecuted.[54] Thus, a vague or overbroad statute is generally invalidated unless it can be narrowly tailored to serve a compelling state interest.[55] A vague statute is necessarily overbroad because due to the ambiguity of the language it is possible to apply the statute to protected as well as unprotected speech. A statute may be overbroad, however, and yet not be vague; for although the behavior covered may be specified in sufficient detail, some of it may be constitutionally protected.

A threshold issue to the consideration of the substantive aspects of vagueness and overbreadth is whether a party has standing to assert these claims. Standing decisions imply that generally a person may only challenge a statute if the statute is unconstitutional in regard to him, provided he has the requisite personal stake in the outcome.[56] There are, however, exceptions allowing a person to assert the rights of third parties: (a) when a statute, though constitutional as applied to him, is unconstitutional as applied to third parties coming within its scope,[57] or (b) when the constitutional rights

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53. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 n.5 (1970).

54. "[B]ecause 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn,' . . . 'in every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom,' . . . In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." Gooding v. Wilson, 405 U.S. 518, 522 (1972).

55. "The consequences of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. . . . Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." Broadrick v. Oklahoma, 413 U.S. 601, 613-14 (1973). *See also* Comment, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853 (1970); note 65 *infra*.

56. The litigant must have a personal stake in the outcome in all standing cases. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 561 (1977); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. 490, 498 (1975); Baker v. Carr, 369 U.S. 186, 214 (1962).

57. One commentator has stated: "If a party against whom a statute is sought to be enforced can show preliminarily non-severability of application or that an attempt to sever would leave standing a statute that would be incapable of giving fair notice of its prohibitions, that party has standing to challenge the statute on the grounds that it infringes the rights of third parties coming within its application." Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 608 (1962).

A distinction must be made between *jus tertii*, or normal third party standing, and standing in overbreadth cases. Overbreadth claims are heard when a claimant, although his conduct could be regulated by a narrowly drawn statute, is allowed to assert the in-

of third parties will be adversely affected by the outcome of the suit,[58] and there is a close relationship between the litigant and the third party.[59]

Included within the first exception are third parties whose standing is allowed on the basis of the "chilling effect" of the statute.[60] A litigant must show that a statute may result in an overbroad application, having a deterrent effect on protected conduct of third persons. In order to remove this deterrent effect on the fundamental right of free expression[61] the Court grants the litigant standing to challenge the legislation even though a narrowly drawn statute could constitutionally regulate that litigant's conduct. The litigant is allowed to assert the rights of the group he represents to protect the entire group rather than being denied standing because his own rights are not necessarily violated. Thus, the Court aims to preserve the exercise of important First Amendment rights that otherwise might not be exercised for fear of violating a statute.[62]

The situations in which a litigant obtains standing because of the chilling effect of a statute apparently were expanded in *Dombrowski v. Pfister*.[63] In that case the Court stated that in two situations relief will be granted because of the chilling effect: first, where the statute is unconstitutional on its face, the Court will invalidate it because its mere existence is a deterrent to freedom of expression; second, if a valid statute is used for the purpose of discouraging protected activity, the Court will entertain a suit for declaratory or injunctive relief.[64] If a statute is readily subject to a narrowing construction by the state courts, however, the challengers may not assert the rights of third parties.[65]

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fringed constitutional rights of others not before the court. *Jus tertii* claims, however, are heard when a litigant alleges that a single application of a law injures him *and* infringes on the rights of third parties not before the court. *Jus tertii* is allowed when one or more of three factors are present: "[F]irst, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders' asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of jus tertii not permitted." Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 423-25 (1974).

58. *See* Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974), and cases cited therein.

59. *See* NAACP v. Alabama, 357 U.S. 449, 458-60 (1958). *See also* Eisenstadt v. Baird, 405 U.S. 438, 446 (1972).

60. Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 820-21 (1969) [hereinafter cited as *Chilling Effect*].

61. See note 127 *infra* for a discussion of fundamental rights.

62. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973); Cameron v. Johnson, 390 U.S. 611 (1968); Baggett v. Bullitt, 377 U.S. 360 (1964); NAACP v. Button, 471 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Douglas v. City of Jeannette, 319 U.S. 157 (1943).

63. 380 U.S. 479 (1965).

64. *Id.* at 489-90. See *Chilling Effect*, *supra* note 60, at 813.

65. 380 U.S. at 491. In Steffel v. Thompson, 415 U.S. 452 (1974), the Supreme Court allowed a federal court to hear a request for a declaratory judgment that a statute

The Court soon began to limit the scope of the chilling effect principle in *Laird v. Tatum*.[66] The Court there stated that when governmental regulations only indirectly deter expression, a challenger of a statute must show a threat of specific future harm.[67] The Court continued its limitation in *Broadrick v. Oklahoma*,[68] in which it held that a statute's deterrent effect must be both "real and substantial."[69] Remote or tenuous possibilities of a chilling effect on expression will not support relaxation of the standing requirements.

3. Application of Vagueness Doctrine

Applying the traditional vagueness principles, the Detroit ordinances were vague, and therefore the theater owners should have had standing to challenge the ordinances. Even though the theater owners admitted that their theaters clearly fell within the classification of adult theaters, the author contends that the ordinances were still vague in regard to them because adequate standards were not provided by which they might judge their conduct and by which waivers of the distance limitation might be granted. Additionally, they might have been allowed third party standing to challenge the ordinances on the basis of their possible chilling effect on protected speech of non-adult theater owners.

Justice Blackmun's dissent details the difficulties presented by the ordinances. The ordinances seem to violate the due process requirement of notice because theaters cannot determine whether their conduct is in fact covered by the ordinances. The guidelines in the ordinances, although perhaps adequate in detail as to areas and activities that appear in adult films, are unclear as to what percentage of these activities and areas must be present for a film to be "characterized by an emphasis" on such matter.[70]

was invalid as applied where no state proceeding was pending, even though the state court had not had an opportunity to narrow the statute. The Court based its decision partially on the fact that a declaratory judgment that a statute is void on its face would interfere with state proceedings more than the narrower judgment that a statute is invalid in a few limited situations, and thus concerns of federalism and comity would not prevent review. In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the Court held that a litigant must exhaust his remedies in a state court, including obtaining a narrowing construction, before a federal court will intervene in a state quasi-criminal nuisance proceeding. *Id.* at 609.

66. 408 U.S. 1 (1972). In Younger v. Harris, 401 U.S. 37 (1971), the Court had emphasized that the chilling effect of a statute alone was not enough to justify federal intervention: "Moreover, the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so." *Id.* at 50-52.

67. 408 U.S. at 11.

68. 413 U.S. 601 (1973).

69. *Id.* at 615.

70. 427 U.S. at 88-89 (Blackmun, J., dissenting).

The proprietor of a non-adult theater must decide *before* he shows a film whether it contains enough of the specified material to warrant being considered an adult theater. If he plans to exhibit an adult film and is within 1,000 feet of another regulated use, he specifically must be granted a waiver as an adult theater before he may show the film. Additionally, the proprietor of an adult theater must ascertain whether any other theater or bookstore within 1,000 feet is an adult theater or bookstore and the character of its presentations. The status of each use must be continually re-evaluated.[71] These decisions are made by each proprietor without legislative guidance, and at the risk of criminal penalties.[72] After two violations of the statute, if found to be harmful to the welfare of the citizenry, the mayor may revoke the proprietor's licence without review.[73]

Several cases have found similar statutes to be vague.[74] In one such case, *Hynes v. Mayor of Oradell*,[75] the Court invalidated an ordinance requiring any person soliciting door-to-door for a recognized charitable or political cause to give notice in writing, for purposes of identification, to the local police department. The Court held that the ordinance, because of its potentially inhibiting effect on speech, had not been drawn with the necessary specificity. Such terms as "charitable cause" were unclear, and the ordinance did not specify which types of organizations it was to cover. It did not indicate what method of notice was adequate, or what types of identification would be required. By the *Hynes* standard, the Detroit ordinances are vague; a person must guess whether his behavior is covered by the ordinances.[76] Such ordinances operate as potential deterrents to freedom of expression because, rather than risk criminal penalties, a theater owner might well eschew the exhibition of a sex-oriented film.[77]

As Justice Blackmun points out, the Detroit ordinances are vague in that they do not specify standards by which city officials may grant or deny waivers of the 1,000 foot provision.[78] Other statutes have been invalidated

71. *Id.* at 90.

