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Constitutional Law - First Amendment - Freedom of Speech - Zoning Authority - Adult Entertainment

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Recent Decisions

CONSTITUTIONAL LAW — FIRST AMENDMENT — FREEDOM OF SPEECH — ZONING AUTHORITY — ADULT ENTERTAINMENT — The United States Supreme Court has held that a zoning ordinance which excludes all forms of live entertainment, including nonobscene nude dancing, from an otherwise broad range of permissible uses violates the first amendment.

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

In June 1973, James F. Schad[1] opened an adult bookstore in a small borough in Camden County, New Jersey.[2] The store was located in an area of the community zoned for commercial use.[3] Initially, the store sold adult books, magazines, and films, but later Shad obtained amusement licenses permitting him to add coin-operated devices to the store.[4] These devices enabled a customer to watch an adult movie by entering a booth and inserting a coin.[5] In July 1976, Schad installed an additional coin-operated device which allowed a person to view a live dancer who usually performed nude behind a glass panel.[6]

The Borough of Mount Ephraim filed a complaint in the New Jersey municipal court against Shad,[7] claiming that the exhibition of live nude dancing violated the Borough's zoning ordinance.[8] The

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1. The storeowners were James F. Schad and Juliette Ann DiLuciano. Brief for Appellants at 1.

2. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). The store was located on the Black Horse Turnpike, a major highway linking Atlantic City with Camden County and Philadelphia, Pennsylvania. *Id.* at 85 (Burger, C.J., dissenting).

3. *Id. See infra* note 9 for the text of the ordinance.

4. 452 U.S. at 62.

5. Brief for Appellants at 4.

6. *Id.*

7. *See supra* note 1. Complaints were also filed against Juliette Ann DiLuciano and the store itself, 613 Corporation. Brief for appellee at 1.

8. The zoning ordinance, MOUNT EPHRAIM, N.J. CODE, § 99-15B (1979), established three categories of zones. The first zoning category restricted use in the area to single-family dwellings. 452 U.S. at 63 & n.1. The second type permitted single-family dwellings, townhouses, and garden apartments. *Id.* The third type was zoned for commercial use. *Id.*

ordinance described a number of permitted uses in a commercial zone,[9] but did not provide for live entertainment.[10] Even though the municipal court interpreted the ordinance as a prohibition of all live entertainment including live nude dancing,[11] it determined that the ordinance was valid, found the defendants guilty, and imposed fines.[12]

The storeowners appealed to the Camden County Court where a trial *de novo* was held on the municipal court's record.[13] The Camden County Court rejected the storeowners' two grounds of appeal and affirmed the decision of the municipal court.[14] The first ground considered by the county court embodied the storeowners' claim of selectivity in the Borough's enforcement of its ordinance.[15] The court noted that other local businesses were permitted to offer live entertainment, but concluded that because these uses existed prior to the enactment of the ordinance, no improper or selective enforcement of the ordinance was present.[16]

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9. 452 U.S. at 63. MOUNT EPHRAIM, N.J. CODE, § 99-15B (1979) provides:

B. Principle permitted uses on the land and in buildings.

(1) Offices and banks; taverns; restaurants and luncheonettes for sitdown dinners only and with no drive-in facilities; automobile sales; retail stores . . .; repair shops . . .; cleaners and laundries; pet stores; and nurseries. Offices may, in addition, be permitted to a group of four (4) stores or more without additional parking, provided the offices do not exceed the equivalent of twenty percent (20%) of the gross floor area of the stores.

MOUNT EPHRAIM, N.J. CODE, § 99-4 (1979) provides that "[a]ll uses not expressly permitted in this chapter are prohibited." 452 U.S. at 64.

10. *See supra* note 9.

11. 452 U.S. at 64. In its complaint, the Borough interpreted the zoning ordinance as restricting all uses not expressly provided for and, therefore, as a prohibition of live nude dancing. Brief for Appellee at 3.

12. 452 U.S. at 64. The municipal court, interpreting the ordinance as a prohibition of all live entertainment including live nude dancing, determined that, although live nude dancing is protected by the first amendment, the zoning ordinance was a valid regulation, neither overly broad nor unduly vague. The storeowners claimed that the Borough's interpretation and application of the ordinance violated their constitutional rights because live nude dancing was a form of expression protected by the first and fourteenth amendments of the United States Constitution. The storeowners also claimed that the ordinance suppressed rather than regulated this form of expression and was unduly vague and overly broad. Brief for Appellants at 5-6.

13. 452 U.S. at 64.

14. *Id.*

15. *Id.*

16. *Id.* The building inspector and the chief of police testified that the establishments offering live music were permitted to do so only because this use of the premises preceded the enactment of the zoning ordinance and therefore qualified as a nonconforming use. *Id.* at n.3.

