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NOTES AND COMMENTS

ZONING, ADULT MOVIE THEATRES AND THE FIRST AMENDMENT: AN APPROACH TO YOUNG v. AMERICAN MINI THEATRES, INC.

The first amendment mandates that government "shall make no law . . . abridging the freedom of speech," but this guarantee has never been held to afford absolute protection for expression. The maintenance of legitimate societal interests has long been recognized as a basis for the curtailment of otherwise protected speech which intrudes upon the normal functioning of social intercourse. Necessarily, it has been the obligation of the judiciary to reconcile the competing values of the first amend-

1. U.S. Const. amend. I. Although the first amendment itself limits only the actions of the federal government, the fourteenth amendment imposes the same constraints on state action, for first amendment rights are protected by the due process clause of the fourteenth amendment. Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2443 n.1 (1976); De Jonge v. Oregon, 299 U.S. 353 (1937); Near v. Minnesota, 283 U.S. 697 (1931); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925). Subsequent reference to the first amendment includes the recognition that the first amendment applies to the states through the due process clause of the fourteenth amendment.


3. See, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1972) (protection of school from noisy demonstration); Brandenburg v. Ohio, 395 U.S. 444 (1969) (prevention of subversive advocacy directed to inciting imminent lawless action with likelihood to produce such action); Cox v. Louisiana, 379 U.S. 559 (1965) (prevention of disorder of courthouse from external picketing); Kovacs v. Cooper, 336 U.S. 77 (1949) (proscription of operation on public streets of sound trucks which emit loud noises); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (proscription of "fighting words" likely to cause a breach of peace); Cox v. New Hampshire, 312 U.S. 569 (1941) (regulation of parade to assure order on public streets, effectuated through reasonable licensing scheme); Schenck v. United States, 244 U.S. 47 (1919) (proscription of words which create clear and present danger of substantive evils which Congress may prevent).
ment guarantee of free speech and the societal interest in maintaining order. The ability of the judicial system to accommodate competing interests effectively within new contexts is a major challenge to the vitality of first amendment doctrine.

In *Young v. American Mini Theatres, Inc.*, the Supreme Court confronted a novel clash of competing values: the conflict between first amendment freedom and the municipal zoning power. The City of Detroit adopted in 1962 an "Anti-Skid Row Ordinance" designed to prevent the concentration of various property uses deemed injurious to the surrounding neighborhood. The ordinance, amended in 1972, restricted location of

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4. Courts have the power to review legislative, executive, or administrative actions and to declare them unconstitutional. Although this power was probably recognized by the Framers of the Constitution, see, e.g., *The Federalist* No. 78 (A. Hamilton), it first received authoritative judicial pronouncement in the landmark case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Chief Justice Marshall said: "It is, emphatically, the province and duty of the judicial department, to say what the law is." *Id.* at 177. Judicial review is, however, antidemocratic in principle, for it is the power of a nonelected, unresponsive judiciary to declare unconstitutional the acts of the popularly controlled executive and legislative branches of government. See, e.g., Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193 (1952). For the opinion of one eminent jurist doubting not only the origin but also the efficacy of judicial review, see L. Hand, *The Bill of Rights* 73 (1958): "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." Although the power of judicial review may be basically antidemocratic in nature, it is nevertheless essential for the protection of basic constitutional guarantees. See generally notes 37-46 infra and accompanying text.


7. *Detroit, Mich., Ordinance No. 742-G, § 66.0000* (1972), designed to prevent concentration of establishments deemed to have undesirable effects on surrounding areas, provided:

Regulated Uses

In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i.e. not more than two such uses within one thousand feet of each other which would create such adverse effects).

Uses subject to these controls are as follows:

Adult

*Adult Book Store*
*Adult Motion Picture Theater*
*Adult Mini Motion Picture Theater*
*Cabaret*
enumerated enterprises, such as pawn shops, hotels and pool halls, to not more than two such "regulated uses" within one thousand feet of each other. The amended ordinance included as regulated uses adult movie theatres and adult bookstores. The

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Group "D" Cabaret
Establishment for the sale of beer or intoxicating liquor for consumption on the premises.
- Hotels or motels
- Pawnshops
- Pool or billiard halls
- Public lodging houses
- Secondhand stores
- Shoeshine parlors
- Taxi dance halls

The ordinance also included a possible waiver of the restriction. Section 66.0101 authorized the Zoning Commission to waive the 1,000 foot restriction upon a showing that the business would not be injurious to surrounding properties or enlarge the development of a "skid row" area. A further amendment made unlawful the establishment of "any Adult Book Store, Adult Motion Picture Theater, Adult Mini Theater or Class 'D' Cabaret within 500 feet of any building containing a residential, dwelling or rooming unit," with a waiver of this requirement permitted if a petition "indicate[d] approval of the proposed regulated use by 51 per cent of the persons owning, residing or doing business" within 500 feet of the regulated use. DETROIT, MICH., ORDINANCE No. 742-G, § 66.0103 (1972).

8. These establishments were defined by the amended ordinance.

DETROIT, MICH., ORDINANCE No. 742-G, § 32.0007 (1972):

- **Adult Book Store**
  - An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

- **Adult Motion Picture Theater**
  - An enclosed building with a capacity of 50 or more persons used for presenting material having as a dominant presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," (as defined below) for observation by patrons therein.

- **Adult Mini Motion Picture Theater**
  - An enclosed building with a capacity for less than 50 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," (as defined below) for observation by patrons therein.

For the purposes of this Section, "Specified Sexual Activities" is 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.

And "Specified Anatomical Areas" is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic...
amendments further required adult movie theatres to be licensed by the Mayor. Plaintiffs, operators and lessees of adult movie theatres, commenced an action in federal district court, alleging that the zoning classification scheme violated the first amendment and the equal protection and due process clauses of the fourteenth amendment. They sought declaratory and injunctive relief against enforcement of the ordinances. The district court, in granting summary judgment for defendant, upheld the constitutionality of the ordinances. The Court of Appeals for the Sixth

region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

9. DETROIT, MICH., ORDINANCE No. 743-G (1972) established the following requirements for the licensing of adult movie theatres:

The Mayor may refuse to issue a license for the operation of any business regulated by this article, and may revoke any license already 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.

From the face of this ordinance, there is no explicit requirement that adult movie theatres be licensed. Both parties to the litigation, however, conceded that the ordinance imposed an affirmative obligation on adult movie theatre operators to obtain licenses based on compliance with the dispersal requirements. Brief for Respondent at 81-82, Brief for Petitioner at 44, Young v. American Mini Theatres, Inc., 96 S. Ct. 2440 (1976). That the Supreme Court accepted this construction of the ordinance is evidenced by Mr. Justice Blackmun’s dissenter opinion. Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2461 (1976) (Blackmun, J., dissenting).

10. Plaintiffs in the district court were American Mini Theatres, Inc., and Pussy Cat Theatres of Michigan, Inc., owners and operators of an adult theatre in Detroit, who filed suit as coplaintiffs; Nortown Theatre Inc. was an operator of another adult theatre whose separate action was joined by the district court. Nortown Theatre Inc. v. Gribbs, 373 F. Supp. 363, 364-65 (E.D. Mich. 1974). An additional plaintiff in the district court, an operator of an adult bookstore, was not party to the subsequent appeal. The defendant Roman Gribbs was the Mayor of Detroit at the time of the district court suit.


