Western New England Law Review

Volume 10 *10 (1988)*
Issue 1

Article 7

1-1-1988

CONSTITUTIONAL LAW—FIRST AMENDMENT—WHEN CONCEPTS COLLIDE: DISPLAY PROVISIONS AND THE FIRST AMENDMENT

Samuel D. Friedlander

CONSTITUTIONAL LAW—FIRST AMENDMENT—WHEN CONCEPTS COLLIDE: DISPLAY PROVISIONS AND THE FIRST AMENDMENT

I. INTRODUCTION

The First Amendment to the United States Constitution[1] does not protect all forms of speech from government interference.[2] While it is established that obscenity does not fall within the area of constitutionally protected speech and press,[3] the problem of identifying and

---

1. The first amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The first amendment is applicable to the states through the fourteenth amendment. *See* Edwards v. South Carolina, 372 U.S. 229 (1963); Gitlow v. New York, 268 U.S. 652 (1925).

2. "Freedom of speech . . . does not comprehend the right to speak on any subject at any time." American Communications Ass'n v. Douds, 339 U.S. 382, 394 (1950). The Supreme Court has determined that the following classes of speech are not protected by the first amendment: fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); obscenity, Miller v. California, 413 U.S. 15 (1973); and child pornography, New York v. Ferber, 458 U.S. 747 (1982).

3. In Roth v. United States, 354 U.S. 476 (1957), the Supreme Court sustained a conviction under a federal obscenity statute which made it unlawful to mail "obscene, lewd, lascivious, or filthy" material and held that "obscenity is not protected by the freedoms of speech and press." *Id.* at 479, 481 (citing 18 U.S.C. § 1461 (1955)). In light of the history of the first amendment, the Court noted that "the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Id.* at 483. Writing for the majority, Justice Brennan observed:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [first amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment [previously] expressed by this Court . . . : "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit . . . derived from them is clearly outweighed by the social interest in order and morality . . . .*"

Id. at 484-85 (emphasis added by Court in *Roth* opinion) (footnote omitted) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)). Thus, in holding that obscenity is not within the area of constitutionally protected speech and press, the Court grounded its justification for excluding obscenity from first amendment protection in its belief that obscenity does not express "ideas," that it is not "essential" as a means of communication, that it has "slight social value," and that it contributes to disorder and immorality.

defining "obscenity" has proven to be an arduous task for the Supreme Court.[4] In determining whether sexually explicit material is obscene and, hence, subject to government regulation, the Supreme Court has recognized that some material may be obscene as to minors but not as to adults.[5] The Court embraced this concept of variable obscenity

---

4. The difficulty in defining obscenity led one Supreme Court Justice to write, "I could never succeed in [defining it] intelligibly . . . . But I know it when I see it . . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Cases involving what Justice Harlan has called the "intractable obscenity problem," Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting), have had a "somewhat tortured history." *Miller*, 413 U.S. at 20 (1973). *Cf.* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 106-07 (1973) (Brennan, J., dissenting).

The Court in *Miller* developed the current test to identify obscenity. Writing for the majority, Chief Justice Burger established a test for determining whether particular material is "obscene" and, therefore, unprotected by the first amendment. There are three essential elements of the test:

> (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.

Miller, 413 U.S. at 24 (citations omitted). The Court thus reaffirmed the holding in Roth v. United States, 354 U.S. 476 (1957), *see supra* note 3, that obscene material is not protected by the first amendment, abandoned the "*utterly* without redeeming social value" standard announced in Memoirs v. Massachusetts, 383 U.S. 413 (1966) (plurality opinion), and declared that obscenity is to be determined by applying "contemporary community standards," not "national standards." *Miller*, 413 U.S. at 37. Responding to the dissenting Justices' claim of repression of speech, Chief Justice Burger wrote that equating "the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." *Id.* at 34.

5. In Ginsberg v. New York, 390 U.S. 629 (1968), the Supreme Court upheld a New York criminal obscenity statute that prohibited merchants from selling sexually explicit material to minors. Material was defined as obscene based on its appeal to minors. The statute did not restrict adult access to the same material. The Court observed that the "well-being of its children is of course a subject within the State's constitutional power to regulate," *id.* at 639, and that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Id.* at 641. Justice Stewart, concurring, wrote that because "a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees," a state may deprive children of rights when deprivation of those same rights would be "constitutionally intolerable for adults." *Id.* at 649-50 (Stewart, J., concurring). *See also* Prince v. Massachusetts, 321 U.S. 158, 170 (1944) ("[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults," even when there is an invasion of freedoms otherwise protected.); Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 75, 271 N.Y.S.2d 947, 952, 218 N.E.2d 668, 671 (1966), *appeal dismissed sub nom.*; Bookcase, Inc. v. Leary, 385 U.S. 12 (1966) ("[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. . . . [T]he concept of obscenity or of unprotected matter

when it upheld a regulation which prohibited the sale to minors of materials which, though not obscene as to adults, were deemed harmful to minors.[6] Although the Supreme Court has upheld regulations which prohibit the sale or distribution to minors of obscene material,[7] the Court has never reviewed the constitutionality of provisions which regulate the display of sexually explicit material.[8] Because display provisions simultaneously restrict access to material protected as to adults and unprotected as to minors, they fall into a gray area of current first amendment doctrine.

Recent decisions by the United States Courts of Appeals for the Fourth[9]* and Eighth Circuits[10] have addressed the first amendment

---

may vary according to the group to whom the questionable material is directed or from whom it is quarantined.").

6. Ginsberg v. New York, 390 U.S. 629 (1968). *See supra* note 5. Support for a variable concept of obscenity is also seen in other sources. Chief Justice Warren, concurring in Roth v. United States, 354 U.S. 476 (1957), noted in dicta that present laws defining obscenity "depend largely upon the effect that the materials may have upon those who receive them," and that "the same object may have a different impact, varying according to the part of the community it reached." *Id.* at 495 (Warren, C.J., concurring). The first amendment rights of minors are not "co-extensive with those of adults." Tinker v. Des Moines School Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring). *See also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) ("It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults."); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) ("[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ."); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 939 (1963) ("The world of children is not strictly part of the adult realm of free expression. [This] factor of immaturity . . . impose[s] different rules."); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 85 (1960) ("Variable obscenity . . . furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance."); Schauer, *The Return of Variable Obscenity?*, 28 HASTINGS L.J. 1275, 1277 (1977) ("The basic principle of variable obscenity is that the determination of obscenity can only be made in the context of the material's distribution.").

7. Ginsberg v. New York, 390 U.S. 629 (1968).

8. Display provisions, unlike the regulation upheld in *Ginsberg*, regulate the manner of display of sexually explicit material. Display provisions are designed to limit juvenile access to sexually explicit material that juveniles are prohibited from purchasing. The provisions generally require retailers to employ one or more of the following measures: prohibit juveniles from entering the store, or the portion of the store in which the material is displayed; use blinder racks, sealed wrappers, or opaque covers; and employ minimum height display restrictions. Without display provisions, juveniles could, conceivably, peruse material in the store that they are prohibited by law from purchasing. *See also infra* note 112.

9. American Booksellers Ass'n v. Virginia, 802 F.2d 691 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 1281 (1987).

implications of display provisions. In each case, the court considered similar regulatory schemes that evoked two competing concerns: the state's interest in limiting juvenile access to sexually explicit material deemed harmful to them, and the right of adults to continued access to the same material. Despite the similarity between the provisions under review, the courts sharply disagreed on the extent to which the display provisions restricted adult access to sexually explicit material. The Eighth Circuit Court of Appeals in *Upper Midwest Booksellers Association v. City of Minneapolis*,[11] upheld the Minneapolis display provision because it did not suppress sexually explicit material and had only an incidental effect on adult access. In contrast, the Fourth Circuit Court of Appeals in *American Booksellers Association v. Virginia*,[12] invalidated the Virginia display provision because it unreasonably restricted adult access to material protected as to adults.

This note examines the *Upper Midwest* and *American Booksellers* opinions. It explores the factors that both courts considered in balancing the competing concerns raised by display provisions. Because the display provisions under review did not amount to a total suppression of protected expression, the note examines other cases in which the Supreme Court has assessed the first amendment implications of regulatory schemes that amount to a less-than-total suppression of protected expression. The note then identifies and categorizes the various ways in which partial bans on expression affect and limit the exercise

---

* Editor's Note—On January 25, 1988, the United States Supreme Court deferred ruling on the constitutionality of the Virginia display provision and certified two questions to the Virginia Supreme Court. Virginia v. American Bookseller's Ass'n, Inc., 56 U.S.L.W. 4113 (U.S. Jan. 25, 1988) (No. 86-1034). The two questions that the Court certified were:

> 1. Does the phrase "harmful to juveniles" as used in Virginia Code §§ 18.2-390 and 18.2-391 (1982 and Supp. 1987), properly construed, encompass any of the books introduced as plaintiffs' exhibits below, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity?
>
> 2. What meaning is to be given the provision of Virginia Code § 18.2-391(a) (Supp. 1987) making it unlawful "to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse" certain materials? Specifically, is the provision complied with by a plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such conduct when observed, but otherwise takes no action regarding the display of restricted materials? If not, would the statute be complied with if the store's policy were announced or otherwise manifested to the public?

Id. at 4117.

10. Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985).

11. 780 F.2d 1389 (8th Cir. 1985).

12. 802 F.2d 691 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 1281 (1987).

of first amendment rights. Finally, the note evaluates whether the display provisions in *Upper Midwest* and *American Booksellers*—as less-than-total bans on protected expression—impermissibly limit adult access to sexually explicit material that is protected as to adults by the first amendment.

II. THE MINNEAPOLIS AND VIRGINIA DISPLAY PROVISIONS

A. *Upper Midwest Booksellers Association v. City of Minneapolis*

The Minneapolis, Minnesota, City Council enacted an ordinance that prohibits the distribution and open display to minors of sexually explicit material defined as harmful to minors.[13] In part, subsection 6 of the ordinance makes it unlawful "commercially and knowingly" to display material which is "harmful to minors" in places where minors can examine the material, "unless each item of such material is at all times kept in a sealed wrapper."[14] Subsection 6(a) of the ordinance requires an "opaque cover" on any displayed material whose "cover, covers, or packaging, standing alone, is harmful to minors."[15] There

---

13. MINNEAPOLIS, MINN., CITY ORDINANCE, tit. 15, § 385.131 (1984).

14. MINNEAPOLIS, MINN., CITY ORDINANCE, tit. 15, § 385.131(6)(1984). Subsection 6 provides that:

> It is unlawful for any person commercially and knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material which is harmful to minors in its content in any place where minors are or may be present . . . and where minors are able to view such material unless each item of such material is at all times kept in a sealed wrapper.

Id.

15. *Id.* at § 385.131(6)(a). Subsection 6(a) provides that:

> It is also unlawful for any person commercially and knowingly to exhibit, display, sell, . . . give away, circulate, distribute, or attempt to distribute any material whose cover, covers, or packaging, standing alone, is harmful to minors, in any place where minors are or may be present or allowed to be present and where minors are able to view such material unless each item of such materials is blocked from view by an opaque cover. The requirement of an opaque cover shall be deemed satisfied concerning such material if those portions of the cover, covers, or packaging containing such material harmful to minors are blocked from view by an opaque cover.

Id.

The ordinance defines "harmful to minors" as:

> that quality of any description or representation, in whatever form, of nudity, sexual conduct, or sexual excitement, when it:
>
> (1) predominantly appeals to the prurient, shameful, or morbid interest of minors in sex; and
>
> (2) is patently offensive to contemporary standards in the adult community as a whole with respect to what is suitable sexual material for minors; and
>
> (3) taken as a whole, lacks serious literary, artistic, political or scientific value.

Id. at § 385.131(3)(e).

are two exemptions provided in the ordinance. First, if minors are not allowed to be present where the sexually explicit material is displayed, subsection 6(b) discharges the requirement of sealed wrappers or opaque covers.[16] Second, subsections 7(a) and 7(b) exempt schools, religious institutions, and other specified organizations and individuals from liability under the ordinance.[17]

Before any enforcement action was initiated under the ordinance, Upper Midwest Booksellers Association, a retail trade organization, and an individual bookseller,[18] filed suit against the City of Minneapolis in the United States District Court for the District of Minnesota. The plaintiffs sought a preliminary and permanent injunction restraining the City from enforcing the display provisions of the ordinance.[19]

---

16. *Id.* at § 385.131(6)(b). Subsection 6(b) provides that:

> The provisions of this subdivision shall not apply to distribution or attempt to distribute the exhibition, display, sale, offer of sale, circulation, giving away of material harmful to minors where such material is sold, exhibited, displayed, offered for sale, given away, circulated, distributed, or attempted to be distributed under circumstances where minors are not present, not allowed to be present, or are not able to view such material or the cover, covers, or packaging of such material. Any business may comply with the requirements of this clause by physically segregating such material in a manner so as to physically prohibit the access to and view of the material by minors, by prominently posting at the entrance(s) to such restricted area, "Adults Only—you must be 18 to enter," and by enforcing said restrictions.