The storeowners' second contention was based on the first and fourteenth amendments.[17] The Camden County Court acknowledged that the first amendment protects live nude dancing, but found that protection was not warranted when only a zoning ordinance, prohibiting all forms of live entertainment, was involved.[18] The court relied on *Young v. American Mini Theatres, Inc.*[19] for the proposition that a zoning ordinance is not automatically invalid solely because it places restrictions on the commercial exploitation of material protected by the first amendment.[20]

On appeal, the Appellate Division of the Superior Court of New Jersey affirmed the convictions for essentially the same reasons.[21] An appeal to the Supreme Court of New Jersey for further review was denied.[22] The storeowners then appealed to the United States Supreme Court.[23] The Court granted their appeal to determine whether the storeowners' first and fourteenth amendment right to free expression had been violated by the imposition of criminal penalties under an ordinance which prohibited live entertainment, including nonobscene nude dancing.[24]

Justice White, writing for the majority,[25] held that the ordinance, as interpreted by the lower courts, denied the storeowners their constitutional right to free expression.[26] Justice White

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17. *Id.* at 64.

18. *Id.*

19. 427 U.S. 50 (1976). In *American Mini Theatres,* the Court upheld a zoning ordinance which restricted the location of new theaters showing sexually explicit adult movies, despite a first amendment challenge. *Id.* at 62.

20. 452 U.S. at 64-65. The Camden County Court rejected the balance of the storeowners' contentions and found them guilty as charged, affirming the fine. *Id.*

21. *Id.* at 65.

22. *Id.* The denial came in Borough of Mount Ephraim v. Schad, 82 N.J. 287, 412 A.2d 793 (1980).

23. 452 U.S. at 65. In their appeal, the storeowners also claimed that the zoning ordinance constituted a denial of the process and equal protection because customers were permitted access to coin-operated movie booths, but were denied access to booths from which they could view nude dancing. 452 U.S. at 65 n.4. The Supreme Court did not address these claims because the majority sustained the storeowners' first amendment challenge to the ordinance. *Id.*

24. *Id.* at 65.

25. Justices Brennan, Stewart, Marshall, Blackmun, and Powell joined in the decision of the majority. *Id.* at 62.

26. *Id.* at 65. The Supreme Court noted that it was bound by the New Jersey courts' interpretation of the Mount Ephraim code, that live entertainment was not a permitted use in any Borough establishment. *Id. See supra* note 11-12 and accompanying text. The Supreme Court also noted that the Camden County Court did not make a determination on

stressed that the ordinance, construed to ban all live entertainment within the Borough,[27] barred a substantial amount to expression protected by the first and fourteenth amendments.[28] He emphasized that an entertainment program may not be prohibited solely because it contains nudity, which is protected to a certain extent by the first amendment.[29]

Justice White then directed his attention to the constitutional protection accorded all forms of live entertainment, because the Borough's ordinance was interpreted as excluding all live entertainment, and not just nonobscene nude dancing.[30] He explained that the first amendment requires adequate justification for the exclusion of categories of protected speech from the range of permissible commercial uses in the Borough, and found that the ordinance, on its face, did not provide this justification.[31] While acknowledging the wide latitude given a municipality to zone and restrain land use, he tempered this declaration by stressing that it must be achieved within constitutional bounds or suffer invalidation on review.[32] According to Justice White, the standard for reviewing a zoning ordinance which treads on a protected expression is that it be "narrowly drawn"[33] and advance a "substantial government interest."[34] Since the zoning ordinance interfered with a

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the permissibility of non-live entertainment. 452 U.S. at 67 n.6.

27. The Borough's code provided that all uses not expressly permitted by the code were prohibited. 452 U.S. at 67. *See supra* note 9.

28. 452 U.S. at 65.

29. *Id.* at 66. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 (1975); Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

30. 452 U.S. at 66. The majority held that the storeowners could stress the impact of the ordinance on all forms of live entertainment because their defense to the lower court convictions centered on the first amendment. *Id. See also* Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) (a party can raise an overbreadth challenge even when his actions could be constitutionally prohibited by a properly limited law, because overbroad laws, like vague ones, deter privileged activities).

31. 452 U.S. at 67. *See supra* notes 28-29.

32. 452 U.S. at 68. *See* Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977)(Stevens, J., concurring)(zoning power must be exercised within constitutional limits).

33. 452 U.S. at 68.