12. Nortown Theatre Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974). The court did, however, invalidate the 500 foot restriction of DETROIT, MICH., ORDINANCE No. 742-G, § 66.0103 (1972), finding that the provision did not further the city’s expressed purpose of avoiding clustering of specified businesses; thus the provision imposed a greater incidental restriction on first amendment freedoms than was necessary to accomplish the legislative purpose. Nortown Theatre Inc. v. Gribbs, 373 F. Supp. 363, 371 (E.D. Mich. 1974). The city did not raise this issue on appeal and subsequently amended the provision to prohibit the operation of an adult theatre within 500 feet of any area zoned for residential use. This amended restriction was not challenged on appeal. Young v. American Mini
Circuit reversed, holding that the amended ordinances violated the equal protection clause of the fourteenth amendment. The Supreme Court, in a five to four decision, upheld the constitutionality of the zoning ordinances, rejecting due process, first amendment, and equal protection challenges.

THE FIRST AMENDMENT PROTECTION OF FILM

The first amendment guarantee of freedom of speech, the foundation of "the principle that debate on public issues should be uninhibited, robust, and wide-open," has been construed to protect expression in its varied forms. While not all modes of expression receive constitutional protection, film as a medium is within the ambit of freedom of speech. The Supreme Court initially extended this constitutional protection to film in Joseph...
Burstyn, Inc. v. Wilson. The Court recognized that film is an important means of communication but emphasized that the protection of film is not absolute. The state statute challenged in Burstyn authorized a public official to deny an exhibition license for motion pictures judged "'obscene, indecent, immoral, inhuman, sacrilegious, or . . . [tending] to corrupt morals or incite to crime.'" The Court held that the statute unconstitutionally abridged freedom of speech. Furthermore, the Court noted that the commercial element of film did not vitiate constitutional protection.

THE FOUNDATION OF THE ZONING POWER

In Young v. American Mini Theatres, Inc., the Supreme Court was confronted with a challenge to local zoning ordinances which allegedly abridged constitutionally protected speech. The municipal zoning power, necessary to regulate the complexities of modern land usage, was upheld in the landmark decision of Village of Euclid v. Ambler Realty Co. In Euclid the state was held to have the authority to implement a comprehensive zoning plan which prohibited the erection of commercial establishments and apartment houses in designated residential districts. The

19. 343 U.S. 495 (1952). This constitutional protection of film promotes values which lie at the foundation of freedom of expression, individual self-fulfillment and the advancement of truth. Cf. T. Emerson, The System of Freedom of Expression 6-7 (1970) (postulating four values protected by freedom of speech). Emerson considers freedom of expression vital for two other values: participation in decisionmaking and achievement of a more adaptable and thus more stable community; such a community is achieved by "maintaining the precarious balance between healthy cleavage and necessary consensus." Id. at 7. For classic statements on the value of free speech, see J. Milton, Areopagitica (AMS Press 1971) and J.S. Mill, On Liberty (1859). For a modern discussion of freedom of speech, see Z. Chafee, Free Speech in the United States (1941).


21. Id. at 502.

22. Id. at 497 (quoting N.Y. Educ. Law §§ 122, 129 (McKinney 1947)).

23. The statute at issue was also deemed to be an abridgement of the first amendment guarantee of freedom of the press.


27. 272 U.S. 365 (1926).

28. The Court held that the zoning ordinance "must find . . . justification in some
Court refused to find the ordinance "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Prior and subsequent cases recognize the broad contours of the state's power to regulate land usage.

Yet the Supreme Court has also held "that the police power, aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." Id. at 387. The Court has further held that the police power is not limited to regulation of public safety, health or morality, but includes physical, aesthetic and monetary values. Berman v. Parker, 348 U.S. 26, 32-33 (1954). The power was recently held "ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clear air make the area a sanctuary for people." Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). See generally R. Anderson, supra note 26; A. Rathkopf, supra note 26, at §§ 2.01-2.03; N. Williams, Jr., American Land Planning Law (1974).


30. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (ordinance limiting the occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons); Berman v. Parker, 348 U.S. 26 (1954) (ordinance prescribing housing redevelopment plan for purpose of creating a more attractive community); Gorieb v. Fox, 274 U.S. 603 (1927) (ordinance creating set-back, on building line in relation to the street, to which all subsequently constructed buildings must conform); Thomas Cusack Co. v. City of Chicago, 242 U.S. 656 (1917) (ordinance prohibiting billboards in residential neighborhoods without consent of neighbors); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (regulation banning operation of brickyard from area zoned to exclude such operations); Laurel Hill Cemetery v. City & County of San Francisco, 216 U.S. 356 (1910) (ordinance prohibiting further burials in existing cemeteries); L'Hote v. New Orleans, 177 U.S. 587 (1900) (ordinance limiting prostitution to certain areas of the city). See also Art Neon Co. v. City & County of Denver, 488 F.2d 118 (10th Cir. 1973), cert. denied, 417 U.S. 392 (1974) (ordinance regulating outdoor advertising signs); Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971) (ordinance requiring distance of 350 feet between proposed gasoline station and any existing station, or between proposed station and various places of public assembly); City of St. Paul v. Chicago, St.P., M. & O. Ry., 413 F.2d 862 (6th Cir.), cert. denied, 398 U.S. 985 (1969) (ordinance imposing height restrictions on buildings); Connor v. West Bloomfield, 297 F.2d 482 (6th Cir. 1961) (per curiam) (ordinance forbidding house trailers in rural residential neighborhood); Texas Co. v. City of Tampa, 100 F.2d 347 (5th Cir. 1938) (statute prohibiting erection or operation of gasoline station, public garage or mercantile establishment in specified district); City of Anchorage v. Paulk, 113 F. Supp. 698 (D. Alas. 1953) (statute impliedly prohibiting storage of used motor vehicles on vacant lots in residential area).

The state police power must, however, accommodate a "nonconforming use," one that "lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance . . . ." R. Anderson, supra note 26, at § 6.02, at least to the extent of containing and only gradually eliminating the use. R. Anderson, supra note 26, at §§ 6.30-6.63. In American Mini Theatres, Inc. v. Gribs, the dissent explicitly recognized that "[p]re-existing businesses are not affected" by the ordinances. 518 F.2d 1014, 1021 (1975) (Celebrezze, J., dissenting).
broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution."

31 In Buchanan v. Warley, the Court invalidated a municipal ordinance which barred a person of one race from acquiring property on a block where the majority of homes were already occupied by persons of another race. The Court found that the "attempt to prevent the alienation of the property. . . . was not a legitimate exercise of the police power of the State, and is in direct violation of. . . . the Fourteenth Amendment [due process of law guarantee]." 33 The essential issue in Young v. American Mini Theatres, Inc., is whether the City of Detroit exceeded its legitimate police power and, under the guise of zoning, unconstitutionally abridged protected rights.