Id.

17. *Id.* at § 385.131(7)(a), (b). In June, 1985, the Minneapolis City Council repealed section 7 of the ordinance. *Upper Midwest*, 780 F.2d at 1408 n.*. Section 7 exempted the following organizations and individuals from criminal or other prosecution under the ordinance:

> (a) Recognized and established schools, religious institutions, museums, medical clinics and physicians, hospitals, public libraries, governmental agencies or quasi governmental sponsored organizations, and persons acting in their capacity as employees or agents of such organization. [sic] For the purpose of this section "recognized and established" shall mean an organization or agency having a full time faculty and diversified curriculum in the case of a school; a religious institution affiliated with a national or regional denomination; a licensed physician or psychiatrist or clinic of licensed physicians or psychiatrists; and in all other exempt organizations shall refer only to income tax exempted organizations which are supported in whole or in part by tax funds or which receive at least one third of their support from publicly donated funds.
>
> (b) Individuals in a parental relationship with the minor.

Id. at 1408.

18. The Upper Midwest Booksellers Association and Harvey Hertz, the individual bookseller, will hereinafter be referred to collectively as the "Booksellers Association."

19. Upper Midwest Booksellers Ass'n v. City of Minneapolis, 602 F. Supp. 1361, 1363 (D. Minn. 1985).

The City of Minneapolis challenged the standing of the plaintiffs. They were granted standing because of the potential chilling effect the display provisions might have on adult

The Booksellers Association argued that the display provisions were overbroad because they restricted the first amendment rights of adults.[20] The Association stressed that the opaque cover requirement restricted the ability of adults to view the cover of publications that fell within the scope of the ordinance. Moreover, the sealed wrapper requirement "would prevent adults from thumbing through the book or magazine prior to deciding whether or not to purchase it," thereby reducing the chances that a purchase would be made.[21] The district

---

access. *Id.* at 1367-68. Under this relaxed standing requirement, it was not necessary for a prosecution to occur before a first amendment challenge was timely. Standing was appropriate as long as the ordinance "may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 1368 n.9 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 611-13 (1973)). The City of Minneapolis did not raise the standing issue on appeal. *Upper Midwest*, 780 F.2d 1389, 1391 n.5.

20. *Upper Midwest*, 602 F. Supp. at 1367. The Booksellers Association advanced three other arguments at the district court level. First, the Booksellers Association argued that the opaque cover provision was overbroad (in excess of the permissible scope of governmental authority and, hence, unconstitutional) because the material subject to regulation was not to be assessed on the basis of the work taken "as a whole." Consideration of the cover "standing alone," they argued, violated the first amendment. *Id.* at 1369. The district court rejected this argument, proclaiming that the "as a whole" standard was developed in the context of an outright ban on protected material and that the Minneapolis display provisions were an attempt to regulate the manner of display, not an attempt at total suppression. *Id.* The court stressed that "[t]he context of speech is an important factor in determining the scope of permissible regulation" and that "to a child who may never acquire and read or view the entire work, the cover of the book or magazine is the 'work [taken] as a whole.' " *Id.*

Second, the Booksellers Association argued that the provision of the ordinance exempting schools and other organizations from liability violated the equal protection clause of the fourteenth amendment, and that strict scrutiny was the appropriate standard of review for assessing the ordinance's classifications. The City of Minneapolis argued, unsuccessfully, that the rational basis test was the appropriate standard of review and that the exemption provision was rationally related to a legitimate governmental interest. The court reviewed the ordinance with strict scrutiny and found that the exemption was not necessary to serve a compelling governmental interest because the overall scheme of the ordinance applied only to harmful commercial display, not non-commercial uses such as sex education. The court severed the exemption provision as unconstitutional. *Id.* at 1373-75.

Having determined that the exemption provision violated the equal protection clause, the court never reached plaintiffs' third argument that an exemption for a religious organization constituted an establishment of religion in violation of the first and fourteenth amendments. *Id.* at 1367 n.7.

21. *Upper Midwest*, 602 F. Supp. at 1370. The Booksellers Association also argued that the ordinance would reduce adult access to protected materials because retailers, wary of potential prosecution, would self-censor their merchandise, thereby depriving adults of access to protected materials. The district court rejected this argument, summarily reasoning that the scienter component of the ordinance, which required that violations of its provisions be "knowing . . . undercuts the argument that retailers would practice self-censorship." *Id.* at 1372-73.

The Booksellers Association also argued that the ordinance was an impermissible time, place, and manner regulation because it was not content-neutral. *Id.* at 1370-71. The district court rejected this argument, stating that content-based time, place, and manner

court rejected the plaintiffs' arguments, upheld the display provisions, and denied the plaintiffs' motion for injunctive relief.[22]

The Eighth Circuit Court of Appeals affirmed the district court decision and stated that the City of Minneapolis had "struck an appropriate balance between its legitimate interest in the protection of its young and allowing adults access to material protected under the First Amendment."[23] The Booksellers Association again argued: (1) that the opaque cover requirement was invalid as overbroad because the material subject to regulation must be identified on the basis of the work taken as a whole, not on the basis of the cover standing alone;[24] (2) that the display provision was an impermissible time, place, or manner restriction because it unreasonably restricted adult access to material protected as to adults under the first amendment;[25] and (3) that the display provision did not qualify as a permissible time, place, or manner restriction because it was not content-neutral.[26]

Writing for the majority, Judge Bowman observed that in order for the ordinance under review to be invalid, its overbreadth must be both "real" and "substantial" in relation to the permissible sweep of the ordinance.[27] The display provision, therefore, had to be "substantially overbroad" in order for the court to invalidate it on its face.[28] Judge Bowman considered whether the Minneapolis ordinance defined

---

regulations are permissible if they further a significant government interest, are narrowly tailored, and impose only a minimal burden on first amendment rights. *Id.*

22. *Upper Midwest*, 602 F. Supp. at 1376.

23. *Upper Midwest*, 780 F.2d at 1395.

24. *Id.* at 1392-94.

25. *Id.* at 1394-96.

26. *Id.* at 1396-98. The Booksellers Association also argued that the district court committed reversible error by severing subsection 7(a) from the ordinance after having determined that it violated the equal protection clause. The Court of Appeals for the Eighth Circuit ruled that severance of the exemption provision was appropriate because, even without the exemption, the overall scheme of the ordinance was still intact. *Id.* at 1398-99. *See supra* note 20.

27. *Upper Midwest*, 780 F.2d at 1391-92 (quoting New York v. Ferber, 458 U.S. 747, 770 (1982)). Overbreadth analysis focuses on the extent to which an arguably permissible regulatory scheme (such as display provisions designed to protect juveniles from the harmful effects of sexually explicit materials) has an impact upon activity protected under the first amendment (such as adult access to sexually explicit material). A regulation is overbroad if it reaches beyond its intended scope and has a chilling effect on protected activity. Overbreadth challenges can be brought on behalf of those not before the court when potential or actual enforcement of the regulation may serve to deter the exercise of first amendment rights. *See* Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1; Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U.L. REV. 1031 (1983); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

28. *Upper Midwest*, 780 F.2d at 1392.

the material subject to regulation in a manner consistent with the definition of obscenity approved in *Ginsberg v. New York*[29] and *Miller v. California*.[30] He found that the ordinance's definition of material harmful to minors was substantially the same as the definition of variable obscenity approved in *Ginsberg*, and modified in *Miller*. That definition allowed for greater state regulation to shield juveniles from material otherwise protected by the first amendment.[31]

The Eighth Circuit Court of Appeals also reviewed whether the display provision was a reasonable time, place, or manner restriction on speech otherwise protected under the first amendment.[32] The court of appeals, like the district court, considered whether the display provision sought to further "significant governmental interests,"[33] was "reasonably structured" to further those interests,[34] and left open " 'adequate alternative channels of communication' " with only incidental effects on continued adult access.[35]

The court observed that although obscene material is not protected by the first amendment, the material subject to regulation under

---

29. 390 U.S. 629 (1968).

30. 413 U.S. 15 (1973).

31. *Upper Midwest*, 780 F.2d at 1392. The court then considered whether the Minneapolis display provision was invalid because the material subject to regulation was to be assessed on the basis of the cover standing alone. The Booksellers Association argued that material subject to regulation must be assessed on the basis of the work taken as a whole. *Id.* at 1392-93. The Booksellers Association cited Kois v. Wisconsin, 408 U.S. 229 (1972), and Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), in support of its position. The court rejected this argument and agreed with the district court's position that the taken "as a whole" requirement applied only to situations where there was an attempt to suppress obscene material completely or prosecute someone for its distribution. *Upper Midwest*, 780 F.2d at 1393. The opaque cover provision, in regulating the manner of display, was valid because it did not suppress distribution of the material. *Id.*

32. *Upper Midwest*, 780 F.2d at 1394. As a general rule, time, place, or manner restrictions of otherwise protected speech are permissible if the restrictions are content-neutral, narrowly tailored, serve a significant government interest, and leave open adequate alternative channels for communication. *See, e.g.*, City Council v. Taxpayers for Vincent, 466 U.S. 789, 803-12 (1984); Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293-94 (1984); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981).

33. *Upper Midwest*, 780 F.2d at 1392-94. The court found that the Minneapolis City Council, believing that sexually explicit material was harmful to the development of juveniles into mature adults, "acted in response to what it perceive[d] to be a matter of serious concern . . . to the well-being of the City's young," and that the City had a significant interest in protecting juveniles from the harmful effects of sexually explicit material. *Id.* at 1399. The court noted that the City's elected representatives were not necessarily mistaken in their perception of the problem and that "it [was] not the business of the courts to second-guess the wisdom or efficacy of validly enacted legislation." *Id.*

34. *Id.* at 1395.

35. *Id.* at 1396 (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981)).

the Minneapolis ordinance was not obscene as to adults.[36] The ordinance, in regulating the display of material obscene as to juveniles but not obscene as to adults, presented a unique problem because, to some extent, it limited the ability of adults to browse through the material.[37] The dispositive question, therefore, was whether Minneapolis had struck an appropriate accommodation between competing concerns: the City's interest in protecting juveniles and the protection afforded adults under the first amendment.

The Booksellers Association again argued that the ordinance was an invalid time, place, or manner restriction because its incidental effect impermissibly limited "the ability of adults to visit a bookstore or newsstand and browse through material that is obscene as to children but not as to adults."[38] Rejecting this argument, the Eighth Circuit Court of Appeals stressed that retailers were not prohibited from stocking and selling the material covered under the ordinance, and that adults could still purchase the material despite the restrictions on juvenile access.[39] The court balanced the state's significant interest in protecting juveniles with the impact the ordinance had on adult access. In doing so, the court observed that adults could still "request a copy of restricted material to view from a merchant," or "view any of the material in a free and unfettered fashion by purchasing it."[40] The court also stated that any burden on adults was "merely an incidental effect of the permissible regulation and [was] minimal in its impact," and that the "continued availability of these materials to adults for purchase under the ordinance weigh[ed] strongly in favor of the ordinance's constitutionality."[41] The court concluded that because the material subject to regulation was not suppressed, and because adults continued to have ultimate access to the material, the ordinance left

---

36. *Id.* at 1395.

37. *Id.*

38. *Id.* at 1394.

39. *Id.* at 1395. The Booksellers Association argued that the display provisions, because of their impact on adult access, were invalid under the holding in Butler v. Michigan, 352 U.S. 380, 383 (1957) (invalidating a Michigan statute that made it unlawful to make available or possess any material "tending to the corruption of the morals of youth"). The court distinguished *Butler* on the ground that the statute in *Butler*, which was an absolute prohibition on the sale of sexually explicit material, resulted in the total suppression of the material covered by the statute. *Upper Midwest*, 780 F.2d at 1395. The Minneapolis display provision did not amount to total suppression within the meaning of *Butler* because retailers were not prohibited from selling the material subject to regulation. The Eighth Circuit Court of Appeals refused to apply *Butler* to a "reasonably structured" display regulation intended to protect juveniles which happened to simultaneously affect adults. *Id.* *See infra* notes 97-100 and accompanying text.