72. See note 22 *supra*.

73. See note 20 *supra*.

74. *See, e.g.*, Coates v. Cincinnati, 402 U.S. 611 (1971), in which an ordinance that made it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by" was invalidated because no standard of conduct was clearly specified. In Baggett v. Bullitt, 377 U.S. 360 (1964), the Supreme Court considered statutes that required a person desiring to be a state employee to take loyalty oaths and to affirm the Constitution and the United States and state laws, and to swear he had respect for the flag and that he was not a subversive person. The Court found the statutes vague because they did not specify a requirement that a person know that his teaching, in this case that of a schoolteacher, might cause overthrow of the government.

75. 425 U.S. 610 (1976). *See also* 427 U.S. at 88-96 (Blackmun, J., dissenting).

76. 427 U.S. at 92-94 (Blackmun, J., dissenting).

77. *Id.* at 90.

78. *Id.* at 91-92.

because of such inadequate standards.[79] One provision of the Detroit ordinances allows the mayor to refuse or revoke a license if he finds the applicant has violated the ordinances or a criminal statute within the past two years in a way that evidences a flagrant disregard for the welfare of the citizens.[80] The mayor therefore has unreviewable discretion to grant or refuse licenses if the proprietor has previously violated the ordinance. The mayor is allowed to define "flagrant disregard for the welfare of the citizens" with no statutorily defined standards on which to base his definition. Further, a waiver of the 1,000 foot provision can be granted by the City Plan Commission only if the establishment is not "contrary to the public interest" or "against the spirit and intent" of the ordinance. No more definite standards are given and no opportunity for review is specifically provided. The unbridled discretion of officials could have a chilling effect on the exercise of First Amendment rights. Applicants for licenses or waivers could be discouraged because of the likelihood of arbitrary denial. A later challenge by a proprietor on the ground of abuse of discretion would be time-consuming and expensive.[81]

In denying review of the vagueness issue the Court relied on *Parker v. Levy*,[82] which held that a person whose conduct is squarely covered by an ordinance may not assert third party standing to challenge it. *Parker* upheld the conviction of Levy, an Army physician, for making public statements urging black enlisted men to refuse orders to go to Vietnam, and for referring to Special Forces personnel by such derogatory terms as "liars and thieves" and "killers of women and peasants," in violation of the Uniform Code of Military Justice.[83] The Court held that third party standing would not be extended to Levy because he was aware that his conduct was covered by the Code, and the military courts had narrowed the statute. Because of the military's unique system of justice, the holding in *Parker* clearly should be

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79. In Gelling v. Texas, 343 U.S. 960 (1952), an ordinance allowing a board to deny a license to a film "of such character as to be prejudicial to the best interests of the people of said city," was held to be invalid on the ground of vagueness. In Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), the Court invalidated as vague due to inadequate standards an ordinance authorizing a board to classify films as to whether they were "suitable for young persons." The Board was to so classify films portraying "sexual promiscuity" which in its judgment was "likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or appeal to their prurient interest." *Id.* at 691-92. In Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), the Court overturned a permit requirement for parades because the permit could be refused if the city commission believed the public welfare, peace, safety, health, decency and good order, morals, or convenience required that it be refused.

80. See note 20 *supra*.

81. *See Chilling Effect*, *supra* note 60, at 827-28.

82. 417 U.S. 733 (1974).

83. 10 U.S.C. § 890 (1970) (U.C.M.S. art. 90); *id.* § 933 (art. 133), *id.* § 934 (art. 134).

limited to military cases.[84] It would seem that the theater owners, as civilians, are not governed by the *Parker* rule and should be able to assert third party standing.[85]

The theater owners should have been granted third party standing to challenge the ordinances even though their own behavior was covered, based on the chilling effect of the ordinances. The Court could have invoked the first prong of the *Dombrowski v. Pfister*[86] holding: a statute unconstitutional on its face could be invalidated because of its potential deterrence of protected expression.[87] The Detroit ordinances are vague on their face because it is unclear what behavior they cover, and no standards for official decisionmaking are provided. Standing possibly should be granted to a litigant in such a case with no requirement that he show that the prosecution was pursued in bad faith as in *Dombrowski*.[88]

It is likely, however, that the theaters would not have surmounted the hurdles to obtain third party standing to allege that the Detroit ordinances had a chilling effect. The ordinances had not been narrowed by the state court, as preferred in *Dombrowski*.[89] The Supreme Court for that reason might refuse to review the ordinances for vagueness. The specific threat of harm required by *Laird v. Tatum*[90] was present, however. The theaters had been notified that their exhibition of adult films was in violation of the ordinances and that they faced possible criminal prosecution.

It would appear that the criterion of a substantial deterrent effect set out in *Broadrick v. Oklahoma*[91] is met. Both adult and non-adult theater owners must determine whether their establishment is within 1,000 feet of another regulated use before they show a movie which could possibly be characterized as having an emphasis on sex. Both types of theaters might be deterred by the standardless discretion granted to officials to grant licenses and waivers. A non-adult theater may forego the exhibition of any films with an orientation toward sex if the exhibition of such a film might cause him to

84. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976), which upheld the denial of a request from several left-wing candidates to speak in restricted areas of Fort Dixon, New Jersey. In his concurrence, Justice Powell emphasized that military activities are not governed by democratic procedures. The legitimate interest of the public in maintaining the reality and appearance of political neutrality of the armed services outweighed the interests of political candidates and their servicemen audience in the availability of a military base for campaign activities. *Id.* at 844-48. *See also* EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 57 (1970). In similar situations, restrictions on the rights of federal employees have been justified in the interest of political neutrality. Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973).

85. *See* 427 U.S. at 94-96 (Blackmun, J., dissenting).

86. 380 U.S. 479 (1965).

87. See text accompanying notes 63-65 *supra*.

88. *See Chilling Effect*, *supra* note 60, at 816-18.

89. See notes 63-65 and accompanying text *supra*.

90. See notes 66-67 and accompanying text *supra*.

91. 413 U.S. 601 (1973). See text accompanying notes 68-69 *supra*.

be labeled an unlicensed "adult" theater in violation of the ordinances. The Court in *American Mini Theatres* indicated, however, that the lesser value of the speech in question implied that it did not deserve such close review because the right to receive or communicate such speech is not entitled to as much protection as other kinds of speech. Thus, although a definite showing of harm and deterrence may be made, the fact that the statute has not been narrowed caused the Court to refrain from review of the vagueness issue.

The numerous requirements that a litigant must meet to obtain standing to challenge a statute because of its chilling effect preclude review except in the most extreme cases. The Court's unwillingness to review the vagueness and overbreadth arguments indicates its desire not to extend standing based on these challenges. The *American Mini Theatres* case might be seen, however, as a decision not to review the issue because of the facts of the case. The theaters had stipulated that they were adult theaters. Thus, the question of the impact of the statute on non-adult theaters was precluded, thereby narrowing the grounds for review of the vagueness issue. The Court could then as mater of policy refuse to review the issue.[92]

92. The Court's refusal to review the Detroit ordinances in spite of their possible chilling effect raises questions about the Court's inconsistent treatment of vagueness claims. One commentator has argued that the doctrine of vagueness is used by the Supreme Court to create a buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms. Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960). "These considerations will suggest that the void-for-vagueness doctrine may be regarded less as a principle regulating the permissible relationship between written law and the potential offender than as a practical instrument mediating between, on the one hand, all of the organs of public coercion of a state, and, on the other, the *institution* of federal protection of the individual's private interests." *Id.* at 81.