34. *Id.* Justice White observed that Schneider v. State, 308 U.S. 147, 162 (1939) held that even legitimate state objectives may be insufficient justification when the regulation interferes with fundamental personal rights. 452 U.S. at 69-70. He also noted that Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980), required that the substantiality of the government interests be assessed, and would permit restrictions on this type of speech only where no less intrusive means existed to further the state's legitimate interest. 452 U.S. at 70. Land use regulations affecting only property interests are governed

protected form of expression, the Court stated it must carefully scrutinize the justifications advanced by the Borough for its prohibition of all live entertainment and determine whether less intrusive means existed to further any actual justification presented.[35]

The Court distinguished *American Mini Theatres,* on which the lower court relied, on the basis that the restriction in that case imposed a minimal burden on protected expression because it did not attempt to ban all live entertainment, but only dispersed the locations available for adult movie theaters.[36] Detroit officials, in *American Mini Theatres,* had justified that minimal burden by advancing evidence which indicated that an increase in the number of adult theaters in limited confines resulted in accelerated deterioration of surrounding neighborhoods.[37] The restriction in *Schad,* however, was a total ban on all live entertainment.

Justice White next addressed the Borough's three justifications for prohibiting live entertainment.[38] First, the Borough had explained that it was seeking to mold a commercial area that provided only for the immediate needs of its inhabitants.[39] The majority, rejecting this justification as insignificant, viewed the numerous uses permitted by the ordinance[40] and observed that far more than just a handful of services were available to the community and that, with exception to live entertainment, it was difficult to find a commercial service or enterprise not obtainable.[41]

The Borough also argued that through its zoning ordinance it had sought to prevent problems such as traffic congestion, trash accumulation, and the need for additional police and medical facilities that are associated with live entertainment.[42] Because the

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by the lower "rational relationship" standard, requiring that the restriction be rationally related to a legitimate state concern. 452 U.S. at 68 n.7.

35. 452 U.S. at 71.

36. *Id. See* 427 U.S. 50 (1976).

37. *See* 427 U.S. at 71-72.

38. 452 U.S. at 72-76.

39. *Id.* at 72-73. The purpose of the commercial zone, set forth in § 99-15A of the Mount Ephraim Code, was to encouraged shopping center-type development and a concentration of commercial uses into few locations. *Id.* at 63 n.2. The Borough's counsel asserted that the stores would enable residents to purchase the few items—bread, milk, gifts—they might forget to buy outside the Borough. *Id.* at 72 n.13.

40. The list of permitted uses included retail stores, motels, lumber stores, offices, car showrooms, barber shops, cleaners, and restaurants. *See supra* note 9.

41. 452 U.S. at 73.

42. *Id.*

Borough failed to demonstrate that live entertainment had a greater effect on such problems than did the uses permitted by the ordinance, the majority concluded that this justification was unfounded.[43] Justice White viewed this explanation as particularly inappropriate because the Borough granted the storeowners a license to exhibit nude dancing on film and offer other adult products while denying a request to allow live entertainment.[44] He postulated that even if some forms of live entertainment might create special situations warranting regulation, any regulation promulgated must be more narrowly drawn than this challenged ordinance, and must address only the particular zoning problems associated with that type of live entertainment.[45]

Finally, the Borough contended that its ordinance sufficed as a reasonable time, place, and manner restriction.[46] Justice White observed that in *Grayned v. City of Rockford*,[47] the Court had held that the reasonableness of the challenged regulation as a time, place, and manner restriction is determined by comparing the suitability of the protected expression with the normal activity of the regulated place.[48] He found that the evidence presented by Mount Ephraim failed to establish that live entertainment was incompatible with the normal activity allowed in the Borough's commercial zone.[49]

Additionally, the Court noted that *Grayned* demanded that a valid time, place, and manner restriction must provide alternative avenues of expression in addition to advancing significant state interests.[50] The Borough suggested that live entertainment was excludable since it was abundantly available in nearby Philadelphia

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43. *Id.* at 73-74.

44. *Id.* at 74.

45. *Id.* Justice White concluded that the Borough had not established that its goals could not be met by an enactment less intrusive on protected expression. *Id.*

46. *Id.* The reasonableness of regulations restricting the time, place, and manner of expression is determined by the nature of the place in question. *Id.* at 75.

47. 408 U.S. 104 (1972).

48. *Id.* at 116-17.

49. 452 U.S. at 75.