40. *Upper Midwest*, 780 F.2d at 1395.

41. *Id.*

open adequate alternative channels of communication to satisfy the requirements of the first amendment.[42]

Finally, the court addressed whether the ordinance was a valid time, place, and manner restriction because it was not content-neutral.[43] In declaring that not all content-based restrictions were invalid,[44] the court focused on whether the Minneapolis display provision was a "reasonable means" of controlling juvenile access to material obscene as to them.[45] The court emphasized that the display provision merely restricted the manner and place in which sexually explicit material could be displayed and that the City's "substantial interest in the well-being of its youth" supported the classification under review.[46] The display provision, in sum, did not violate the first amendment.

Chief Judge Lay, in dissent, wrote that "no ordinance or law written in such sweeping terms has, until today, gained constitutional ap-

---

42. *Id.* at 1396.

43. *Id.* Content-neutral restrictions regulate and limit expression without consideration of the message conveyed. City Council v. Taxpayers for Vincent, 466 U.S. 789, 793, 803-04 (1984). *See also* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 126-31 (1981) (upholding a federal content-neutral statute prohibiting all unstamped "mailable matter" from being placed in any private-home letterbox); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (upholding a Minnesota State Fair regulation that prohibited the distribution of all leaflets on fairgrounds except from an approved booth). Content-based restrictions generally are subject to exacting scrutiny because of the concern that regulation of expression based on its message, ideas, or subject matter impliedly favors particular ideas or viewpoints. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92 (1972) (invalidating an ordinance that prohibited all picketing near a school but allowed peaceful labor picketing). For a comprehensive analysis of the content-neutral and content-based distinction see Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983). *See also* Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980).

44. *Upper Midwest*, 780 F.2d at 1396 (citing New York v. Ferber, 458 U.S. 747, 774 (1982); Young v. American Mini Theatres, 427 U.S. 50 (1976)).

45. *Upper Midwest*, 780 F.2d at 1396.

46. *Id.* In support of its position, the court observed that the material subject to regulation was likely to be on the " 'borderline between pornography and artistic expression' " and that the first amendment interests at stake were of less concern—or of lower value—than material involving the expression of social or political ideas. *Id.* (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 61 (1976)). Justice Stevens developed this theory of lower level speech in *Young*. In *Young*, Justice Stevens observed that there is a "less vital interest" in protecting sexually explicit material than in protecting the dissemination of higher level social and political expressions. *Young*, 427 U.S. at 61 (Stevens, J., plurality opinion). "[S]ociety's interest in protecting [sexually explicit] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ." *Id.* at 70. Under this theory, adopted by some members of the Supreme Court, different levels of speech are thus entitled to different degrees of protection under the first amendment. *See also* F.C.C. v. Pacifica Found., 438 U.S. 726, 743 (1978) (Stevens, J., plurality opinion) (patently offensive references "lie at the periphery of First Amendment concern").

proval."[47] He argued that the Minneapolis display provision unreasonably encroached on the freedom of speech protected by the first amendment and was not "reasonably restricted to the evil" which it purported to address.[48] Chief Judge Lay argued that "[i]n promoting the morals of its youths by restricting their access to certain communications . . . [the City of Minneapolis] may not simultaneously create barriers that substantially restrict adult access to material they are constitutionally entitled to obtain."[49]

The Chief Judge examined the opaque cover provision of the ordinance and the alternative restrictions of an "adults only" section or an "adults only" store.[50] He found that there was a "stigma" attached to the "adults only" label that might cause many adults—who would otherwise purchase the material—to "forgo exercising their first amendment rights to purchase nonobscene literature . . . ."[51] Moreover, booksellers, realizing that the stigma attached to the "adults only" display alternative would result in the loss of adult patronage, might choose instead to sell only that material which would not fall under the ordinance as harmful to minors. This approach, he argued, "could very easily lead to the suppression of many literary works, including classics and other best sellers."[52]

Addressing the sealed wrapper provision of the Minneapolis ordinance, the Chief Judge considered whether it was a reasonable time, place, or manner restriction. He focused on whether Minneapolis had demonstrated a "significant government interest" and whether the sealed wrapper provision was "narrowly drawn" to further that

---

47. *Upper Midwest*, 780 F.2d at 1399 (Lay, C.J., dissenting) (footnote omitted).

48. *Id.*

49. *Id.* at 1403.

50. See *supra* notes 15 and 16 and accompanying text for a description of these provisions of the Minneapolis ordinance.

51. *Upper Midwest*, 780 F.2d at 1402 (Lay, C.J., dissenting).

52. *Id.* Chief Judge Lay rejected the majority's argument that it was permissible under the opaque cover requirement to assess material subject to regulation on the basis of its cover standing alone. Relying heavily on Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), Judge Lay argued that the "as a whole" evaluation requirement applied equally to regulations involving suppression as well as those regulating manner of display. *Upper Midwest*, 780 F.2d at 1400-01 (Lay, C.J., dissenting). His primary concern, however, was that the opaque cover provision also limited juvenile access to material protected as to juveniles—a possibility never considered by the majority. *Id.* at 1400. The opaque cover requirement did not apply to material that, as a whole, was obscene as to juveniles. Under the ordinance, such material was to be displayed in a sealed wrapper because, as a whole, it was obscene as to juveniles. The Chief Judge argued that the opaque cover requirement thus resulted in the "absurdity" that juveniles were prohibited from viewing the cover of the material on display but were still entitled to examine or buy the entire item if, taken as a whole, it was not obscene. *Id.* at 1401.

interest.[53]

Chief Judge Lay did not dispute that Minneapolis had a legitimate interest in promoting the welfare and morals of its youth by limiting their access to material obscene as to juveniles. He found, rather, that the sealed wrapper provision was not narrowly drawn and was more restrictive than necessary to achieve its designated purpose.[54] Chief Judge Lay argued that the "unavoidable collateral effect" of the provision was to "severely limit" the ability of adults to examine protected materials,[55] because the "practical effect" of the sealed wrapper provision was to restrict adult access to that which is suitable for children.[56] The sealed wrapper provision, he argued, "would either preclude adults from browsing through material prior to purchase or would place a heavy burden on store owners to restructure their stores . . . ."[57] Furthermore, the dissent noted that "[t]he ordinance overlooks the fact that the display of magazines and books plays a vital role in the bookseller's ability to advertise and sell its merchandise" and that "many adults who would be required to unseal this [sexually explicit] literature in public areas in order to peruse the book or magazine would be embarrassed to do so."[58] The dissent concluded that the Minneapolis ordinance was unconstitutionally overbroad because its impact on adult access to sexually explicit material went considerably beyond its articulated purpose of protecting juveniles.[59]

B. *American Booksellers Association, Inc. v. Virginia*

The Virginia General Assembly amended a Virginia statute that made it "unlawful for any person knowingly to sell or loan to a juvenile" sexually explicit material defined by the statute as harmful to juveniles.[60] The amendment made it unlawful knowingly to display the harmful materials "in a manner whereby juveniles may examine and peruse" them.[61] Unlike the Minneapolis ordinance, the Virginia

---

53. *Upper Midwest*, 780 F.2d at 1403.
54. *Id.* at 1403-04.
55. *Id.* at 1403.
56. *Id.* at 1404.
57. *Id.*
58. *Id.*
59. *Id.* The Chief Judge also disagreed with the majority on the severability of the exemption provision of the ordinance. *Id.* at 1404-06. Judge Lay argued that severing the exemption provision rendered the entire Minneapolis ordinance invalid because severance alone impermissibly changed the overall intended effect of the ordinance. *Id.* *See supra* note 20.
60. VA. CODE ANN. § 18.2-391(a) (Supp. 1985).
61. *Id.* Section 18.2-391(a) provides that:

It shall be unlawful for any person knowingly to sell or loan to a juvenile, or to

statute did not enumerate specific methods of display—such as opaque covers or sealed wrappers—that would enable a merchant to comply with the terms of the statute. The definition of material that was "harmful to juveniles," however, was similar to the definition provided in the Minneapolis ordinance.[62]

The American Booksellers Association, a retail trade association,[63] challenged the constitutionality of the amendment in the United States District Court for the Eastern District of Virginia. The Booksellers sought declaratory and injunctive relief to prevent the enforcement of the amendment.[64] The district court declared the

---

knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:

(1) Any picture, photography, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in subdivision (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

Id.

62. *See supra* note 15. Virginia defined "harmful to juveniles" as sexually explicit material having a quality, in whatever form, which:

(a) predominantly appeals to the prurient, shameful or morbid interest of juveniles,

(b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and

(c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

VA. CODE ANN. § 18.2-390.6 (Supp. 1985).

63. Four other trade associations, two retail bookstores and an individual adult and juvenile member of the community were also named as plaintiffs [hereinafter collectively referred to as the "Booksellers"]. The court granted standing to the trade associations and bookstores but denied standing to the individual plaintiffs. American Booksellers Ass'n v. Strobel, 617 F. Supp. 699, 703-04 (E.D. Va. 1985). The standing arguments advanced by both parties were similar to those reviewed in *Upper Midwest*. *See supra* note 19. The Fourth Circuit Court of Appeals agreed that standing was appropriate because of the Booksellers' claim that the Virginia amendment might deter the exercise of protected first amendment rights. American Booksellers Ass'n v. Virginia, 802 F.2d 691, 694 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 1281 (1987).

64. The defendants were the Commonwealth of Virginia, William K. Stover, Chief of Police for Arlington County, Virginia, and Charles T. Strobel, Director of Public Safety for the City of Alexandria, Virginia [hereinafter collectively referred to as "Virginia"]. Strobel was not a party to the appeal.

The Booksellers also sought attorneys' fees pursuant to 42 U.S.C. § 1988 (1982). The court of appeals reversed, in part, the district court's denial of the Booksellers' request for attorneys' fees. Attorneys' fees were, on remand, to be assessed against Virginia, but not against defendants Strobel and Stover. American Booksellers Ass'n v. Virginia, 802 F.2d 691, 696-97 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 1281 (1987).

amendment unconstitutional and enjoined its enforcement.[65]

The district court found that in order to comply with the amendment, a merchant had one of four options suggested by Virginia, none of which were enumerated in the statute.[66] A merchant could bar all persons under the age of eighteen from entering the store, create an "adults only" section, limit inventory to books and magazines not regulated under the amendment, or place all proscribed material behind a counter.[67] The court noted that the manner in which a particular publication is displayed plays a crucial role in determining how many copies will sell. Moreover, customers generally make a purchase only after browsing and are reluctant to ask openly for books with a strong sexual content.[68] The court considered these factors and observed that while the intended effect of the amendment was to prevent the examination and perusal by minors of harmful material, the "unavoidable collateral effect" of the law was to "severely limit" the ability of adults to examine material protected as to them by the first amendment.[69] Thus, the amendment was unconstitutional because it created a barrier which placed "substantial restrictions" upon adult access to sexually explicit material.[70]

The Court of Appeals for the Fourth Circuit, affirming the district court, held that the display provision of the Virginia amendment was facially unconstitutional for overbreadth because it unreasonably interfered with the way in which booksellers conducted their business activities and unreasonably restricted adult access to materials protected under the first amendment.[71] The court held that the most serious flaw of the amendment was its overbreadth because it had "both a

65. American Booksellers Ass'n v. Strobel, 617 F. Supp. 699 (E.D. Va. 1985).

66. *Id.* at 702-03.

67. *Id.*

68. *Id.* at 702.

69. *Id.* at 706.

70. *Id.* at 705. The district court also considered whether the Virginia amendment was a valid time, place, and manner regulation. The " 'crucial question,' " according to the court, was whether the manner of expression sought to be regulated was " 'basically incompatible with the normal activity of a particular place at a particular time.' " *Id.* at 706 (quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (upholding an ordinance barring demonstrations near a school that would disturb or interfere with school activities because disruptive demonstrations were incompatible with normal school activities)). The court held that the amendment was an invalid time, place, and manner regulation because it was not narrowly drawn. The display of sexually explicit material—the regulated expression—was not incompatible with the environment—retail establishments—in which it was displayed. *Id.*

71. American Booksellers Ass'n v. Virginia, 802 F.2d 691 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 1281 (1987).

real and substantial deterrent effect on protected expression."[72]

Virginia argued on appeal that the amendment was a valid time, place, and manner regulation and that "compliance with the amendment would not deter the exercise of first amendment rights."[73] Booksellers, they argued, could "readily modify their display methods to comply with the amendment."[74] The appeals court disagreed.

