University of Dayton Law Review

Volume 2 | Number 2 Article 12

1977

Free Expression: Inverse Zoning of Adult Theaters Not a Violation of Due Process or Equal Protection

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FREE EXPRESSION: INVERSE ZONING OF ADULT THEATERS NOT A VIOLATION OF DUE PROCESS OR EQUAL PROTECTION—*Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

I. INTRODUCTION

The plight of large metropolitan urban areas is the focus of much concern in the United States.[1] Recently, the migration to the cities has reversed,[2] and industry and commercial interests have abandoned metropolitan cores.[3] Consequently, urban areas are suffering from neglect, epitomized by loss of an adequate tax base.[4] Sociologists and urban planners have recognized that a major factor contributing to urban blight is the de facto concentration of so-called "adult" establishments in the inner city.[5] Skid rows visibly evolve as commercial residents vacate the older areas of a city, and less respected establishments take their place.

City planners have attempted to control the growth of skid row areas in two ways. The customary approach has been to confine "adult" establishments to certain defined areas. This conventional technique is most notable in Boston, which has established what has been dubbed an "erogenous zone" for pornographic bookstores, x-rated moviehouses, and peep-shows.[6] This approach, however, has compounded the problem and has created policing difficulties.[7] A novel approach is to disperse adult establishments so as to prevent the creation or further proliferation of slum areas. An example of this technique was the Detroit plan which was challenged in *Young v. American Mini Theatres, Inc.*[8]

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1. N.Y. Times, Feb. 19, 1977, at 1, col. 1 (city ed.); U.S. News & World Report, Apr. 5, 1976, at 49-59.

2. *See* U.S. News & World Report, Nov. 15, 1976, at 94; Business Week, Jan. 12, 1976, at 77.

3. 222 THE NATION 561 (May 8, 1976).

4. R. LISTON, DOWNTOWN, OUR CHALLENGING URBAN PROBLEMS 41-48 (1968).

5. *See* Petition for Certiorari at 3-39, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

6. BOSTON ZONING CODE, Amendment No. 38, and ZONING DISTRICTS - CITY OF BOSTON, MAP 1 - BOSTON PROPER, Amendment No. 130. Amicus Curiae Brief at 10 n.7, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). Boston's "Adult Entertainment District" ordinance defines an adult establishment as one which "customarily . . . exclude[s] any minor by reason of age as a prevailing practice." *Id. See* Dayton Daily News, June 28, 1976, at 16, col. 1.

7. *Id.*

8. 427 U.S. 50 (1976). The City of Dallas also prohibits adult motion picture theatres, or the exhibition of individual adult motion pictures, within one thousand feet of any church, school, or residential district. DALLAS CITY CODE § 46-9.2. *See* Amicus Curiae Brief at 9 n.6, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). The Dallas Code defines an adult moving picture theatre as one which excludes minors by reason of age without regard to whether such minors are accompanied by parent, guardian, husband or wife. *Id.*

II. THE DETROIT PLAN

In 1962, the City of Detroit enacted an ordinance requiring that absent waiver from the Zoning Commission, certain regulated uses could not be located within one thousand feet of any two other such uses.[9] City planners had found that the concentration of such uses had a causal relation to the deterioration of their city.[10] The ordinance was adopted in a prohibitive form,[11] enumerating eight uses which fell within the category "adult" establishments.[12]

In 1972, this "Anti-Skid Row Ordinance" was amended by several provisions to include adult motion picture theatres and bookstores.[13] Two amendments prohibited the establishment of more than two such uses within one thousand feet of each other[14] and provided that no regulated use could locate within five hundred feet of any building containing a residential, dwelling, or rooming unit,[15] absent a waiver.[16] Further, the ordinance provided that no adult theatres could operate without a license issued by the mayor.[17] The establishments were also restricted to the commercially and industrially zoned areas.[18]

The Detroit zoning ordinances became the subject of constitutional challenges by two motion picture theatre operators after adoption of the 1972 amendments.[19] The Nortown, an established