50. *Id. See* 408 U.S. at 116, 118; Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980) (commission regulation that prohibited inclusion in monthly electrical bills of inserts discussing issues of public policy held violative of freedom of speech); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (Virginia statute that made advertising the prices of prescription drugs conduct subjecting pharmacists to license suspension or revocation held violative of the first amendment).

and in other areas of Camden County outside the Borough limits.[51] The majority admitted the possible appropriateness of this argument if Camden County had been organized with county-wide zoning; however, no such county-wide plan existed.[52] According to Justice White, the Borough also failed to produce evidence indicating the availability of live entertainment in a close proximity.[53] Justice White theorized that even if live entertainment was shown to be available in nearby areas, a Mount Ephraim resident's avenue to this expression should not always necessitate an out-of-town journey if the activity is appropriate and compatible with permitted uses.[54] The Court then reversed the convictions and remanded the case for further proceedings consistent with its opinion.[55]

Justice Blackmun's concurrence focused on two issues he believed important in this developing area of the law.[56] He stated that the long-attendant presumption of validity attached to the exercise of a local authority's zoning power is inappropriate when the regulation encumbers a right protected by the first amendment.[57] To justify a restriction on the freedom of expression in the community, Justice Blackmun demanded a sufficient foundation for any asserted government concern.[58]

Justice Blackmun also considered the Borough's "availability in nearby areas" justification.[59] Following the majority's dismissal of this theory, he found it improper to require a resident of one community to infiltrate a nearby territory to exercise his first amendment rights, because this would make the resident's right of access to such expression contingent on the decisions of a community in which he had no political voice.[60] Justice Blackmun recognized

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51. 452 U.S. at 76.

52. *Id.*

53. *Id.*

54. *Id.* at 76-77. "One 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 places." *Id.* (*quoting* Schneider v. State, 308 U.S. 147, 163 (1939)).

55. 452 U.S. at 77.

56. *Id.* (Blackmun, J., concurring).

57. *Id.* Justice Blackmun emphasized that this situation demands a "narrowly drawn" ordinance which furthers a "sufficiently substantial" interest. *Id.*

58. *Id.* Justice Blackmun did not view this scrutiny insurmountable, but stressed that minimal scrutiny requiring only some rational relation to the community interest was insufficient. *Id.*

59. *Id.* at 78 (Blackmun, J., concurring).

60. *Id.* Justice Blackmun hypothesized that if such a contention became law, a nearby

that *American Mini Theatres* did not in any manner accept this argument beyond the confines of a single political subdivision. He expressed great concern for those minority members of the community who wish to practice a form of protected expression within their borough, which the principal sector of the community finds incompatible with its concept of decent life.[61] He admitted that zoning is a proper tool to be utilized by a municipality to protect the community's character; however, Justice Blackmun regarded the protection of diversity of ideas as a touchstone to democratic thought, requiring that unpopular expression, which also warrants first amendment protection, find judicial bulwarks from assault by majoritarian sectors of the community seeking to ban it.[62]

Justice Powell, who also wrote in concurrence,[63] agreed with the majority's view that the Borough failed to introduce sufficient evidence to justify such a broad restriction on protected expression.[64] He pointed out, however, that with a more narrowly drawn ordinance, a community could prohibit or limit all commercial entertainment.[65] Such an action, Justice Powell stated, could be acceptable in a residential area where all commercial uses were prohibited.[66] Accepting the majority's view, Justice Powell found the Borough's ordinance underinclusive by permitting uses that went far beyond just providing for the immediate needs of residents, and overinclusive by prohibiting all live entertainment.[67]

Justice Stevens, concurring in the judgment, filed a separate opinion[68] in which he noted that the majority had viewed the case as founded in the first amendment and, therefore, had required the Borough to overcome a presumption of invalidity.[69] To do so, he observed, the majority had required Mount Ephraim to demon-

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city, such as Philadelphia, could become obligated to provide noncitizens with access to adult materials simply because other communities had earlier banned such access. *Id.*

61. *Id.*

62. *Id.* at 79 (Blackmun, J., concurring).

63. *Id.* (Powell, J., concurring). Justice Powell's concurrence was joined by Justice Stewart.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* (Stevens, J., concurring).

69. *Id.* at 80 (Stevens, J., concurring). Justice Stevens theorized that if evidence had been presented showing that the change in the defendants' business had disturbed the community, then the Borough could have prohibited it. *Id.* at 83. (Stevens, J., concurring).

strate that the ordinance was narrowly drawn and that it effectuated a sufficiently substantial government interest.[70] He also indicated that if the case were analyzed from the perspective adopted by Chief Justice Burger—that the Borough's ordinance represented a solitary attempt to exclude nude dancing from a residential area—the storeowners would have been faced with overcoming the presumption that the ordinance was constitutionally valid.[71] This would have necessitated a display that the Borough had applied the exclusion selectively, or that similar expression was not sufficiently available in areas close to the Borough limits.[72]