The court claimed that booksellers faced a "substantial problem [in] attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale" because the display methods suggested by Virginia were either "insufficient to comply with the amendment or unduly burdensome on the first amendment rights of adults."[75] The court reviewed the compliance options suggested by Virginia and noted that "[p]lacing 'adults only' tags on books and magazines or displaying the restricted material behind blinder racks[76] or on adults only shelves" would not prevent juveniles from examining and perusing the materials and, hence, the merchant would still be subject to prosecution under the amendment.[77] The other options of creating a separate and restricted "adults only" area, requiring sealed wrappers, or placing the material behind a counter would, according to the court, "unreasonably" and "significantly" interfere with the bookseller's right to sell the restricted material[78] and "unrealistically" limit adult access.[79] Moreover, many adults would be hesitant to enter segregated—and clearly identified—"adults only" areas in order to make a purchase.[80] The amendment was thus unconstitutional because it "discourage[d] the exercise of first amendment rights in a real and substantial fashion."[81]

---

72. *Id.* at 695.

73. *Id.* at 695-96. Booksellers, they argued, were still entitled to stock the material subject to regulation. *Id.* at 695.

74. *Id.* at 696.

75. *Id.* at 696. The Fourth Circuit Court of Appeals expressly disagreed with the holding in *Upper Midwest*. *Id.* at 696.

76. Blinder racks block or "blind" the cover of magazines from public view. The display racks either contain a shield that blocks the bottom three-quarters of a magazine's cover or a shield that blocks the cover entirely. The three-quarter shield allows a customer to read the title printed at the top of the publication without having to lift the shield. With a full shield, however, a customer does not know which magazines are available unless the shield is lifted or it identifies the publication being blocked from view.

77. *American Booksellers*, 802 F.2d at 696.

78. These potential methods of compliance interfered with the normal business practices of booksellers who previously were able to display merchandise without any restrictions.

79. *American Booksellers*, 802 F.2d at 696.

80. *Id.*

81. *Id.*

III. ASSESSING THE IMPACT OF DISPLAY PROVISIONS

The display provisions under review in *Upper Midwest* and *American Booksellers* both regulated the manner and, to some extent, the place in which sexually explicit material could be displayed. Although both courts agreed that the display provisions placed some burden on adult access, they disagreed about the extent of the burden created by the display provisions. The Court of Appeals for the Eighth Circuit stressed that the Minneapolis ordinance did not suppress sexually explicit material and held that the display provisions only had an incidental and minimal effect on adult access.[82] The Fourth Circuit Court of Appeals, in contrast, struck down the Virginia amendment because it was unduly burdensome and unreasonably restricted, in a real and substantial way, adult access to material protected as to adults.[83] Both opinions turned on the degree to which each court perceived that display provisions—by regulating the manner of display of material deemed harmful to minors—limited adult access to the same sexually explicit material.[84]

Display provisions, by their nature, fall into the "interstices of current First Amendment doctrine" because they "simultaneously affect[ ] material protected in relation to one group—adults—and unprotected in relation to another group—minors . . . ."[85] Under current first amendment doctrine, obscene material is not entitled to any con-

---

82. *See supra* notes 23-46 and accompanying text.

83. *See supra* notes 71-81 and accompanying text.

84. The basic drafting difference between the Minneapolis and Virginia display provisions did not, in and of itself, cause the different outcomes in *Upper Midwest* and *American Booksellers*. The Minneapolis display provision, unlike the Virginia provision, provided opaque covers, sealed wrappers, and "adults only" sections as specific methods of compliance. *See supra* notes 14-16 and accompanying text. The Virginia provision made it unlawful to display the material subject to regulation in a manner whereby juveniles could "examine and peruse" it. *See supra* notes 60-61 and accompanying text. The provision did not "provide any potential defenses or methods of compliance." *American Booksellers*, 802 F.2d at 695. The primary concern of the Fourth Circuit Court of Appeals was the impact that display provisions have on adult access to sexually explicit material, not the absence of potential defenses or the absence of specific methods of compliance in the Virginia provision. The court in *American Booksellers* rejected, as unduly burdensome, the specific methods of compliance suggested by Virginia. *Id.* at 696. The methods of compliance would have been just as burdensome had they been enumerated in the statute itself. Furthermore, the court expressly disagreed with the holding in *Upper Midwest* that display provisions could be "legitimized" by enumerating specific display methods which would place a merchant in compliance with the statute. *Id.* at 695 n.8 (citing *Upper Midwest*, 780 F.2d at 1390-91).

85. Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389, 1394 (8th Cir. 1985).

stitutional protection.[86] In *Miller v. California*,[87] the Supreme Court established the test for determining whether particular material is obscene and, therefore, not protected by the first amendment. The Court upheld a California statute that made it unlawful to knowingly distribute material defined as "obscene."[88] If material is identified as "obscene" under the *Miller* test, it is obscene as to both children and adults. Merchants are not only prohibited from displaying obscene material, they are prohibited from stocking and distributing it as well.

In *Ginsberg v. New York*,[89] the Supreme Court held that the definition of obscenity can vary according to the audience at which the material is directed.[90] Under this concept of "variable obscenity," it is permissible constitutionally to accord juveniles "a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see."[91] Thus, the Court in *Ginsberg* upheld a New York statute that regulated the sale to juveniles—not the manner of display—of material defined as obscene as to juveniles but not obscene as to adults. The statute upheld in *Ginsberg* did not affect the ability of adults to examine or purchase the sexually explicit material.[92]

Display provisions, in theory, are designed to complement the concept of variable obscenity and the restriction on sales upheld in *Ginsberg*. It would seem to follow that if the state can protect juveniles by preventing merchants from selling them sexually explicit material, the state can also protect juveniles by limiting their access to the harmful material.[93] Without display provisions, juveniles could

---

86. Miller v. California, 413 U.S. 15 (1973) (upholding a conviction under the California Penal Code for knowingly distributing material defined as obscene).

87. *Id.* *See supra* note 4.

88. *Miller*, 413 U.S. at 37.

89. 390 U.S. 629 (1968).

90. *See supra* notes 5-6 and accompanying text.

91. *Ginsberg*, 390 U.S. at 637. In *Ginsberg*, a New York criminal obscenity statute prohibited the sale of obscene material to minors under seventeen years of age. Sexually explicit material was defined as obscene on the basis of its appeal to minors. The court upheld the conviction of a merchant who sold two sexually explicit magazines to a sixteen-year-old boy. *Id.*

92. Whereas *Ginsberg* expanded the definition of obscenity to encompass a broader range of material subject to regulation when juveniles are included in the viewing audience, display provisions, as an extension of *Ginsberg*, seek to prevent juveniles from viewing that material.

93. The Supreme Court has recognized the state's interest in protecting minors from exposure to vulgar and offensive spoken language. F.C.C. v. Pacifica Found., 438 U.S. 726 (1978). In Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986), a high school student delivered a speech at a high school assembly nominating another student for elective office. School officials viewed the speech, which described the candidate as a man who

browse through material on display that they are otherwise prohibited from purchasing.[94] The problem, of course, is that display provisions, unlike the prohibition on sale upheld in *Ginsberg*, also affect the ability of adults to view and purchase the same material.[95]

The extent to which display provisions actually limit adult access to sexually explicit material is the central concern of both *Upper Midwest* and *American Booksellers*. Without display provisions, merchants are free to display material offered for sale as they see fit. If the book or magazine is on open display, a potential customer can examine the material and make a purchase free of any limitations. Restrictive display provisions, however, affect the way in which retailers can merchandise sexually explicit material. They also limit the ability of adults to visit bookstores and freely browse through material that they are constitutionally entitled to obtain. The extent of this burden on adult access to sexually explicit material, the way in which the bur-

---

was "firm in his pants, . . . who takes his point and pounds it in" and was willing to go to the "climax" for his constituents, *id.* at 3167 (Brennan, J., concurring), as offensively lewd and indecent speech. *Id.* at 3162. The student was suspended for two days after admitting that he had deliberately used sexual innuendo.

The Supreme Court, upholding the decision to suspend the student, accepted the school district's argument below, that it had an interest—superior to the student speaker's first amendment concerns—in protecting "an essentially captive audience of minors from lewd and indecent language." *Id.* at 3163. The Court pointed out that there are "limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Id.* at 3165. The Court was thus unwilling to extend first amendment protection to the speech because it was presented in a public school.

In a concurring opinion, Justice Brennan stressed that the *Fraser* opinion was limited only to the school's authority to regulate the language used in the school environment and not to public debate outside of the school. *Id.* at 3167 n.1 (Brennan, J., concurring). This statement is important because both *Fraser* and *Ginsberg*—unlike *Upper Midwest* and *American Booksellers*—involved a predominantly juvenile audience. *Fraser* was confined to protecting juveniles and had no collateral effect on the ability of adults to hear protected speech. Thus, although *Fraser* illustrates the extent to which *Ginsberg* can be extended to protect juveniles from sexually explicit speech, *Fraser* does not address the concerns raised by display provisions. Adults are not the primary audience at public school assemblies as they are at stores that stock sexually explicit material. They are not affected by the type of prohibition upheld in *Fraser*. However, adults are confronted unavoidably by the burdens associated with display provisions.

94. The Superior Court of Pennsylvania expressed the view that regulating the sale of sexually explicit material to minors without simultaneously controlling the commercial display of the material would seem to render efforts to protect juveniles meaningless. American Booksellers Ass'n v. Rendell, 332 Pa. Super. 537, 581-82, 481 A.2d 919, 942 (1984).

95. The Supreme Court has had great difficulty with "hybrid regulations" such as display provisions which involve government limitations on speech in a specific context. Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1219 (1984).

den is to be characterized and measured, and the extent to which the burden can be tolerated, remain unclear after *Upper Midwest* and *American Booksellers*.

A. *Regulations That Result in the Total Suppression of a Category of Protected Expression*

Display provisions do not suppress completely the availability of sexually explicit material. The Supreme Court has held that regulations that result in the total suppression of a category of protected expression violate the first amendment.[96] In *Butler v. Michigan*,[97] the Supreme Court reviewed a Michigan statute that made it unlawful, in any setting, to make available or possess any material "tending to the corruption of the morals of youth . . . ."[98] The statute prohibited adults and minors from distributing or possessing the material subject to regulation. The Supreme Court invalidated the statute because its result was "to reduce the adult population of Michigan to reading only what is fit for children."[99] The statute, in effect, suppressed material that adults were entitled to obtain.[100]

Similarly, in *Schad v. Borough of Mount Ephraim*,[101] the Court reviewed a zoning ordinance that prohibited all live entertainment in any establishment in the borough.[102] The operators of an adult establishment were convicted of violating the ordinance when they installed a coin-operated booth that permitted customers to watch live nude

---

96. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73-74 (1983); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-68 (1981); Butler v. Michigan, 352 U.S. 380, 383 (1957).

97. 352 U.S. 380 (1957).

98. *Id.* at 381.

99. *Id.* at 383.

100. *See also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983). In *Bolger*, the Supreme Court invalidated a federal statute which barred the unsolicited mailing of advertisements for contraceptives. The government asserted an interest in assisting parents in their efforts to discuss birth control with their children when they saw fit. Although the court found a substantial governmental interest in preventing unsolicited home intrusions and helping parents, the statute was invalid because it was far more restrictive than necessary. The statute shut down the flow of the unsolicited mailings and blocked advertisements that were suitable for adults. The court proclaimed that the "level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id.* at 74.

101. 452 U.S. 61 (1981). *See also* Note, *Municipalities May Not Exclude Live Entertainment From Areas Zoned for Commercial Uses:* Schad v. Borough of Mount Ephraim, 86 DICK. L. REV. 391 (1982); Note, *Zoning Prohibition Which Impinges Upon First Amendment Activity Must be Adequately Justified by Municipality*, 12 SETON HALL L. REV. 311 (1982).

102. *Schad*, 452 U.S. at 62.

dancers perform behind a glass panel.[103] The borough argued that the ordinance permissibly suppressed live entertainment because adults still had ample opportunity to view such entertainment in neighboring communities.[104] The Supreme Court reversed the convictions, emphasizing that "when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest."[105] The ordinance significantly limited a protected activity by banning live entertainment, including nude dancing, and made it necessary for adults to go outside of the borough to see live entertainment. As a result, the Supreme Court scrutinized the "interests advanced by the Borough to justify this limitation on protected expression and the means chosen to further those interests."[106] The ordinance was invalid because the Borough failed to justify adequately its "substantial restriction of protected activity"[107] and to es-

---

103. *Id.* at 62-64.

