Municipal Zoning Restrictions on Adult Entertainment: Young, Its Progeny, Indianapolis' Commercial Special Exceptions Ordinance,

Kenneth L. Turchi
Indiana University School of Law, kturchi@indiana.edu

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The growth of suburban America in the 1950's and 1960's transformed tranquil urban neighborhoods into blighted areas filled with vacant buildings and plagued by dwindling property values. Adult bookstores, adult movie theaters, massage parlors, pawn shops, pool halls, and other similar establishments gradually displaced corner grocery stores and family-owned, first-run movie houses. In an effort to combat the deterioration of their neighborhoods and, at the same time, monitor public morals by checking prostitution and gambling, many cities enacted ordinances aimed at the reduction or obliteration of these businesses. Although anti-vice statutes by and large have enjoyed insulation from constitutional challenges, ordinances that control adult bookstores and movie theaters through zoning regulation have met continual opposition on first amendment and equal protection grounds.

The United States Supreme Court has attempted to articulate standards by which the validity of zoning ordinances regulating adult uses can be measured. *Young v. American Mini Theatres, Inc.* offers one exposition of the constitutional limits on the regulation of adult uses, but the ques-

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1 In an affidavit, a Detroit real estate developer and appraiser said that:

[When it first appears that [adult bookstores and theaters] are beginning to cluster in a neighborhood, those nearby residents and businessmen who can afford to move will immediately offer their property for sale, and assume any financial loss rather than gamble on the anticipated decline in property values; that the anticipation whether or not warranted in fact is sufficient to and does cause the property owners to flee the area; that the appearance of more than one or two vacant store fronts ... creates an apprehension in the minds of the prospective buyers .... That other neighboring residents and businesses recognizing the situation that their property values are in jeopardy and so offer their names and businesses to "get out while the getting's good"; that the resulting surplus of properties ... causes a further decline in sale prices, that a home which would sell for $45,000 outside the City of Detroit is sold with difficulty at a loss of almost half that amount in these declining neighborhoods.


3 See generally W. TONER, REGULATING SEX BUSINESSES 19-30 (1977) (survey of ordinances controlling adult uses in Boston, Detroit, New Orleans, Norwalk, Cal. and Santa Maria, Cal.).

4 See, e.g., IND. CODE § 35-45-5-1 to -5 (1982) (gambling statute that has survived challenges).

5 See infra notes 108-76 and accompanying text.

6 "Adult" as used on this note must be distinguished from "obscene." Materials judged "obscene" under Miller v. California, 413 U.S. 15, 23 (1973), are afforded no first amendment protection. Nonobscene "adult" materials, on the other hand, deserve at least some protection. See Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion). See infra notes 108-76 and accompanying text.

tions surrounding this issue are far from resolved. Each zoning ordinance raises new questions concerning “offensive” materials, freedom of expression, and judicial treatment of the tension between these two subjects. Indianapolis’ Commercial Special Exceptions Ordinance, which regulates adult materials, recently has been challenged in two lawsuits. Given this most recent challenge to a zoning ordinance, similar to the one upheld in Young, an examination of the United States Supreme Court’s view of this subject is both timely and appropriate. Along with an analysis of post-Young opinions, this note presents a discussion of the Indianapolis ordinance and a comparison of that ordinance with the Detroit statute upheld in Young. The note concludes that the Indianapolis ordinance is unconstitutional in view of the Supreme Court’s attitude toward laws that encroach upon first amendment rights.

MUNICIPAL REGULATION OF ADULT AND OTHER USES PRIOR TO YOUNG

Novel systems of regulation often encounter constitutional challenges.^

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Two recent suits are Cutshaw v. City of Indianapolis, No. 30, 170 (Johnson County Cir. Ct. filed Jan. 9, 1980), and Antico v. City of Indianapolis, No. S519-1613 (Marion County Super. Ct. filed Dec. 27, 1979). Both suits challenged the Indianapolis ordinance on theories of equal protection, due process, free speech, right to access, taking, prior restraint, and retroactivity. Cutshaw involved massage parlors and adult bookstores situated throughout Indianapolis; Antico concerned a popular hotel in downtown Indianapolis that rented in-room adult movies. Both businesses were denied licenses to operate because they had failed to obtain special exceptions as required by Indianapolis law. See INDIANAPOLIS, IND., CODE §§ 17-220 to-334 (1982). Upon denial of the licenses, Cutshaw sued the city in Johnson County Court seeking a declaratory judgment that the ordinance was unconstitutional. The court granted the injunction without a hearing. On appeal, the Indiana Court of Appeals reversed the trial court’s granting of summary judgment in Antico. Antico was reversed because the trial court’s record was “totally silent as to whether the public’s access to protected materials [had] been restricted or suppressed.” Antico v. City of Indianapolis, ___ Ind. App. ___, 441 N.E.2d 999, 1002 (1982). Cutshaw also was reversed because a material issue of fact existed as to the constitutionality of the ordinance so that summary judgment was improper. Consolidated City of Indianapolis v. Cutshaw, ___ Ind. App. ___, 443 N.E.2d 853 (1983). Incidentally, the court in Cutshaw considered many of the arguments raised in this note but refused to offer an opinion because of the insufficient record. See, e.g., id. at 859 (vagueness argument discussed and discarded because of incomplete record).

During the big-business oriented era of “Lochnerization,” see Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court invalidated numerous state laws on the grounds that they interfered with the “general right of an individual to be free in his person and in his power to contract....” Id. at 58. See also New State Ice Co. v. Liebman, 285 U.S. 262 (1932) (laws regulating ice manufacturing as a public utility abolished); Adkins v. Children’s Hosp., 261 U.S. 525 (1923) (laws prescribing minimum wages for women held violative of due process); Coppage v. Kansas, 236 U.S. 1 (1915) (law prohibiting “yellow dog” contracts held unconstitutional). See generally G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 511-27 (10th ed. 1980).
but usually are vindicated.\textsuperscript{11} Zoning regulation in general was challenged and upheld in 1926 in \textit{City of Euclid v. Ambler Realty Co.}\textsuperscript{12} In \textit{Euclid}, the Supreme Court held that zoning regulations will be presumed valid,\textsuperscript{13} that the police power is broad enough to permit governmental relegation of industrial establishments to areas apart from residential sectors,\textsuperscript{14} and that zoning ordinances will be upheld provided they bear a substantial relationship to the "public health, safety, morals, or general welfare."\textsuperscript{15} \textit{Euclid} and its progeny, however, speak only to the validity of ordinances that control behavior not protected by the first amendment.\textsuperscript{16} Thus, although \textit{Euclid} established by implication that a city may direct the location of shopping centers,\textsuperscript{17} residential subdivisions,\textsuperscript{18} mobile homes,\textsuperscript{19} and the like without encroaching on a property owner's constitutional rights,\textsuperscript{20} the holding left unanswered questions surrounding the validity of zoning laws that primarily