THE FIRST AMENDMENT CHALLENGE

The Detroit zoning scheme was challenged in Young as a

32. Id.
33. Id.

See Berman v. Parker, 348 U.S. 26 (1954), where the Court, in upholding comprehensive redevelopment legislation, noted that although the legislative declaration of the public interest is "well-nigh conclusive," id. at 32, the resultant legislative regulation is "subject to specific constitutional limitations. . . ." 34 See also State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Yick Wo v. Hopkins, 118 U.S. 356 (1885); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1019 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), a zoning ordinance was unsuccessfully challenged on the ground that it infringed upon first amendment rights. The ordinance limited occupancy of family dwellings to traditional families or to groups of not more than two unrelated persons. The Court found that this restriction did not infringe upon the first amendment freedom to associate. Id. at 7. But see Mr. Justice Marshall's dissent in Belle Terre, which suggested that fundamental rights of privacy and association guaranteed by the first and fourteenth amendments were involved in the zoning ordinance. Although noting that the Court must "afford zoning authorities considerable latitude in choosing the means by which to implement [zoning] purposes," id. at 14, Justice Marshall emphasized that "[t]his Court has an obligation to ensure that zoning ordinances, even when adopted in furtherance of. . . legitimate aims, do not infringe upon fundamental constitutional rights. . . . [I]t is clear that the First Amendment provides some limitations on zoning laws." Id.

See R. Babcock, THE ZONING GAME 15 (1966), which suggests that zoning is more precisely within the realm of constitutional law than within real estate law. The Supreme Court, however, has failed to "see zoning as regulations affecting people and not just as regulations affecting land." Id. Babcock further suggests that the "continuing validity [of land use planning] in a democratic society is to be judged by the same general principles that are employed in other areas of the law." Id. at 137. See generally Comment, Zoning, Aesthetics and the First Amendment, 64 COLUM. L. REV. 81 (1964).
prior restraint, through licensing, on freedom of speech. When state authority conflicts with first amendment values, "the character of the right, not of the limitation . . . determines what standard governs . . . ." Such a standard has generally afforded preeminent value to first amendment interests. This preeminence, the theory of "preferred freedoms," has its origins in a footnote in United States v. Carolene Products Co.: There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

In subsequent cases the preferred freedoms of the first amendment have elicited rigorous protection from the judiciary. This stringent protection is justified because the first amendment is essential for the protection of the integrity of the political system: By guaranteeing freedom of expression, the first amendment in-

35. A prior restraint is governmental proscription of speech prior to expression. See notes 53-71 infra and accompanying text. It may be effectuated through licensing by prohibiting specified speech which does not comply with licensing requirements. See notes 72-84 infra and accompanying text.
38. E.g., Hague v. CIO, 307 U.S. 496 (1939), where the Court held unconstitutional an ordinance forbidding the leasing of any hall for a public meeting without a prior permit. Justice Stone declared that "[n]o more grave and important issue can be brought to this Court than that of freedom of speech . . . ." Id. at 524 (Stone, J., concurring).
39. 304 U.S. 144 (1938).
40. Id. at 152 n.4.
41. E.g., Schneider v. New Jersey, 308 U.S. 147, 161 (1939), where the Court said: In every case . . . where legislative abridgement of [first amendment] rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as the cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.
sures the exchange of ideas necessary for the educated exercise of suffrage.\textsuperscript{1} Denial of freedom of expression corrupts the right of franchise causing resultant governmental action to be wholly suspect.\textsuperscript{2} Even though the "preferred freedoms" theory was originally designed to insure the integrity of the political system, the first amendment does not distinguish nor graduate its protection upon the character of first amendment speech.\textsuperscript{3} "The principle [of freedom of expression] also carries beyond the political realm. It embraces the right to participate in the building of the whole culture, and includes freedom of expression in religion, literature, art, science, and all areas of human learning and knowledge."\textsuperscript{4} This protection of first amendment speech has become predominantly the function of the judiciary, for that institution effectively withstands majoritarian pressures inconsistent with the constitutional guarantees of individual liberty.\textsuperscript{5}

The Prior Restraint Challenge

The Supreme Court in \textit{Young} found that the Detroit zoning ordinances were not an unconstitutional prior restraint upon first amendment rights.\textsuperscript{6} Mr. Justice Stevens, writing for the Court, noted that petitioners did not claim the ordinance totally prohib-


\textsuperscript{2} "Just so far as, at any point, the citizens who are to decide issues are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to those issues, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking powers of the community against which the first amendment is directed." Testimony of A. Meiklejohn to the Hennings Senate Sub-Committee on Constitutional Rights, November 14, 1955, quoted in A. Meiklejohn, Political Freedom 109 (1960).

\textsuperscript{3} See, e.g., Roth v. United States, 354 U.S. 476, 484 (1957), where the Court said: "All ideas having even the slightest redeeming social importance . . . have the full protection of the [first amendment] guarantees, unless excludable because they encroach upon the limited area of more important interests." (Footnote omitted). See also Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). \textit{But see} A. Meiklejohn, Political Freedom 34-38 (1960), which suggests that the Constitution recognizes two different kinds of speech—first amendment freedom of speech and fifth amendment liberty of speech—with absolute protection afforded public (political) speech of the first amendment and less than absolute protection extended to nonpublic (nonpolitical) speech of the fifth amendment.


\textsuperscript{6} \textit{Young} v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2448 (1976).
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ITED this form of protected speech. Justice Stevens stated that “[v]iewed as an entity, the market for this commodity is essentially unrestrained.” Mr. Justice Stevens observed that the city’s general zoning laws required all theatres to satisfy certain locational requirements; such requirements might be effectuated either by confining theatres to specified districts or by requiring dispersal throughout the city. That constitutionally protected speech was subject to zoning and licensing requirements did not mandate invalidation of the ordinances. The one thousand foot restriction of the ordinances did not constitute an impermissible prior restraint, because the city’s interest in regulating and planning land usage supported locational restriction of all theatres; therefore, “regulation of the place where [adult] films [might] be exhibited [did] not offend the First Amendment.” In a footnote, the Court added: “Reasonable regulations of the time, place and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment.”

Mr. Justice Stevens’ reasoning is, however, a departure from the established first amendment principle that prior restraints on freedom of expression are generally condemned. In the landmark case Near v. Minnesota, the Supreme Court declared unconstitutional a state statute which enjoined newspaper publication of allegedly “malicious, scandalous and defamatory” matter; the Court based the finding of unconstitutionality on the principle that the statute was a prior restraint on liberty of the press. This immunity from prior restraint applies not only to the freedom of the press protected by the first amendment, but also to the other types of speech similarly protected. In Shuttlesworth v. City of Birmingham, the Supreme Court held unconstitutional a municipal ordinance which prohibited any parade or demonstration for which the city commission had not granted a permit. The

48. Id.
49. Id.
50. Id.
51. Id. (footnote omitted).
52. Id. n.18 (citations omitted).
53. 283 U.S. 697 (1931).
54. Id. at 701-02.
57. Id. at 149-50.
Court considered such an ordinance an impermissible prior restraint, stating that "a law subjecting the exercise of the First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." This condemnation of prior restraints also extends to arguably distasteful and lewd modes of expression. In *Southeastern Promotions, Ltd. v. Conrad,* the Court found that a municipal board's refusal to lease a city auditorium to the promoters of the rock musical "Hair," because the production would not be in the best interests of the community, constituted an impermissible prior restraint. The Court said that "[o]nly if we were to conclude that live drama is unprotected by the First Amendment—or subject to a totally different standard from that applied to other forms of expression—could we possibly find no prior restraint here." The first amendment and the rule against prior restraint protect not only the press, not only political speech, but also all manner of protected expression, even "[w]olly neutral futilities.