104. *Id.* at 76. The Court rejected this argument, stressing that protected expression, otherwise appropriate in one location, could not be suppressed in the borough merely because it was possible to exercise the right elsewhere. *Id.* at 76-77 (citing Schneider v. State, 308 U.S. 147, 163 (1939)).

105. *Schad*, 452 U.S. at 68. Although the Court observed that live entertainment is expression protected by the first amendment, *id.* at 65, and that "nude dancing is not without its First Amendment protections from official regulation," *id.* at 66, the Court did not resolve the status of nude dancing within the protection of the first amendment. Because the Mount Ephraim ordinance prohibited all live entertainment in the Borough and not only nude dancing, the Court addressed only the broader question of the status of live entertainment under the first amendment.

Recently, in City of Newport v. Iacobucci, 107 S. Ct. 383 (1986) (per curium summary disposition), the Supreme Court upheld a Newport, Kentucky, ordinance that prohibits "nude or nearly nude" dancing in establishments licensed to sell liquor for consumption on the premises. The ordinance was promulgated under the state's broad power under the twenty-first amendment to regulate the sale of liquor within its boundaries. The City of Newport determined that the combination of nude dancing and serving liquor was harmful to the residents of the city. *Id.* at 386. The ordinance was designed to stabilize neighborhoods and reduce "crime, disorderly conduct and juvenile delinquency." *Id.* Stressing that there is a presumption that regulations under the twenty-first amendment are valid, the Court noted that Newport's "interest in maintaining order outweighs the interest in free expression by dancing nude." *Id. See also* New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 717 (1981) (per curium summary disposition) ("The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs."); California v. LaRue, 409 U.S. 109, 114 (1972) (state power under the twenty-first amendment to regulate the sale of liquor outweighs any first amendment interest in nude dancing). Justice Stevens dissented in *Iacobucci* because of the "blatantly incorrect" reasoning that the "Twenty-first Amendment shields restrictions on speech from full First Amendment review." *Iacobucci*, 107 S. Ct. at 386 (Stevens, J., dissenting).

106. *Schad*, 452 U.S. at 71.

107. *Id.* at 72. The Borough argued that the ordinance was necessary to further its substantial interest in creating commercial zones that would cater to the "immediate needs" of its residents. *Id.* at 72-73. Rejecting this argument, the Court found that the

tablish that its interests could not be met by less intrusive restrictions.[108]

The ordinances under review in *Butler* and *Schad* were invalid because they amounted to total suppression of a category of protected expression. The Minneapolis and Virginia display provisions, in contrast, merely regulate the manner in which sexually explicit material can be displayed. The provisions do not suppress completely the material subject to regulation.[109] The Eighth Circuit Court of Appeals in *Upper Midwest* stressed that the material continued to be available in Minneapolis and that adults were free to purchase any of the regulated material.[110] In contrast, the Fourth Circuit Court of Appeals in *American Booksellers* held that the Virginia display provisions unreasonably interfered with adults' ability to buy the restricted material. The court, however, did not find that there was total suppression of sexually explicit material in Virginia.[111] Under this analysis, display provisions, unlike the ordinances struck down in *Butler* and *Schad*, amount to a less-than-total restriction of a category of protected expression.

B. *Regulations That Result in the Partial Restriction of a Category of Protected Expression*

As previously noted, the Supreme Court has never considered whether display provisions—as less-than-total restrictions on protected expression—place an impermissible burden on adult access to sexually explicit material.[112] The Court has, however, had occasion to

---

immediate commercial needs of the residents were met already and would not be reduced by having live entertainment in the commercial zone. *Id.* Moreover, the Court found that the range of "permitted uses" in the commercial zones, such as motels, lumber stores, offices and car showrooms, far exceeded the "immediate needs" of the residents, rendering the Borough's "immediate needs" argument "patently insufficient." *Id.* at 73. The borough also argued that the ban on live entertainment would avoid the problem of the extra burden on municipal services created by live entertainment. The Court rejected this argument because there was no evidence that live entertainment created greater parking, trash, or police problems than other existing businesses. *Id.*

108. *Id.* at 74.

109. Chief Judge Lay, dissenting in *Upper Midwest*, argued that the "practical effect" of the sealed wrapper provision was equivalent to the ordinance in *Butler* because it restricted adult reading to that which was suitable for children. Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389, 1404 (8th Cir. 1985) (Lay, C.J., dissenting). *See supra* notes 55-56 and accompanying text.

110. *Upper Midwest*, 780 F.2d at 1395.

111. American Booksellers Ass'n v. Virginia, 792 F.2d 1261, 1266 (4th Cir. 1986).

112. At least eleven other state and federal courts, aside from *Upper Midwest* and *American Booksellers*, have reviewed display provisions. The cases provide little or no guidance in assessing the Minneapolis and Virginia display provisions. In M.S. News Co.

consider the impact on protected expression of regulatory schemes that amount to less-than-total restrictions.[113] In these cases, the Supreme Court considers a variety of factors to determine whether the regulatory scheme impermissibly burdens protected expression.[114]

---

v. Casado, 721 F.2d 1281 (10th Cir. 1983), American Booksellers Ass'n v. Rendell, 332 Pa. Super. 537, 481 A.2d 919 (1984), and Capital News Co. v. Nashville, 562 S.W.2d 430 (Tenn. 1978), display provisions required sexually explicit material to be displayed behind a blinder rack or opaque cover. The display provisions under review in each case were considerably less restrictive than the Minneapolis and Virginia display provisions.

Several courts have struck down display provisions that regulated material protected as to adults *and* children. In each of these cases the definition of "harmful to minors" was overbroad because it did not conform to the standards enunciated in *Miller* and *Ginsberg*. *See* Rushia v. Town of Ashburnham, 582 F. Supp. 900 (D. Mass. 1983) (invalidating a display regulation as constitutionally overbroad because it regulated material not obscene as to juveniles); American Booksellers Ass'n v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981) (same); Hillsboro News Co. v. City of Tampa, 451 F. Supp. 952 (M.D. Fla. 1978) (ordinance restricting display of "offensive sexual material" found unconstitutionally vague); American Booksellers Ass'n v. Superior Court, 129 Cal. App. 3d 97, 181 Cal. Rptr. 33 (1982) (ordinance overbroad because it required material containing any photo whose primary purpose was sexual arousal to be sealed regardless of whether it was obscene as to minors); Tattered Cover, Inc. v. Tooley, 696 P.2d 780 (Colo. 1985) (invalidating display provision as overbroad because it was inconsistent with the standard enunciated in *Ginsberg*); Dover News, Inc. v. City of Dover, 117 N.H. 1066, 381 A.2d 752 (1977) (invalidating ordinance prohibiting the display below sixty vertical inches of sexually explicit material defined as harmful to juveniles because the definition included material protected as to juveniles); Calderon v. City of Buffalo, 61 A.D.2d 323, 402 N.Y.S.2d 685 (1978) (invalidating the "Anti-Obscenity And Display To Minors Ordinance" as overbroad because it prohibited sale and exhibition of material not obscene as to either juveniles or adults); Oregon v. Frink, 60 Or. App. 209, 653 P.2d 553 (1982) (statute prohibiting dissemination of all nudity to minors was overbroad because it failed to limit prohibition to material obscene as to juveniles).

113. "Less-than-total" restriction here refers to those regulatory schemes that purport to leave open alternative channels of communication. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), *reh'g denied*, 106 S. Ct. 1663 (1986); City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981); F.C.C. v. Pacifica Found., 438 U.S. 726 (1978); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

114. Although the Court has never expressly categorized the various types of burdens that limit protected expression, several categories of burdens are readily identifiable. The various forms of less-than-total restrictions that the Supreme Court has analyzed can be categorized as follows: first, restrictions that suppress a "uniquely valuable" or "important" mode or method of communication within a category of expression, without imposing a total ban on that category of expression, City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (ordinance prohibiting posters on public property without banning other modes or methods of conveying the same message), Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977) (ordinance prohibiting house "For Sale" signs without banning other methods of advertising houses for sale); second, restrictions that result in fewer overall opportunities for access by limiting the locations at which access takes place, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), *reh'g denied*, 106 S. Ct. 1663 (1986) (concentrating location of adult establishments), Young v. American Mini Theatres, Inc.,

These various forms of less-than-total restrictions on protected expression—and the manner in which the Supreme Court has characterized their impact—are useful in assessing the impact of display provisions on adult first amendment rights.

Although the Courts of Appeals for the Fourth and Eighth Circuits purported to assess the impact of display provisions on adult first amendment rights, the courts did so without identifying and categorizing the ways in which display provisions limit adult access to sexually explicit material. Both courts failed to identify adequately and assess the types of burdens associated with display provisions. They also failed to explore the way in which the Supreme Court has viewed similar burdens in contexts that implicate the first amendment. The courts thus reached different conclusions about the burdens associated with display provisions without providing a proper framework for assessing those burdens.

1. Uniquely Valuable or Important Modes of Communication

The Supreme Court has stated that although the first amendment does not guarantee the right to use every imaginable means of communication in all places at all times,[115] a restriction that bans a "uniquely valuable or important mode of communication" may be invalid if it threatens the ability to communicate protected expression effectively.[116] In *City Council v. Taxpayers for Vincent*,[117] the Court up-

427 U.S. 50 (1976) (dispersing location of adult theaters), or the format through which or the time at which access takes place, F.C.C. v. Pacifica Found., 438 U.S. 726 (1978) (limiting method and time of access to indecent, non-obscene language); third, restrictions that result in increased financial burdens on distributors, recipients, or customers of protected expression, United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (increased cost of mailing civic association notices and pamphlets), Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (increased cost of showing drive-in movies); and fourth, restrictions that deter access by stigmatizing a form of protected expression, Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (restrictions which stigmatize protected expression such as communist propaganda deter the exercise of first amendment rights).

115. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981). The Court has observed that the "guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.' " Greer v. Spock, 424 U.S. 828, 836 (1976) (quoting Adderley v. Florida, 385 U.S. 39, 48 (1966)).

116. City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984). A restriction that bans a uniquely valuable or important mode of communication is not synonymous with an outright ban on a category of expression. The former bans only a particular means for conveying a message. The latter bans a class of expression, such as political speech, and in doing so, necessarily bans the means of communication with respect to that class of expression. The possibility exists, of course, that a particular way of communicating a category of expression can be so valuable or important to that category that a ban on that method can amount to a ban on the category of expression.

held a City ordinance that prohibited the posting of signs on public property. The City enforced the ordinance by "routinely remov[ing] all signs attached to utility poles," including posters attached by the supporters of a political candidate.[118]

Political supporters argued that the posting of political posters on public property was a "uniquely valuable or important mode of communication" and that the ordinance was invalid because it restricted their ability to communicate their message effectively.[119] Other modes of communication, they argued, were not effective alternatives for conveying the same political message.[120] The Court rejected this argument, observing that posting signs on public property did not have communicative advantages over other forms of expression such as posting signs on private property.[121] Because the supporters could still convey the same message adequately through the alternatives of picketing, parading, distributing handbills, and carrying signs or posting them on private property, the ban on postings on public property did not restrict a "uniquely valuable" or "important" mode of communication.[122]

In *Linmark Associates, Inc. v. Township of Willingboro*,[123] however, the Court invalidated a township ordinance that prohibited the display of "For Sale" and "Sold" signs in front of private homes.[124] The township argued that the restriction was valid because it restricted only one method of communication and left open "ample al-

---

117. 466 U.S. 789 (1984).

118. *Id.* at 793. The city argued that the ordinance furthered the substantial government interests of advancing aesthetic values by reducing clutter and visual blight, and promoting traffic safety by removing potential distractions and view obstructions. *Id.* at 794-95. The ordinance was not designed to single out and suppress particular ideas that the city found distasteful. The city uniformly applied the ordinance and removed all signs on public property. *Id.* at 804. For a discussion of *Vincent* and the promotion of aesthetics as a legitimate state interest see Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439 (1986).

119. *Vincent*, 466 U.S. at 812.

120. *Id.*

121. *Id.*

122. *Id.*

123. 431 U.S. 85 (1977).