\begin{footnotesize}
\begin{enumerate}
\item In the 1930's the Court cast aside its practice of reading fundamental rights into the Constitution and began holding that any regulation bearing a real and substantial relationship to a legitimate governmental goal would be upheld. Nebbia v. New York, 291 U.S. 502, 525 (1934). See also Olsen v. Nebraska, 313 U.S. 236 (1941) (law fixing maximum employment agency fees upheld); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (Adkins overruled). This standard has become less strict over the past half century: a conceivable reason rationally related to a legitimate state goal will result in the ordinance being upheld. Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Cf. Ferguson v. Skrupa, 372 U.S. 726 (1963) (state debt-adjusting law found unconstitutional); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (Court observed that it "does not sit as a super-legislature"). See generally G. GUNTHER, supra note 10 at 528-43. Although the "rational basis" test suffices when nonfundamental rights are in question, the standard of review is more strict when, for example, first amendment rights are violated.
\item 272 U.S. 365 (1926).
\item Id. at 388.
\item Id. at 389-90.
\item Id. at 395 (citations omitted). This deferential view has been upheld repeatedly during the past half century. See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (most recent application of \textit{Euclid}, upholding ordinance prohibiting more than two unrelated persons from living together; "rational basis" test deemed sufficient grounds for upholding). \textit{But see Moore v. City of East Cleveland,} 431 U.S. 494 (1977) (ordinance preventing cohabitation by persons related more remotely than first generation held violative of substantive due process after city failed to meet "compelling interest" test required whenever such rights are abrogated). \textit{Euclid} was decided on "police power" grounds. \textit{Euclid,} 272 U.S. at 388-90; see also \textit{Escanaba Co. v. City of Chicago,} 107 U.S. 678, 682-83 (1882); \textit{Patterson v. Kentucky,} 97 U.S. 501, 504 (1878) (municipal actions held within police power).
\item Id. at 395 (citations omitted).
\item Id. at 395 (citations omitted).
\item Id. at 395 (citations omitted).
\item \textit{E.g.,} American Sav. and Loan Ass'n v. County of Marion, 633 F.2d 364, 370 (9th Cir. 1981).
\item \textit{E.g.,} Cooper v. Sinclair, 66 So. 2d 702 (Fla.), cert. denied, 346 U.S. 867 (1953); State v. Larson, 292 Minn. 350, 195 N.W.2d 180 (1972).
\item For cases holding that a municipality's exercise of the police power sometimes bears an unreasonable relationship to an asserted goal, see Indiana Toll Rd. Comm'n v. Jankovich, 244 Ind. 574, 581, 193 N.E.2d 237, 240 (1963) ("taking" of air space requires compensation; not to do so is unreasonable); Board of Zoning Appeals v. Schulte, 241 Ind. 339, 349, 172 N.E.2d 99, 43 (1961) (board advanced unreasonable justifications for denying permission to build church and school); Arabia v. Zisman, 143 N.J. Super. 168, 175, 362 A.2d 1221, 1225 (1976), \textit{aff'd}, 384 A.2d 1110 (1978) (ordinance allowing only owners of beach front property to place chairs on beach held unreasonable delegation of municipal authority to private individuals).
\end{enumerate}
\end{footnotesize}
or incidentally restrict free speech under the first amendment. Cox v. New Hampshire answered to some extent the questions left open in Euclid. Cox held that reasonable time, place, and manner restrictions on first amendment speech are permitted, provided the restrictions are administered in a "fair and non-discriminatory manner." In Police Department v. Mosley, the Supreme Court further refined these now axiomatic "time, place, and manner" restrictions. In Mosley, a city ordinance prohibited picketing within 150 feet of a school unless the school being picketed was involved in a labor dispute. The Court held this ordinance violative of equal protection. It reasoned that although "reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests," the ordinance describes impermissible picketing "not in terms of time, place and manner, but in terms of subject matter." Citing a long line of cases holding content-based restrictions unconstitutional, the Court reaffirmed its constitutional mandate of keeping channels of communication open and ensuring that regulations restricting speech protected by the first amendment be upheld only if the regulations truly are content neutral.

21 These questions were addressed prior to Young, 427 U.S. 50 (plurality opinion), in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1976); Police Dep't v. Mosley, 408 U.S. 92 (1971); and Cox v. New Hampshire, 312 U.S. 569 (1941). See infra notes 25-46 and accompanying text.

22 312 U.S. 569 (1941). Cox involved first amendment and equal protection challenges to an ordinance requiring a license before holding a parade on a public street. The Court saw the regulation here as no more restrictive than a traffic signal. Id. at 574. Cox left open, however, the question of content-based regulations. See id. at 578.

23 Id. at 576.

24 Id. at 577.


26 Id. at 92-93.

27 Id. at 98 (citations omitted).

28 Id. at 99.

29 Id. at 95, citing Cohen v. California, 403 U.S. 15, 24 (1971) (conviction for wearing jacket bearing words "Fuck the Draft" held violative of first and fourteenth amendments); Street v. New York, 394 U.S. 576 (1969) (conviction for uttering defamatory words about American flag held unconstitutional); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (showing of malice required to recover in defamation action); NAACP v. Button, 371 U.S. 415 (1963) (striking down Virginia statute that forbade attorneys to accept compensation for organizations with no pecuniary right in case; statute held invalid as undue restriction on free speech); Wood v. Georgia, 370 U.S. 375 (1962) (punishing persons for speaking out on public issues currently before a jury not "clear and present danger" and therefore violative of first amendment); Termiello v. City of Chicago, 337 U.S. 1 (1949) (ordinance barring speech which "invites dispute" held violative of first amendment); DeJonge v. Oregon, 299 U.S. 353 (1937) (meeting held by advocate of violence held within protection of fourteenth amendment).

30 See Mosley, 408 U.S. at 96.

31 Id. at 99. "Above all else," said the Court, "the first amendment means that government has no power to restrict expression because of its message, its idea, its subject matter, or its content." Id. at 95. See also Carey v. Brown, 447 U.S. 455 (1980) (statute allowing picketing of places of employment but not residence held unconstitutional using Mosley rationale). One must remember that content-based regulations will be upheld if the state can prove that a compelling interest exists and that the statute is as narrowly drawn as possible. See United States v. O'Brien, 391 U.S. 367 (1968) (ordinance Preventing burning of draft cards upheld...
The Court refined the *Euclid-Cox-Mosley* line of cases to address adult uses in *Erznoznik v. City of Jacksonville.* Jacksonville had enacted an ordinance prohibiting motion pictures or other film presentations depicting "the human male or female bare buttocks, human female bare breasts, or human bare pubic areas . . . , if such motion picture . . . is visible from any public street or public place." The city maintained that the ordinance complied with the *Euclid* requirement that the restriction affect only time, place, and manner, and argued that its interest in protecting children outweighed detrimental effects on free speech. The Court summarily rejected this justification and held that the restriction was vague because it reached all forms of nudity, including a "a baby's buttocks, the nude body of a war victim, or scenes from a culture where nudity is indigenous." Since nudity is not per se obscene and therefore is afforded constitutional protection, the Court found this ordinance too loosely drawn to guard effectively against abrogation of constitutional rights.

The city's primary argument in *Erznoznik* was that its paramount goal was to "protect its citizens against unwilling exposure to materials that may be offensive." The Court seized upon this argument to emphasize that

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as legitimate means of ensuring orderly disposition of conscription system; Kovacs v. Cooper, 335 U.S. 77 (1949) (ordinance banning sound trucks upheld as legitimate means of maintaining quiet city).

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24 422 U.S. 205 (1975).

23 JACKSONVILLE, FLA., CODE § 330.313 (1972) (quoted in *Erznoznik*, 422 U.S. at 205-07).

24 See *Erznoznik*, 422 U.S. at 208.

25 Id. at 212.

26 Id. at 213.

27 422 U.S. 205 (1975) (ordinance banning sound trucks upheld as legitimate means of maintaining quiet city).

28 *Id.* at 212.

29 Id. at 213.


31 Obscene material, on the other hand, deserves no constitutional protection. Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476, 481-85 (1957). The Court in *Miller* articulated guidelines for deciding whether material is obscene:

The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks, serious literary, artistic, political, or scientific value.


32 *Erznoznik*, 422 U.S. at 214. At oral argument the city attempted to justify the ordinance as a means of reducing distractions to passing motorists whose gaze might be diverted from the highway to a drive-in movie screen. *Id.* at 214. The Court rejected this argument: if the state interest was indeed traffic safety, then the ordinance in question was underinclusive because "[t]here is no reason to think that . . . other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist." *Id.* at 214-15.

33 *Id.* at 208.
viewpoint-based restrictions on free speech may not be justified as time, place, and manner restrictions.\footnote{Id. at 208-09. The Court noted that "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." Id. at 210. The distinction between content-based and viewpoint-based restrictions is explored more fully elsewhere in this note. See infra notes 80-81 and accompanying text.}

In sum, time, place, and manner restrictions prior to Young v. American Mini Theatres, Inc.\footnote{427 U.S. 50 (1976).} were a valid exercise of the police power\footnote{See Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); City of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).} if the city justified these restrictions by a rational governmental purpose.\footnote{See Euclid, 272 U.S. at 395.} When these restrictions encroached on first amendment rights, however, the restrictions had to be imposed without regard to the content of the speech being regulated.\footnote{E.g., United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (ordinance preventing burning of draft cards upheld as legitimate means of ensuring orderly disposition of conscription system); see also Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (ordinance banning sound trucks upheld as legitimate means of maintaining quiet city).} If the restriction was based on content, however, the regulation could be justified only if the government successfully proved the existence of a compelling interest.\footnote{The Supreme Court has, however, carved out exceptions to the general notion that first amendment restrictions must be content-neutral. See Ginsberg v. New York, 390 U.S. 629 (1968) (material not obscene as to adults may be obscene as to children); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (standard for proving libel different when plaintiff is public official or public figure); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting words" not within scope of first amendment.) For a discussion of these distinctions, see infra notes 70-82 and accompanying text.}