The principle of prior restraint does not afford absolute protection to first amendment speech; a prior restraint is not unconstitutional per se. But any previous restraint carries a heavy presumption of unconstitutionality. This heavy presumption against prior restraint is essentially a traditional abhorrence of censorship. Illustrative of the weighty requirements necessary
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to justify prior restraint are the criteria suggested in Near v. Minnesota:

[A] government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.68

Moreover, prior restraints are generally invalid even when the restrained speech might subsequently be found unprotected.67 That expression may be subjected to later punishment does not justify prior restraint because “a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.”69

To pass constitutional scrutiny, any scheme of prior restraint must fall within the narrowly specified exceptions articulated in Near; it must also be accompanied by procedural safeguards designed to reduce the danger of suppressing constitutionally protected speech.69 In Freedman v. Maryland,70 the Supreme Court

free people—is deep-written in our law.” See also New York Times Co. v. United States, 403 U.S. 713, 714-19 (1971) (Black, J., concurring); Near v. Minnesota, 283 U.S. 697, 713-14 (1931); J. Milton, supra note 19, who, in his classic statement decrying the licensing of printers in seventeenth century England, said: “And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?” Id. at 58.

66. 283 U.S. 697, 716 (1931) (footnote omitted).
67. See Near v. Minnesota, 283 U.S. 697, 713-15 (1931). The Court noted that the original Blackstonian principle of previous restraint dictated that government could not suppress speech prior to communication, but that once communication occurred, government could punish whatever was “improper, mischievous or illegal.” Id. at 714 (citing 4 W. BLACKSTONE, COMMENTARIES* 151, 152). See generally Z. CHAFEE, supra note 19, at 9-11; T. EMERSON, supra note 19, at 503-04.
70. 380 U.S. 51 (1965).
promulgated a scheme of procedural safeguards, requiring that
(1) the censor bear the burden of proving that the material is
unprotected expression; (2) any restraint prior to judicial deter-
mination be imposed only to preserve the status quo, and only for
the shortest fixed period necessary for judicial resolution; and (3)
prompt, final judicial decision be assured. Thus the principle of
prior restraint permits governmental suppression of protected
speech prior to communication only in cases of extreme govern-
mental necessity and only when implemented through strict pro-
cedural safeguards.

The requisite justifications for prior restraints, however, do
not preclude the state from imposing reasonable time, manner
and place restrictions on freedom of expression in the public
forum. In upholding a licensing requirement for conducting a
parade, the Supreme Court noted:

The authority of a municipality to impose regulations in order
to assure the safety and convenience of the people in the use of

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71. Id. at 58-59. Although the film censorship statute in Freedman was held uncon-stitutional, the Court has sustained narrowly drawn review statutes designed to suppress obscenity prior to actual communication. E.g., Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), where the Supreme Court upheld a statute authorizing the seizure of allegedly obscene material and requiring judicial resolution as to the constitutionality of the material within a matter of days. Cf. Heller v. New York, 413 U.S. 483 (1973) (adversary hearing prior to seizure was not required because only one copy of the film was seized for preservation of evidence, thus not precluding continued exhibition of the film); Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) (prior restraint was not necessarily un-constitutional under all circumstances).

72. The “public forum” has traditionally been considered to embrace the public streets and parks. In Hague v. CIO, 307 U.S. 496, 515 (1939), the Supreme Court said:

Wherever the title of streets and parks may rest, they have immemorially been
held in trust for the use of the public and, time out of mind, have been used for
purposes of assembly, communicating thoughts between citizens, and discuss-
ing public questions. Such use of the streets and public places has, from ancient
times, been a part of the privileges, immunities, rights, and liberties of citizens.

The concept of the public forum is clearly expansive, however. In declaring unconsti-
tutional the City of Chattanooga’s refusal to lease a city theatre to the promoters of the rock-
musical “Hair,” the Court found a municipal theatre to be a part of the public forum. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975). But see Lehman v.
City of Shaker Heights, 418 U.S. 298 (1974), where the Court refused to find a city transit
vehicle to be a public forum for first amendment activity. Yet this decision may have been
primarily based upon avoidance of “lurking doubts about favoritism, and sticky adminis-
trative problems [which] might arise in parceling out limited space to eager politicians.”
Id. at 304. Mr. Justice Brennan dissented in Lehman because “the city created a forum
for the dissemination of information and expression of ideas when it accepted and dis-
played commercial and public service advertisements on its rapid transit vehicles.” Id.
at 310. See generally Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965
public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.\(^7\)

The maintenance of social order is itself a justification for subjecting first amendment activity to reasonable time, manner and place regulation. "One would not be justified in ignoring the familiar red light because it was thought to be a means of social protest."\(^7\) Moreover, the government may impose specified geographical limitations designed to effectuate an important governmental interest.\(^7\) Mr. Justice Stevens, in upholding the Detroit zoning scheme challenged in Young, considered the zoning ordinances to be reasonable time, place and manner regulation in furtherance of significant governmental interests.\(^7\)

**Prior Restraint Through Licensing**

A licensing regulation which gives a public official broad discretionary power to permit or prohibit the exercise of first amendment activity has traditionally been held an unconstitutional prior restraint. In Cantwell v. Connecticut,\(^7\) the Supreme Court declared unconstitutional a licensing statute which prescribed solicitation of money or any other items of value for any alleged religious, charitable or philanthropic cause without prior approval by the secretary of the public welfare council.\(^7\) The statute empowered the secretary to use his discretion to determine whether the cause was religious and, if religious, to permit solicitation.\(^7\) The Supreme Court held that "[s]uch a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment ... ."\(^7\) Similarly, in Hague v. CIO,\(^4\) the Supreme Court invalidated a

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\(^7\) Cox v. New Hampshire, 312 U.S. 569, 574 (1941). It should be noted that the state supreme court narrowly construed the challenged statute, with this narrowed construction then binding on the Supreme Court. For further discussion of reasonable regulations, see Kovacs v. Cooper, 336 U.S. 77 (1949). But see Saia v. New York, 334 U.S. 558 (1948).\(^7\)

\(^4\) Cox v. Louisiana, 379 U.S. 536, 554 (1965).\(^7\)


\(^7\) Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2448 n.18 (1976).\(^7\)

\(^7\) 310 U.S. 296 (1940).\(^7\)

\(^7\) Id. at 300 n.1.\(^7\)

\(^7\) Id. at 305.\(^7\)

\(^7\) Id.\(^7\)

\(^7\) 307 U.S. 496 (1939).
licensing ordinance which permitted denial of a license "for the purpose of preventing riots, disturbances or disorderly assemblage." The Court found this ordinance a means of arbitrary suppression of protected speech. Thus the licensing of first amendment activity, to avoid constitutional infirmity as an impermissible prior restraint, must reasonably regulate the time, place and manner of speech; it cannot be effectuated with discretionary administrative application.

