CONSTITUTIONAL LAW—FIRST AMENDMENT—ZONING PROHIBITION WHICH IMPINGES UPON FIRST AMENDMENT ACTIVITY MUST BE ADEQUATELY JUSTIFIED BY MUNICIPALITY—*Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176 (1981).

James F. Schad opened an adult bookstore[1] in the commercial zone[2] of the Borough of Mount Ephraim[3] in 1973.[4] Customers could purchase adult magazines, books, and films.[5] The store later installed coin-operated booths which allowed customers to view adult films.[6] Schad introduced a new feature in 1976; this coin-operated device permitted customers to view a live nude dancer who performed behind a sheet of glass.[7]

After this device was introduced, complaints were filed against the owners of the store alleging that the live dancing violated the borough's zoning ordinance,[8] which was interpreted to prohibit live entertainment. In municipal court the owners were found guilty of violating the ordinance, and they subsequently appealed their conviction to the Camden county court where a trial *de novo* was held.[9] The county court held that the owners were challenging a zoning ordinance,[10] and therefore they could not invoke first amendment

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[1] Brief for Appellant at 5, Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176 (1981). Juliette Ann DiLuciano and 613 Corporation were also owners of the store with Schad. Hereinafter, references will be made to the appellants by using Schad's name alone.

[2] Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176, 2179 (1981); *see* MOUNT EPHRAIM, N.J., CODE §§ 99-4, 99-15B (1978). Mount Ephraim had three zones, one of which was the commercial district in question.

[3] The Borough of Mount Ephraim is located in Camden County, New Jersey.

[4] Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176, 2179 (1981).

[5] *Id.*

[6] *Id.* An amusement license was issued by the borough so that the store could have these devices. *Id.*

[7] *Id.*

[8] *Id.* MOUNT EPHRAIM, N.J., CODE § 99-15B (1978) provided for permitted uses as follows:

> Offices and banks; taverns, restaurants and luncheonettes for sit-down dinners only and with no drive-in facilities; automobile sales; retail stores, such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry, paint, wallpaper, appliances, flowers, gifts, books, stationery, pharmacy, liquors, cleaners, novelties, hobbies and toys; repair shops for shoes, jewels, clothes and appliances; barbershops and beauty salons; cleaners and laundries; pet stores; and nurseries.

Id. Further, another section of the Code provided "[a]ll uses not expressly permitted in this chapter are prohibited." *Id.* § 99-4. The complaints were filed in spite of the fact that three other establishments were permitted to have live musicians. Schad v. Borough of Mount Ephriam, 101 S. Ct. 2176, 2180 (1981); *see* note 14 *infra* and accompanying text.

[9] Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176, 2180 (1981). The trial *de novo* was held on the record made in the borough's municipal court.

[10] *See* MOUNT EPHRAIM, N.J., CODE § 99-15B (1978).

freedoms.[11] Accordingly, it rejected Schad's arguments based on the first and fourteenth amendments.[12] Further, the county court was not persuaded by the owner's claim that the ordinance was arbitrarily enforced against him while three other establishments, which offered live music to their customers, were permitted to operate in the same commercial zone.[13] Those uses were classified as "non-conforming" since these establishments had been in existence before the enactment of the ordinance.[14] The defendants were found guilty of violating the ordinance,[15] and the appellate division of the New Jersey superior court affirmed in an unpublished *per curiam* opinion.[16] The owners appealed to the New Jersey Supreme Court, but certification was denied.[17] Appeal was granted by the United States Supreme Court.[18] In *Schad v. Borough of Mount Ephraim*,[19] the Court reversed the convictions and remanded, holding that live entertainment was a right protected by the first amendment, and that Mount Ephraim had failed to justify the exclusion of live entertainment from the commercial uses permitted by the zoning ordinance.[20]

Historically, zoning laws have been the responsibility of municipalities.[21] Each community derives its power to enact ordinances

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[11] Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176, 2180 (1981). The Court, however, took cognizance of the fact that the first amendment protects live nude dancing. *Id.*

[12] *Id.* U.S. CONST. amend. I, provides in part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

U.S. CONST. amend. XIV, provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[13] Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176, 2180 (1981).

[14] *Id.* The Borough's building inspector and police chief both testified that the three establishments which offered live music had done so before the enactment of the ordinance in question and the uses were thus classified as nonconforming. *Id.* at n.3.

[15] *Id.* at 2180.