**YOUNG: NEW APPROACHES TO THE REQUIREMENT OF CONTENT NEUTRALITY**

In the early 1970's, Detroit found itself faced with the dilemma that had beset other American cities.\footnote{See generally W. Toner, supra note 3.} Many of its inner-city neighborhoods had become blighted strips filled with adult bookstores, adult movie theaters, cabarets, and other undesirable businesses.\footnote{Brief for Petitioner at 4-5, Young v. American Mini Theatres Inc., 427 U.S. 50 (1976). "Undesirable" in this context and in the context of the Detroit ordinance refers to businesses that work a cumulative effect on neighborhoods by destroying property values, promoting prostitution, and causing crime. Some members of the Court in Young suggested that if a city viewed "undesirable" businesses as those which would damage the moral fiber of the community, then the distinction between "undesirable" and "desirable" would be an impermissible one. Young, 427 U.S. at 81 n.4 (Powell, J., concurring) ("[T]he Common Council did not inversely zone adult theaters in an effort to protect citizens against the content of adult movies. If that had been its purpose . . ., the case might be analogous to [Erznoznik].") (emphasis in original)). See also infra notes 80-82 and accompanying text.} In response to this urban deterioration, the Detroit City Council amended\footnote{Detroit, Mich., Ordinance 742-G (Oct. 26, 1972) (amending Detroit, Mich., Ordinance 390-G).} an anti-skid row
ordinance to include movie theaters, adult bookstores, pawn shops, and other uses. In general, the ordinance provided that an adult theater or similar use could not be located within 500 feet of an area zoned for residential use or within 1000 feet of any two other regulated uses. The ordinance also defined "adult" movies and bookstores as those which depicted or sold materials that depicted "specified sexual activities" or "specified anatomical areas."

Two adult theater owners challenged the ordinance with a petition for an injunction and declaratory judgment of unconstitutionality. Both theaters were located within 1000 feet of two other regulated uses. The district court upheld the ordinance, but the Sixth Circuit reversed, holding that the city had failed to discharge its heavy burden of "showing that the method which it chose to deal with the problem at hand was necessary and that its effect on protected rights was only incidental." The majority opinion reaffirmed the judicial commitment to the requirement of Police Department v. Mosley that time, place, and manner restrictions may not be based on the content of materials protected under the first amendment.

In reversing the court of appeals, the Supreme Court created a substantial exception to the Mosley doctrine. First, in rejecting the respondents' vagueness arguments, the Court found that the theater owners lacked standing to raise vagueness claims because, even though the ordinance

The effect of the amendment was a differentiation between "motion pictures which exhibit sexually explicit 'adult' movies and those which do not." Young v. American Mini Theatres, Inc., 427 U.S. 50, 52 (1976) (plurality opinion).

Young, 427 U.S. at 54 (plurality opinion). Anti-skid row ordinances are so named because they focus on "the relationship between a series of uses that... have or create a 'skid-row effect' on adjoining properties." W. Toner, supra note 3, at 2. These ordinances generally include definitions of pornographic uses and seek either to disperse or concentrate adult uses. Id.


One of the theaters also was within 500 feet of a residential area. See id. at 364.

The provisions pertaining to the 500 foot restrictions, however, were declared invalid. Id.

American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1021 (6th Cir. 1975), reh'g denied, 429 U.S. 783.

Id. at 1020.

408 U.S. 92 (1972).

American Mini Theatres, Inc. v. Gribbs, 518 F.2d at 1020.


By allowing some content-based restrictions on first amendment rights, the Court modified the traditional idea that such restraints must be content neutral. Compare id. at 66 with Police Dep't v. Mosley, 408 U.S. 92, 99 (1971) (content neutrality held indispensable) and supra note 31 (content-based restrictions valid if narrowly drawn to effectuate compelling governmental interest).

Young, 427 U.S. at 58-61.
might be vague as applied to other theater owners, it was clearly not vague as applied to them. The Court then acknowledged that third parties sometimes have standing to raise vagueness issues when first amendment rights are at stake, but found that this exception was not apposite in the present case because adult movies were not of sufficient "value" to allow third parties to raise the constitutional rights of others; the exception should instead be reserved for speech whose dissemination encourages a "free and open market for the interchange of ideas." Second, the Court dismissed the theater owners' contention that the licensing requirements imposed on adult theaters constituted a prior restraint on protected speech. The Court rejected this argument, observing that mere zoning requirements do not work a prior restraint unless the requirements totally exclude communication prior to its dissemination.

Having disposed of these two arguments, the Court then turned to an equal protection analysis of the ordinance, beginning with a modification

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Specifically, respondents objected to the language of the statute that imposed the requirement of a waiver of the 1000 foot restriction for all uses that were "characterized by their emphasis ... on 'Specified Sexual Activities' or 'Specified Anatomical Areas.'" Detroit, Mich., Ordinance 742-G § 32.0007 (Oct. 26, 1972). In rejecting this argument, the Court noted that "both theaters propose to offer adult fare on a regular basis." Young, 427 U.S. at 69 (plurality opinion) (footnote omitted). Thus, the Court concluded, "It is clear ... that any element of vagueness in these ordinances has not affected these respondents." Id.; cf. Broadrick v. Oklahoma, 413 U.S. 601, 617 (1973) ("conduct appellants have been charged with falls squarely within ... proscriptions [of statute]").

A general rule of the law of standing is that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Broadrick v. Oklahoma, 413 U.S. 601, 610 (citations omitted). When the first amendment is at stake, however, third parties have sometimes been permitted to raise the claims of others because the policies of standing yield to "the overriding importance of maintaining a free and open market for the interchange of ideas." Young, 427 U.S. at 60 (plurality opinion).

Young, 427 U.S. at 60 (plurality opinion); cf. NAAA v. Button, 371 U.S. 415, 428 (1963) (corporation entitled to assert members' first amendment rights where corporation's goal was elimination of racial discrimination and where state statute inhibited corporation's attainment of that goal).

Prior restraint generally involves the notion that speech may not be restrained "prior to a communication's dissemination, or prior to 'an adequate determination that [the expression] is not protected by the First Amendment.'" L. Tribe, American Constitutional Law § 12-31, at 725 (1978) (citation omitted) quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973). Therefore, the municipal regulation in Young was not a prior restraint because there was "no claim that distributors or exhibitors of adult films [were] denied access to the market.... Viewed as an entity, the market for this commodity [was] essentially unrestrained." Young, 427 U.S. at 62 (plurality opinion).

Id. at 58-61. The Court's emphasis on the distinction between zoning that consolidates or disperses theaters and zoning that absolutely forbids theaters becomes essential in an analysis of the Indianapolis ordinance. See also Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981); see infra notes 138-42 and accompanying text.

"Equal protection" arguably carries the same meaning as "content regulation" so that Young and Mosley can easily be viewed as first amendment cases. The equal protection analysis of Young has engendered a great deal of scholarly criticism. See generally, Note, Constitutional Law—First Amendment—Content Neutrality, 28 Case W. Res. L. Rev. 456 (1978); Note, Content-Based Classifications of Protected Speech: A Less Vital Interest?, 1976 Utah L. Rev.
of Mosley. The Court noted that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," and that "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." The Court then listed instances in which expression was permissibly restricted on the basis of content. 

Recovery in a libel action, for example, is permissibly governed by the content of the message: "malice" must be proven in libel claims by a public official, but a lesser standard will sustain a claim when the plaintiff is a private citizen. Similarly, material that is not obscene as to adults may be constitutionally defined as obscene as to minors. Finally, states may constitutionally set apart "fighting words" and exclude these words from first amendment protection. The Court then listed non-obscene but "adult" materials as another category of speech that may be regulated on the basis of content if the regulation serves some significant state interest.

At the same time, however, the Court in Young reiterated its commitment to governmental neutrality whenever speech is regulated. Regulations that suppress speech because the government disagrees with the speaker's viewpoint cannot be justified. On the other hand, regulations that restrict speech merely because of its subject matter and for reasons not related to the government's appraisal of the speech itself are valid. Since the Detroit ordinance regulated the exhibition of all adult films without reference to the government's viewpoint of the messages contained in any


Young, 427 U.S. at 59-61.

Id. at 64 (plurality opinion) (citations omitted) (quoting Police Dep't. v. Mosley, 408 U.S. 92, 95 (1971).)