Justice Stevens believed that the issue should be addressed from a different angle. He rejected the Chief Justice's approach, finding the record too opaque to enable the Court to adequately characterize the community of Mount Ephraim with the degree of definiteness necessary to determine the need for this specific ordinance.[73] Justice Stevens reasoned that although the first amendment is attentive to more serious matters than live nude dancing, it nevertheless requires, when the record is unclear, that the burden of showing the adverse effect of live entertainment on the community be placed on the Borough.[74]

Justice Stevens concluded that Mount Ephraim had not met this burden of persuasion and had left the Court to speculate as to the Borough's reasons for attacking the appellants' business and as to the justification for the distinction drawn by Mount Ephraim between live and other forms of entertainment.[75] He reasoned that while local government ordinarily need not justify the means chosen to effectuate its zoning policy, when first amendment interests are implicated, a municipality is required to show that it is regulating expressive activity pursuant to a uniform policy.[76] Further, he maintained such a policy must be implemented by a restriction

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70. *Id.* at 80 (Stevens, J., concurring).

71. *Id.* at 79-80 (Stevens, J., concurring).

72. *Id.* at 80 (Stevens, J., concurring).

73. *Id.* at 83 (Stevens, J., concurring).

74. *Id.* Justice Stevens qualified this statement, explaining that in unspecified instances he might presume that live nude dancing has an adverse impact on a community when the challenged ordinance is narrowly drawn to separate such live entertainment from other permitted uses. *Id.* However, Justice Stevens could not utilize this exception in this case because the ordinance cut a broad swath through the field of protected expression. *Id.* *See supra* note 11 and accompanying text.

75. 452 U.S. at 83-84 (Stevens, J., concurring).

76. *Id.* at 84 (Stevens, J., concurring).

which is as narrowly drawn as possible and applied in accordance with content—neutral standards.[77] Conversely, regulations affecting expressive activity which are limited only by the discretion of public officials are not permitted.[78] Because there had been no showing that the proper standards had been applied by Mount Ephraim to the appellants' business,[79] Justice Stevens agreed with the majority that the appellants' convictions should be reversed.[80]

Chief Justice Burger, in a dissenting opinion,[81] categorized the Borough of Mount Ephraim as a quiet, "bedroom" commmunity[82] and grounded his opinion that the lower court convictions should be affirmed on that basis.[83] The Chief Justice noted that, in application the ordinance was merely an exercise of the community's power to determine what is best for its residents with regard to their health, safety, and welfare, a power which has been upheld under past Supreme Court decisions.[84] Unlike the majority, Chief Justice Burger characterized the case as involving a valid attempt by a tiny residential community to exclude commercial nude dancing from their quiet confines.[85] According to the Chief Justice, the breadth of the ordinance's restriction should be defined by its application and not by its potential literal meaning as the majority had held;[86] therefore, because this ordinance, as applied, operated only as a ban on nude dancing, analysis of a potential ban on live

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77. *Id.*

78. *Id.* Justice Stevens did not think that a uniform, recognizable policy was discernable from the Mount Ephraim ordinance, and observed that the Borough itself had offered varying interpretations of the prohibition throughout the stages of the litigation. These interpretations ranged from a ban of commercial live entertainment to a total rejection of all commercial entertainment. *Id.* at n.10. (Stevens, J., concurring).

79. Justice Stevens agreed with Justice Powell that residential communities could maintain the status quo by banning commercial entertainment when all commercial activity is excluded. He concluded, however, that Mount Ephraim did not qualify as a purely residential community. *Id.* at n.11 (Stevens, J., concurring).

80. *Id.* at 85 (Stevens, J., concurring). Justice Stevens refused to embrace the majority's overbreadth finding. *Id.*

81. *Id.* (Burger, C.J., dissenting). Chief Justice Burger was joined by Justice Rehnquist. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 85-86 (Burger, C.J., dissenting). *See* Berman v. Parker, 348 U.S. 26, 33 (1954) (upholding a District of Columbia redevelopment act which authorized a redevelopment agency to acquire and assemble real property for the redevelopment of blighted property).

85. 452 U.S. at 85-86 (Burger, C.J., dissenting).

86. *Id.* at 86 (Burger, C.J., dissenting). *See supra* note 28 and accompanying text.

entertainment should have been saved for future consideration.[87]

Additionally, Chief Justice Burger declared that the breadth of an ordinance should be questioned only when it is used to restrain expression not justified by the community's legitimate objective.[88] He viewed the community's battle to preserve their basic character from the invasion of nude dancing as sufficient justification for possible shoddy draftsmanship and overbreadth challenge.[89] The Chief Justice found it clear that the introduction of live nude dancing had to have had a detrimental impact on this quiet community, especially since the storeowners had ignored the objections of the community by interjecting this form of expression within its periphery.[90]