[16] *Id.* The appellate division of New Jersey's superior court affirmed the convictions for essentially the same reasons given by the Camden county court. *Id.*

[17] Schad v. Borough of Mount Ephraim, 82 N.J. 287, 412 A.2d 794 (1980).

[18] Schad v. Borough of Mount Ephraim, 101 S. Ct. 264 (1980). Final judgments of the highest court of a state may be appealed to the Supreme Court for review if the validity of a state statute is alleged to be repugnant to the Constitution. 28 U.S.C. § 1257(2) (1976). For purposes of that section the Court has held that a local ordinance is deemed to be a state statute thereby giving the Court jurisdiction. *See* King Mfg. Co. v. City Council, 277 U.S. 100 (1928).

[19] 101 S. Ct. 2176 (1981).

[20] *Id.* at 2187.

[21] *See* D. MANDELKER, THE ZONING DILEMMA 3 (1971). The Standard Zoning Enabling Act was prepared as a guide for states in adopting legislation dealing with a general delegation of power to a municipality in order that communities could regulate the use of property through ordinances. U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926); 1 E. YOKLEY, ZONING LAW AND PRACTICE § 1-4, at 6 (4th ed. 1978). In New Jersey, a governing

from the state's police powers which include the regulation of public health, safety, morals, and general welfare.[22] An ordinance must bear some reasonable relation to the legitimate interest of the municipality.[23] As with any other law, a zoning ordinance will be presumed to be valid until challenged in the courts.[24]

The Supreme Court upheld a municipality's right to enact comprehensive zoning ordinances as a valid exercise of police power in *Village of Euclid v. Amber Realty Co.*[25] Since that decision the Court has been faced with numerous cases challenging the validity of zoning ordinances as violating first amendment rights.[26] The results

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body is given the power to zone. N.J. STAT. ANN. § 40:55D-62 (West Cum. Supp. 1981-1982) (superseding N.J. STAT. ANN. § 40:55-30 (West 1967)). At the time the complaint was filed, the latter statute was in effect. For the purpose of this case, it was conceded that the content of both statutes was essentially the same. Brief for Appellee at 9 n.5, Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176 (1981). For a survey of each state's enabling statute, see Marcus, *Zoning Obscenity: Or, The Moral Politics of Porn*, 27 BUFFALO L. REV. 1, 39-44 (1977) (app. A).

[22] Village of Schaumberg v. Citizens For a Better Environment, 444 U.S. 620 (1980) (municipality may not prohibit solicitation of contributions based on percentage figure derived from money received to money expended on charitable figures); Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). *See* E. YOKELY, *supra* note 21, § 3-1, at 31.

[23] *See generally* Berman v. Parker, 348 U.S. 26 (1954); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); E. YOKELY, *supra* note 21, § 3-13, at 59.

[24] *See* D. MANDELKER, *supra* note 21, at 4.

[25] 272 U.S. 365 (1926). In that case, the Court emphasized that the test to which a challenged ordinance is submitted will vary with circumstances. If the legislative classification could be justified, in some way the ordinance must be allowed to control. *Id.* at 387-88. Justice Sutherland, in writing for the Court, noted that the restrictive provisions of *Euclid's* classification could be sustained because of a municipality's desire to separate residential districts from commercial districts. *Id.* at 389. That type of classification could be justified as an aspect of police power. *Id.* at 387. *See generally* Young v. American Mini Theaters, Inc., 427 U.S. 50, 73 (1976) (Powell, J., concurring); Note, *Inverse Condemnation Unavailable as Remedy for Deprivation of Property Value by City Zoning Ordinance*, 4 WASH. U. L.Q. 1121, 1122-23 (1979). The ordinance in question divided the land into six land use districts. 272 U.S. at 380-83. The appellee challenged the validity of the ordinance because, as a result of the enactment of the local law, he could not use his land for industrial purposes. *Id.* at 384. If the appellee, as prescribed by Euclid's ordinance, had to develop his land for residential purposes, he would have lost a great deal of money. *Id.* The Supreme Court held that the ordinance did not deprive the appellees of due process of law. *Id.* at 384-85. *Accord*, Nectow v. City of Cambridge, 277 U.S. 183 (1927). In *Nectow*, the challenged zoning ordinance divided the city into three classified districts, each of which defined the type of buildings which could be constructed. *Id.* at 185. The *Nectow* Court determined that the ordinance in question could not be sustained because the city had failed to justify the uses as within its police powers. *Id.* at 188-89.