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9. DETROIT, MICH., OFFICIAL ZONING ORDINANCES § 66.0000 (1962). Petition for Certiorari at 67, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

10. *See* Brief of Petitioner at 17-21, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

11. N. WILLIAMS, AMERICAN PLANNING LAW § 94.14 (1974).

12. DETROIT, MICH., OFFICIAL ZONING ORDINANCES § 66.0000. Uses subject to these controls are: establishments for the sale of beer or intoxicating liquor for consumption on the premises, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, second-hand stores, shoeshine parlors, and taxi dance halls. Petition for Certiorari at 67-68, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

13. DETROIT, MICH., OFFICIAL ZONING ORDINANCES §§ 32.0007, 32.0023 and 66.0103 (1972); CODE OF THE CITY OF DETROIT ORDIANCE §§ 5-2-1.1, -1.2, -3 (1972). The amendments added the following controlled uses: adult book stores, adult motion picture theatres, adult mini motion picture theatres, and group "D" cabarets. Petition for Certiorari at 65-70 and 80-82, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

14. *See* note 11 *supra*. The ordinances were denominated 742-G and 743-G.

15. DETROIT, MICH., OFFICIAL ZONING ORDINANCES § 66.0103 (1972); Petition for Certiorari at 69, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). The district court invalidated this provision, Nortown Theatre, Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974), and it was not considered by the Supreme Court. The language of the ordinance was later amended to read "any area zoned for residential use."

16. DETROIT, MICH., OFFICIAL ZONING ORDINANCES § 66.0101 (1972); Petition for Certiorari at 68, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

17. CODE OF THE CITY OF DETROIT § 5-2-1.1, -2-3 (1972). Petition for Certiorari at 80-82, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

18. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1015 (6th Cir. 1975).

19. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), *rev'g sub nom.* Ameri-

theatre for over thirty years, was denied the right to exhibit adult films in its present location. American Mini Theatres, Inc. was denied an occupancy certificate after it had converted a gas station into a "mini theatre" to show adult films. The theatres' suits were consolidated by the district court. The challenges were based on the contention that the owners' free speech protections as incorporated in the fourteenth amendment and their rights to due process and to equal protection of the laws were violated by the "Anti-Skid Row" ordinances.

III. THE COURTS

The district court held the five hundred foot regulation invalid, but the one thousand foot regulation withstood the "strict scrutiny" test because it furthered a compelling state interest.[20] The Sixth Circuit Court of Appeals reversed,[21] holding that the one thousand foot regulation was a denial of equal protection and constituted a prior restraint on protected communication.[22] Applying the traditional strict equal protection analysis, the court held that though the city had a compelling public interest, the means to further that interest need not distinguish regulated uses on the content of protected expression and that the effect on protected rights was not incidental.

The United States Supreme Court granted certiorari and reversed the appellate court's decision.[23] The Court had never before addressed the competing interests of a municipality's commercial zoning ordinance and the individual's right of free expression protected by the first and fourteenth amendments. The state's zoning power has been described as "one of the most essential powers of government, one that is the least limitable";[24] the interest in free expression has been ranked as a most fundamental right, basic to

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can Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975), *rev'g sub nom.* Nortown Theatre, Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974).

20. Nortown Theatre, Inc. v. Gribbs, 373 F. Supp. 363, 369-70 (E.D. Mich. 1974). "The compelling State interest . . . is the preservation of neighborhoods, upon which adult establishments have been found to have a destructive impact." *Id.* at 369.

21. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975). Circuit Judge Celebrezze, in dissent, would have held the ordinance a valid regulation of time, place and manner, following Grayned v. City of Rockford, 408 U.S. 104 (1972) and Cox v. New Hampshire, 312 U.S. 569 (1941).

22. Relying on Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), the Court found that Detroit's ordinance "slipped from the neutrality of time, place and circumstances into a concern about content." 518 F.2d 1014, 1020 (6th Cir. 1975).

23. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

24. Hadacheck v. Los Angeles, 239 U.S. 394, 410 (1915).

our constitutional form of government.[25] The plurality opinion by Justice Stevens was joined by the Chief Justice, Justice White, and Justice Rehnquist, while Justice Powell wrote a concurring opinion but declined to join the majority in their equal protection analysis.

The majority in *American Mini Theatres* concluded that the Detroit ordinances could be narrowly construed, and "[s]ince there is surely a less vital interest in the uninhibited exhibition of material that is on the border line between pornography and artistic expression than in the free dissemination of ideas of social and political significance," these ordinances do not involve "the kind of threat to the free market in ideas and expression that justifies the exceptional approach to constitutional adjudication recognized in cases like *Dombrowski v. Pfister* . . . ."[26]

Justice Stewart wrote a strong dissent[27] in which Justices Blackmun, Brennan, and Marshall joined. Justice Stewart found support in *Erznoznik v. City of Jacksonville*[28] which held a similar ordinance unconstitutional on first and fourteenth amendment grounds of overbreadth and underinclusiveness. Citing the factual similarities,[29] Justice Stewart criticized the Court for upholding Detroit's ordinances, which were admittedly not content-neutral, in a context not related to captive or juvenile audiences.[30] Justice Powell, the author of the *Erznoznik* opinion, distinguished that case on the facts, as the language of the *Erznoznik* ordinance failed to permissibly achieve the government's interests[31] because it attempted to regulate content of expression directly. He concluded that Detroit was not using its zoning power as a pretextual means of suppressing expression.

This note will examine the probable impact of the Supreme Court's decision upon first amendment freedoms with respect to content-based zoning ordinances enacted to rehabilitate deteriorat-

25. *See* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

26. 427 U.S. 50, 61 (citation omitted).

27. Justice Stewart emphasized his dissent by reading it aloud after Justice Stevens announced the decision of the Court. Usually only the authors of the majority positions summarize their holdings. N.Y. Times, June 25, 1976, § D, at 33, col. 5.

28. 422 U.S. 205 (1975).

29. Both ordinances, according to Justice Stewart, required merely an alteration in the physical setting, were aimed at the undesirable effects of speech having a particular content, and had similar definitions of the regulated content.

30. Time, place and manner regulations affecting protected expression have been held valid only when they are content-neutral, except in the context of captive or juvenile audiences. *See* 427 U.S. 50, 86 n.5 (Stewart, J., dissenting).

31. The Jacksonville ordinance sought to protect the public from exposure to offensive materials which could be viewed on the drive-in theatre screen from public places. 422 U.S. 208 (1975).

ing urban areas. As the public's response to this decision has demonstrated, the "inverse zoning" concept may be utilized for ends which are inconsistent with traditional protections afforded commercial speech.[32]

IV. THE OPINION

The Court's decision was divided upon the constitutional standards applicable to content-based zoning ordinances. Three grounds for invalidation were urged upon the Court by the respondents, American Mini Theatres, Inc., and Nortown Theatre, Inc.: that the ordinances deprived them of due process because of facial vagueness;[33] that the license requirement acted as a prior restraint upon protected speech; and that regulations triggered by the content of non-obscene communications violated the equal protection clause of the fourteenth amendment. This note will focus upon the equal protection holdings of the Court.

A city's interest in content-based zoning restrictions has been held to a strict scrutiny test of equal protection in prior decisions, whereas the Detroit ordinances were upheld on the basis that "the city must be allowed a reasonable opportunity to experiment. . . ."[34] Though the Court explicitly stated that the ordinances were not limited to, and did not attempt to define, unprotected obscene speech,[35] Justice Stevens termed the respondent's expression "border line"[36] and characterized society's protective interest in such speech as being of a lesser magnitude than that in

32. *E.g.*, N.Y. Times, June 25, 1976, § A, at 1, col. 7; Dayton Daily News, Aug. 11, 1976, at 14, col. 1.