The fundamental evil inherent in discretionary licensing is the potential regulation of the content of speech. In Police Department v. Mosley, the Supreme Court held unconstitutional a municipal ordinance which exempted peaceful labor picketing from the general prohibition on picketing within 150 feet of any school. The Court said:

The central problem with . . . [the] ordinance is that it describes permissible picketing in terms of its subject matter. . . . The operative distinction is the message on a picket sign. 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. . . . [O]ur people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.

In Young both the majority and dissenting opinions cited Erznoznik v. City of Jacksonville, which held unconstitutional a municipal ordinance prohibiting the showing of films containing any nudity by an open-air theatre when the screen was visible from a public street or place. The Court again emphasized the requirement of "content neutrality" when it stated that government may not censor offensive but protected speech. Such "con-
tent control” frustrates the fundamental purposes of freedom of expression: Content control stifles individual self-fulfillment, impedes the discovery of truth, corrupts the knowledgeable participation in decisionmaking, and disrupts the fragile balance of cleavage and consensus which freedom of expression preserves.9

The Detroit zoning scheme challenged in Young required that adult movie theatres be licensed by the Mayor.90 To obtain a license, a theatre was required to comply with the one thousand foot dispersal regulation.91 Moreover, the Mayor had broad discretion to revoke an operator’s license.92 This licensing scheme, challenged in Young as an unconstitutional prior restraint, was upheld by the Supreme Court. Yet the scheme constituted a prior restraint not within the extraordinary class of permissible restraints and not within the bounds of reasonable time, place and manner regulation. It thus violated established first amendment principles.

The denial of a theatre license proscribed the exercise of constitutionally protected speech. The articulated justification for the statutory suppression of speech, “the city’s interest in the character of its neighborhoods,”93 does not fall within the narrowly defined class of permissible prior restraints. The state interest in neighborhood preservation does not equal in importance the suppression of imminent publication of secret military data, suggested in Near v. Minnesota94 as illustrative of adequate justification for prior restraint.95 Moreover, while it is established that obscene material might legitimately be suppressed,96 the “adult”
material regulated by the Detroit zoning ordinances was not obscene. The Detroit scheme created a "middle ground" of obscenity: It permitted the regulation of speech which, albeit sexually explicit, should be fully entitled to constitutional protection. By regulating constitutionally protected speech, the Detroit zoning ordinances control sexually explicit material without resort to problematic obscenity laws.

Furthermore, the Detroit zoning scheme constitutes a prior restraint without the requisite procedural safeguards enunciated in Freedman v. Maryland. The Detroit zoning statutes vested authority in a public official to refuse licenses to "adult" theatres not complying with the one thousand foot dispersal regulation. The ordinances impose a prior restraint without time limitation and without expedient judicial resolution of the permissibility of restraint.

The most serious problem of the ordinances is that they go beyond permissible time, place and manner regulation of protected speech; these ordinances regulate the content of expression. This content regulation, traditionally condemned by the Supreme Court, exists on two levels. First, the zoning restrictions apply only to theatres which exhibit "adult" movies. Second, the zoning ordinances constitute content regulation because they allow the exercise of discretion by public officials. Ordinance 743-G authorizes the Mayor to deny a license, or revoke any license already issued, upon proof of "the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute . . . or of any ordinance . . . regulating, controlling or in any way relating to the construction, use or operation of any [regulated use] . . . which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business that justifies its suppression. Although the Near decision implies the latter, the distinction is without substance.


99. DETROIT, MICH., ORDINANCE No. 742-G, § 66.0000 (1972); DETROIT, MICH., ORDINANCE No. 743-G (1972).

100. See notes 85-89 supra and accompanying text.

101. See notes 129-158 infra and accompanying text for equal protection discussion.

102. DETROIT, MICH., ORDINANCE No. 743-G (1972).
This ordinance allows a public official to deny or revoke a license on indefinite and expansive standards. Moreover, the zoning scheme defines an adult theatre as one presenting material "characterized by an emphasis" on sexual matter. This vague definition of adult theatres permits discretionary application of the regulatory scheme. Consequently, the Detroit zoning ordinances constitute nothing less than the potential for unlimited censorship and content regulation.

Mr. Justice Stevens emphasized that the zoning scheme did not prohibit speech, because it left "the market for this commodity . . . essentially unrestrained." He noted that the ordinances only imposed locational restrictions on the exercise of speech. However, both total prohibition and locational regulation are condemned by the first amendment. Locational regulation, in essence a prior restraint, was invalidated in Southeastern Promotions, Ltd. v. Conrad, where the Supreme Court said: "Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. . . . It does not matter for purposes of this case that the board's decision might not have had the effect of total suppression . . . ."

The movie theatres affected by the challenged zoning scheme are subject to the general zoning restrictions applicable to all theatres; these laws are constitutional as reasonable regulations applicable to all land uses. But "adult" theatres are subjected to a further locational restriction based upon the material which they exhibit. This one thousand foot dispersal requirement, even if not a total proscription of speech, is constitutionally impermissible because it deprives protected expression of an available forum. That a theatre can relocate does not justify imposing a

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103. DETROIT, MICH., ORDNANCE NO. 742-G (1972).
105. Id. at 2448. However, Mr. Justice Stevens also noted that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." Id. at 2453 n.35.
106. Schneider v. New Jersey, 308 U.S. 147, 163 (1939): "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."
108. Id. at 556 (citing Schneider v. New Jersey, 308 U.S. 147 (1939)).
prior restraint upon first amendment freedom; the first amend-
ment forbids content regulation, as well as content prohibition. 110

The Detroit zoning scheme might even result in a de facto
total prohibition of speech. Adult businesses may actually de-
pend upon clustering, for other establishments may be hesitant
to locate nearby. Consequently, the landlord who owns several
pieces of property may refuse to rent to the single adult movie
exhibitor in order to retain the adjacent businesses as tenants.
Economic incentives may thus affect the dissemination of speech.
In addition, the consequences of such a dispersal requirement in
a small city may severely restrict the number of such businesses;
a required dispersal regulation in a city of small geographic area
may allow only a very limited number of adult businesses within
the city limits, thus effectively curtailing the speech. Through the
 guise of zoning, the Detroit ordinances may thus proscribe pro-
tected speech by "chilling" the exercise of first amendment free-
doms. Such a chilling effect has often elicited judicial scrutiny
more sensitive to first amendment rights. 111

The O'Brien Analysis

Justice Powell concurred in upholding the Detroit zoning
ordinances, but on grounds very different from Justice Stevens' rea-
soning. Justice Powell stated that the challenged ordinances
should be analyzed under the test devised in United States v.
O'Brien. 112 In O'Brien the Supreme Court upheld a conviction for
draftcard burning during an antiwar demonstration despite defen-
dant's claim that he engaged in protected first amendment activity. 113 In reaching this result, the Supreme Court declared:
"[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 inciden-
tal limitations on First Amendment freedoms." 114 The Court then

110. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Southeastern Promotions,
Ltd. v. Conrad, 420 U.S. 546 (1975); Police Dep't v. Mosley, 408 U.S. 92 (1972). See also
Sullivan, 372 U.S. 58 (1963); Schneider v. New Jersey, 308 U.S. 147 (1939); Lovell v. City
of Griffin, 303 U.S. 444 (1938).