[26] *Compare* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (ordinance restricting land use to one-family dwelling and defining "family" sustained as valid exercise of police power) *with* Erzoznik v. City of Jacksonville, 422 U.S. 205 (1975) (ordinance prohibiting showing of films containing nudity held invalid on its face).

Further, the Court has held that a statute which forbids wearing a uniform absent authority was invalid as applied to the petitioner when it was read in conjunction with a statute which authorizes a person to act in a theatrical production wearing a military uniform. Schacht v.

of these cases indicate that when a zoning ordinance proscribes activity which is arguably protected by the first amendment, a municipality or state must justify its reasons for enacting the ordinance.

In *Erznoznik v. City of Jacksonville,*[27] for example, the challenged ordinance prohibited drive-in theaters from showing any motion picture that contained nudity.[28] The Court held that the ordinance impermissibly discriminated against a protected form of expression solely on the basis of its content.[29] This censorship by the municipality could not be justified by the "limited privacy interest of persons on the public streets."[30] The city's argument that children might see the movies while walking on the streets near the theaters was held insufficient because the ordinance was not narrowly drawn.[31] The Court concluded that the ordinance was constitutionally invalid because it was overbroad, thereby upholding the first

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United States, 398 U.S. 58, 61, 65 (1970). In *Schacht*, the petitioner wore an army uniform while performing a skit denouncing the Viet Nam war. *Id.* at 60. Schacht was arrested for violating 18 U.S.C. § 702 (1964), which made such activity a crime. 398 U.S. at 59. The Court found that such a performance was a theatrical production, and that therefore under 10 U.S.C. § 772 (1964), the conviction could not stand. 398 U.S. at 62. Actors were thus afforded the constitutional right to speak.

[27] 422 U.S. 205 (1975).

[28] *Id.* at 206-07. The ordinance stated, in part, that:

> It shall be unlawful and it is hereby declared a public nuisance for any . . . person connected with or employed by any drive-in theater in the City to exhibit . . . any motion picture . . . in which the human male or female bare buttocks [is shown] . . . , if such motion picture . . . is visible from any public street or public place.

JACKSONVILLE, FLA., CODE § 330.313 (1972).

[29] 422 U.S. at 211. In writing for the Court, Justice Powell argued that there may be educational value to some films which contain nudity, and the municipality could not ban all movies because they have nude scenes. *Id.* at 211-12.

In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), motion pictures were recognized as having the protection of the first amendment. *Id.* at 502. In *Burstyn*, the appellant challenged a New York statute that banned motion pictures deemed to be "sacrilegious" as an unconstitutional abridgement of his first and fourteenth amendment rights. *Id.* at 499. In invalidating the statute, the Court held that New York could not justify such a prior restraint on expression, and that such censorship could not be legitimized under the guise of a state's police powers. *Id.* at 502, 505. First amendment rights were thus shown to have considerable import. *See generally* Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422 (1980).

[30] 422 U.S. at 212. Justice Powell noted that this case did not involve a narrowly drawn ordinance. *Id.* at 212 n.9. A logical extension of that statement may be that if such an ordinance were narrow, the ordinance might be constitutional.

[31] *Id.* at 211-12. Generally, though, a state may place "stringent controls on communicative materials available to youths." *Id.* at 212. *See* Ginsberg v. New York, 390 U.S. 629 (1968). The Court stated that Jacksonville could do so only if the ordinance had been well-defined. 422 U.S. at 213. Since the ordinance in question was not "easily susceptible of a narrowing construction," *id.* at 213, the Court held that this justification was infirm. *Id.* at 216.

With reference to the argument that the ordinance was not narrowly drawn, or clearly defined, the Court utilized overbreadth analysis. *Id.* at 215-16. Overbreadth analysis may be applied in two different manners: "as applied" or "on its face." Note, *The Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). Justice Powell used both methods of analysis here, declaring

amendment right of theater owners to show films which had nude scenes.[32]

Although first amendment protection from zoning regulation has not been extended to obscene[33] activites, nude dancing has been recognized as having first amendment protection.[34] This is not to say that the Court has invalidated those regulations pertaining to restrictions on nude dancing; rather, the Court has closely examined the ordinances by balancing an individual's first amendment rights with the municipality's interest in the "quality of life."[35]

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that the ordinance was invalid on its face because it could not be narrowly construed and the state itself had failed to restrict its construction. 422 U.S. at 216. It was void as applied because it either limited the selection of movies or it imposed increased expenses on the people in charge of the theaters. *Id*; *see* notes 97-98 *infra* and accompanying text.