33. In other first amendment contexts, the void for vagueness doctrine has been available to plaintiffs, though they clearly came within the statute. This has been a departure from the traditional rule of standing that a party may not challenge the constitutionality of legislation on the grounds that it may infringe upon others in circumstances not before the court. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). Nevertheless, a successful challenge on vagueness grounds requires that the legislation be found to be lacking in clarity and precision in violation of due process requirements. *See* Note, *The Void-for-Vagueness Doctrine and the Supreme Court*, 109 U. PA. L. REV. 67 (1960); *see generally* Annot., 45 L. Ed. 2d 725 (1976); Annot., 40 L. Ed. 2d 823 (1975). The respondents in *American Mini Theatres* did not challenge the particularity of the definition of "Specified Sexual Activities" or "Specified Anatomical Areas." They contended, however, that a theatre operator could not determine with certainty how much of such use was a "substantial or significant portion" so as to be "distinguished or characterized" as "adult" fare. Respondents also argued the waiver provisions of the ordinance (§ 66.0101) did not supply adequate standards and guidelines. The respondents' conduct, however, clearly fell within the regulated classification. *See* pp. 359-60 *infra*.

34. 427 U.S. at 71.

35. *Id.* at 61.

36. *Id.*

expression of ideas because "few of us would march our sons and daughters off to war, to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theatres of our choice."[37] Thus, the Court did not apply traditional equal protection analysis but, after reviewing cases involving unprotected speech, concluded that nonobscene, erotic materials may be treated differently under first amendment principles from other forms of protected expression.[38] Only four members of the Court joined in this holding.[39]

Justice Powell's concurrence may be read as having particular importance because he addressed the respondent's equal protection argument with the more familiar test. Furthermore, Justice Powell authored the *Erznoznik* opinion upon which the dissenting Justices relied. Justice Powell viewed the Detroit ordinances as implicating first amendment concerns only incidentally. The primary purpose of the regulations was to achieve an important public interest by means of the zoning power, long regarded as one of the police powers of the state. He did note, however, that this was the first case to be considered by the Court in which the interests in constitutionally protected free expression were implicated by a municipality's zoning ordinances.[40]

As did the courts below, Justice Powell examined the nature of the alleged infringement upon free expression. He concluded that the regulations do not "impose any content limitations on the creators of adult movies [nor] their ability to make them available to whom they desire, and [do not] restrict in any significant way the viewing of these movies. . . ."[41]

Applying the four-part balancing test of *United States v. O'Brien*,[42] the ordinances were found to satisfy the test: they affect expression only incidentally and further governmental interests wholly unrelated to the regulation of expression. The respondents had not disputed that this "inverse zoning" technique was within the constitutional power of the government nor that the interests

37. *Id.* at 70.
38. *Id.* at 70-71.
39. *Id.* Justice Powell concurred only in Parts I and II of the opinion.
40. *Id.* at 76.
41. *Id.* at 78.
42. 391 U.S. 367 (1968).

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

furthered by the ordinances were arguably both important and substantial.[43] They did argue, however, that the time, place and manner restriction must be content-neutral. Powell rejected this argument because Detroit's purpose was not to restrict the communication itself because of its nature.[44] He noted that "the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated."[45]

Regulation of libelous[46] and commercial[47] communications has been sustained by the Court, but, prior to *American Mini Theatres*, the sharp distinction between sexually explicit expression that has social value—which deserves full constitutional protection, and expression lacking such value, and considered obscene—which has no protection at all, had never been altered.[48] Justice Powell therefore, would relax the *O'Brien* test, which has been limited to cases regulating conduct, to apply to laws distinguishing expression on the basis of what is communicated, if done for a purpose unrelated to suppressing expression and without significant effect upon the creators or their overall market for the communication.[49] Justice Powell also implied, in dictum, that an adult theatre's expression may be afforded less protection where the government has "special and overriding interests."[50] The main thrust of Justice Stewart's dissent was that the Court was departing from established principles of first amendment law by providing less than full protection for "borderline" speech that not "more than a 'few of us' would take up arms to defend."