124. *Id.* at 86-87. The township argued that the ban on real estate signs was necessary to help check the flow of white homeowners from the community. *Id.* at 88. The Court rejected this argument because there was no evidence that whites were leaving Willingboro in substantial numbers. *Id.* at 95. The Township Council believed that the signs were a "major catalyst" of the fear that the white population of the township was decreasing and that a decrease in the number of signs would reduce panic selling and "white flight." *Id.* at 88. Rejecting this "assumption," the Court observed that banning signs might achieve the opposite result by "fuel[ing] public anxiety over sales activity by increasing homeowners' dependence on rumor and surmise." *Id.* at 96 n.10.

ternative channels for communication."[125] The Court disagreed. Although the restriction imposed was less-than-total, the only options that were realistic alternatives, such as newspaper advertisements and listings with real estate agents, were unsatisfactory.[126] These alternatives were far less effective than a "For Sale" sign posted in a front yard.[127] Moreover, the alternative methods of communication were far less likely to reach those who were not seeking sales information.[128] Without "For Sale" signs, impulse buyers, most likely, would be unaware that a particular house was available and, thus, would not inquire about its purchase. Therefore, the Court viewed "For Sale" signs as a unique and important method of communication and protected their use.

In *Vincent* and *Linmark*, the Court proclaimed that a less-than-total restriction on communication may be invalid if the mode of communication is uniquely valuable or important in order to convey a particular message. The availability of alternative means of communication will not validate the restriction if the mode of communication restricted is so essential that without it, the message cannot be conveyed effectively.[129]

Dissenting in *Upper Midwest*, Chief Judge Lay observed that a merchant's ability to sell a particular publication is related directly to

---

125. *Id.* at 93 (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

126. Alternatives such as leaflets, sound trucks, and demonstrations were also unrealistic because they were not methods through which real estate traditionally is advertised and were, thus, unlikely to be successful. *Linmark*, 431 U.S. at 93.

127. Real estate agents reported that it took twice as long to sell a piece of real estate without a "For Sale" sign on the property. *Id.* at 89.

128. *Id.* at 93.

129. The Court made this determination in *Vincent* and *Linmark* without serious consideration of the category of speech involved. It struck down the ordinance in *Linmark* even though the ordinance involved commercial speech, a category of speech generally not entitled to the highest degree of first amendment protection. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770-72 (1976) (commercial speech, while not excluded entirely from the scope of the first amendment, is not entitled to as much protection as other types of speech). The Court upheld the ordinance in *Vincent*, however, even though it involved core political speech, generally entitled to the fullest possible measure of first amendment protection. *See, e.g.*, Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 107 S. Ct. 616, 631 (1986) (political speech warrants the highest degree of first amendment protection); Brown v. Hartlage, 456 U.S. 45, 58 (1982) (the first amendment affords political speech "unequivocal protection"). *See also* H. BLACK, A CONSTITUTIONAL FAITH 46 (1969) (Protection of political speech "was no doubt a strong reason for the [First] Amendment's passage."). *See also supra* note 46. Nothing in the Supreme Court's analyses in *Vincent* and *Linmark* suggests that it would be unwilling to apply the concept of a uniquely valuable or important mode of communication to sexually explicit speech.

the way in which the publication is displayed. Most publications, he stressed, "are purchased only after a potential reader has had an opportunity to peruse the book or magazine's contents."[130] If a potential customer is unable to see or browse through a publication while shopping because of an opaque cover or sealed wrapper, it is less likely that he or she will make a purchase.[131] Because the open display of sexually explicit material has advantages over other modes of communication and cannot be duplicated through other means,[132] the Minneapolis and Virginia display provisions are comparable to the restriction struck down in *Linmark*.

Potential customers of sexually explicit material are like the impulse home buyers in *Linmark*—if they are unaware of what is available, they are unlikely to buy it. Like the ban on "For Sale" signs in *Linmark*, but unlike the ban on signs in *Vincent*, display provisions such as opaque covers and sealed wrappers restrict a uniquely valuable and important mode of communication, the effect of which is not easily duplicated merely because there are available alternatives.

2. Reduced Opportunity for Access

The Supreme Court has examined restrictions that limit the number of locations at which protected communication can take place,[133] or the format through which or the time at which the communication can be made.[134] In *Federal Communications Commission v. Pacifica Foundation*,[135] *Young v. American Mini Theatres, Inc.*,[136]

---

130. Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389, 1404 (8th Cir. 1985) (Lay, C.J., dissenting).

131. *See* Lynn, *Polluting the Censorship Debate: A Summary and Critique of the Final Report of the Attorney General's Comm'n on Pornography*, A.C.L.U. PUB. POL'Y REP. 99 (1986) ("Most laws regarding the shielding of covers are highly dangerous to First Amendment interests. When an opaque wrapper covers the front of . . . [a magazine], not only does the potential consumer not see a scantily clad woman, but he or she also does not see what articles are there.").

132. *See* text accompanying *supra* notes 57-58.

133. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), *reh'g denied*, 106 S. Ct. 1663 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

134. F.C.C. v. Pacifica Found., 438 U.S. 726 (1978).

135. *Id. See generally* Note, *Broadcasting Seven Dirty Words:* FCC v. Pacifica Found., 20 B.C.L. REV. 975 (1979); Note, *Regulation of Programming Content to Protect Children After Pacifica*, 32 VAND. L. REV. 1377 (1979); Note, *Constitutional Law —First Amendment—FCC May Regulate Broadcast of Non-Obscene Speech*, 53 TUL. L. REV. 273 (1978).

136. 429 U.S. 50 (1976). *See generally* Note, *Zoning, Adult Movie Theatres and the First Amendment: An Approach to* Young v. American Mini Theatres, Inc., 5 HOFSTRA L. REV. 379 (1977); Comment, *Municipal Zoning Ordinance May Restrict Location of Adult Motion Picture Theatres*, 16 WASHBURN L.J. 479 (1977).

and *City of Renton v. Playtime Theatres, Inc.*,[137] the Supreme Court examined less-than-total restrictions on nonobscene, sexually explicit speech. In each case, the Court assessed the impact of the restriction on protected expression.

Regulations that limit the format through which or the time at which access to protected expression can occur are not necessarily invalid. In *Pacifica*, the Supreme Court reviewed a Federal Communications Commission declaratory order that prohibited a radio station from broadcasting a monologue that was indecent, but not obscene, during a time of day when children were likely to be exposed to the broadcast.[138] The Commission characterized the monologue as "patently offensive" and sought to protect children from its harmful effects.[139] The radio station argued that because the monologue was not obscene, the first amendment prohibited the government from restricting the public broadcast of language that was merely indecent.[140] The Supreme Court rejected this argument and upheld the Commission's declaratory order.

In a concurring opinion, Justice Powell stressed that although the restriction might limit the times at which adults could hear the monologue, its effect would not limit the opportunity of adults to hear only that which was fit for children.[141] Adults could still purchase Carlin's monologue at record stores, attend live Carlin performances, or read "the transcript [of the monologue] reprinted as an appendix to the Court's opinion."[142] Moreover, Pacifica was not prohibited from broadcasting the monologue late in the evening when children were less likely to be in the broadcasting audience.[143]

Although the restriction upheld in *Pacifica* made it less likely that

---

137. 475 U.S. 41 (1986), *reh'g denied*, 106 S. Ct. 1663 (1986). *See generally* Comment, *The Conflict Between the First Amendment and Ordinances Regulating Adult Establishments*, 30 WASH. U.J. URB. & CONTEMP. L. 315, 319-31 (1986).

138. *Pacifica*, 438 U.S. at 731-32. The Commission had acted in response to a complaint from a father who heard an afternoon broadcast of George Carlin's "Filthy Words" monologue while driving with his young son. *Id.* at 729-30.

139. *Id.* at 731. The Commission's "primary concern was to prevent the broadcast [of the monologue] from reaching the ears of unsupervised children" who were likely to be listening to the radio during the afternoon hours. *Id.* at 757 (Powell, J., concurring). If the monologue were broadcast late at night it would be less likely that children would be exposed to it. *Id.* at 760 (Powell, J., concurring).

140. *Id.* at 744.

141. *Id.* at 760 (Powell, J., concurring) (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)).

142. *Id.*

143. *Id.* The Commission's holding, on its face, and the Court's opinion, only addressed the question of broadcasting the monologue during the day.

adults would hear Carlin's monologue on the radio, there were other formats through which adults could obtain access to the monologue. Display provisions also amount to a less-than-total restriction on adult access to sexually explicit material protected as to adults. Display provisions, and the broadcasting restriction in *Pacifica*, are both designed to protect children from exposure to sexually explicit material that is harmful to them by restricting access to expression.[144] Both restrictions leave untouched other formats through which the same expression can occur.[145] For instance, in *Pacifica*, although adults are unable to hear the Carlin monologue at certain times on the radio, the expression is available in other formats, such as records or a printed transcript. Likewise, although display provisions prevent adults from having wholly unimpeded access to sexually explicit material, the material remains available in different formats, such as "adults only" stores or with an opaque cover or in a sealed wrapper.

The Supreme Court also has addressed regulations that limit the locations at which protected expression can occur. In *Young*, the Court upheld a Detroit zoning ordinance that sought to preserve and stabilize neighborhoods by dispersing the location of adult theaters.[146] The Court noted that the restriction on the location of theaters imposed a minimal burden on protected speech because although adult theaters were dispersed, their total numbers were not reduced and the market for the commodity was "essentially unrestrained."[147] The

144. This comparison, however, is not without limitations. The Court in *Pacifica* emphasized the "narrowness" of the holding, *Pacifica*, 438 U.S. at 750, explaining that radio broadcasting has a "uniquely pervasive presence in the lives of all Americans" and that it is "uniquely accessible to children, even those too young to read." *Id.* at 748-49. Moreover, broadcasting has "received the most limited First Amendment protection." *Id.* at 748. Radio broadcasts, unlike material on display in a bookstore, confront individuals in the privacy of the home, involve a potentially captive audience, and are uniquely accessible to young children. Radio broadcasts are thus subject to greater regulation than other modes of communication. As the Court observed in Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983), "[prior] decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." *Id.* at 74 (footnote omitted).

145. A notable distinction is that the display provisions in *Upper Midwest* and *American Booksellers* apply under all circumstances where children may have access to sexually explicit material, while the restriction in *Pacifica* applies only during certain times of day.

146. Young v. American Mini Theatres, Inc., 427 U.S. 50, 50 (1976). Those theaters which exhibited sexually explicit films were classified as "adult" theaters. Adult theaters had to satisfy a location restriction not applicable to other types of theaters. The zoning ordinance prohibited a new adult theater from being located within 500 feet of a residential area. *Id.* at 52. The Detroit City Council had determined that "some uses of property [such as adult entertainment] are especially injurious to a neighborhood when they are concentrated in limited areas." *Id.* at 54.

147. *Id.* at 62.

zoning ordinance was valid because it served "the city's interest in preserving the character of its neighborhoods"[148] and was minimal in terms of first amendment impact. The Court in *Young* warned, however, that "the situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."[149]

In a concurring opinion, Justice Powell stressed that the "central concern of the First Amendment in this area is that there be a free flow [of expression] from creator to audience," and that the public maintain free access to the expression.[150] He concluded that the im-

---

148. *Id.* at 71. The Court upheld the ordinance despite the fact that the determination of whether a particular theater was an "adult" theater turned on the content of the films exhibited at that theater. *Young* is thus an "exception[ ] to the general rule preventing government regulation based upon the content of speech." Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 715 n.144 (1978).

In Police Dep't v. Mosley, 408 U.S. 92 (1972), the Supreme Court emphasized that the "First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. *See also* Cohen v. California, 403 U.S. 15, 24 (1971). The Court in *Young* observed that if this statement was "read literally" it would "absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication." *Young*, 427 U.S. at 65. The Court in *Young* chose not to read the statement literally because "a difference in content may require a different governmental response." *Id.* at 66. The government, however, must remain neutral without regulating on the basis of "sympathy or hostility" for a particular message. *Id.* at 67.