The concerns that determine whether the Court will entertain a vagueness challenge in its balancing of these interests appear to be: (1) whether the statute is more uncertain than the average statute; (2) the nature of the individual freedom at stake; (3) the probability of its violation; (4) the potential deterrent effect of irregular applications of the statute and violation of the individual right on the exercise of that right; (5) the practical power of the Court to supervise the application of the statute; and (6) the necessity of ad hoc judgments. The Court in *American Mini Theatres* apparently did not deem these factors important if it considered them at all. First, the fact that the areas and activities covered by the ordinances were specifically described in the ordinances militated against vagueness review. The requirement that the films be "characterized by an emphasis" on sexual material before they would be covered by the statute, however, is clearly vague. As Hynes v. Mayor of Oradell, 425 U.S. 610 (1976), illustrates, the requirements of the Detroit ordinances are no less uncertain than other ordinances which have been invalidated. The Court in *American Mini Theatres* decided, however, that the only vagueness in the ordinances concerned the amount of sexually explicit material a theater could show before it was considered adult. This question could be readily answered in the state courts. 427 U.S. at 61. Second, although First Amendment interests generally are regarded as fundamental, the Court decided that sexually-oriented materials deserve less protection than other types of expression. Therefore, because of content, what would be an interest deserving close review did not merit examination for vagueness. *Id.* Justice Blackmun noted

B. Prior Restraint

1. The Supreme Court's Disposition

The theater owners alleged that the ordinances constituted prior restraints because inadequate procedures were provided for the granting of licenses and waivers.[93] The city of Detroit acknowledged that the ordinances prohibited theaters not licensed as adult from exhibiting sex-oriented films.[94] The majority held that because the theaters were restricted only as to location, the slight degree of prior restraint did not justify invalidating the ordinances. An indefinite number of adult theaters were permitted in the city as long as they complied with the zoning ordinances and obtained a license. The majority pointed to the city's interest in the quality of its neighborhoods as justification for regulating material protected by the First Amendment.[95]

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in his dissent, "As to the third reason, that 'adult' material is simply entitled to less protection, it certainly explains the lapse in applying settled vagueness principles, as indeed it explains this whole case." *Id.* at 96 (Blackman, J., dissenting). Third, the Court indicated that even if the individual rights involved were likely to be violated, they could easily be vindicated by a narrowing construction of the ordinances by the state courts on a case-by-case basis. 427 U.S. at 61. Since there had been no narrowing construction attempted, the Court was reluctant to invalidate all of the ordinances. Fourth, although the system would seem to approach censorship if it induced exhibitors to forego exhibition of protected films because they are unable to determine to what extent these films or the films of their neighbors are covered by the ordinances, the Court indicated that the potential deterrent effects are slight compared with the limited value of the expression. *Id. See id.* at 88 (Blackmun, J., dissenting). "Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court." 427 U.S. at 61. The city's interest in controlling this form of expression because of its harmful effect on neighborhoods was deemed overwhelming. *Id.* at 71-73. Fifth, the Court did not seem concerned about lower court supervision of the ordinances, perhaps due to federalism concerns. *Id.* at 71. Finally, the Court implied that possible ad hoc judgments by local officials are justifiable in the city's attempt to preserve the viability of its neighborhoods. *Id.* at 61. The exercise of freedoms such as that of expression thus seem to depend on a municipality's ability to maintain the public order.

This overview of the criteria often deemed important in the Court's decisions to hear a vagueness challenge may indicate that such a refusal is a policy decision and that the merits of the claims are not closely scrutinized. In *American Mini Theatres* the right to exhibit and view adult movies in any location was considered less important than the city's interest in preserving the quality of the neighborhoods surrounding adult theaters. Resolution of the problems adult theaters cause was considered best left to the cities themselves, there being no clear solution to this conflict. *Id.* at 71.

93. Brief for Respondent at 33-36, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

94. 427 U.S. at 62. Justice Blackmun recognized that the Detroit ordinances constituted a prior restraint, but he chose to emphasize what he considered the more glaring defect of vagueness. *Id.* at 91 n.4. (Blackmun, J., dissenting).

95. 427 U.S. at 62-63.

2. The Doctrine of Prior Restraint

Historically, officials cannot regulate speech on the basis of its content.[96] Under limited circumstances, however, a prior restraint, which is an attempt to restrain before publication the expression or publication of material on the basis of its content, may be allowed.[97] Prior restraints are not unconstitutional per se.[98] Any system of prior restraints, however, "comes to [the] Court bearing a heavy presumption against its constitutional validity,"[99] because our society would prefer to punish persons after their expression is determined to transgress the law.[100]

A prior restraint, to be valid, must first fit within one of a few limited exceptions. These exceptions include war-time secrets, prior censorship of films, reasonable time, place, and manner restrictions on expression in public places, and situations in which rights of individuals in surrounding areas are violated, or in which there is a captive audience.[101] Second, a prior restraint must be accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech.[102] In this regard the Court has stated:

> We held in *Freedman*, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards:

96. *See, e.g.*, Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. SOC. PROB. 648, 655 (1955), in which the author asserts that it is a general presumption of our society that freedom of expression is the rule and restraint is the exception.

97. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 n.10 (1963). *See* Times Film Corp. v. Chicago, 365 U.S. 43, 49-50 (1961); Near v. Minnesota, 283 U.S. 697, 716 (1931).

98. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975).

99. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

100. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975). "Under a system of subsequent punishment, the communication has already been made before the government takes action; it thus takes its place, for whatever it may be worth, in the marketplace of ideas. Under a system of prior restraint, the communication, if banned, never reaches the marketplace at all. Or the communication may be withheld until the issue of its release is finally settled, at which time it may have become obsolete and unprofitable. Such a delay is particularly serious in certain areas—such as motion pictures—where large investments may be involved." Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. SOC. PROB. 648, 657 (1955).

101. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931) (war-time secrets); Times Film Corp. v. Chicago, 365 U.S. 43 (1961) (prior censorship of films); Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953) (reasonable time, place and manner restrictions such as permits on expression in public places); Cameron v. Johnson, 390 U.S. 611 (1968); Adderly v. Florida, 385 U.S. 39 (1966) (use of a facility primarily serving a competing use); Kovacs v. Cooper, 336 U.S. 77 (1949) (rights of individuals in the surrounding areas violated); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (captive audience).

102. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975). For a discussion of standards for official decisionmaking, see text accompanying notes 112-14 *infra*. *See also* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 518-20 (1970).

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.[103]

3. Application of Prior Restraint Doctrine

One of the limited exceptions was employed by the Court in *Kovacs v. Cooper*,[104] which upheld a prior restraint under circumstances similar to those in *American Mini Theatres*. The *Kovacs* ordinance barred from public streets vehicles emitting "loud and raucous" noises. The Court held that the residents, a captive audience, suffered an invasion of the quiet of their homes by being forced to hear these noises.[105] In the *American Mini Theatres* case, it was demonstrated in the trial court that adult businesses, if concentrated in a particular area, would have a detrimental effect on surrounding property values. Experience in cities such as Boston indicates that, when sex-oriented businesses become more prominent in a neighborhood, residents feel less neighborhood pride.[106] A belief that the neighborhood will deteriorate causes real estate prices to drop, businesses and residents to move from the area, and the crime rate to rise.[107] The detrimental effect on property and aesthetic values thus arguably justifies a prior restraint in this case.

The Detroit ordinances, however, do not meet the second requirement of a justifiable prior restraint; they lack adequate procedural safeguards. Although they impose no direct censorship, they have the *effect* of a prior restraint in that they discourage protected conduct. The Detroit ordinances deter protected conduct in three respects: adequate standards for granting licenses and waivers are lacking, prompt judicial review is not provided, and a theater owner cannot accurately judge whether his conduct is covered by the ordinances.