[32] 422 U.S. at 217-18.

[33] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973), wherein the Court announced basic guidelines for the trier of facts in obscenity cases. These guidelines were held to be:

> a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ;'
> b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state laws; and
> c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24. In a companion case to *Miller*, Paris Adult Theatre I v. Slanton, 413 U.S. 49 (1973), the Court applied the *Miller* obscenity test in upholding the validity of a Georgia statute which prohibited the showing of obscene films, even to audiences of consenting and knowledgeable adults. *Id.* at 69. *Cf.* Jenkins v. Georgia, 418 U.S. 153 (1974) (appellant's conviction under Georgia's obscenity statute examined under *Miller's* standards). *See also* Marcus, *supra* note 21, at 27-29.

[34] *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (nude dancing may be entitled to first and fourteenth amendment protections under some circumstances); California v. La Rue, 409 U.S. 109 (1972) (nude dancing not without first amendment protections). In *Doran*, a municipal ordinance prohibiting bar owners from allowing entertainers to appear topless was challenged as violative of the first and fourteenth amendments. 422 U.S. at 924. The appellees had sought a temporary restraining order and a preliminary injunction against the enforcement of the ordinance. *Id.* at 925. The United States District Court granted only the preliminary injunction and the Court of Appeals for the Second Circuit, by a divided vote, affirmed. *Id.* at 925-26.

Justice Rehnquist, writing for the Supreme Court, recognized in dictum that nude dancing could be protected by the first amendment. *Id.* at 932. Specifically, Justice Rehnquist stated: "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. La Rue*, 409 U.S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." *Id.* However, the ordinance in *Doran* was applicable to establishments other than those which the state could control by virtue of the twenty-first amendment and the municipality did not present any compelling state interest which would outweigh the appellees' first amendment guarantees. *Id.* at 932-33. The Court thus upheld the relief granted by the district court. *Id.* at 934.

[35] The "quality of life" interest has been advanced as arguably within the police power of the states. *See* Paris Adult Theater I v. Slanton, 413 U.S. 49, 57-60 (1973). In Young v. American

The "quality of life" argument was espoused in *Young v. American Mini Theatres, Inc.*,[36] in which the challenged ordinance restricted the location of adult movie theaters in the city of Detroit.[37] The respondents alleged that their first and fourteenth amendment rights had been suppressed by that ordinance.[38] The Court was not persuaded by the respondents' arguments that the Detroit ordinance was vague, overbroad, or constituted a prior restraint on protected expression.[39] Nor was the Court supportive of the respondents' allegation that the ordinance's differential treatment of theaters which did and those which did not exhibit sexually explicit movies was in violation of the equal protection clause of the fourteenth amendment.[40] Thus, the Court closely examined[41] the interests of both parties and found that the state had enacted a reasonable and justified restriction when it limited the location of adult movie theaters in Detroit in an attempt to preserve the character of the neighborhood.

It was against this historical background that the case of *Schad v. Borough of Mount Ephraim* was decided. Justice White, writing for

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Mini Theatres, Inc., 427 U.S. 50 (1976), Justice Stevens explained this concept as an "interest [of a municipality] in attempting to preserve the quality of urban life." *Id.* at 71. He concluded that this interest is one that "must be accorded high respect." *Id.*

The Chief Justice was persuaded by that argument in *Schad.* 101 S. Ct. at 2191-92. (Burger, C.J., dissenting). It was his contention that a municipality should be permitted to prohibit activity that is not compatible with its atmosphere of tranquility. *Id.* at 2191 (Burger, C.J., dissenting). *See also* note 86 *infra* and accompanying text.

[36] 427 U.S. 50 (1976).

[37] *Id.* at 54-55. *See* Note, *Municipal Zoning Ordinance May Restrict Location of Adult Motion Picture Theaters*, 16 WASHBURN L.J. 479, 479-81 (1977).

[38] 427 U.S. at 55-60.

[39] *Id.* at 61-63. Generally, a state may not enact legislation that imposes a prior restraint. *See generally* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal board members may not reject play without first seeing it or reading script); Freedman v. Maryland, 380 U.S. 51 (1965) (law as administered which required all films to be submitted to Board for approval held invalid); Thomas v. Collins, 323 U.S. 516 (1945) (statute requiring labor union organizers to file request with Secretary of State before soliciting members held invalid as previous restraint); Cantwell v. Connecticut, 310 U.S. 296 (1940) (act requiring application to secretary, who was empowered to determine if solicitation was religious in nature or not, held invalid as prior restraint); Lovell v. City of Griffen, 303 U.S. 444 (1938) (ordinance requiring written permission from city manager before circulars could be distributed held invalid on its face); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 655 (1955) (instances of prior restraint go before court bearing presumption against constitutional validity). *See also* note 108 *infra* and accompanying text.