71 Id. (plurality opinion).

72 Id. at 66 (plurality opinion).


77 See Young, 427 U.S. at 68-69 (plurality opinion). The holdings in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Ginsberg v. New York, 390 U.S. 629 (1968); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), lead to the conclusion that the broad language of Mosley is of questionable validity. The addition of "adult" materials to the list of categories of speech which may be regulated on the basis of content further weakens the bold assertion set forth in Mosley.

78 Young, 427 U.S. at 67-68 (plurality opinion). The Court illustrated the viewpoint-content distinction in a commercial speech context: "[A]lthough the content of a story must be examined to decide whether it involves a public figure or a public issue, the Court's application of the relevant rule may
particular film, the ordinance was upheld as a permissible content-based regulation. Finally, the Court pointed out that the Detroit ordinance would be invalid, notwithstanding the foregoing criteria, if the ordinance caused total exclusion or suppression of adult uses.

Having decided that the Detroit ordinance was both based on content and grounded in governmental neutrality, the Court turned to its justification for upholding a content-based, viewpoint-neutral classification in the area of adult materials. The Court explained its new classification by adding that adult forms of speech and conduct, while not obscene under Miller v. California, nonetheless deserve less constitutional protection than do "legitimate" forms of expression such as political debate or philosophical discussion. This line of reasoning resembles the Court's treatment of commercial speech, fighting words, and other forms of speech where content-based regulation is permissible. The Court's candid assessment of adult

not depend on its favorable or unfavorable appraisal of that figure or that issue." Id. (plurality opinion).

Professor Ely finds the Young distinction inconsistent with the Court's commercial speech classification. He notes that the Court's classification of adult speech as less protected "runs precisely counter to the point of an 'unprotected messages' approach, which is that unless the expression in question falls into one of the unprotected categories, it is fully protected against content-directed regulation, irrespective of how it might measure up against other protected expression." J. Ely, Democracy and Distrust 115 n.27 (1980).

Young, 427 U.S. at 70 (plurality opinion). Compare the result in Erznoznik, where the Court overturned a similar ordinance because the city's purpose in enacting the ordinance was to "protect its citizens from exposure to unwanted 'offensive' speech." Id. at 71 n.34 (plurality opinion). In other words, the Erznoznik restrictions were grounded in the city's point of view about adult speech and not in the city's interest in preserving urban blight or meeting some other state interest unrelated to the content of the speech itself. Id. (plurality opinion). In Young, on the other hand, the Court found that the city's interest in preserving urban neighborhoods justified an imposition on protected speech, that the imposition was viewpoint neutral, and that the ordinance was therefore constitutional. Id. at 71 (plurality opinion); see generally L. Tribe, supra note 67, § 12-19, at 679-80.

Young, 427 U.S. at 71 n.35 (plurality opinion). The plurality observed that [t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that..."[t]here are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight." Id. (plurality opinion) (quoting Nortown Theatre v. Gribbs, 373 F. Supp. 363, 370 (E.D. Mich. 1974)).

Young, 427 U.S. at 70-73 (plurality opinion).


Four members of the court joined Justice Stevens' formulation of the "less protected speech" rationale:

[Society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. ... Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatres of our choice.

Young, 427 U.S. at 70.
speech and conduct, however, marked the first instance in which the Court assigned relative values to different kinds of constitutionally protected speech. This "less protected speech" rationale is suspicious because it vests in administrative officials and judges the power to decide how much constitutional protection a given form of speech deserves. Consequently, Young is ineffective as a tool for determining which categories of speech will be afforded less protection in subsequent cases. Moreover, the Court's ranking of first amendment rights departs radically from its analysis in Gertz v. Robert Welch, Inc.

In Gertz, the Court refused to set specific standards for recovery in libel actions. Instead, it articulated general guidelines, permitting the states to "retain substantial latitude in their efforts to enforce a legal remedy...." This approach contemplated the lack of wisdom in committing "[the task of fashioning remedies] to the conscience of judges." It is difficult to reconcile these disparate views of judicial intervention, especially since both Young and Gertz involved similarly treated types of speech. However, the differing forms of speech in Gertz and Young may provide one possible basis for reconciling the two cases. Perhaps the plurality in Young felt that adult speech deserves even less protection than defamatory speech so that "unwise" judicial decisions would be less harmful in cases involving Young-implicated situations.

In summary, Young stands for the proposition that content-based regulations of adult materials are permissible if they do not lead to total suppression of speech and if they serve some significant state interest not related to the government's appraisal of the message expressed. A plurality of the Court based its holding on the idea that adult speech is worthy of less protection than other forms of speech and conduct.

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Id. at 345-46.

Id. at 346.

The standard of judicial review was not articulated in Young. See Note, Content-Based Classifications of Protected Speech: A Less Vital Interest?, 1976 Utah L. Rev. 616, 617-30 (discussion of whether "rational basis" or "strict scrutiny" test was intended in determining legitimacy of state interest in creating content-based classification).

See Young, 427 U.S. at 70 (plurality opinion). A few words about the concurring and dissenting Justices' opinions are in order, especially since Justice Powell's concurring opinion was the swing vote in Young. Justice Powell emphasized the fact that the Detroit ordinance did not totally suppress protected speech but that it merely dispersed the theaters. Id. at 77-79 (Powell, J. concurring). Justice Powell then claimed that the ordinance was not content-based but rather a permissible regulation under the four-part test in United States v. O'Brien, 391 U.S. 367 (1968). Under the O'Brien test, a governmental regulation is sufficiently justified, despite its incidental im-
A recent Supreme Court case illustrates the crucial distinction between dispersal or concentration of adult uses and outright exclusion of them.

Young, 427 U.S. at 79-80 (Powell, J. concurring) (quoting O'Brien, 391 U.S. at 377). Since the criteria of O'Brien had been met, Justice Powell argued, the inquiry need go no further. Erznoznik, on the other hand, was not apposite because it represented a direct attempt to regulate speech and to further governmental interests not wholly unrelated to the regulation of expression. Id. at 83-84 (Powell, J. concurring). Powell failed to recognize, however, that Young did not fit squarely within the O'Brien analysis because O'Brien involved a governmental interest (cohesive military system) unrelated to suppression (the burning of draft cards), whereas Young concerned a governmental interest (preservation of neighborhoods) related to suppression (zoning of adult theaters).

Finally, Justice Powell distinguished Erznoznik by hinting that improper legislative motive rendered the Jacksonville ordinance invalid. This analysis seems to be similar to that used in racial discrimination cases where ordinances were invalidated for "bad motive." See Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265-66 (1977) (plaintiff must show "that a discriminatory purpose has been a motivating factor in the decision"); Gomillion v. Lightfoot, 364 U.S. 339 (1960); cf. Wright v. Rockefeller, 376 U.S. 52 (1964) (plaintiffs failed to prove discriminatory purpose).

Professor Ely contends that motive is relevant in first amendment cases "where the good or right whose distribution is in issue is not one whose provisions or accommodation is affirmatively required . . . ." J. Ely, supra note 80 at 141. Thus, although cities are not obligated to provide for adult movies, their restriction must not be based on municipal viewpoint of the content of a particular adult movie. Young, 427 U.S. at 64 (plurality opinion); see supra notes 74-83 and accompanying text.

Although Professor Ely finds legislative motive relevant in certain first amendment areas, J. Ely, supra note 80, at 141, a more cogent approach can be reached through a "means end" analysis, see infra notes 170-76 and accompanying text, and through a "content viewpoint" distinction, see supra notes 74-83 and accompanying text; see infra notes 159-69 and accompanying text. This analysis obviates the need for motive analysis in an area where it has generally not been invoked and vitiates the problems that attend legislative mind-reading and determining dominant motive. See, e.g., Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95. See also Palmer v. Thompson, 403 U.S. 217 (1971). The court there contended that [i]t is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

Id. at 225.