The zoning ordinance in *Young* was a reaction to the concern that a concentration of "adult" theaters in the same area would attract "undesirable" transients, reduce property values, increase crime, and cause residents and businesses to flee from the neighborhood. *Id.* at 55. The ordinance was upheld because it was these "secondary effect[s]" which the ordinance sought to avoid, not the dissemination of sexually explicit speech. *Id.* at 71 n.34. Disparate treatment of adult theaters was thus justified by a "compelling public interest" in the preservation and stabilization of neighborhoods and unrelated to the suppression of expression based on content. *Id.* at 57 n.14 (quoting American Mini Theatres v. Gibbs, 518 F.2d 1014, 1020 (6th Cir. 1975)). *Cf.* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), in which the justifications offered by the city for regulating drive-in theaters rested primarily on a government interest in protecting citizens from unwanted exposure to nudity, not its secondary effects. The Court invalidated the regulation because the impact on traffic safety—the only secondary effect cited by the city—was an effect which might have also been caused by any drive-in movie, even one that did not contain nudity. *Id.* at 214-15.

149. *Young*, 427 U.S. at 71 n.35. Other courts interpret this footnote to mean that an ordinance is unconstitutional if its effect, rather than the intent, is to "suppress or greatly restrict" adult access to protected expression. *See* Comment, *supra* note 137, at 321-23.

150. *Young*, 427 U.S. at 77 (Powell, J., concurring). Justice Powell's concern was that there must be a full opportunity to convey a message and a full opportunity to receive it. *Id.* at 76. He proposed a two-part inquiry for assessing the impact of the less-than-total restriction on protected expression: (1) whether it imposes a limit on a creator's ability to make material available; and (2) whether it "restrict[s] in any significant way" those who desire access to the protected expression. *Id.* at 78.

pact of the zoning ordinance on protected expression was "incidental and minimal."[151] Adult theaters still had full opportunity to convey their message and the viewing public still had full opportunity to view the films.[152]

While the zoning ordinance in *Young* sought to preserve neighborhoods by dispersing adult theaters, the zoning ordinance under review in *City of Renton v. Playtime Theatres, Inc.* sought to regulate adult theaters by concentrating their location.[153] Reversing the decision of the Ninth Circuit Court of Appeals, the Supreme Court held that the Renton ordinance did not violate the first amendment because it did not ban adult theaters altogether. Instead, as a less-than-total restriction, it merely regulated where adult theaters could be located.[154]

Potential adult theater owners argued that the ordinance did not allow for "reasonable alternative avenues of communication."[155] The ordinance, they argued, denied them a reasonable opportunity to open and operate an adult theater within the city because they were excluded from ninety-five percent of the city's land.[156] The Court rejected this argument and implied that the remaining five percent of the city's land, or 520 acres, provided a reasonable and ample alternative for use as adult theater sites. The first amendment was not violated merely because the allotted land was less desirable economically.[157]

Read together, *Young* and *Renton* indicate that the Court will be less concerned with first amendment implications when zoning regula-

---

151. *Id.* at 78 (footnote omitted).

152. *Id.* at 78-79.

153. 475 U.S. 41 (1986), *reh'g denied*, 106 S. Ct. 1663 (1986).

154. *Id.* at 46. Because the Renton ordinance regulated the place in which adult films could be displayed, the Court considered whether it was a valid time, place, and manner regulation. First, the Court found that the ordinance was content-neutral because its "*predominate* concern[ ]" was with the undesirable "*secondary effects*" of adult theatres, and not with the suppression of unpopular views. *Id.* at 47. Second, the Court found that the ordinance sought to serve the substantial government interest in preserving the quality of urban life. *Id.* at 50. The Court also considered whether the ordinance allowed for "reasonable alternative avenues of communication." *Id. See infra* notes 155-56 and accompanying text.

155. *Renton*, 475 U.S. at 50. The challengers were the owners of two existing theaters in Renton. They had acquired the theaters with the intent of using them as adult theaters but were precluded from doing so under the zoning ordinance. *Id.* at 45.

156. *Id.* at 53. The theater owners claimed that there were no "commercially viable" sites available in the remaining five percent of the city land. *Id.*

157. *Id.* at 54. Justice Brennan dissented. He argued that the ordinance imposed "special restrictions" on particular kinds of speech based on the content. His concern was that the ordinance may have been designed to suppress the content of adult movies and not designed to avoid the harmful "secondary effects" of adult theaters. *Id.* at 56-57 (Brennan, J., dissenting).

tions limit, without suppressing, the places in which sexually explicit expression can occur. The Court stressed that the restrictions on location in each case were valid because they did not suppress adult theaters completely and left some locations available as potential sites for new theaters. Moreover, the zoning ordinances were valid because they were a response to the harmful secondary effects of the location of adult theaters and not because of viewer response to the content of the movies shown at the theaters.[158]

In theory, the zoning ordinances under review did not limit protected expression at its source, nor did they limit the ability of adults to view the protected expression. In practice, the ordinances, by reducing the total number of available locations for adult theaters, limited the potential number of theaters.[159] The economic undesirability of the locations available under the ordinance further reduced the potential number of theaters. Although the Court in *Young* claimed that the outcome would have been different if the ordinance had the "effect of suppressing" or "greatly restricting access to" protected expression,[160] the Court in *Renton* upheld a restriction that left theater owners with limited options.[161] The Court, in effect, held that as long as there were avenues of expression available, the restrictions did not violate the first amendment even if they served to reduce the total number of adult theaters by reducing the available locations at which the expression could take place.

Under this standard, display provisions are considerably less restrictive than the ordinances upheld in *Young* and *Renton*. Unlike the zoning ordinances in *Young* and *Renton*, display provisions do not reduce directly the availability of the material subject to regulation. In *Young* and *Renton* there were fewer potential outlets for expression as a direct result of the ordinances. Display provisions, however, result in an indirect reduction of outlets for sexually explicit material if merchants, rather than facing the burden of compliance with display restrictions, decide to limit their inventory to material not subject to regulation. It is unlikely that this reduction amounts to the functional equivalent of suppression or the type of significant restriction on ac-

158. In this respect, display provisions differ from the zoning regulations in *Young* and *Renton*. Display provisions are designed to protect juveniles from the harmful effects of the content of sexually explicit material and not from the harmful secondary effects that may or may not be generated from open display of the material.

159. *See supra* note 150 and accompanying text.

160. *Young*, 427 U.S. at 71 n.35.

161. *See supra* note 157 and accompanying text.

cess to protected expression that is necessary to invalidate display provisions under the standards announced in *Young* or *Renton*.

Because display provisions only alter the format in which sexually explicit material can be displayed, they are consistent with the approach in *Pacifica* which allows the restriction of a particular means of expression, provided that other formats for the same expression remain available. The Supreme Court has not viewed reductions in the number of outlets through which expression can take place, or the format through which expression can occur, as serious first amendment infringements. Display provisions, in this respect, will likely pass constitutional muster.

3. Increased Financial Burden

The Supreme Court has examined regulations that impose a financial burden on protected expression and thereby deter the exercise of first amendment activities.[162] Although "[t]here is no such thing as a free speech,"[163] the first amendment offers protection against undue financial burdens on freedom of expression.[164] The burden imposed on the exercise of protected first amendment activities must be significant in order for the regulatory scheme giving rise to the burden to be invalid.[165]

In *Erznoznik v. City of Jacksonville*, the Supreme Court invalidated a city ordinance that prohibited drive-in movie theaters from showing films containing nudity when the movie screen was visible from a public street or place.[166] The City of Jacksonville argued that the ordinance was valid because it regulated only the manner in which films could be shown and served the legitimate governmental interests of protecting citizens from "unwilling" exposure to offensive material,[167] protecting children,[168] and promoting traffic safety.[169]

---

162. *See* Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257 (1985). *See also* Central Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515 (11th Cir. 1985) (conditioning the exercise of first amendment rights upon the payment of a substantial and unreasonable fee for additional police protection places an impermissible burden on the first amendment's guarantee of freedom of speech); Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir. 1983) (invalidating insurance and administrative fee requirements for political march because they imposed a prohibitive financial burden on first amendment rights).

163. Neisser, *supra* note 162, at 258.

164. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (state may not single out press for special use tax).

165. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 127 (1981).

166. 422 U.S. 205, 206 (1975).

167. *Id.* at 208, 212. The Court rejected this argument for two reasons. First, the

The Supreme Court focused its analysis on the impact that the ordinance would have on the continued availability of movies containing even harmless forms of nudity.[170] Although the ordinance was not an outright ban on movies containing nudity, the net result of the ordinance was to "deter drive-in theaters from showing movies containing any nudity . . . ."[171] The Court found that although theater owners were still free to show films containing nudity if they blocked the screen from public view, the owners would avoid the costs of blocking the screen from public view by not showing certain films.[172] This deterrent effect of the ordinance on first amendment rights was too great. The Court found that "the owners and operators of these theaters are faced with an unwelcome choice: to avoid prosecution . . . they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable."[173] The Court noted that although the deterrent effect of the ordinance might not result in "total suppression" of the movies subject to regulation, it was nevertheless an impermissible restraint on freedom of expression.[174]

The Minneapolis and Virginia display provisions, because of the

---

ordinance did not protect citizens from all types of movies that might be offensive. *Id.* at 208. Second, offended viewers who were able to see the screen from public or private places had the option not to look. *Id.* at 212.

168. *Id.* at 212. The Court rejected this argument because the overbreadth of the ordinance included films that were not obscene as to children. *See infra* notes 170-71 and accompanying text.

169. *Erznoznik*, 422 U.S. at 214-15. The Court found that the state interest in traffic safety was not met by the ordinance because scenes from any movie, not only those containing nudity, could be equally distracting to motorists. *Id.*

Moreover, because the legislative classification focused on the subject matter or content of expression, the Court did not presume validity of the ordinance without further inquiry. *Id.* at 215. While recognizing the general rule that a municipality can enact reasonable time, place, and manner regulations as long as they are "applicable to all speech irrespective of content," *id.* at 209, the Court noted that a content-based regulation might withstand constitutional review if there were clear reasons for the differences in treatment. *Id.* at 215. The Jacksonville ordinance was invalid because there was no justification for treating movies containing nudity differently from other movies in an ordinance designed to promote traffic safety. *Id.*

170. *Id.* at 213. The ordinance was overbroad because it prohibited harmless forms of nudity that were protected as to adults and children, such as a nude baby or the nude body of a war victim. *Id.*

171. *Id.* at 211.

172. *Id.* at 211 n.7.

173. *Id.* at 217. Although the record did not indicate how much it would cost to block a theater from public view, the Court noted that in one case the cost was prohibitive. *Id.* at 211 n.8 (citing Olympic Drive-In Theatre, Inc. v. City of Pagedale, 441 S.W.2d 5, 9-10 (Mo. 1969)).

174. *Id.* at 211 n.8.

increased financial burdens that they place on booksellers, may have a similar deterrent effect on the exercise of first amendment rights. In order to avoid the costs associated with complying with the display provisions, merchants might decide not to carry any of the material subject to regulation—just as the theater owners in *Erznoznik* might have decided not to show certain films in order to avoid the cost of blocking their screens from public view.

Display provisions interfere with the booksellers' business practices,[175] "place a heavy burden on [some] store owners to restructure their stores"[176] and result in financial burdens on the booksellers. If the merchant is required to move sexually explicit merchandise to an "adults only" section of the store, the merchant may have to restructure the layout of the store. This might not be practical, or even possible, in some stores because of space limitations or a selling area that does not lend itself to change. The merchant may decide not to restructure the store to accommodate an "adults only" section and, therefore, would be unable to openly stock the material subject to regulation. Even if the layout of a store makes an "adults only" section feasible, merchants may be unwilling to absorb the extra cost of restructuring their selling areas to establish "adults only" sections.

Under the Minneapolis ordinance and, perhaps, the Virginia ordinance, merchants who do not establish "adults only" sections would then be required either to discontinue offering the material subject to regulation, or display it with sealed wrappers or opaque covers. Both alternatives result in increased financial burdens. These financial burdens may also deter booksellers from stocking and attempting to sell sexually explicit material.

Despite the Court's willingness to consider increased costs in *Erznoznik*, the increased financial burdens associated with display provisions may not give rise to the type of restriction on protected expression that violates the first amendment.[177] In *United States Postal Service v. Council of Greenburgh Civic Associations*,[178] the Supreme Court reviewed a civic association's challenge of a federal statute that prohibited the placement of "mailable matter" on which no postage

175. American Booksellers Ass'n v. Virginia, 802 F.2d 691, 696 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 1281 (1987).

176. Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389, 1404 (8th Cir. 1985) (Lay, C.J., dissenting).

177. The Court in *Erznoznik* considered factors other than increased financial burdens when it invalidated the ordinance under review. *See supra* notes 167-70 and accompanying text.