Every motion picture exhibitor must obtain a license before he is allowed to exhibit any film, and denial of a license may be based on the mayor's determination that the proposed theater intends to show adult films. The mayor must determine whether the applicant has violated any city ordinances or state criminal statutes within the last two years in a way that "evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby."[108] This indefinite standard might discourage potential applicants because of the fear

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103. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975).

104. 336 U.S. 77 (1949).

105. *Id.* at 87.

106. *See* NEWSWEEK, Dec. 6, 1976, at 35.

107. Appendix to Supreme Court Briefs at 16-50, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

108. See note 20 *supra*.

that some past action might in the mayor's judgment evidence a flagrant disregard for the public welfare. It is unclear whether the ordinance requires a prior conviction. The mayor can also revoke an existing license of any non-adult theater under the "flagrant disregard" standard;[109] this could deter non-adult theater owners from exhibiting even one adult film.[110] The deterrence becomes even more likely because any person who violates the ordinances is also subject to the criminal penalty of a fine or jail sentence.[111]

In *Southeastern Promotions, Ltd. v. Conrad*,[112] the Court reversed a state court determination upholding a decision by the directors of a municipal theater in Chattanooga to reject the application of Southeastern Promotions to stage the musical "Hair". The Court held that the refusal to allow use of the theater constituted a prior restraint under a system that lacked minimum procedural safeguards. The opinion reasoned:

> Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law.[113]

Similar considerations seem applicable in *American Mini Theatres*. The standards used by officials to determine whether a movie was meant to be regulated under the ordinances seem inadequate in that they lack specificity,

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109. For a case raising the issue of standards given to officials, *see, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), in which a Birmingham ordinance prohibiting parades without a permit was invalidated because a provision that a permit would be refused if the city thought the parade would not be for the "public welfare, peace, safety, health, decency, good order, morals, or convenience" was deemed to delegate a standardless discretionary power to city officals. *Id.* at 149-50.

110. "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." NAACP v. Button, 371 U.S. 415, 433 (1963). In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), a New York law that forbade exhibition of any motion picture without a license was held invalid because a license could be denied if a film was considered "sacrilegious." *Id.* at 506. In Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), a board was authorized to classify motion pictures as suitable for young persons if the film did not portray (1) brutality, criminal violence, or depravity in such a manner as likely to incite young persons to crime or delinquency, or (2) "sexual promiscuity or extra-marital or abnormal sexual relations in such manner as . . . likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or appeal to their prurient interest." *Id.* at 681. The film was unsuitable if it was likely to convey the message that such behavior was acceptable. Terms such as "sexual promiscuity" and "acceptable" were not defined, and the Court held that the ordinance was void because it did not provide narrowly drawn and definite standards for officials to follow. *Id.* at 690. *See also* Marcus v. Search Warrant, 367 U.S. 717 (1961).

111. See note 22 *supra*.

112. 420 U.S. 546 (1975).

113. *Id.* at 553.

thereby granting unbridled discretion to officials.[114] Also, the adult films shown by the theaters in *American Mini Theatres*, which led to the threat of prosecution under the ordinances, had not been determined obscene by a court. In *Southeastern* the municipal theater directors' decision denied the production company the use of a public forum in advance of expression. In that case the Court argued that any obscenity could be prosecuted after it occurred. Both cases therefore involved a prior restraint imposed without procedural safeguards.[115]

The provision that grants waivers to the distance limitation is another example of the chilling effect of indefinite standards. To obtain a waiver, the applicant must show that the proposed use will not be contrary to the public interest or injurious to nearby properties, that it will not create a "skid row" area, and that it will not be contrary to any program of neighborhood conservation or urban renewal.[116] These provisions themselves discourage application for a waiver. It is unclear what the public interest is, how one serves it, and what constitutes a "skid row" area. In addition, the burden of showing compliance is placed on the applicant rather than on the government where it properly belongs.[117]

The Detroit ordinances also do not provide for prompt judicial review of the status of a film. The only path of review is through the regular court system, a potentially lengthy process. In *Freedman v. Maryland*,[118] the Court found one section of an ordinance requiring prior submission of films for licensing invalid due to the failure of the ordinance to provide for a prompt administrative or judicial decision on the obscenity of the film.[119]

114. 427 U.S. at 91-92 (Blackmun, J., dissenting).

115. Although *Southeastern* involved the use of a public forum, the same procedural safeguards should be available with regard to private property. Greater latitude is allowed when a person seeks to exercise his freedom of expression on his own property. *See, e.g.*, Stanley v. Georgia, 399 U.S. 557 (1969), in which the court held that a person may view in his home obscene films that the state may prohibit from exhibition to the general public. *American Mini Theatres* might be distinguished from *Southeastern* in that the exercise of First Amendment rights on private property had a profound effect on the surrounding area. This is not a justification, however, for allowing protected conduct to be chilled as a result of inadequate procedural safeguards. No matter where rights of expression may be exercised, their deprivation should be accompanied by rigorous procedural safeguards.

116. See note 19 *supra*.

117. See notes 12-22 *supra*.

118. 380 U.S. 51 (1965).

119. *Id.* at 55, 60. Judicial, rather than administrative, determination of the obscenity of a film is essential. "*Freedman*'s preference for judicial evaluation of first amendment claims rests upon the most fundamental considerations—the inherent institutional differences between courts and administrative agencies, no matter how judicial the administrative proceedings may be. First, long judicial tenure frees judges, in most cases, from direct political pressures. Judicial insulation encourages impartial decision-making; more importantly, it permits the courts to take the 'long view' of issues. Administrative bodies, particularly at a state level, are rarely so insulated; indeed, they are often seen

Southeastern emphasizes that prior restraints must be delineated so as not to infringe unduly on First Amendment rights. Under the requirements of the Detroit ordinances, after a theater owner decides that he wishes to show adult movies, he must obtain a license to do so to avoid a violation of the ordinance. The films in question are not necessarily obscene, yet they would have to be determined "adult" or "not adult" in a proceeding for a declaratory judgment or an injunction instituted by the theater owner. The non-adult theater owner could be subject to two prosecutions: one for showing an adult film and one for showing an obscene film. No prompt and final judicial determination is assured if an exhibitor is uncertain as to the classification of a film he wishes to show.[120] The expense and time of litigating the acceptability of each film in practice precludes judicial review of each film with some sexual content.[121] The Detroit ordinances also fail to provide for prompt judicial review of administrative decisions. The normal route is through the court system, and the scope of review is limited.[122]

The Detroit ordinances also operate as a prior restraint because they discourage a licensed exhibitor of non-adult films from showing *any* film that may be characterized as "adult." Films may be characterized as adult regardless of artistic value or critical acclaim.[123] If a theater is within 1,000 feet of another regulated use, exhibition of an adult film is a violation of the ordinances. Films might not be exhibited if theater owners are uncertain whether such an exhibition will be covered by the statute. Therefore, the deterrent effect of the provisions operates as would a prior restraint.[124] In

primarily as political organs. Second, the role of the administrator is not that of the impartial adjudicator but that of the expert—a role which necessarily gives an administrative agency a narrow and restricted viewpoint. . . . Courts, on the other hand, do not suffer congenitally from this myopia; their general jurisdiction gives them a broad perspective which no agency can have." Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 522-23 (1970).

120. "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." Freedman v. Maryland, 380 U.S. 51, 58 (1960).

121. Courts see delay in the availability of judicial review as tantamount to no judicial relief at all. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 532 (1970).

122. MICH. CONST, art. VI, § 28 provides that on appeal, review of administrative decisions is limited to the question of whether the administrative board acted on the basis of law, and whether its action was supported by the record. This in effect means that the decision will not be overturned unless the board acted arbitrarily or abused its discretion.

123. In Jenkins v. Georgia, 418 U.S. 153 (1974), the Court held that the film *Carnal Knowledge* was not obscene. The distributor had been convicted in the state court of distributing an obscene film. The Supreme Court reasoned that a film that does not focus on ultimate sexual acts, and that shows only occasional nudity, is not obscene under the *Miller* standard. Miller v. California, 413 U.S. 15, 24 (1973). It must, therefore, be artistic expression even though it involves sex-related material.

124. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940), in which the Court held that it was unconstitutional to require that anyone who wished to solicit aid for a

Bantam Books, Inc. v. Sullivan,[125] the Court held invalid a system of informal censorship that operated as a prior restraint of freedom of speech. A commission determined that certain books were obscene, and reported these titles to the distributors. The distributor stopped shipment on these books rather than risk possible criminal prosecution based on the commission's recommendation to the Attorney General. Similarly, in *American Mini Theatres*, the theater owners might restrain their conduct in response to the ordinances. Thus the Detroit ordinances are a prior restraint in that they deter protected expression, provide inadequate standards for official decisionmaking, and do not guarantee prompt judicial review.

C. Levels of First Amendment Protection

1. *The Supreme Court's Disposition*

The theater owners alleged that the Detroit ordinances violated the equal protection clause of the Fourteenth Amendment because they placed theaters in different classes based on the content of their exhibitions. The owners claimed that such a classification is neither rationally related to a valid public purpose, nor justified by a compelling governmental interest.[126]

Writing for four members of the Court, Justice Stevens rejected these claims. Although regulation of theaters on the basis of the content of their exhibitions would violate the equal protection clause if all theaters were similarly situated,[127] the Court stated that adult theaters could be classified

religious cause obtain a permit because local authorities had discretion to determine what a religious cause was, and applicants, therefore, could not tell if their conduct was covered by the statute.

125. 372 U.S. 58 (1963).

126. Brief for Respondent at 49, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

127. The basic premise of equal protection theory is that a law, to be acceptable, must classify together those who are similarly situated. Comment, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969). The Court has developed a two-tiered test of equal protection. At the first level a statute merits "strict scrutiny" if it infringes on fundamental rights or involves a suspect classification. Any classification based on race, (Loving v. Virginia, 388 U.S. 1 (1967)), alienage, (Graham v. Richardson, 403 U.S. 365 (1971)), or lineage, (Hernandez v. Texas, 347 U.S. 475 (1954)), is suspect, and requires a heavy burden of justification before it will be sustained. Examples of rights that have been held to be fundamental are freedom of expression, (Schneider v. State, 308 U.S. 147 (1939)), the right to travel, (Shapiro v. Thompson, 394 U.S. 619 (1969)), the right to vote, (Dunn v. Blumstein, 405 U.S. 330 (1972)), the right to procreate, (Skinner v. Oklahoma, 316 U.S. 535 (1942)), and certain rights of criminal defendants, (Williams v. Illinois, 399 U.S. 235 (1970)). At this level of scrutiny, the state has the burden of demonstrating that the statute promotes a compelling governmental interest, and that there is no reasonable method of achieving those goals with a lesser burden on constitutionally protected activity. The Court has, however, refused to expand the number of suspect classifications and fundamental rights beyond the few mentioned, perhaps because the test has resulted in extremely divergent treatment of statutes. If a fundamental right or suspect classification is present, strict review is re-

separately because of their effect on the surrounding neighborhoods and because of the limited social value of sex-oriented expression.[128] The classification, then, seems wholly based on content. The Court stated that the content of protected First Amendment speech and its effect on the surrounding neighborhoods justifies accordingly less protection to sex-oriented materials than to other types of speech.[129] Justice Stevens stated that speech has often been regulated on the basis of content. He used as examples war information about troops,[130] speech that incites to crime,[131] and "fighting words,"[132] all of which have been determined to be unprotected speech on the basis of content. Within the area of protected speech, several regulations have been based on content. He cites libel as an example of speech regulated on this basis.[133] Cases upholding a prohibition of the sale or distribution of adult materials to minors, defining these materials as obscene in regard to them, provide other examples of the regulation of protected speech on the basis of content.[134] Stevens pointed to cases dealing with commercial speech as justifying limited protection for speech with a certain content.[135]

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quired; a statute rarely survives such review. If the statute does not require strict review, it is usually upheld. Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 FORDHAM L. REV. 605, 611 (1973).

A statute not impinging on fundamental rights or discriminating on the basis of suspect classes is evaluated under the "rational relationship" standard. Courts overturn such statutes only if they fail to exhibit any rational relationship to a conceivable purpose of the statute. The burden of proving the unreasonableness of the classification is on the individual. *Id.* at 610-11.

It is unclear what standard the Court is now using to evaluate equal protection claims. For example, in some recent cases, the Court seemed to abandon its two-tier test, and invalidated statutes under the rationality standard. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971).

128. 427 U.S. 50, 70-73 (1976).

129. *Id.* at 70-71.

130. Near v. Minnesota, 283 U.S. 697 (1931).

131. Bond v. Floyd, 385 U.S. 116 (1966); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Musser v. Utah, 333 U.S. 95 (1948).

132. Chaplinsky v. New Hampshire, 315 U.S. 558 (1942).

133. In New York Times, Inc. v. Sullivan, 376 U.S. 254 (1964), a public official was denied recovery of damages for libel, absent proof of malice, from a critic of his official conduct. The requirement of malice for defamation of public officials is based both on the public nature of the speech and the public need to know about official conduct. The *Sullivan* holding was expanded in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in which the Court stated that defamation of private individuals was not protected by the First Amendment. Private persons include public personalities who have not been significantly involved in a newsworthy event.

134. *E.g.*, Ginsberg v. New York, 390 U.S. 629 (1968).

135. 427 U.S. 56 n.31. In Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), the Court held that advertising of prescription drug prices is protected commercial speech. In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), the Court held that a municipal policy of refusing to accept political advertising for display on rapid transit vehicles did not violate the First Amendment because due

These types of speech, the opinion suggests, are entitled to partial but not complete protection under the First Amendment because they impliedly have less social value.[136] Justice Stevens asserted that adult films do not add much to the marketplace of ideas; political speech, on the other hand, is recognized as essential to the maintenance of a democratic society.[137] He stated:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic social value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.[138]

In the Court's opinion, because adult films have less social value, exhibition of sex-oriented films is not a fundamental right and regulations concerning their exhibition are not subject to strict scrutiny. The plurality opinion held that although adult films were entitled to some protection, the state could use the content of such materials to classify adult theaters differently from other theaters. The opinion found that there was a "factual basis" for the city's interest in preserving the character of its neighborhoods, and that this interest deserved "high respect," indicating minimal scrutiny.[139] Therefore, the Court found no violation of the equal protection clause.[140]

Justice Powell did not concur in the equal protection section of the decision.[141] Because it commanded the assent of only four members of the

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to its commercial nature rapid transit is not a public forum, and cities have an interest in protecting the involuntary recipient from the "blare" of political speech. Other advertising cases could possibly be read as allowing regulation on the basis of content. In Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969) (dismissed for want of a substantial federal question), a state statute allowed billboards in the neighborhood to advertise local businesses only. The Court cited NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), which held that a company may express its opinions on union activities so long as expression contains no threat of reprisal.The Court cited Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946); FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975); E. F. Drew & Co. v. FTC, 235 F.2d 735, 740 (2d Cir. 1956), as indicating that false advertising may be regulated on the basis of its content.

136. 427 U.S. at 63-73.

137. 427 U.S. at 70.

138. *Id.*

139. *Id.* at 71.

140. *Id.* at 71-73.

141. *Id.* at 73 n.1. (Powell, J., concurring in the judgment and portions of the opinion.)

Court, it is unclear what significance the creation of a lower level of protected speech will have for other types of speech.

2. *First Amendment Protection*

The plurality opinion involved two assumptions unsupported by past First Amendment law. First, that speech may be regulated on the basis of content and second, that certain speech is deserving of less protection.