In two sets of dissenting opinions, Justices Brennan, Stewart, Marshall and Blackmun lamented that the majority opinion set the stage for selective enforcement, id. at 85 (Stewart, J., dissenting), and unbridled enforcement discretion on questions of what is and is not protected, id. at 91 (Blackmun, J., dissenting). The dissenters observed that "[t]he fact that the 'offensive' speech here may not address 'important' topics . . . does not mean that it is less worthy of constitutional protection," id. at 87 (Stewart, J., dissenting), and warned that permitting unpleasant speech is "the price to pay for constitutional freedom." Id. at 88.
Schad v. Borough of Mt. Ephraim\textsuperscript{29} concerned a local ordinance that in effect banned all forms of live entertainment.\textsuperscript{30} The ordinance was challenged by an adult bookstore owner who had installed a coin-operated device that permitted a customer to watch a nude dancer behind a glass panel.\textsuperscript{44} In striking down the ordinance as violative of the first amendment, the Court relied upon a "less intrusive [means]" analysis\textsuperscript{55} and held that the Borough had failed to justify its total ban on public entertainment.\textsuperscript{56} Furthermore, the Court dismissed the notion that the Mt. Ephraim ordinance was a valid time, place, and manner restriction under Young.\textsuperscript{97}

The Court found Young inapposite to the ordinance in Schad because the Detroit ordinance in Young "did not affect the number of adult movie theaters . . . in the city; it merely dispersed them."\textsuperscript{98} The Mt. Ephraim ordinance, on the other hand, effected an outright ban on live entertainment. The Court pointed to its refusal to "approve the total exclusion from the city of theaters showing adult, but not obscene materials,"\textsuperscript{99} and noted that the Detroit ordinance imposed no limitation on the number of regulated uses.\textsuperscript{100} Schad thereby reaffirmed the Court's careful distinction in Young between permissible regulation and impermissible suppression.\textsuperscript{101}

Although the regulation-suppression distinction allows Schad and Young to be read consistently, it is important to note that the Schad Court did not apply Justice Stevens' "less protected speech" rationale.\textsuperscript{102} The Court

\textsuperscript{29} 452 U.S. 61 (1981).

\textsuperscript{30} Mt. Ephraim, N.J., Ordinance § 99-15B (1975). The ordinance allowed the operation of motels and only certain kinds of retail establishments, most of which were oriented toward neighborhood convenience. Id. The ordinance further provided that "[a]ll uses not expressly permitted in this chapter are prohibited." Id. § 99-4. Since no forms of live entertainment were listed in the permitted use section of the ordinance, all forms of live entertainment were banned. See id.

\textsuperscript{44} Schad, 452 U.S. at 62.

\textsuperscript{45} Id. at 70.

\textsuperscript{55} Id. at 73 (footnote omitted). Mt. Ephraim sought to justify the ordinance on two grounds. First, the Borough argued that "permitting live entertainment would conflict with its plan to create a commercial area that caters only to the 'immediate needs' of its residents . . . ." Id. at 72. Second, the Borough contended "that it may selectively exclude commercial live entertainment from the broad range of commercial uses permitted in the Borough [in order to] avoid . . . problems . . . such as parking, trash, police protection, and medical facilities." Id. at 73. The Court found the ordinance too broadly drawn to address these problems constitutionally. "The Borough has not established that its interests could not be met by restrictions that are less intrusive on protected forms of expression." Id. at 74.

\textsuperscript{97} Schad, 452 U.S. at 74-76.

\textsuperscript{98} Id. at 71.

\textsuperscript{99} Id. at 76.

\textsuperscript{100} Id.

\textsuperscript{101} See supra notes 80-82 and accompanying text.

\textsuperscript{102} Justice Stevens filed an opinion concurring in the judgment in which he hinted that nude dancing was less protected than other forms of speech. He contended: (E)ven though the foliage of the First Amendment may cast protective shadows over some forms of nude dancing, . . . its roots were germinated by more serious concerns that are not necessarily implicated by a content-neutral zoning ordinance banning commercial exploitation of live entertainment. Cf. Young v. American Mini Theatres, Inc., 427 U.S. 50, 60-61 (1976) (foot-
instead favored a more traditional “less intrusive [means]” approach with a special emphasis on the legitimacy of the municipality’s justifications for permitting or prohibiting certain forms of protected speech.

The Court’s hesitancy to use a “less protected speech” theory has never been fully explained. However, one possible explanation for the reluctance to apply this analysis to Schad and other cases involving adult forms of expression is that further application might lead to an outright ban on such activities. The normative judgments inherent in a “less protected speech” analysis must be exercised with care. Application of these judgments would lead to a total ban on any and all forms of speech that encourage anything less than “untrammeled political debate” or “political oratory or philosophical discussion.” The Supreme Court might simply fear the ramifications of wholesale bans on “less protected speech” and therefore might be unwilling to take the first step by applying a “less protected speech” analysis to adult uses. Thus, although the reasons for the holdings in Young and Schad differ slightly, the underlying policy of allowing regulation of protected speech but prohibiting its suppression pervades both opinions and has retained its vitality.

note omitted). Schad, 452 U.S. at 80. Justice Blackmun also filed a concurring opinion in which he objected to the fact that Mt. Ephraim’s ordinance forced its citizens to travel to communities in which they “have no political voice,” id. at 78, in order to view live entertainment.

Justices Powell and Stewart filed a separate concurring opinion in which they briefly suggested that a city could ban all live entertainment if the ordinance were carefully drawn and reflective of the least restrictive means of reaching an asserted interest. Id. at 79. See also supra note 90 and accompanying text.


104 Id. at 74-75. For further examples of cases which focus on the municipality’s justifications, see Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 528-30 (1981) (concurring opinion) (city failed to provide adequate justification for restriction on protected activity); Young v. American Mini Theatres, Inc., 427 U.S. 50, 62-63 (1976) (concurring opinion) (city’s interest in regulating commercial property found adequate); Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (city’s interest in quiet surroundings outweighs ramifications of ban on sound trucks). But see, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) (protection of citizens from “offensive” materials not legitimate interest given first amendment implications).

105 Young, 427 U.S. at 70 (plurality opinion).

106 Id. (plurality opinion).

107 See, e.g., Young, 427 U.S. at 87 (Stewart, J., dissenting). Justice Stewart observed that first amendment freedoms are not defined in terms of importance; and that, absent a determination of obscenity, adult forms of conduct are not unimportant. See id. (Stewart, J., dissenting).

108 Another recent case, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), involved a San Diego ordinance that allowed billboards advertising goods or services available on the property where the sign was located. Billboards containing all other forms of commercial and noncommercial advertising were banned unless the form of advertising fell within one of twelve exceptions. A plurality of the Court upheld the ordinance “insofar as it regulated commercial speech.” Id. at 512 (emphasis added). The plurality referred to prior decisions which held that commercial speech enjoys only “‘a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression.’” Id. at 506 (quoting Ohralik v. Ohio Bar Ass’n, 436 U.S. 447,
INDIANAPOLIS' SPECIAL EXCEPTIONS ORDINANCE: YOUNG REVISITED OR A NEW CONSTITUTIONAL CHALLENGE?

In 1976, the Indianapolis City-County Council adopted a Commercial Special Exceptions Ordinance aimed at regulating amusement arcades, adult bookstores, massage parlors, and adult theaters. An examination of this ordinance under Young v. American Mini Theatres, Inc. and Schad v. Borough of Mt. Ephraim as well as a discussion of the general constitutional validity of the ordinance, lead to the conclusion that, although the ordinance is similar to the one upheld in Young, it suffers from constitutional infirmities that render it invalid.

Vague Statutory Language

The Supreme Court has continually voiced great concern whenever a vague ordinance encroaches upon first amendment freedoms. The Court

456 (1978)). Under this view of commercial speech, the Court concluded the San Diego ordinance was valid as to commercial speech. Id. at 512.

With respect to noncommercial speech, on the other hand, the plurality held the ordinance invalid because it permitted content-based restrictions on noncommercial speech. Id. at 513. Without reference to Young, the Court reiterated its traditional stand on time, place, and manner restrictions by holding that "[these restrictions] are permissible if 'they are justified without reference to the content of the regulated speech, ... serve a significant governmental interest, and ... leave open ample alternative channels of communication of the information.'" Id. at 516 (quoting Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 771 (1976).

Young and Metromedia can easily be reconciled because the legitimacy of restrictions on commercial speech is well established and because the noncommercial speech regulated in Metromedia lacked the "less protected" characteristics of the speech regulated in Young. Metromedia raises the issue, however, of whether or not cities can control adult uses on a theory of aesthetics, and prevention of urban blight, if the ordinance addressing these goals can survive a "least restrictive means" test and is buttressed by corresponding "comprehensive coordinated efforts to address other ... contributors to an unattractive environment." See generally Rowlett, Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality, 34 VAND. L. REV. 603 (1981).