111. See, e.g., Walker v. City of Birmingham, 388 U.S. 307, 345 (1967) (Brennan, J.,
dissenting); Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); Wieman v. Upde-
graff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). See generally Note, The


113. Id. at 376.

114. Id.
offered a four-part test of the constitutionality of such limitations: (1) the regulation must fall within the government's constitutional power; (2) it must promote a substantial governmental interest; (3) the governmental interest must not be a guise for suppression of protected speech; and (4) the restriction on first amendment freedoms must be no greater than necessary to promote the governmental interest. Mr. Justice Powell found that the Detroit zoning ordinances satisfied each of these elements. He thus upheld the zoning scheme, without resort to the majority's prior restraint analysis; under the O'Brien test, he viewed this zoning scheme as "innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent."

Justice Powell, however, misapplied the O'Brien test. The O'Brien test permits limitation of expression when it arises from the same course of conduct as nonspeech. It is essentially a balancing test which permits regulation of speech arising out of a nonspeech context. Such regulation is permissible because the nonspeech element threatens important governmental interests. These interests and the statutes implementing them must directly limit only the noncommunicative aspect of conduct. O'Brien's exercise of his first amendment rights could be restricted because it flowed tangentially from a course of conduct which could be proscribed.

But the operation of an adult movie theatre, which this zoning scheme affects, does not fall within this speech-nonspeech dichotomy. While the commercial operation of theatres as nonspeech may be subject to regulation, this operation is intrinsically related to the constitutionally protected exhibition of films. The regulation in Young may be characterized as "one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." O'Brien condemns such regulation as the direct suppression of communication, not merely as the regulation of noncommunicative conduct. To

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115. Id. at 377.
117. Id. at 2453.
119. Id. at 382.
120. Id.
apply the O'Brien test to a zoning ordinance regulating adult movie theatres is to subject speech and nonspeech elements—readily distinguishable in the symbolic speech context of draftcard burning—to an illusory dichotomy. One can burn one's draftcard without communicating first amendment expression; yet one cannot operate a movie theatre without enjoying the protection of this constitutional guarantee.121

The Dissenters' Analyses

Four members of the Court dissented in Young. Mr. Justice Stewart, writing for himself and Justices Brennan, Marshall and Blackmun, asserted that the case involved "selective interference with protected speech whose content is thought to produce distasteful effects."122 He suggested that the Court repudiated the first amendment requirement that time, place and manner regulations be content-neutral.123 Justice Stewart concluded that while the speech at issue may be of little or no value, "that is the price to be paid for constitutional freedom."124

Mr. Justice Blackmun, joined by the others, dissented on the additional ground of vagueness. He found the ordinances unconstitutional because the statutory definition of adult material was nebulous.125 The movie exhibitor was required initially to ascertain the character of the films which he exhibited. If he were to conclude that his theatre was an adult theatre, he would then have to determine if any other "regulated uses" were within one thousand feet of his establishment. Thus the motion picture exhibitor must be able to characterize his own films accurately. Further, he must accurately characterize the material of any competitor within one thousand feet.126 The adult theatre operator seeking to comply with the ordinance is doubly burdened by indefinite statutory requirements. Justice Blackmun noted also that these vague standards may be applied under indefinite licensing criteria. Thus without reaching the question of prior re-

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123. Id.
124. Id. at 2461.
125. Id. (Blackmun, J., dissenting).
126. Id.
Zoning of Adult Movie Theatres

A Public Forum Approach

While the dissenters in Young found the Detroit zoning scheme unconstitutional, their opinions did not focus narrowly on an analytical framework for ascertaining whether the zoning regulations in question abridged first amendment rights. The Young case should be analyzed within the context of traditional public forum and licensing principles. The exhibition of adult movies is an exercise of freedom of speech. When the various theatres exhibit adult movies within a particular neighborhood, the operators' collective activity constitutes the exercise of speech within the public forum; the neighborhood, like a street or a park, is part of the public domain. Zoning ordinances which limit the locational density of specified motion picture theatres regulate speech in the public forum to further the safety and convenience of the community; such zoning ordinances, designed to preserve the character of a neighborhood, expand the regulation of protected speech in the interest of social order.

Therefore, these zoning ordinances must be analyzed as a prior restraint on protected speech. Whether the ordinances constitute a permissible regulation must depend on (1) whether the restraint is within the narrow exceptions to general condemnation of prior restraint and is accomplished with procedural safeguards, or (2) whether the restraint is a reasonable time, place and manner regulation which does not control content. The zoning ordinances in Young satisfied neither of these requirements. In upholding Detroit's zoning scheme, the Supreme Court has thus departed from established first amendment principles which limit the extent of governmental regulation permissible in controlling public forum speech.128

127. Justice Blackmun noted, however, that the ordinances were also challengeable as a prior restraint. Id. at 2462 n.4.

128. It may be interesting to note that Mr. Justice Powell stated: "[T]his situation is not analogous to cases involving expression in the public forums or to those involving individual expression . . . ." Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2455 (1976) (Powell, J., concurring). He then applied the O'Brien test—a test devised to determine the validity of governmental regulation in the very narrow context of symbolic speech—to the zoning scheme challenged in Young. It is unclear, if the case at hand is unique and unrelated to individual expression, why the O'Brien test should be determinative. The better analysis is that the case is not unique and that traditional public forum standards should apply.
THE EQUAL PROTECTION CHALLENGE

The Detroit zoning ordinances were also challenged as a denial of equal protection.\textsuperscript{129} The essential question in an equal protection challenge is "whether there is an appropriate governmental interest suitably furthered by the differential treat-

\begin{itemize}
  \item 129. Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2446 (1976). The Detroit zoning scheme was also challenged as violative of the due process guarantees of the fourteenth amendment. Respondents argued that the regulation of activity "characterized by an emphasis" on sexual material, DETROIT, MICH., ORDINANCE No. 742-G, § 32.0007 (1972), was vague. Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2446 (1976). Moreover, they asserted that the waiver procedures of the 1,000 foot restriction was similarly vague. \textit{Id}. The Court failed to discuss the merits of these arguments because "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents. . . . It is clear, therefore, that any element of vagueness in these ordinances has not affected these respondents." Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2446 (1976).
  
  Respondents contended that they could raise the vagueness question because of the overbreadth doctrine. First amendment overbreadth permits a defendant whose own activity is unprotected to challenge the constitutionality of legislation because the regulation abridges constitutionally protected speech. Overbreadth is essentially a relaxation of traditional rules of standing; it permits "[l]itigants . . . to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). See also Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2447 n.17 (1976), and cases therein cited; Doran v. Salem Inn, Inc., 422 U.S. 922, 933 (1975); Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); NAACP v. Button, 371 U.S. 415, 433 (1963). See generally Note, \textit{The First Amendment Overbreadth Doctrine}, 83 HARV. L. REV. 844 (1969).
  
  The Supreme Court found, however, that respondents could not assert the rights of others because the deterrent effect was "not 'both real and substantial,' " Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2447 (1976), and because the statute was "readily subject to a narrowing construction by the state courts . . . ." \textit{Id}. (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975)). Yet, it should be noted that because suit was commenced in federal court, the state courts had not limited the statute. Consequently, the Supreme Court's opinion leaves uncertain whether the ordinance was actually valid, or whether the Court was merely suggesting that the state courts should have the opportunity to narrow the statute. \textit{Cf.} Gooding v. Wilson, 405 U.S. 518 (1972) (statute punishing "opprobrious words" is unconstitutional absent a narrowing construction by the state courts).
  