Agreeing with Justices Powell and Stevens, Chief Justice Burger noted that even if nude dancing was protected under the first amendment, the Borough could prohibit it.[91] He specified that merely because a form of expression is entitled to some constitutional protection, it does not become invulnerable to government regulation.[92] The Chief Justice stated that a community should be able to decide what uses it will permit and not be required to face an all-or-nothing proposition regarding commercial exploitation of protected expression, commenting that one form of desired commercial use should not be held at ransom to force the acceptance of all other types.[93]

Zoning regulations restricting forms of commercial expression from designated areas of a community have generally been held to be a valid exercise of a community's police power and not violative of the due process or equal protection clauses of the United States Constitution.[94] When the object of the regulation is a sexually-oriented form of commercial expression, such as an adult bookstore offering live nude dancing, first amendment considerations are im-

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87. 452 U.S. at 86 (Burger, C.J., dissenting). The Chief Justice commented that if the community utilized the ordinance to prohibit a high school performance of *The Sound of Music*, only then should this aspect of first amendment protection be considered. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 86-87 (Burger, C.J., dissenting).

91. *Id.* (citing Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)).

92. 452 U.S. at 87 (Burger, C.J., dissenting).

93. *Id.* at 88 (Burger, C.J., dissenting).

94. *See, e.g.*, Penn Central Transp. v. New York City, 438 U.S. 104 (1978); New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Village of Belle Terre v. Borass, 416 U.S. 1 (1974).

plicated and the municipality's action must survive strict scrutiny.[95]

Jurists have pondered the place of repugnant expression for many decades.[96] Various forms of expression—obscenity,[97] libelous utterances,[98] fighting words,[99]—have been termed to be of such limited social value that they warranted little or no constitutional protection. Traditionally, two principles have governed first amendment controversies in this area: first, a governmental body cannot regulate protected expression solely on the basis of content,[100] and second, nonobscene expression, which includes some sexually explicit material, must receive full first amendment protection.[101] These traditional principles have, however, been shaken by the uncertainty resulting from the Court's decision in *American Mini Theatres*.[102]

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95. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Erznozik v. City of Jacksonville, 422 U.S. 205 (1975).

96. *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919), in which Justice Holmes suggested that:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id. at 630 (Holmes, J., dissenting). *But cf.* Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in Wartime and Peace-time*, 14 ILL. L. REV. 539 (1920).

97. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1975); Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); United State v. Reidel, 402 U.S. 351 (1971).

98. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *But see* Gooding v. Wilson, 405 U.S. 518 (1972), in which the appellant was convicted on two counts of using abusive language in violation of Georgia law. The words spoken to police officers were; "white son of a bitch, I'll kill you"; "you son of a bitch, I'll choke you to death"; and "you son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." The Court found the Georgia law void on its face because it was not limited to words having a direct tendency to cause acts of violence by the person to whom they are addressed. 405 U.S. at 523. *See also,* Plummer v. City of Columbus, 414 U.S. 2 (1973) (per curiam); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Cohen v. California, 403 U.S. 15 (1971).

99. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

100. *See, e.g.*, Erznozik v. City of Jacksonville, 422 U.S. 205 (1975). In *Erznozik*, Justice Douglas stressed that any ordinance which regulates movies on the basis of content, whether by an obscenity standard or by some other criteria, impermissibly infringes upon guaranteed rights. *Id.* at 218 (Douglas, J., concurring). *See also,* Police Dep't of Chicago v. Mosely, 408 U.S. 92 (1972).

101. *See supra* note 95.

102. *See* Goldman, *A Doctrine of Worthier Speech: Young v. American Mini Thea-*

Prior to the decision in *American Mini Theatres*, the Supreme Court had never altered its sharp distinction between sexually explicit expression warranting full constitutional protection and obscene expression, deserving no protection.[103] That case has left great uncertainty over whether this distinction still survives.

In *American Mini Theatres*, a Detroit "anti-skid row" ordinance prohibited adult movie theaters and adult bookstores within 1000 feet of any two other "regulated uses" which included adult theaters and bookstores, liquor stores, pool halls, pawnshops, and other similar uses.[104] The ordinance defined "adult motion picture theater" as one "presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas.' "[105] While acknowledging the strength of the constitutional protection forbidding content-based regulation of expression,[106] and admitting that the first amendment protects nonobscene communication from total suppression,[107] Justice Stevens, writing for the plurality, upheld the ordinance. He reasoned that the interest of the community in sexually explicit adult expression was weaker than their interest in free political debate and was correspondingly less vital.[108]

Categorization of speech was the apparent basis of the *American Mini Theatres'* plurality opinion. The categorization was one which distinguished between expression which is worthy of full constitutional protection, and sexually explicit speech which merits only some protection, the inference following that one category of protected speech is less valuable to society than another.[109] Alternatively, since the ordinance in *American Mini Theatres* did not

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tres, Inc., 21 ST. LOUIS U.L.J. 281, 301 (1977).