Justice Blackmun joined Justice Stewart's negative response to the Court's apparent innovations in first amendment protections. Moreover, he found the ordinances unconstitutionally vague as applied to the respondent theatres. Where a theatre operator intends to show only an occasional adult film or the film only partly depicts adult subject matter, the ordinances provide no guidelines to determine whether the theatre is "used for presenting" films that are

43. 427 U.S. 80.

44. *Id.* at 80-81.

45. *Id.* at 82 n.6. Respondents did contend the alleged effects of "adult establishments" upon the business community resulted from unsubstantial fears.

46. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

47. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S.Ct. 1817, 1830-31 n.24 (1976).

48. *See The Supreme Court, 1975 Term*, 90 HARV. L. REV. 57, 200 (1976).

49. 427 U.S. at 78. For criticism of this approach, *see The Supreme Court, 1975 Term*, 90 HARV. L. REV. 57, 203-04 (1976).

50. 427 U.S. at 84.

"distinguished or characterized by an emphasis on" the specified activities. Should the operator find that his use falls within the adult status, he must then determine whether two other regulated uses are within one thousand feet. To compound the difficulty further, any one of the ten regulated establishments could become a regulated use at any time, conceivably causing several adult uses to close and subjecting the operator to payment of a fine or jail.[51]

As stated above, the majority did not consider these concerns because the respondents clearly fell within the ordinances' definitions. The majority refused to examine the language as it applied to others because the ordinances will have no "significant deterrent effect on the exhibition of films protected by the first amendment," is easily susceptible of "a narrowing construction," and "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."[52]

This last reason might be read to mark the departure of the Supreme Court from its long history of vigilance to assure protection of non-obscene communications competing with legitimate state interests. To aid in understanding the possible import of this language, it is important to consider the context in which it was written and, more particularly, the nature of the zoning power.

V. The Zoning Context

Until recent years the Supreme Court has not rendered many decisions concerning the state's zoning power.[53] That the state has a broad zoning power, however, has never seriously been doubted when not drawn into conflict with constitutional protections. In *Hadacheck v. Los Angeles,*[54] which upheld a nuisance abatement ordinance, the Court stated:

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may indeed, seem harsh in its exercise, usually is on some individual, but

51. Detroit, Mich., Official Zoning Ordinances § 69.000 (1962).

52. 427 U.S. at 61.

53. From 1930 until 1970, only Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (regulation by town ordinance), Shelley v. Kraemer, 334 U.S. 1 (1948) (private agreements), and Hurd v. Hodge, 334 U.S. 24 (1948) (covenants in private conveyances) considered land use controls. Berman v. Parker, 348 U.S. 26 (1954), which upheld the power of eminent domain to facilitate urban renewal, was also discussed in zoning terms. *See generally* N. Williams, American Land Planning Law §§ 3.01, 4.03, 38.21 (1974).

54. 239 U.S. 394 (1915).

> the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. . . .[55]

Ordinances which have been held only to have an economic or social impact have been afforded minimal scrutiny. In *Village of Belle Terre v. Boraas,*[56] which upheld an ordinance that prohibited occupancy of residential dwellings by more than two unrelated persons, Justice Douglas stated, "[w]e deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a [permissible] state objective.' "[57]

On the other hand, zoning regulations affecting constitutionally suspect classifications or fundamental rights have been subjected to "strict scrutiny."[58] For perhaps the last twenty years, zoning challenges based upon due process grounds have indicated an "inverse presumption of constitutionality," requiring a particularly strong justification by the government.[59] The Supreme Court has been much more hesitant to apply the same rules to the equal protection clause.[60] Until *American Mini Theatres,* the Supreme Court had not upheld a zoning ordinance applied to the exercise of a fundamental right, in the face of a challenge on both due process and equal protection grounds.[61]

Although freedom of expression is a fundamental right, not all forms of expression are protected by constitutional guarantees.[62] Even protected forms of communication may be subject to regulation under certain circumstances.[63] Motion picture theatres have been held to be within the protection of the first amendment;[64]

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55. *Id.* at 410. Of course, there are limitations on the scope of the police power; *e.g.,* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *See generally* N. WILLIAMS, AMERICAN LAND PLANNING LAW § 162.06 (1974).