The effect created by certain types of speech has been used to justify the regulation of the time, place, and manner of expressive conduct.[142] It has always been maintained, however, that such regulation must be content-neutral,[143] and recent cases have expressly so stated. In *Police Department of Chicago v. Mosley*,[144] an ordinance banned all picketing, except labor picketing, within 150 feet of a school to preserve quiet and order in the classrooms. The Court held that the distinction between labor and other types of picketing violated the equal protection clause. Picketing for any purpose could disturb the functioning of the classroom: "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[145]

Similarly, *Erznoznik v. City of Jacksonville*[146] overturned a Jacksonville, Florida ordinance on the ground that it impermissibly regulated expression on the basis of content. The ordinance provided that it would be a public nuisance for the user or owner of any drive-in theater in the city to exhibit any motion picture involving nudity if the motion picture was visible from any public place. The ordinance was struck down as an attempt to regulate freedom of expression directly on the basis of content; no legitimate governmental interest was found. The city attempted to justify the ordinance as a traffic regulation, but the Court rejected this contention because the exhibition of similarly distracting films with non-adult subject matters was not prohibited.[147] Any annoyance to unwilling viewers who might pass by

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142. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); Grayned v. City of Rockford, 408 U.S. 104 (1972); Feiner v. New York, 340 U.S. 315 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949); Cox v. New Hampshire, 312 U.S. 569 (1941).

143. Justice Stewart stated in his dissent, "What this case does involve is the constitutional impermissibility of selective interference with protected speech whose content is thought to produce distasteful effects. It is elementary that a prime function of the First Amendment is to guard against just such interference." 427 U.S. at 85 (Stewart, J., dissenting).

144. 408 U.S. 92 (1972).

145. *Id.* at 95.

146. 422 U.S. 205 (1975).

147. *Id.* at 214-15.

would be minimal because people who did not want to see nudity could simply avert their eyes.[148] The Court justified its decision as follows:

> [W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. . . . Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure . . . .
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> . . . .
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> Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.[149]

The Court has also indicated clearly that speech that is classified as protected is entitled to the full protection of the First Amendment. In *Roth v. United States*,[150] the Court emphasized that while obscene speech is unprotected, all other types of speech are fully and equally protected:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests . . .
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> . . . .
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> . . . The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.[151]

The plurality in *American Mini Theatres* points to commercial speech cases as indicating that some types of speech are entitled to less protection

148. *Id.* at 208-12.

149. *Id.* at 209-10.

150. 354 U.S. 476 (1957).

151. *Id.* at 484, 487. And in Miller v. California, 413 U.S. 15 (1973), the Court said, "State statutes designed to regulate obscene materials must be carefully limited. . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value.

. . . .

"Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." *Id.* at 23-24, 27.

under the First Amendment. In *Lehman v. City of Shaker Heights*,[152] the Court upheld a municipal policy of refusing to sell advertising space on transit vehicles to political advertisers. That the transit system was a commercial venture implied that the vehicles were not a public forum and the city was not required to grant everyone space. The travelers on transit vehicles were also found to be a captive audience entitled to be protected from the "blare" of political speech.[153] The Court held in *Bigelow v. Virginia*[154] that speech involving sales or solicitation is not necessarily commercial. The Court found the advertisement at issue to be fully protected by the First Amendment, but indicated that all advertising might not be protected.[155]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[156] the Court found that if pharmacists had a right to advertise, consumers had a right to receive information about prescription drug prices. The Court indicated that the consumer's interest in reception of information might be as great as his interest in political speech.[157] The Court characterized the speech in question as purely commercial and went on to hold that it was entitled to First Amendment protection.[158] "Our question is whether speech which does 'no more than propose a commercial transaction' . . . is so removed from any 'exposition of ideas' . . . and from ' "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government," ' . . . that it lacks all protection."[159]

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152. 418 U.S. 298 (1974).

153. *Id.* at 301-04.

154. 421 U.S. 809 (1975).

155. *Id.* at 825. "We conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection and that appellant Bigelow had no legitimate First Amendment interest. We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.

"Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. . . . To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection." *Id.* at 825-26.

156. 425 U.S. 748 (1976).

157. *Id.* at 763.

158. *Id.* at 770. "Here . . . the question whether there is a First Amendment exception for 'commercial speech' is squarely before us.

If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject.

What is at issue is whether a state may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative." *Id.* at 760-61, 773.

159. *Id.* at 762.

3. Application of First Amendment Doctrine

The plurality in *American Mini Theatres* concluded that in the past certain types of speech have been regulated on the basis of content. In regard to libel, the Court cited *New York Times, Inc. v. Sullivan*[160] and *Gertz v. Robert Welch, Inc.*[161] as examples of such regulation. *Sullivan* held that non-malicious reporting of official speech is not libel, and therefore is protected by the First Amendment. *Gertz* made it clear that defamation of private persons is not protected by the First Amendment. *Sullivan* and *Gertz*, however, determined that non-malicious reporting of official speech would be fully protected on the basis of its public nature; no mention was made of partial protection. Libelous speech was held unprotected, while other speech was fully protected.

The plurality also alleged that non-obscene erotic material has been regulated on the basis of content. It relied on *Ginsberg v. New York*[162] as support for this contention. *Ginsberg* held that speech that is protected for viewing by adults may be deemed obscene if viewed by minors.[163] *Ginsberg* does not allow regulation on the basis of content, however, but rather allows total prohibition of certain types of speech for viewing by certain groups, namely, minors.

A review of these cases indicates that none of them provides support for the contention that protected speech may be regulated on the basis of its content, other than by reasonable time, place, and manner restrictions. They indicate, rather, that speech may be held to be totally unprotected on the basis of content.

The Court in *American Mini Theatres* stated, in addition, that recent cases have indicated that some forms of speech are entitled to less protection. The Court cited *Lehman v. City of Shaker Heights*[164] as an example of the partial protection of speech based on its commercial nature. In dicta, in *Bigelow v. Virginia*,[165] the Court indicated that commercial speech might be afforded a degree of protection. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[166] however, the Court expressly held that prescription drug prices, purely commercial speech, are entitled to the full protection of the First Amendment. Thus, although the films in *American Mini Theatres* had a commercial aspect, in that they were shown for profit, they should not have been denied the full protection of the First Amendment under *Virginia State Board of Pharmacy*.

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160. 376 U.S. 254 (1964).
161. 418 U.S. 323 (1974).
162. 390 U.S. 629 (1968).
163. *Id.* at 38-43.
164. 418 U.S. 298 (1976).
165. 421 U.S. 809 (1975).
166. 425 U.S. 748 (1976).

In *Lehman* the Court reasoned that rapid transit vehicles were not public forums. Due to the commercial nature of political advertising, the city had no obligation to grant equal access to all advertisers. The speech was still provided the full protection of the First Amendment, however. Because political posters arguably could be more annoying to passengers than commercial advertising, they could be banned from rapid transit vehicles under a reasonable place restriction.

These cases illustrate that when the effects of certain types of speech on the environment or on society differ from the effects of other types, the offending speech may be subject to reasonable time, place, and manner restrictions.[167] There is no support in the cases, however, for the Court's conclusion that speech with a certain content is entitled to *less* protection under the First Amendment.[168]

The *American Mini Theatres* plurality then distinguished *Erznoznik* on the grounds that in that case the city was attempting to regulate movies solely on the basis of their offensive content, while in *American Mini Theatres* the city was attempting to regulate only secondary effects of speech.[169] Justice Powell distinguished *Erznoznik* on the grounds that the Jacksonville ordinances indiscriminately prohibited all nudity in a misconceived attempt to regulate the content of expression. Justice Powell characterized the Detroit zoning ordinances as affecting expression only incidentally and as accomplishing governmental ends unrelated to the regulation of expression.[170]

In contrast to Justice Powell, Justice Stewart urged that *Erznoznik* was directly analogous to *American Mini Theatres* because the ordinances in neither case forbade distasteful expression, but instead required an alteration in the location of the forum.[171] In both cases the interest of the city was to minimize the undesirable effects of speech having a certain content. Justice Stewart concluded that constitutional freedom means that much unpleasant speech will be protected.[172]

The ordinances in both *Erznoznik* and *American Mini Theatres* regulate the location of businesses that desire to show films containing nudity. In *American Mini Theatres*, the governmental interest in the preservation of neighborhoods was greater than the interests of passers-by in *Erznoznik* not to be confronted with nudity on giant picture screens. Detroit demonstrated that allowing adult theaters to concentrate in certain areas causes property

167. *See also*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Lehman v. City of Shaker Heights, 408 U.S. 298 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1965).