103. *See* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 11. In determining the constitutionality of any ban on communication, the first question is whether it belongs to a category that has any social utility. If it does not, it may be banned. *Id.*

104. 427 U.S. at 52 & n.3.

105. *Id.* at 53 & n.4.

106. *Id. See* Agins v. City of Tiburon, 447 U.S. 255 (1980) (a zoning ordinance designed to discourage premature conversion of open-space lands to urban uses did not constitute a taking); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (housing ordinance limiting occupancy to single families construed to forbid grandchildren is unconstitutional).

107. 427 U.S. at 61-62.

108. *Id.* at 70.

109. *Id.* at 66. The Court commented that "even within the area of protected speech, a difference in content may require a different governmental response." *Id.* at 66.

involve a total ban of protected expression but merely a regulation of its location, the Court's approval of the ordinance might only indicate an acceptance of minimal state regulation of protected expression when coupled with an adequate state interest.[110] The Court in *Schad,* however, failed to delineate the actual prospective effect of *American Mini Theatres.*

The *Schad* majority viewed the Mount Ephraim ordinance as a ban of all live entertainment, not as solely a prohibition of nonobscene nude dancing.[111] By using this interpretation, the majority failed to resolve the most troubling aspect of the plurality opinion in *American Mini Theatres:* that is, whether *American Mini Theatres* stands for the acceptance by the Court of an all-encompassing sliding-scale approach to first amendment questions.[112] This approach would require a weighing of the relative importance of the speech involved against the governmental interest and the scope of the challenged restriction.[113]

The danger of such an approach is that any attempt to rank speech, in all its infinite forms, in order of its believed importance must be termed unworkable, especially in light of the elusive quest waged by the Court in defining obscenity.[114] Justice Brennan, in an earlier opinion, realized the inability of the Court to find a sufficiently honed tool to separate obscenity from other sexually oriented speech.[115] If the alleged chasm between obscenity and other expression is so obscure, the division between the other various forms of expression would be unrecognizable.

The guaranty of freedom of speech has always sought to protect the view of dissidents.[116] The availability of many categories of

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110. 427 U.S. at 71 n.34.

111. *See supra* notes 30, 87 and accompanying text.

112. *See supra* note 108 and accompanying text.

113. *See* Goldman, *supra* note 102, at 301. *See also* Note, 28 CASE W. RES. L. REV. 456, 478-80 (1978); Brest, *The Supreme Court: 1975 Term,* 90 HARV. L. REV. 1, 200 (1976).

114. *See e.g.,* Miller v. California, 413 U.S. 15, 22 (1973). Chief Justice Burger stated that apart from the decision in Roth v. United States, 354 U.S. 476 (1957), no majority had at any time agreed on a formula for classifying what is obscene material.

115. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

116. *See, e.g.,* First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978); Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976)(a town must further its interests with narrowly drawn regulations without unnecessarily interfering with first amendment freedoms). *See also,* Cohen v. California, 403 U.S. 15, 21 (1970). The legitimate ability of government to shut off discourse solely to prevent others from hearing it is dependent upon a showing that substantial privacy interests are not unacceptably tread upon; "[a]ny broader view of this au-

protected expression, such as nonobscene erotic material, would be threatened and possibly extinguished if the sliding-scale test gained a foothold with a majority of the Supreme Court, since the local authority would only be required to demonstrate minimal justification for any restriction of expression falling at the bottom of this graduated scale. Challengers of these restrictions would face an almost insurmountable barrier to garner judicial recognition. Also, this type of review would create havoc with stare decisis in first amendment case study since the value attributed to the speech at issue would vary depending on popular opinion at that time and the composition and political views of the bench then presiding.

In addition, the traditional dual test of determining whether a particular expression is protected and, if so, what legitimate state interests with a properly drawn statute justify an intrusion thereon remains tantalizingly simple when compared to the sliding-scale test. The *Schad* majority's analysis parallels this simpler historical approach, regarding live entertainment as an obvious form of protected expression and then weighing the justifications offered by the Borough for infringing on its exercise. Nevertheless, the status of *American Mini Theatres,* which apparently casts the Court as a super legislature with the requisite task of ranking the societal value of all protected expression, remains uncertain following the *Schad* decision.