106 INDIANAPOLIS, IND., CODE app. D, pt. 23 (1982). The ordinance requires the grant of a special exception by the Marion County Board of Zoning Appeals for all "Class 1 Regulated Commercial Uses." Id. § 1C. These uses include amusement arcades (including coin operated booths featuring live nude dancers), massage parlors, adult bookstores, and adult movie theaters. Id. § 1A. Furthermore, if the proposed class 1 regulated commercial use is within 500 feet of a residential district, church, school, or other similar use, the applicant is required to obtain both a zoning variance pursuant to IND. CODE § 36-7-4-918(e)(2) (1982), and a Special Exception. INDIANAPOLIS, IND., CODE § 1B. Unlike the Detroit ordinance at issue in Young, the Indianapolis ordinance does not speak to the proximity of one adult use to other adult uses, but instead addresses the establishment of the use in the absolute and the proximity of the use to other zoning districts.


108 452 U.S. 61.

109 No distinction is drawn in this note between vagueness and overbreadth; the two doctrines overlap considerably. One scholar considers standing the only difference between the two. See L. TRIBE, supra note 67, §§ 12-28 to -29, at 719-20 (1978).

has characterized a vague statute or ordinance as one so unclear that "men of common intelligence must necessarily guess at its meaning."\textsuperscript{114} The Indianapolis ordinance, unlike its Detroit counterpart,\textsuperscript{115} contains language that would force a theater or bookstore owner or some other man of "common intelligence" to guess at its meaning. For example, the Indianapolis ordinance requires that all adult theaters obtain special exceptions, "except those establishments which only infrequently present such films..."\textsuperscript{116} As a result, the theater owner or bookseller must determine whether or not he presents adult films only "infrequently." The vague language of the ordinance might make an adult use owner uncertain about the legality of his planned conduct and persuade him to forego showing adult movies or selling adult books altogether.\textsuperscript{117} Consequently, the vague language of the statute could have a chilling effect on the theater owner's first amendment rights.\textsuperscript{118}

In addition, the definition of the word "adult" in the Indianapolis ordinance restricts first amendment rights.\textsuperscript{119} "Adult" in the Indianapolis ordinance is defined not in terms of specific content of the material but rather


\textsuperscript{115} The Detroit ordinance required all theaters exhibiting films that depicted "Specified Anatomical Areas" and that fell within the distance requirements set forth in the ordinance to obtain a waiver. Detroit, Mich., Ordinance 742-G § 66.0103 (Oct. 24, 1972).


\textsuperscript{117} See, e.g., Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 684 (1968) (proprietor "runs the risk of being foreclosed... from a significant portion of the movie-going public"); cf. Baggett v. Bullitt, 377 U.S. 360 (1964). In invalidating a loyalty oath that required teachers to pledge allegiance to the flag, the Court observed, "Those... sensitive to the perils posed by... indefinite language avoid the risk... only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." Id. at 371. See generally L. TRIBE, supra note 67, §§ 12-28 to -29, at 718-20 (1978).


\textsuperscript{119} The Indianapolis ordinance, on the other hand, classifies adult theaters and bookstores as those that are "distinguished or characterized by an emphasis on matter depicting, describing, or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas...':" Detroit, Mich., Ordinance 742-G § 32.0007 (Oct. 26, 1972). The Supreme Court in Young rejected respondents' argument that "they cannot determine how much of the described activity may be permissible before the exhibition is 'characterized by an emphasis' on such matter." Young, 427 U.S. at 50, 58 (plurality opinion). Thus, it might appear that the Court would accept the "infrequently" language of the Indianapolis ordinance as it did the "characterized by an emphasis on" language of the Detroit ordinance. The Court's rejection of this argument did not rest, however, on a modification of vagueness standards. It was based instead on the fact that "[t]he record indicates that both [of respondents'] theaters propose to offer adult fare on a regular basis." Id. at 59 (footnote omitted). In other words, because the Detroit ordinance was clearly applicable to the respondents, they lacked standing to claim that the statute was vague as to third parties. Thus, a lack of standing instead of a relaxation of vagueness standards led to the failure of respondents arguments.
in terms of material that is harmful to minors under Indiana state law.\textsuperscript{120} The Indiana Code defines "harmful to minors" in the context of a criminal statute that prohibits dissemination of obscene material to minors and merely lists the \textit{Miller v. California}\textsuperscript{121} standards. Defining "adult" in this manner presents constitutional difficulties. "Harmful to minors" as defined in the statute requires a subjective judgment instead of reliance upon definitions containing reference to specific activities or anatomical areas.\textsuperscript{122} Just as the "infrequency" exception requires that men of common intelligence must necessarily guess at its meaning,\textsuperscript{123} the "harmful to minors" language forces a theater owner to guess whether his conduct falls within the scope of the statute. Language so vague that it forces people to guess whether their conduct is proscribed cannot withstand constitutional challenges.\textsuperscript{124}

\textbf{Prior Restraint}

The standards for granting a special exception create further constitutional difficulties by imposing the threat of a prior restraint\textsuperscript{125} on protected speech. These standards give rise to infirmities not present in the \textit{Young}
ordinance. The Indianapolis ordinance forbids the establishment of a adult use within 500 feet of a residential, park, church, or other similar district.\textsuperscript{126} The owner of an adult use who wishes to locate his theater within 500 feet of these districts must apply for and obtain a special exception and a zoning variance\textsuperscript{127} from the Metropolitan Board of Zoning Appeals.\textsuperscript{128}

Indiana law imposes upon the Board five requirements that must be met before a zoning variance may be granted,\textsuperscript{129} but these standards contemplate comparatively mundane cases such as variances of use and development standards as set forth in the Indianapolis Code.\textsuperscript{130} No separate standards exist for the granting of a variance in special exception cases, where first amendment rights are called into question. As a result, the Board of Zoning Appeals is faced with inapplicable standards when the owner of an adult use appears with special exception and variance petitions. The Supreme Court has disapproved of regulatory schemes that lack clearly defined statutory standards because these schemes "encourage erratic administration whether the censor be administrative or judicial."\textsuperscript{131} Instead, the Court has insisted that regulatory systems that allow administrative boards to suppress speech prior to its communication contain standards that provide sufficient guidance for reviewing bodies.\textsuperscript{132} Under these stringent guidelines created by the Court, the broad standards of the Indianapolis ordinance can easily be challenged.

\footnotesize
\textsuperscript{126} INDIANAPOLIS, IND., CODE § 36-7-4-918(f) (1982).
\textsuperscript{127} IND. CODE § 36-7-4-918(f) (1982). Zoning variances are required whenever a property owner seeks to use his property for any reasons other than those permitted by the zoning regulations applicable to the property owner’s land.
\textsuperscript{128} The Boards themselves are established pursuant to IND. CODE § 36-7-4-901 to -918 (1982).
\textsuperscript{129} These requirements are as follows:
(1) the grant will not be injurious to the public health, safety, morals, and general welfare of the community;
(2) the use or value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner;
(3) the need for the variance arises from some condition peculiar to the property involved and the condition is not due to the general conditions of the neighborhood;
(4) the strict application of the terms of the zoning ordinance will constitute an unusual and unnecessary hardship if applied to the property for which the variance is sought; and
(5) the grant does not interfere substantially with the [metropolitan] comprehensive plan....
\textsuperscript{130} See, e.g., INDIANAPOLIS, IND., CODE app. D, pt. 12, ch. II, § 2.05 B (1982) (standards for high intensity commercial districts). For example, the five statutory requirements must be met before the Board may properly grant a variance allowing a petitioner to open a used car lot in a residential district.
\textsuperscript{132} Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 685 (1968).
The Board of Zoning Appeals is faced with equally unclear standards when a proposed use is an "adult" use but is not within 500 feet of certain districts so that a zoning variance is not required. The standards for the granting of a special exception are very similar to the five statutory requirements for granting an ordinary zoning variance. Thus, the Board merely applies ordinary variance standards in a situation where standards more closely related to the justifications for regulating speech would be appropriate. This conspicuous absence of standards calls to mind the Supreme Court's hesitancy to accept a system that permits city officials to control first amendment rights "prior to 'an adequate determination that [the expression] is not protected by the First Amendment.'"

Finally, the language of the Special Exceptions Ordinance raises the possibility that the Board of Zoning Appeals might totally exclude adult uses from Marion County. In Young, the Court explicitly noted that the Detroit ordinance merely regulated adult speech without imposing an outright ban on adult uses. The Court also was explicit in pointing out that if the Detroit ordinance had created the possibility of total suppression, then the ordinance probably would not have survived a constitutional challenge.