  Moreover, the Supreme Court in \textit{Young} has expanded the "substantial overbreadth" limitation first enunciated in Broadrick v. Oklahoma, 413 U.S. 601 (1973). The limitation of "substantiality" was specifically intended to apply to regulation of conduct. The function of overbreadth "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct. . . . [P]articularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well . . . ." Broadrick v. Oklahoma, 413 U.S. 601, 618 (1973). The Supreme Court in \textit{Young}, however, has applied the substantiality limitation to expression more akin to "pure speech" than to "conduct." The Court's interpretation of the overbreadth doctrine has thus insulated Detroit's zoning scheme from constitutional challenge on vagueness grounds.
\end{itemize}
ment.” The theatre operators contended that the zoning classification of adult and nonadult films, and the disparate regulation of each, denied equal protection.

Any claim of a denial of equal protection based on a classification of first amendment activity necessarily intertwines equal protection and first amendment interests. To regulate selectively one mode of first amendment expression raises a claim of abridgement of freedom of speech. Yet the classification itself affords a further claim of denial of equal protection of the law.

The equal protection clause, in its theoretical terms, requires that similarly situated individuals receive similar treatment under the law. This requirement, however, has proved difficult to implement in a consistently principled manner. All legislation in effect classifies; thus equal protection analysis implicitly involves a complex evaluation of the character of the classification, the individual rights affected by the classification, and the governmental interests asserted in support of the classification.

The dominant mode of equal protection analysis of the past several decades has focused on a two-tiered test of legislative classification. When classification involves economic or social legislation, a court must apply minimal scrutiny, upholding the legislation if “the State's system be shown to bear some rational

130. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).
131. E.g., id.; Cox v. Louisiana, 379 U.S. 556, 557 (1965); Niemotko v. Maryland, 340 U.S. 268, 272 (1951). See Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2451 n.27 (1976). See also Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 21 (1975): “Although the Supreme Court has only recently recognized the centrality of the equality principle in the first amendment, the principle was implicit in the Supreme Court's 'public forum' decisions. More fundamentally, the principle of equal liberty lies at the heart of the first amendment's protections against government regulation of the contest speech.” This commentator further suggests that the “equality principle” may in fact be more protective of speech than traditional first amendment doctrines. Id. at 65-68.
132. This principle has been most aptly and succinctly stated: “Freedom of speech is indivisible; unless we protect it for all, we will have it for none.” Karst, supra note 131, at 23 (quoting Kalven, Upon Rereading Mr. Justice Black on the First Amendment, 14 U.C.L.A. L. Rev. 428, 432 (1967)).
133. Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (citing Williams v. Rhodes, 393 U.S. 23, 30 (1968)).
relationship to legitimate state purposes.” Where the legislative scheme involves fundamental rights or suspect classifications, a court applies strict scrutiny, requiring that the legislation further a compelling state interest by the least restrictive means.


It had, at one point, been perceived that the fundamental rights approach to equal protection analysis might be a broad tool of social reform. The Burger Court, however, has generally not expanded fundamental rights to include “fundamental interests” and “necessities.” See, e.g., San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education); Lindsey v. Normet, 405 U.S. 56 (1972) (housing); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare benefits).

137. Suspect classifications include race, Loving v. Virginia, 388 U.S. 1 (1967); Yick Wo v. Hopkins, 118 U.S. 556 (1866); ancestry, Korematsu v. United States, 323 U.S. 214 (1944); alienage, Graham v. Richardson, 403 U.S. 365 (1971); Sei Fugii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952). A suspect class has been characterized as one “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

At one point, four Supreme Court Justices considered sex to be a suspect class. Frontiero v. Richardson, 411 U.S. 677, 682 (1973). However, while gender classification has frequently elicited more than minimal scrutiny, see, e.g., Stanton v. Stanton, 421 U.S. 7 (1975); Reed v. Reed, 404 U.S. 71 (1971), and note 139 infra, sex is not regarded as a suspect class. Similarly, illegitimacy, while not considered a suspect class, frequently is subject to judicial review more stringent than minimal scrutiny. See Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968). But see Labine v. Vincent, 401 U.S. 532 (1971). These classes might best be characterized as “suspicious.”

138. “[S]trict scrutiny means that the [classification scheme] is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a
Yet while the two-tiered mode of analysis has persisted in form, judicial scrutiny has not systematically conformed to this bifurcated approach. The Supreme Court, however, has recently reaffirmed the two-tiered analysis as the test of equal protection. It might therefore have been expected that the Detroit zoning scheme would have been subjected to either this minimal or strict scrutiny approach.

In discussing respondent's equal protection claim in Young, the Court diverged from the established two-tiered approach. Mr. Justice Stevens initially articulated the principle that governmental regulation of speech must be content-neutral: "The sovereign's agreement or disagreement with the content of what a speaker has to say may not affect the regulation of the time, place or manner of presenting the speech." However, in Justice Stevens' view, this principle does not wholly forbid content regulation, because "broad statements of principle, no matter how

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139. The Burger Court, while purporting to apply minimal scrutiny, has frequently been less deferential to legislative classification than mere rationality has traditionally permitted. The Court has invalidated legislation by applying a more subjective, and perhaps indefinable, mode of scrutiny. See Stanton v. Stanton, 421 U.S. 7 (1975); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); James v. Strange, 407 U.S. 128 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). See also Mr. Justice Marshall's frequent dissents calling for a more flexible approach, a "sliding scale" assessing the benefit denied, the character of the class, and the asserted state interest, cited in Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2569 (1976). See generally Gunther, supra note 135, which proposes a strengthened rationality standard by requiring that legislative purpose have a substantial basis in actuality, not merely in judicial conjecture; Shaman, The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause, 2 HASTINGS CONST. L.Q. 153 (1975); Comment, Fundamental Personal Rights: Another Approach to Equal Protection, 40 U. CHI. L. REV. 807 (1973); Note, 52 J. URBAN L. 388 (1974), note 12 supra.

140. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976). Murgia was decided the day after Young. But see Mr. Justice Marshall's sharp dissent in Murgia condemning this rigid approach. Id. at 2568-73.

141. It must be emphasized that only three other members of the Court joined in Justice Stevens' equal protection analysis. Mr. Justice Powell, who concurred in the result, did not agree with this portion of the opinion. See Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2453 n.1 (1976).

correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached." Consequently, Justice Stevens justified the regulation of content without discussing whether the affected right was fundamental.

He first noted that whether speech falls within first amendment protection often depends upon the content of the speech. Moreover, Justice Stevens stated that even if speech were protected, "a difference in content [might] require a different governmental response." Justice Stevens cited the New York Times libel standard and the commercial speech standard to support the proposition that speech is legitimately subject to content distinctions. Finally, he emphasized that obscenity and distribution of sexual material to minors and unconsenting adults may be regulated, again a regulation of speech based on content.