168. See text accompanying notes 142-59 *supra*.

169. 427 U.S. at 71 n.34.

170. *Id.* at 83-84 (Powell, J., concurring).

171. *Id.* at 88 (Stewart, J., dissenting).

172. *Id.*

values to drop and the crime rate to rise.[173] Therefore, *Erznoznik* is not directly analogous to *American Mini Theatres*. *Erznoznik* illustrates a time, place, and manner restriction that was unreasonable because its content-based distinction was not related to the expressed purpose of the statute, traffic regulation. The Detroit ordinances in *American Mini Theatres*, however, were reasonable time, place, and manner restrictions because the effect of the exhibition of adult films was different from that of non-adult films and because the ordinances did not attempt directly to regulate speech on the basis of its content. The *American Mini Theatres* holding that adult films are entitled to less protection under the First Amendment was unnecessary to the decision; the issue could have been resolved as a legitimate time, place, and manner restriction.[174] The Court, however, emphasized the relative value of various forms of expression.

Whether speech may be protected to a lesser degree on the basis of its so-called value, as the plurality alleges, depends on what one considers the purpose of the First Amendment. The First Amendment has been approached primarily from two points of view. Under the traditional theory, all areas of expression except those few whose protection would circumvent an overwhelming governmental interest are protected. Political, commercial, artistic, and scientific speech are covered.[175] Under this theory, the purpose of the Amendment is to protect free discourse and exchange in all areas, and all types of speech are equally protected.

Alexander Meiklejohn, a noted First Amendment scholar, theorized, on the other hand, that only speech related to the people's power of self-government is deserving of absolute protection. The First Amendment encompasses those powers the people have reserved to themselves; it does not define a private right, but a public power.[176] Included within the activities absolutely protected are forms of expression and thought from which the voter derives knowledge, intelligence, and sensitivity to human values. Education, achievements in philosophy and the sciences, literature, and art, and the dissemination of discussion of public issues are examples of activities that the First Amendment would protect only as furthering the public's ability to govern itself.[177] These activities, however, are not pursued

173. Appendix to Supreme Court Briefs at 1-39, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

174. *See* 427 U.S. at 78-79 (Powell, J., concurring in the judgment and portions of the opinion).

175. *See* EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3-8 (1966).

176. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. L. REV. 254, 255. *See also* Hynes v. Mayor of Oradell, 425 U.S. 610, 626 n.3 (1976) (Brennan, J., concurring).

177. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. L. REV. 245, 256-57.

to further the individual's own knowledge or self-fulfillment, but to further the process of self-government.[178]

Meiklejohn's theory may have surfaced in several Supreme Court opinions. *New York Times, Inc. v. Sullivan*[179] has been noted as a case in which the Court granted absolute protection to non-malicious reporting of official speech of public officers. This new attitude[180] is exemplified by *Garrison v. Louisiana*,[181] in which the Court stated that speech concerning public affairs is the essence of self-government.[182] *Garrison* involved a statement by a district attorney disparaging the conduct of certain judges. The Court held that in a criminal case, as well as in the civil cases dealt with by *New York Times*, only false statements concerning official conduct made with knowledge of their falsity or with reckless disregard of their truth are punishable.[183] Although the Court may not have accepted Meiklejohn's theory totally, there are indications that the plurality in *American Mini Theatres* may have adopted his assumption that pure political speech is the core of speech protected by the First Amendment, and the only type of speech entitled to absolute protection. The Court may be extending this limited concept of the First Amendment in *American Mini Theatres* by holding that non-obscene, erotic films are entitled to less protection than other forms of expression. Certainly statements to the effect that this form of speech has little social value indicate this possibility.[184]

In the past, the protection of the First Amendment has not been limited to great literature or to information central to the political process. This would certainly imply that the government would not have the right to suppress *non*-obscene material. Justice Stewart, in his dissent in *American Mini Theatres*, argued that the full protection of the First Amendment has never been held to be limited to expression we would fight to defend.[185] Non-obscene adult films are entitled to as much protection even though they do not deal with what are considered "important" topics. In a related case involving First Amendment regulation, *Winters v. New York*,[186] the Court invalidated a statute that punished as a misdemeanor the sale, loan, or

178. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 89, 100 (1948).

179. 376 U.S. 254 (1964).

180. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 18-19 (1965). "The Court has emphasized that the central meaning of the free expression guarantee is that the body politic of this Nation shall be entitled to the communications necessary for self-governance . . . ." Time, Inc. v. Firestone, 424 U.S. 448, 471 (1976) (Brennan, J., dissenting).

181. 379 U.S. 64 (1964).

182. *Id.* at 74-75.

183. *Id.* at 74.

184. 427 U.S. at 61, 70.

185. *Id.* at 86.

186. 333 U.S. 507 (1948).

distribution of any printed matter involving criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust, or crime. The statute was aimed at the protection of minors. The Court found the statute vague because it could cover protected conduct.[187] All expression was to be protected equally regardless of social value:

> We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. . . . What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.[188]

The Court in *American Mini Theatres* uses two concepts on which to base its holding; first, that speech may be regulated solely on the basis of its content, and second, that adult films are entitled to less protection than other forms of protected speech. Using these two doctrines, the Court concludes that adult and non-adult theaters are not similarly situated under the Detroit ordinances, and need not be similarly treated. Justice Powell believed that not all types of theaters were affected by the Detroit ordinances: "The case would present a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas."[189] Even if non-adult and adult theaters are classified differently, however, they are both affected by the ordinances. Because non-adult theaters cannot show adult films without an adult license, all theaters are regulated with respect to the showing of adult films. Both types of theaters must meet the same criteria to show an adult film. The classification is inaccurate because non-adult theaters, even though not covered by the statute expressly, are impliedly covered when they show an adult film.

D. Zoning—Unresolved Issues

American Mini Theatres has broad implications for zoning law as well as for First Amendment law. Traditionally, cities have enacted zoning ordinances as a valid exercise of the police power, to serve the public health, safety, morals, and general welfare.[190] Preservation of the character of neighborhoods, the interest asserted in *American Mini Theatres*, has been recognized in more recent decisions as a proper and even primary purpose of

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187. *Id.* at 519-20.

188. *Id.* at 510.

189. 427 U.S. at 82 (Powell, J., concurring). *See* R. ANDERSON, AMERICAN LAW OF ZONING § 7.03 (1977) [hereinafter cited as ANDERSON]. "The concept of public welfare is broad and inclusive. . . . The values it represents are spiritual as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean . . . ." Berman v. Parker, 348 U.S. 26, 33 (1954).

190. ANDERSON, *supra* note 189, at § 7.03.

zoning regulations.[191] Originally, zoning ordinances relegated certain uses to certain areas, and cities have traditionally concentrated certain uses into limited areas.[192] Cities such as Boston have attempted to zone adult businesses into one area, but the result has been an increase in crime, and a deterioration of the area.[193] Accordingly, some uses have been dispersed due to their adverse effects on surrounding areas.[194] Presumably the Court in *American Mini Theatres* thought that dispersion of adult theaters was the only acceptable method of dealing with adult businesses. Instead of expressly so stating, however, the Court substantially ignored the zoning issues.[195]

The Court has always accorded great deference to zoning ordinances.[196] They are presumed valid, and are evaluated under the most lenient rationality standards.[197] A recent example of such deference is *Village of Belle Terre v. Boraas*.[198] The village had restricted land use in one area to single-family dwellings, defining "family" as no more than two unrelated persons.[199] The owners of a house rented to six unrelated students were served with an order to remedy the violation. Petitioners alleged, *inter alia*, that the ordinance interfered with their right to travel, and with two other fundamental rights, association and privacy.