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123 Indianapolis, Ind., Code app. D, pt. 23 § 1C2 (1982). The ordinance provides that a Special Exception will be granted upon the Board's finding that:
   a. The proposed use will not be injurious to the public health, safety, morals, convenience or general welfare;...
   c. The proposed use will not adversely affect the adjacent area or property values therein; and
   d. The proposed use will be consistent with the character of the district ....
Id. Cf. Ind. Code § 36-7-4-918(f)(1)-(5) (1982); see supra note 175.


Similarly, a federal district court recently invalidated a section of the Indianapolis licensing code that governed amusement arcades. Indianapolis, Ind., Code § 17-31(c)(6) (1975) was declared unconstitutional in Evansville Book Mart, Inc. v. City of Indianapolis, 477 F. Supp. 128, 132 (1979). The invalidated section provided that the decision to grant a license was to be in the "sound discretion of an administrative official." Indianapolis, Ind., Code § 17-31(c)(6) (1975). The court found this section of the ordinance unconstitutional because it did "not contain adequate guidelines" and "give the controller almost unlimited discretion regarding the grant or denial of a license." Evansville Book Mart, Inc., 477 F. Supp. at 132.

The business licensing ordinance is relevant to the Special Exceptions ordinance because the City of Indianapolis considers coin-operated nude dancing booths "amusement machines" and thus requires that these "machines" receive licenses from the city controller. Indianapolis, Ind., Code § 17-185 (1975).

125 Young, 427 U.S. at 62-63 (plurality opinion).
Furthermore, the Schad v. Borough of Mt. Ephraim plurality reiterated the Court's commitment to upholding ordinances that regulate adult speech and to invalidating ordinances that suppress adult speech.\(^{137}\) A close comparison of the Detroit and Indianapolis ordinances shows that the terms and procedures of the Special Exceptions Ordinance can impermissibly lead to an outright prior restraint on adult forms of speech.

First, the standards for granting a special exception sweep so broadly that the Board could find, as a matter of course, that none of the standards was met. A second and more fundamental difference between the Detroit and Indianapolis ordinances lies in the scope of each ordinance's regulation. The Detroit ordinance applies only to an adult use that either is within 1000 feet of two other adult uses\(^{138}\) or is within 500 feet of residential districts.\(^{139}\) Adult uses not located in these two areas by implication are exempt from regulation. Thus, the ordinance in effect guarantees the existence of adult uses in all areas not within the two categories set forth in the ordinance. The Indianapolis ordinance, on the other hand, forces all owners of adult uses to obtain special exceptions, regardless of the location of the use.\(^{140}\) As result, the Board conceivably could deny each special exception and thereby achieve a total ban of adult uses in Indianapolis. In other words, the Indianapolis ordinance does not contemplate dispersal of adult uses but instead provides for their exclusion. The Supreme Court has indicated that this extreme form of regulation is tantamount to suppression,\(^{141}\) and that even if adult uses are "less protected" by the first amendment,\(^{142}\) they may not be totally suppressed.

Two recent cases reiterate the holdings of Young and Schad and further weaken the constitutionality of the Indianapolis ordinance. In CLR Corporation v. Henline,\(^{143}\) the Sixth Circuit found a Wyoming, Michigan ordinance invalid, although its language was nearly identical to that of the Detroit ordinance upheld in Young. The Wyoming ordinance contained distance requirements for adult uses similar to those in the Detroit\(^{144}\) and Indianapolis\(^{145}\) ordinances. Relying upon language in Schad that proscribed severe restrictions of free expression, the Sixth Circuit invalidated the Wyoming ordinance because the city failed to "assert a factual justifica-
tion, compelling or otherwise, for the severe infringements of free expres-
sion." The invalidation of the Wyoming ordinance resulted from ques-
tions of degree: a "myriad of locations" for restricted uses met with
the Sixth Circuit's approval, but permitting only "two to four restricted
uses in a half-mile strip of the city" overly restricted free expression.

Both the Indianapolis ordinance and the ordinance in CLR Corporation
effectuate severe restriction on free expression. The Indianapolis ordinance
makes possible a total ban on adult uses. The Detroit ordinance in Young,
on the other hand, dispersed adult uses, allowing them to operate in many
areas throughout the city. If "severe" limitations on adult uses are im-
permissible under CLR Corporation, then an ordinance that can completely
ban adult uses is a fortiori unconstitutional.

In City of Minot v. Central Avenue News, Inc., the Supreme Court
dismissed the appeal of a North Dakota case upholding an adult uses or-
dinance. This dismissal indicates that the Supreme Court is unwilling to
disturb Young if a challenged ordinance is carefully drawn. In Minot, the
North Dakota Supreme Court upheld an ordinance that imposed distance
limitations for adult theaters. The North Dakota court emphasized that
evidence introduced at trial showed other areas in the city in which adult
uses could relocate. The court found this availability

particularly significant in light of the fact that a central concern
of the courts in [Young] and other cases considering this issue
was the effect of . . . zoning space as it relates to the ability of
people in the future to gain access, as buyers or sellers, to the
adult entertainment market." The court in Minot placed the ordinance outside the bound-
daries of Schad because adult entertainment was not suppressed in the city
of Minot.

The Minot ordinance contained carefully drafted definitions of "Specified
Anatomical Areas" and "Specified Sexual Activities;" these definitions mir-
rored those set forth in the Detroit ordinance. Furthermore, the Minot
ordinance, unlike its Indianapolis counterpart, lacked vague standards
unrelated to municipal interests. The Minot court invalidated a provision
of the ordinance, however, that called for the "closing for a year of an

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146 CLR Corp., 702 F.2d at 639.
148 CLR Corp., 702 F.2d at 639.
149 Cf. supra notes 140-42 and accompanying text.
150 Id.
152 Id. at 864, citing Young, 427 U.S. at 71 (Stevens, J).
153 Minot, 308 N.W.2d at 865; see supra notes 92-102 and accompanying text.
154 Compare Minot, N.D. Ordinance No. 2236 (1979) with Detroit, Mich. Ordinance 742-G
establishment to prevent the dissemination of material therein." This provision was an invalid prior restraint and recalls the need for a prompt determination of obscenity.

It therefore appears that the Supreme Court is not willing to entertain appeals from state decisions that uphold Young-based ordinances. The risks of total suppression, loose standards, and prior restraint, on the other hand, might lead the Court to an opposite determination if cases challenging the Indianapolis ordinance reached the docket. As a result, the Indianapolis City-County Council should consider revising its ordinance so that it mirrors the precise standards, language, and definitions set forth in the Detroit ordinance.

**Attenuated Relationships and Illicit Objectives**

The possibility of total suppression of adult uses in Indianapolis causes one to question the purpose underlying the Special Exceptions Ordinance. Although the preamble to the ordinance mentions the maintenance of property values and zoning district character, the suppressive effect of the ordinance leads to the suspicion that the city intended to regulate morals rather than stave off skid row when it imposed special exception requirements on adult uses. In this regard, the Indianapolis ordinance is similar to the one invalidated in *Erznoznik v. City of Jacksonville*, where the Court found the relationship between the asserted governmental objective and the means of achieving that objective too attenuated to withstand a constitutional challenge. Suppression as a means of achieving a purported goal of preserving the character of the city is too tenuous a relationship for the Supreme Court.