56. 416 U.S. 1 (1974).

57. *Id.* at 8, *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) and Reed v. Reed, 404 U.S. 71, 76 (1971).

58. *See* 416 U.S. 1, 7 (1974).

59. N. WILLIAMS, *supra* note 55, at 91.

60. *Id.* at 91 n.15.

61. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), upheld a zoning ordinance against an equal protection challenge because it was found not to restrict any substantive constitutional right.

62. *See, e.g.,* Roth v. United States, 354 U.S. 476 (1957) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Near v. Minnesota, 283 U.S. 697 (1931) (national secrets).

63. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertisements); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) (protecting children from objectionable materials).

64. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

however, they are not necessarily subject to the precise rules governing any other particular mode of expression.[65] Their protection has not been diminished because they may not convey an idea, since "[t]he line between the transmission of ideas and mere entertainment is much too elusive for [a] [c]ourt to draw, if indeed such a line can be drawn at all."[66]

Where legitimate state interests are drawn into conflict with first amendment rights as applied through the equal protection clause of the fourteenth amendment, a balancing test has been applied.[67] Justice Powell has been especially identified with this interpretation of first amendment requirements.[68] The test of *United States v. O'Brien*[69] has permitted limited incidental restrictions on freedom of expression where a substantial government interest is furthered. In that case, the symbolic expression involved in burning one's draft registration certificiate was permissibly regulated because both speech and non-speech elements were present, and the government's interest in the orderly administration of the selective service system justified the incidental impact on expression. The statute in *O'Brien,* however, did not abridge free speech on its face but dealt with conduct having only symbolic connection with speech.[70]

It appears that the court's application of *O'Brien* to an ordinance admittedly regulating protected speech, solely on the basis of the expressive content of a film, is strained. Though the inhibition of communication by "adult" theatres was found by Justice Powell to be incidental and not more restrictive than necessary to achieve the city's interest, four members of the Court, as well as the appeals court, would have held otherwise. Coupled with the language that "adult" films, as "borderline" speech, are entitled to less protection than expression of political oratory or philsophical discussion, the decision in *American Mini Theatres,* can at least be said to indicate

65. Times Film Corp. v. Chicago, 365 U.S. 43, *reh. denied,* 365 U.S. 856 (1961). By allowing a system of prior restraint upon constitutionally protected as well as unprotected motion pictures, the Supreme Court has failed to give legal status to the motion picture equal to that of other media. Annot., 22 L. Ed. 2d 949, 952 n.9 (1970).

66. Stanley v. Georgia, 394 U.S. 557, 566 (1969).

67. For a discussion of classic confrontation between advocates for the balancing test and the absolutist view of first amendment rights, *see* Konigsberg v. State Bar of Calif., 366 U.S. 36 (1961).

68. *See, e.g.,* Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell,* 24 STAN. L. REV. 1001 (1972).

69. 391 U.S. 367 (1968).

70. *Id.* at 375.

the changing attitude of the Court toward first amendment protection.

In the instant case, Detroit's primary concern—revitalizing the inner city—was found to be wholly unrelated to the expression of free speech. Under the balancing approach of *O'Brien,* therefore, where a municipality can discern and enunciate a causal relation between an undesirable element in the city and a deleterious effect unrelated to the suppression of a fundamental right, a carefully drawn ordinance restricting the concentration of that element within a certain area may pass judicial scrutiny.

In view of the Court's historical respect of, and deference to, the state's zoning power and the evolving composite attitude of the Justices away from an absolutist view of freedom of expression, continued innovation may be expected in the field of regulations proscribing activities according to their objectionable content.

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