Mr. Justice Stevens went on to state that the content of film may similarly be regulated without violating the obligation of content-neutrality: "[T]he regulation of the places where sex-
ually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message the film may be intended to communicate; whether the motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same." In addition, he suggested that society’s interest in protecting erotic materials is of a lesser magnitude than its interest in safeguarding political debate. Although Justice Stevens recognized that total suppression of sexually explicit material is forbidden, he concluded that the state may legitimately classify and regulate such material based on its content.

The final question Justice Stevens confronted was whether the ordinances’ classification scheme was justified by the city’s interest in preserving the character of its neighborhoods. He suggested that “the city’s interest in attempting to preserve the quality of urban life is one that must be accorded high respect . . . [and that] the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” Therefore, the city’s interest in the character of its neighborhoods supported content classification of motion pictures.

Mr. Justice Stevens’ reasoning departs from established equal protection analysis. Surely the right at issue in Young—the opportunity to distribute adult literature and movies—is guaranteed by the first amendment and is thus fundamental. Accordingly, the classification should have been subjected to strict scrutiny; the governmental interest to support regulation should have been compelling. But it is rare that a state interest is sufficiently compelling to justify abridgement of fundamental rights. While

150. Id. at 2450-52.
151. Id. at 2452.
152. Id. at 2453.
154. Korematsu v. United States, 323 U.S. 214 (1944), is the only case where the Court squarely held that a compelling state interest justified restrictions under strict scrutiny. In Korematsu the Court sustained the conviction of an American of Japanese ancestry for violating a military internment order during World War II. The Court found that even though the challenged order classified on the basis of race, the government’s
Justice Stevens demonstrated that content may be classified, he failed to relate permissible classification to the nature of the right involved and to the quality of the governmental interest promoted. Nonetheless, the Court held that although Detroit's zoning ordinances classified a protected right on the basis of content, the "city's interest in the present and future character of its neighborhoods adequately support[ed] its classification of motion pictures." If "adequate support" is synonymous with compelling state interest, Justice Stevens' opinion broadly expanded the strict standard sufficient to support discriminatory classification. Yet if the state purpose here did not rise to compelling state interest, the decision was an aberration of equal protection, for minimal scrutiny cannot justify abridgement of a fundamental right.

Mr. Justice Stevens' opinion was perhaps an expression of discontent with the established two-tiered mode of analysis. But, by sanctioning the Detroit zoning classification scheme, he obfuscated equal protection principles. Moreover, when the issue in Young is analyzed within the framework of public forum speech, Justice Stevens' opinion is strikingly defective. Regulation of subversive advocacy, libel, commercial speech, and distribution of sexual materials to minors and unconsenting adults—which Justice Stevens noted to be permissible regulation—is of course predicated upon content classification. Such classification is permitted because of evils perceived to arise from the content of the speech. Content classification of these modes of speech may thus serve legitimate state purposes. But public forum speech is of another dimension; strict content neutrality is required when government regulates protected speech within the public domain. Content classification of public forum speech is the essence of governmental censorship.

Furthermore, where strict scrutiny is applied, the legislative classification must not only promote a compelling state interest,
but also must further that interest by the least restrictive means possible.\textsuperscript{156} The Supreme Court "has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose."\textsuperscript{157}

The Detroit ordinances should have been found defective because they failed to satisfy these criteria: The ordinances permitted the exercise of overly broad administrative discretion by public officials. Ordinance 743-G\textsuperscript{158} sanctions a vague and generalized basis for denial or revocation of a license. The scheme is not narrowly tailored to serve its objective of preservation of the neighborhood; instead, the zoning ordinances allow wholesale stifling of first amendment rights by standardless administrative discretion inherent in the licensing requirements. Denial or revocation of a license might have been predicated upon a standard such as a violation of obscenity laws by management itself. Such a scheme would be a more narrowly designed means of effectuating the city's interest; license revocation or denial for violation of obscenity laws would not suppress protected forms of speech. Yet Ordinance 743-G permits license revocation or denial where any employee, within the preceding two years, has violated a state criminal statute or a city ordinance relating to regulated commercial uses which demonstrated flagrant disregard for the safety or welfare of others. Consequently, the same vice which infects the ordinance as an unconstitutional prior restraint also denies equal protection: the discretionary content regulation permitted by the ordinances. The zoning scheme constitutes an impermissible prior restraint through the discretionary licensing requirement; similarly, it denies equal protection through a discretionary classification system. The distinction between the equal pro-


\textsuperscript{158} See note 9 supra.
tection and first amendment arguments in Young is less real than apparent; they are in essence inseparably merged. Different analytical approaches lead to the same result.

CONCLUSION

The Detroit zoning ordinances requiring dispersal of adult movie theatres should have been found to deny both first amendment free speech and fourteenth amendment equal protection rights. This conclusion is not meant, however, to ignore the magnitude of the problems confronting our cities today. Surely city legislatures must be permitted to counteract the decay infecting major urban centers. Zoning is a unique and necessary tool for intelligent and responsive urban planning. In this regard, a city may regulate the physical and operational characteristics of adult businesses; promoting aesthetics, protecting public health, and regulating hours, for example, are legitimate forms of zoning ordinances. Ordinances imposing only such limitations would be narrower means of effectuating the city's goals than the dispersal regulation required by the zoning ordinances upheld in Young. Yet any regulation touching upon first amendment rights must be drafted with precision. The Constitution does not permit a regulatory scheme which sanctions the content control inherent in discretionary application. In failing to recognize the content regulation implicit in the Detroit zoning scheme, the Supreme Court in Young has departed from critical first amendment principles.

The current plight of our cities, however, is complex. The multiplicity of problems—declining property values, segregation, physical deterioration and the like—will not be remedied by regulating "adult" businesses. Solutions will require more energy, more creative planning, and perhaps more fundamental changes than merely devising zoning ordinances which regulate pornographic movie theatres, bookstores and various other establishments selling or displaying erotica. Unfortunately, other municipalities will attempt to "clean-up" their deteriorating neighborhoods by enacting ordinances based on Detroit's myopic zoning scheme.159

159. New York City, for example, long known for the availability of sexual material in the midtown area, is currently developing a zoning scheme based on the Detroit ordinances. See N.Y. Times, Nov. 17, 1976, § B, at 2, col. 1; N.Y. Times, Nov. 12, 1976, at 1, col. 4. Indianapolis and Fairfax County, Virginia, have already enacted ordinances similar to the Detroit scheme; other cities, including Los Angeles, California; Des Moines, Iowa;
Yet the evil of such zoning regulation is apparent. Detroit’s zoning scheme, upheld by the Supreme Court in *Young*, threatens equal protection and, more directly, freedom of speech. “[A] state may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions.” Some will argue that the free communication of views at issue in *Young* is only that of “porno shops,” views not worthy of constitutional protection. While the suppression of distasteful and unpopular speech is an easy path to follow, it is a path which belittles the integrity of the first amendment. “[T]he Framers thought,” Justice Black once wrote, “that the best way to promote the internal security of our people is to protect their First Amendment freedoms . . . and that we cannot take away the liberty of groups whose views most people detest without jeopardizing the liberty of all others whose views, though popular today, may themselves be detested tomorrow.” By placing the imprimatur of constitutionality on the Detroit zoning scheme, the Supreme Court in *Young v. American Mini Theatres, Inc.*, has jeopardized tomorrow’s liberty for all others.

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