This attenuated means-to-end relationship also suggests that the city sought to enact speech regulations based on governmental viewpoint in

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155 Minot, 308 N.W.2d at 871.
157 Id. at § 1C2d.
158 This contention is supported by various statements by the Mayor of Indianapolis and the Marion County prosecutor. See infra note 210.
159 See supra notes 32-45 and accompanying text.
160 The Court in *Erznoznik* readily dismissed the city’s justifications for its ordinance. First, the Court declared that the city had no right to decide what kinds of materials were unfit for its citizens. *Erznoznik*, 422 U.S. at 208-12. Second, the Court rejected the city’s argument that the restrictions fell within the police power. Id. at 212-13. Finally, the Court dismissed the city’s contention that the ordinance was directed at traffic safety. Id. at 214-15. See supra notes 32-41 and accompanying text. Similarly, the Borough of Mt. Ephraim in *Schad* contended that its ordinance was a means of allowing only businesses which catered to residents’ “immediate needs” and of avoiding trash and clutter. *Schad*, 452 U.S. at 72-73. The Court rejected these contentions because the “Borough [did not establish] that its interests could not be met by restrictions that are less intrusive on protected forms of expression.” Id. at 74.
161 See supra notes 158-59 and accompanying text.
162 See supra notes 78-82 and accompanying text.
stead of on content alone. The Supreme Court regards the viewpoint-content distinction as crucial and will not sustain regulations of speech based on the "sovereign's agreement or disagreement with . . . what a speaker has to say."166 There is at least one instance in which statements of policy reveal a desire to enact viewpoint-based restrictions. Shortly after the Special Exceptions Ordinance was declared unconstitutional in Cutshaw v. City of Indianapolis,167 the city planning staff recommended approval168 of a special exception169 for a motel that wished to show in-room adult movies.170 Within a week, according to The Indianapolis Star, the Mayor of Indianapolis issued a memorandum to planning and development officials in which he "noted how unhappy he was to learn that the city staff had supported the granting of the . . . variance . . . to allow the use of movies at the motel."171 The Mayor's reaction to the planning staff's recommendation might reflect a "stamp out adult movies" campaign, which is an impermissible form of censorship,172 or a crusade to "clean up" Indianapolis by regulating morals, which is equally impermissible since it might reflect a viewpoint-based restriction.173 Recent public statements by the Mayor, however, reflect his apparent recognition of the constitutional limitations on obliterating adult uses. In March, 1983, Mr. Hudnut assured a neighborhood organization that the City of Indianapolis was doing everything possible to close adult bookstores and massage parlors. The Mayor added, however, that "we have to do it in a way that holds up in court."174

In addition to its suppressive effect, the Indianapolis ordinance contains an amortization clause that forces each owner of regulated uses to obtain

166 Young, 427 U.S. at 64 (plurality opinion).
167 No. 30, 170 (Johnson County Cir. Ct. filed Jan. 9, 1980).
168 The Boards as a matter of course are advised by the planning and zoning staff. See Ind. Code § 36-7-4-920(d) (1982).
170 The motel catered mainly to truck drivers and was located in an older industrial section of Indianapolis that was bordered by a residential area. Minutes of the Metropolitan Bd. of Zoning Appeals, Div. Two, at 7-8 (June 9, 1981). No one appeared at the hearing to object to the exception. Id.
171 According to the article, the Mayor seemed upset at the very notion that any city official would condone adult uses in Marion County. Indianapolis News, July 24, 1981, at 43, col. 6. In this case, a variance as well as a Special Exception was needed because the motel was within 500 feet of a residential district. Indianapolis, Ind., Code app. D, pt. 23 § 1B2 (1982).
172 As noted earlier, it was pointed out in Young that an outright ban on adult movies instead of the imposition of restrictions "addressed only to the places at which the type of expression may be presented" would be impermissible. Young, 427 U.S. at 78-79 (Powell, J., concurring). The Mayor made similar remarks the following October at an anti-pornography rally in downtown Indianapolis. He said, "There are two sides to the pornography question. I know. But I'd be happy if there weren't any adult bookstores and massage parlors in Indianapolis. . . . I think we need to recognize when the majority of a community is against something and then do something to stop it." Indianapolis Star, Oct. 10, 1981, at 23, col. 1.
173 See Young, 427 U.S. at 64 (plurality opinion); see supra notes 80-81 and accompanying text.
a special exception before January 1, 1978 or risk receiving an injunction and order of closure from the Marion County courts. This provision again raises the twin spectres of an improper means-to-end relationship and a viewpoint-based restriction on speech. If the city’s goal were the maintenance of property values, then that goal could have been reached through a much more direct means-to-end approach without using the amortization clause. Moreover, the amortization clause increases the danger of total suppression of adult uses and recalls the suppression-regulation distinction set forth in Young. Finally, the clause implies municipal distaste for adult uses and again raises the viewpoint-content distinction that the Supreme Court holds in high regard. In short, the risk of suppression, the loose means-to-end fit, and the amortization clause combine to suggest that the Special Exceptions Ordinance cannot survive Young safeguards against total suppression of protected speech.

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122 Indianapolis, Ind., Code app. D, pt. 23, § 1D (1982). The amortization clause provides that:
1. . . . All Class 1 Regulated Commercial Uses . . . existing in any zoning district within Marion County on [Sept. 13, 1976]:
   a. Shall conform to all requirements . . . of this ordinance, including the requirement of obtaining a grant of special exception to permit such Class 1 Regulated Commercial Use, on or before January 1, 1978; or
   b. Such use shall be amortized and terminated upon such date, and all use of the land, structure or premises therefor shall be in accordance with permitted land uses and regulations of the applicable zoning district.

123 Indiana law empowers the Metropolitan Development Commission of Marion County to seek injunctions. See Ind. Code § 36-7-4-404(c) (1982).

124 Young, 427 U.S. at 62.

125 Id. at 62-63.

126 The foregoing analysis of the Indianapolis ordinance can also be discussed in terms of Justice Powell’s concurring opinion in Young. Id. at 73-84 (Powell, J., concurring). Even though Justice Powell did not adopt the plurality’s “less protected speech” rationale, the same infirmities exist under his analysis. Justice Powell viewed the Detroit ordinance as “an example of innovative land-use regulation, implementing First Amendment concerns only incidentally and to a limited extent.” Id. at 73 (Powell, J., concurring). Justice Powell found the city’s interest in avoiding urban blight sufficient to warrant incidental effects on first amendment rights. Id. at 80-82 (Powell, J., concurring). Justice Powell was mindful, however, that an ordinance could reflect a desire to suppress free expression. He noted that “[i]t is clear both from the chronology and from the facts that Detroit has not embarked on an effort to suppress free expression,” id. at 80 (Powell, J., concurring), and observed that “a zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression.” Id. at 81 n.4 (Powell, J., concurring). Finally, Justice Powell cautioned against “using the power to zone as a pretext for suppressing expression,” id. at 84 (Powell, J., concurring), and advised courts to be watchful of this regulatory tactic. Id. (Powell, J., concurring).

Justice Powell’s opinion also points to another weakness of the Indianapolis Ordinance. Justice Powell noted that Detroit’s anti-skid row ordinance “was already in existence, and its purposes clearly set out, for a full decade before adult establishments were brought under it.” Id. at 80 (Powell, J., concurring). In fact, the ordinance as originally enacted governed hotels or motels, establishments that served beer or liquor, pawnshops, billiard halls, rooming houses, second stores, shoeshine parlors, and taxi dance halls. Detroit, Mich., Ordinance 742-G § 66.0000 (Oct. 26, 1972). Justice Powell used the scope of the Detroit ordinance as first enacted as further evidence of the city’s interest in fighting blight in-
Ordinances that restrict first amendment rights have been subjected to changing doctrines and applications over the past forty years. The original requirement of content neutrality has been modified to allow categorization of certain forms of speech that can be regulated in furtherance of governmental interests. In the area of non-obscene "adult" speech and conduct, the Young plurality permits regulations that do not effect a prior restraint, that ensure limited administrative discretion, and that lack vague provisions. Furthermore, although the Young plurality classified "adult" speech as "less protected," the Court made it clear that less protected speech cannot be totally suppressed and that a governmental interest in suppressing adult speech will not justify regulation.

The Indianapolis Special Exceptions Ordinance is a paradigmatic example of a statute that regulates adult uses but that cannot survive the tests set forth in Young. First, the ordinance contains vague language that works a chilling effect on protected speech; second, the broad administrative discretion permitted by the ordinance increases the likelihood of prior restraint; third, the scope of the ordinance makes total suppression of adult speech possible; fourth, an asserted governmental interest in inhibiting urban blight is too attenuated given the means for reaching that goal; and finally, municipal policies behind the ordinance suggest a desire to suppress adult uses and not to disperse or concentrate them. These infirmities indicate that, even within the fairly broad regulatory framework of Young, the Indianapolis Special Exceptions Ordinance cannot withstand a constitutional challenge.

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stead of in suppressing expression. Id. at 80-81 (Powell, J., concurring). The Indianapolis ordinance, on the other hand, applies only to four uses: amusement arcades, massage parlors, adult bookstores, and adult theaters, INDIANAPOLIS, IND., CODE app. D, pt. 23 § 1A1 to 4 (1982). Furthermore, the Indianapolis ordinance did not amend prior skid row legislation; it in fact represents the city's sole attempt to control uses that might hasten urban blight. This singular treatment of adult uses adds further support to the notion that the ordinance speaks to the suppression of certain types of speech that the city finds distasteful and not to the inhibition of urban deterioration.