The Court found that the ordinance was not designed to further any of these purposes and that it did not abridge any fundamental right guaranteed by the Constitution.[200] The Court intimated that it would use the "rational relationship" test for the equal protection claim; active review was not triggered, and the ordinance was upheld. Justice Marshall dissented, recognizing that the *Belle Terre* ordinance burdened the students' fundamental

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191. *Id.* at § 7.27. Anderson cites Nortown Theatres, Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974) and American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975), the lower court opinions, as examples of recent legislation that attempts to regulate the location of adult bookstores as a moral objective. "These uses have been found sufficiently different from the generality of commercial uses as to warrant their separate classification in a zoning ordinance." ANDERSON, *supra* note 189, § 7.11. This is not the expressed purpose of the Detroit ordinances, however. Affidavits supporting the city's position indicate that moral issues may have been involved, but the expressed purpose was that of preserving the quality of the neighborhoods. Appendix to Supreme Court Briefs at 1-39, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

192. ANDERSON, *supra* note 189, at § 7.28.

193. NEWSWEEK, Dec. 6, 1976, at 35.

194. *See* ANDERSON, *supra* note 189, at § 7.28, describing ordinances requiring gas stations to be a certain distance from one another, which were upheld.

195. *See* 427 U.S. at 71-73.

196. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297 (1976); Berman v. Parker, 348 U.S. 26 (1954); City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

197. ANDERSON, *supra* note 189, at § 3.14.

198. 416 U.S. 1 (1974).

199. *Id.* at 2.

200. *Id.* at 7-9.

rights of travel, association, and privacy that are protected by the First and Fourteenth Amendments, and should therefore be subject to strict scrutiny.[201] Decisions such as *Belle Terre* indicate that the Court feels latitude must be given to cities in promoting the health, safety, and general welfare of their citizens. Local officials are best able to judge which means will further these goals.[202]

Modern comprehensive zoning ordinances may frequently conflict with fundamental constitutional rights.[203] For example, a zoning scheme in Decatur, Illinois, which required that all buildings be set back from the street and that adequate off-street parking be provided, was challenged by a church as unconstitutional in *Board of Zoning v. Decatur*.[204] The state court found that the setback requirement was reasonable, but that the parking space requirement unduly burdened the right to freedom of worship because it would have prevented the erection of the church altogether. As the Court noted:

> When . . . the welfare and safety of the people in the neighborhood is placed in the scales of justice on one side, and the right to freedom of worship and assembly is placed on the other, the balance weighs heavily on the side guaranteeing the right to peaceful assembly and to worship God according to the dictate of conscience, regardless of faith or creed.[205]

Similarly, in *Erznoznik v. City of Jacksonville*,[206] speech protected by the First Amendment was regulated on the basis of its unsavory content.[207] The Court overturned the ordinance, finding the proffered governmental interests inadequate to sustain such a regulation of protected speech.

There is no reason why a zoning ordinance should be given more weight than any other legislation that potentially conflicts with constitutional rights.

> It is inconceivable to me that we would allow the exercise of the zoning power to burden First Amendment freedoms, as by ordinances

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201. *Id.* at 12-20.

202. *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 97 S. Ct. 555 (1977), which applied a rationality standard to a village's refusal to rezone land to allow construction of low-income housing. The Court referred to the "generous *Euclid* test," allowing any zoning scheme not irrational or arbitrary to stand. *See also* Washington v. Davis, 426 U.S. 229 (1976).

203. *See* Frame & Scorza, *Village of Belle Terre v. Boraas: Property Rights, Personal Rights and the Liberal Regime*, 2 HASTINGS CONST. L.Q. 935 (1975).

204. 117 N.E.2d 115 (1954).

205. *Id.* at 120.

206. 422 U.S. 205 (1975).

207. See text accompanying notes 169-75 *supra*.

> that restrict occupancy to individuals adhering to particular religious, political or scientific beliefs. Zoning officials properly concern themselves with the uses of land—with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.[208]

The Court in *American Mini Theatres*, in its desire to uphold the Detroit ordinances, minimized the fundamental right involved. The Court concluded that adult films are entitled to less protection than other forms of protected speech.[209] Under the Court's holding, less protected speech would not be deemed fundamental. Justice Powell, although he did not join in this section of the opinion, found the Detroit ordinances valid because they infringed only indirectly on First Amendment rights.[210] The plurality section dealing with the equal protection claim could be read to allow infringement of less protected speech only when the effect on such speech is indirect.[211] Alternatively, the opinion could be read broadly to authorize a city's use of the zoning power to regulate forms of protected speech whenever officials decide that a type of speech is entitled to less protection. The latter interpretation constitutes a substantial retreat from traditional First Amendment guarantees.

Conclusion

In the past, the First Amendment has been interpreted to mean that some speech is fully protected. Other types of speech such as libel, obscenity, fighting words, and words that incite to crime received no protection. The Court in *American Mini Theatres* broke new ground by holding that non-obscene, sex-oriented films are entitled to less protection under the First Amendment than other types of speech. The Court denied the theaters standing to challenge the Detroit ordinances on the ground of vagueness, mentioning the limited social value of adult films. It concluded that as only the location of theaters was regulated, the effect on First Amendment expression was slight. The Court also rejected a prior restraint challenge. Because theaters could locate anywhere in the city provided they obtained a license,

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208. Village of Belle Terre v. Boraas, 416 U.S. 1, 14-15 (Marshall, J., dissenting).

209. 427 U.S. at 70-71.

210. *Id.* at 79-82 (Powell, J., concurring).

211. See the discussion of United States v. O'Brien, 391 U.S. 367 (1968), *supra* note 30.

and because the interest in preserving neighborhoods was strong, no prior restraint was imposed. Last, the Court rejected an equal protection challenge. Adult and non-adult theaters were found not to be similarly situated with respect to the purpose of the ordinance because of the lesser value of adult films and their different impact on neighborhoods and therefore did not have to be similarly treated. Instead of upholding the Detroit ordinances as a reasonable time, place, and manner regulation, the Court went further to hold that non-obscene, sex-oriented films were entitled to only partial protection under the First Amendment.

The recurring theme of the majority opinion was the limited value of adult films in comparison with expression such as that involving political topics. As Justice Blackmun stated in his dissent: "As to the third reason, that 'adult' material is simply entitled to less protection, it certainly explains the lapse in applying settled vagueness principles, as indeed it explains this whole case."[212] Another factor that may have been important in the Court's decision is the fact that a zoning ordinance was involved. Zoning ordinances are treated with great deference because zoning is one of the principal means by which cities can deal with complex and confusing urban problems. The Court may have decided to leave the resolution of these problems to the municipalities. The fact that constitutional rights were involved, however, should have called for closer scrutiny of the zoning ordinance.

The Court's holding that adult, non-obscene films deserve less protection implies that such expression does not involve a fundamental right. Regulation of adult films, therefore, deserves only minimal scrutiny. This radical break with prior First Amendment law sets a precedent by which courts will be able to pick and choose among forms of speech, establishing levels of First Amendment protection. This is an objectionable interpretation of the First Amendment because it allows the courts to determine the value of different forms of speech. These value decisions should be left to each citizen to make for himself. Each person has the right to communicate and receive expressions concerning ideas, feelings, and reflections. This freedom should not be limited to speech that relates to government or politics. Political expression is certainly necessary to the maintenance of a democratic society, but the First Amendment should protect expression on any topic. There are a few limited exceptions essential to the smooth functioning of a civilized society, such as libel and "fighting words," but the greater part of speech should receive the full protection of the First Amendment.

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212. 427 U.S. at 96.

A hierarchy of protected speech undercuts the basic right to receive and communicate on any topic. If such a hierarchy were instituted on the basis of *American Mini Theatres*, the judiciary would have the privilege of placing every type of speech somewhere on the scale, thereby defining the scope of a person's right to communicate and to express himself. The vagueness and confusion resulting from such a determination would culminate in a virtual re-writing of the First Amendment, and a new, more limited guarantee.