178. 453 U.S. 114 (1981).

had been paid, in any private letterbox approved for the receipt or delivery of mail.[179] The civic association had a "practice of delivering messages to local residents by placing unstamped notices and pamphlets in the [private] letterboxes."[180] When the local postmaster notified the association that they were in violation of federal law, the association sought injunctive and declaratory relief. The association argued that enforcement of the statute would "inhibit their communication with residents . . . and would thereby deny them the freedom of speech secured by the First Amendment."[181]

The association also argued that they were unable to afford the cost of postage and that the alternative of depositing their materials in places other than letterboxes was less effective than their usual practice.[182] The Court upheld the statute[183] despite evidence that the restriction was "financially burdensome" on the association and that the alternative delivery methods constituted a "serious burden [on their] ability to communicate with their constituents."[184] The Court was un-

---

179. 18 U.S.C. § 1725 (1982).

180. *Greenburgh*, 453 U.S. at 116.

181. *Id.* at 116-17.

182. *Id.* at 134-35 (Brennan, J., concurring). The Postal Service argued that enforcement of the restriction was necessary to ensure effective mail delivery and protection of the mails. *Id.* at 117-18. Moreover, it argued that the council was left with "ample alternative means of delivering their message," including paying postage, hanging notices on doorknobs, placing notices under doors or doormats, telephoning residents, person-to-person delivery in public areas, tacking or taping notices on a door post or letterbox post, or placing newspaper advertisements. *Id.* at 119.

183. The Court based its decision to uphold the statute on the finding that a letterbox is not a public forum. *Id.* at 128. As an "authorized depository" for the delivery and receipt of mail, a letterbox is not transformed into a "public forum" such as a public street or park, to which the first amendment guarantees unlimited access. *Id.* at 128-31. Property which is not a public forum "may be subject to a prohibition of speech . . . or other forms of communication without running afoul of the First Amendment." *Id.* at 131 n.7.

The Court's emphasis on public forum analysis only served to distract the Court from proper consideration of the extent to which the Postal Service regulation inhibited the ability of the civic association to communicate with residents. Professors Farber and Nowak have argued that "[e]ven when public forum analysis is irrelevant to the outcome of a case, the judicial focus on the public forum concept confuses the development of first amendment principles." Farber & Nowak, *supra* note 95, at 1223. For example, in *Greenburgh*, the real issue was whether the limitation on public access "so inhibited the communication of ideas as to be inconsistent with the first amendment." *Id.* An emphasis in *Greenburgh* on public forum analysis distracted attention from proper consideration of the first amendment concerns at stake. *Id.*

184. *Greenburgh*, 453 U.S. at 119-20. Hanging notices on doorknobs or doorposts could result in the notices being lost or damaged by the elements. *Id.* at 120 n.2. Weatherstripping on doors would prevent notices from being placed under the door and the use of plastic bags for the protection of notices left outside would be "relatively expensive for a small volunteer organization." *Id.* (quoting Greenburgh Civic Ass'n v. United States Postal Serv., 490 F. Supp. 157, 160 (S.D.N.Y. 1980)). Furthermore, the relatively slow pace of

moved by the fact that none of the alternative means of delivery suggested by the Postal Service were nearly as effective as placing notices in letterboxes.

Unlike *Erznoznik*, *Greenburgh* suggests that the Court is unconcerned about the financial burdens associated with a regulatory scheme that affects protected expression, as long as ample opportunities for expression still exist. Under the standard applied in *Greenburgh*, the additional costs associated with display provisions would have to be substantial in order for the regulatory scheme to violate the first amendment.

4. Restrictions Resulting in Stigmatization

The display provisions under review in *Upper Midwest*[185] and *American Booksellers*[186] attach a stigma[187] to sexually explicit material.[188] The effect of this stigma may be to deter impermissibly adults from seeking access to the material. In *Upper Midwest*, Chief Judge Lay observed that "many adults who would be required to unseal this [sexually explicit] literature in public areas in order to peruse the book or magazine would be embarrassed to do so."[189] He also found that there was a "stigma" attached to an "adults only" label.[190] Many adults might "forgo exercising their first amendment rights to purchase nonobscene literature if such material were only available" in "adults only" sections or stores.[191]

In *Wieman v. Updegraff*, Justice Black observed that "laws which stigmatize . . . thought and speech . . . have a way of reaching, ensnar-

---

mail delivery would, when time was of the essence, impede the ability of civic associations to communicate quickly with their constituents. *Id.* at 120.

185. Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985).

186. American Booksellers Ass'n v. Virginia, 802 F.2d 691 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 1281 (1987).

187. Stigma is defined as "a mark of shame or discredit" or "a mark or label indicating deviation from a norm." WEBSTER'S THIRD NEW INT'L DICTIONARY 2243 (14th ed. 1961).

188. The stigma associated with sexually explicit material may, of course, exist even without display provisions. Display provisions may merely exacerbate the degree of stigma involved. Moreover, stigma "has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978).

189. *Upper Midwest*, 780 F.2d at 1404 (Lay, C.J., dissenting).

190. *Id.* at 1402.

191. *Id.* In *American Booksellers*, the court observed that "[m]any adults, for a variety of reasons, would not enter a display area identified as 'for adults only.'" *American Booksellers*, 802 F.2d at 696. The court, presumably, was referring to the stigma now attached to sexually explicit material as a result of the "adults only" label.

ing and silencing many more people than at first intended."[192] The Supreme Court has considered the role that stigma plays in altering human behavior and perceptions in a variety of settings and circumstances, including public education,[193] prisons,[194] civil proceedings,[195] juvenile offender proceedings,[196] and racial discrimination.[197]

In *Lamont v. Postmaster General*,[198] the Supreme Court reviewed a federal statute[199] that required the Postmaster General to detain unsealed foreign mailings to the United States of "communist political propaganda."[200] Under the statute, the post office mailed the addressee a notice identifying the mail being detained and advising that the mail would be destroyed unless the addressee returned an attached reply card to the post office within twenty days.[201] The Post Office Department assumed that those who did not return the card did not want to receive the identified publication or any similar publications.[202]

The Court held that the statute was unconstitutional because the government's imposition of an affirmative obligation on addressees—the return of the reply card—constituted an abridgement of the addressee's first amendment rights.[203] Justice Douglas, writing for the majority, concluded that the affirmative obligation imposed by the government was "almost certain to have a deterrent effect," especially

---

192. 344 U.S. 183, 193 (1952) (Black, J., concurring).

193. Plyler v. Doe, 457 U.S. 202, 223 (1982) (Children that are denied a basic education will be marked by the "stigma of illiteracy . . . for the rest of their lives.").

194. Hewitt v. Helms, 459 U.S. 460, 473 (1983) ("Unlike disciplinary confinement the stigma of wrongdoing or misconduct does not attach to administrative segregation under Pennsylvania's prison regulations.").

195. Arnett v. Kennedy, 416 U.S. 134, 163 (1974) (Civil Service Commission post-termination hearing procedures adequately protect federal employees from being "wrongfully stigmatized by untrue and unsupported administrative charges.").

196. Smith v. Daily Mail, 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring) (prohibiting, under some circumstances, the publication of the name of a juvenile charged as a juvenile offender transcends first amendment concerns and serves "to protect the young person from the stigma of his misconduct").

197. Fullilove v. Klutznick, 448 U.S. 448, 484 (1980) (upholding Minority Business Enterprise provision which sought to remedy the present effects and stigma associated with past discrimination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357-58 (1978) (Brennan, J., White, J., Marshall, J., and Blackman, J., concurring and dissenting) (categories based on race used to stigmatize politically powerless segments of society are invalid).

198. 381 U.S. 301 (1965).

199. Postal Service and Federal Employees Salary Act of 1962, 39 U.S.C. § 4008(a) (1962).

200. *Lamont*, 381 U.S. at 302-04.

201. *Id.* at 303.

202. *Id.* at 304.

203. *Id.* at 305-07.

on those with "sensitive positions."[204] He emphasized that any addressee would be "likely to feel some inhibition in sending for literature" which the government had condemned as "communist political propaganda."[205] The statute, because of its deterrent effect on the exercise of first amendment rights, was thus an impermissible restriction on the manner in which the communist publications were distributed—even though addressees still had complete access to the material by simply returning the reply card.

The display provisions in *Upper Midwest* may also inhibit and deter adults from obtaining protected material. The inhibition in *Lamont* arose from the stigma that the government placed on the material by labeling it "communist."[206] At the time, when anti-communist sentiment in the United States was high, the label of "communist" provided a strong deterrent to the exercise of first amendment rights. Display provisions, in this respect, also inhibit the exercise of first amendment rights. Public attention has focused on the issue of pornography[207] and there have been increased efforts to limit access to pornographic materials.[208] As the Court noted in *American Booksellers*, "adults only" labels and sealed wrappers place a stigma on sexually explicit material. The stigma might deter adult access to material protected by the first amendment. Moreover, sealed wrapper provisions may, in effect, require adults to request an inspection copy of the material from a merchant in order to decide whether to make the purchase, something that they are unaccustomed to doing. The imposition of such an affirmative obligation is contrary to the holding in *Lamont*. Display provisions, like the statute in *Lamont*, may well be inconsistent with the "uninhibited, robust and wide-open" debate and discussion contemplated by the first amendment.[209]

---

204. *Id.* at 307.

205. *Id.*

206. *Lamont*, 381 U.S. at 301, involved core political speech, not sexually explicit speech.

207. *See* REP. OF THE ATT'Y GENERAL'S COMM'N ON PORNOGRAPHY (1986). The Attorney General's Commission on Pornography was chartered to "determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained consistent with constitutional guarantees." *Id.* at 1957. *But see also* Lynn, *supra* note 131, at 1 ("Although their final Report [report of the Attorney General's Commission on Pornography] is voluminous, it is ultimately an unsatisfying analysis, failing to take the reader very far toward understanding what roles pornography plays in our culture, and why it is such a massive business enterprise."); Vance, *Porn in the U.S.A.: The Meese Commission on the Road*, THE NATION, Aug. 2/9, 1986 at 65.

208. The Wall Street Journal, Oct. 23, 1986 at 11, col. 1.

209. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Political speech

IV. CONCLUSION

Although the Minneapolis and Virginia display provisions are unlike the total bans on protected expression struck down in *Butler* and *Schad*, they may place an impermissible burden on adult access to sexually explicit material. The display provisions under review in *Upper Midwest* and *American Booksellers* cannot be justified merely because they seek to protect juveniles from exposure to sexually explicit material obscene as to juveniles. Because the material subject to regulation is not obscene as to adults, it becomes necessary to assess the impact of display provisions on adult access to the same material.

Display provisions, as less-than-total restrictions on adult access, limit adult access to protected expression in several ways. If some merchants decide not to stock sexually explicit material—rather than face the burden of complying with the requirements of a display provision—there will be a reduced opportunity for adults to obtain the material. A mere reduction in the number of outlets at which expression can occur, without more, is not sufficient to invalidate display provisions as long as a meaningful opportunity for access remains.[210] Similarly, under the Court's approach in *Pacifica*, a restriction that merely limits the format through which expression can take place does not provide sufficient grounds to invalidate the regulation.

Display provisions also impose a financial burden on protected expression by increasing the cost of distributing and purchasing sexually explicit material. The increased financial burdens associated with display provisions may deter adult access to material that adults are entitled to obtain under the first amendment. Financial burdens, however, must be substantial in order for the regulatory scheme under review to violate the first amendment. Although a reduction in the number of outlets at which protected expression can occur and the increased financial burdens associated with display provision are not sufficient to invalidate a display provision, at least two other burdens associated with the provisions are significant under standards drawn from previous cases.

Because the way in which a publication is displayed is directly related to a store owner's ability to sell the material, opaque cover requirements and sealed wrapper provisions restrict a "uniquely valua-

---

may, of course, be entitled to greater protection than non-obscene, sexually explicit expression. *See supra* note 46. This distinction, however, does not mean that substantial burdens placed on sexually explicit expression do not violate the first amendment. *See supra* note 129.

210. *See supra* notes 158-60 and accompanying text.

ble" and "important" mode of communication under the standard announced in *Vincent* and *Linmark*. The display alternatives available to merchants in Minneapolis and Virginia are not "ample alternative channels for communication."[211] Moreover, display provisions stigmatize sexually explicit material. The combined effect of these burdens on expression protected under the first amendment presents a serious case for invalidating the display provisions under review in *Upper Midwest* and *American Booksellers*.

Samuel D. Friedlander

211. *Linmark*, 431 U.S. at 93 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)).