The silence by the *Schad* majority on whether it accepted the categorization of nonobscene sexually explicit expression suggests two possible conclusions. First, the Supreme Court, in the half decade interim between the *Schad* and *American Mini Theatres* decisions, may have decided that the category of protected erotic materials in *Schad* deserved the same treatment along traditional first amendment guidelines as other forms of protected expression. Alternatively, if the sliding-scale approach has not been discarded, it must be assumed that the *Schad* court did not apply it here because the challenged ordinance represented a total prohibition on access while the Detroit ordinance embodied a partial restriction on location.

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thority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Id.* The Court also recognized that much expression serves a dual communication function, conveying not only ideals of measurable explanation, but also ones of undescribable emotion. *Id.*

The former alternative is hesitantly encouraged by Chief Justice Burger's reliance in his *Schad* dissent on a belief that the restriction was justified by legitimate government concerns.[117] This suggests that the Chief Justice may have yielded to the four dissenting members of the court in *American Mini Theatres* who emphatically argued that in the absence of a determination of obscenity, all speech is equally worthy of constitutional protection.[118] The *American Mini Theatres* dissenters reiterated a cardinal rule of first amendment jurisprudence: that time, place, and manner regulations affecting protected expression must be content-neutral.[119]

Unfortunately, it is not likely that the Chief Justice has embraced the logic of the *American Mini Theatres* dissents since he had joined the plurality's categorization of nonobscene sexually explicit speech in an effort to increase the scope of a municipality's zoning authority with regard to these unpopular forms of expression. His *Schad* dissent tracks a long line of decisions dating from the 1970s in the obscenity and quasi-obscenity area, all affirming the state's power to regulate within an extremely wide range of factual situations.[120] In *Schad,* the Chief Justice did not concern himself with the majority's fear of the potential abuse inherent in the expansive Mount Ephraim ordinance, claiming that any improper application should be dealt with as it arises.[121] If this manner of construction were accepted by a majority of the Court, local zoning authorities could draft very broad ordinances, restricting various establishments offering assorted entertainment, and enforce it successively, thereby requiring numerous law suits to define its constitutional limits. This notion is in direct opposition to previous Court holdings that the chilling effect of vague statutes upon the exercise of constitutionally protected behavior requires that they specifically enumerate the prohibited action.[122]

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117. 452 U.S. at 86 (Burger, C.J., dissenting). *See supra* notes 91-92 and accompanying text.

118. 427 U.S. at 84, 88.

119. *Id.* at 86. *See* Erznozik v. City of Jacksonville, 422 U.S. 205 (1975); Police Department of Chicago v. Mosely, 408 U.S. 92 (1972).

120. *See, e.g.,* Pinkus v. United States, 436 U.S. 293 (1978); Marks v. United States, 430 U.S. 188 (1977); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Miller v. California, 413 U.S. 15 (1973); United States v. Reidel, 402 U.S. 351 (1971).

121. 452 U.S. at 86 (Burger, C.J., dissenting).

122. *See supra* note 85 and accompanying text.

If the second alternative indicates the present status of *American Mini Theatres*, requiring the Court to act as a super legislature ranking the societal value of all protected expression, a determination of what lesser protection this category of nonobscene sexually oriented expression deserves will not be available until a majority of the Court upholds a narrowly drawn ordinance banning this form of expression for reasons insufficient to ban protected and allegedly more valuable expression.

The *Schad* court thus avoided the question of what societal value should be placed on live nude dancing by resolving the issue on the basis of whether the prohibition on live entertainment was justified. By doing so, the Court greatly limited the importance of this decision. The *Schad* court relied on the traditional dual analysis, determining whether the challenged statute was narrowly drawn and served sufficiently substantial government concerns.[123] The *Schad* court refused to consider the applicability of *American Mini Theatres* to this form of adult entertainment, relying on the distinction that the Mount Ephraim ordinance totally prohibited this expression instead of merely dispersing its availability, when in fact the *American Mini Theatres'* plurality spoke in terms of content, and not merely location. Thus, while given an opportunity to reaffirm the nondiscriminatory role of the first amendment in protecting nonobscene expression, or alternatively, to accept the categorical speech distinctions enunciated in *American Mini Theatres*, the *Schad* court merely utilized the case to penalize the Borough for sloppy draftsmanship and inability to demonstrate that this form of entertainment adversely affected the community. The result is continued uncertainty in this area of first amendment protection.

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123. *See e.g.*, Smith v. Goguen, 415 U.S. 566, 572 n.7 (1974) (the chilling effect upon the exercise of constitutional rights caused by vague statutes mandates that such statutes specifically describe the prohibited behavior); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 287 (1961)(statute requiring written oath that state employees had never lent their aid, support, advice or counsel to the Communist party impermissibly vague). *See also*, Colautti v. Franklin, 439 U.S. 379 (1979); Dombrowski v. Pfister, 380 U.S. 479 (1965).