[40] 427 U.S. at 63-73. The content of the material was examined, and the state's rationale for placing such a location restriction on adult movie theaters was found to be reasonable and legitimate. *Id.* The Court held that the classification was not in violation of the equal protection clause. *Id.* at 73.

[41] *See* Marcus, *supra* note 21, at 7-8, wherein the author develops his thesis that the Court had not utilized the familiar minimal scrutiny test; rather, it had used a close scrutiny test.

the plurality,[42] determined that the case involved first amendment freedom,[43] and accordingly analyzed the contested ordinance in terms of the overbreadth doctrine.[44] The municipality was thus cast with the burden of justifying the law's constitutionality by showing two elements: a narrowly drawn statute[45] and sufficient justification of the borough's goals.[46]

Initially, Justice White noted that the lower court's interpretation of the ordinance as banning all "live entertainment"[47] was binding on the Supreme Court.[48] He then examined the ramifications and effects of this prohibition against live entertainment in light of Schad's first amendment rights and the municipality's justification for the ban. According to Justice White, the borough's contention that it wished the commercial zone to serve the "immediate needs" of its inhabitants was not adequately supported by evidence.[49] Nor was there any evidence to support Mount Ephraim's claim that it prohibited live entertainment because it wanted to avert potential

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[42] Justice White was joined by Justices Brennan and Marshall. *Id.* at 2179. Justice Blackmun concurred in the judgment. *Id.* at 2187 (Blackmun, J., concurring). Justice Powell concurred in a separate opinion in which he was joined by Justice Stewart. *Id.* at 2188 (Powell, J., concurring). Justice Stevens also wrote a separate opinion concurring in the judgment. *Id.* (Stevens, J., concurring). Chief Justice Burger, joined by Justice Rehnquist, wrote a dissenting opinion. *Id.* at 2191 (Burger, C.J., dissenting).

[43] *Id.* at 2181. The municipality therefore had the burden of justifying the constitutionality of the ordinance. *Id.* at 2188 (Stevens, J., concurring).

[44] *Id.* at 2181. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973), wherein the Court held that "the person making the attack [need not] demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Id.* at 612.

[45] 101 S. Ct. at 2182-83. For a discussion of the overbreadth analysis established by the Court, see notes 94 & 97-98 *infra* and accompanying text.

[46] 101 S. Ct. at 2183. As stated at note 43 *supra*, a state must justify any regulation which allegedly infringes on first amendment rights. Such justification may, for example, be based upon the state's police powers, or reasonable "time, place, and manner" restrictions. 101 S. Ct. at 2182, 2186.

[47] Although there was some initial confusion as to whether entertainment or live entertainment was prohibited, it was concluded that only live entertainment was proscribed by the ordinance. 101 S. Ct. at 2181, 2182 n.6. "Live entertainment" necessarily includes movies, musicals, plays, dance, and dramatic productions. *Id.* at 2182.

[48] *Id.* at 2181. Support for the proposition that a state court's interpretation is binding on the Supreme Court may be found in Village of Schaumberg v. Citizens For a Better Environment, 444 U.S. 620, 625-28 (1980). *See generally* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 493 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cox v. New Hampshire, 312 U.S. 569 (1941).

[49] 101 S. Ct. at 2184-85. Counsel for Mount Ephraim urged that the stores in the commercial district could sell milk or bread to customers who had neglected to buy these items elsewhere. *Id.* at 2185 n.13. The Court was not persuaded by that argument, noting that many other items were in fact sold in the district, and no evidence supported counsel's contention. *Id.* at 2185.

problems[50] associated with such activity. There was also no evidence supporting Mount Ephraim's claim that it prohibited live entertainment in a "reasonable time, place and manner",[51] and there was nothing in the record to show that the borough could proscribe activity because it was available in nearby cities.[52] The plurality thus held that the justifications advanced could not withstand scrutiny.[53]

The lower courts had determined that the reasonable time, place, and manner restriction of *Young*[54] controlled this case. The plurality rejected that finding for several reasons. First, in *Young*, the adult movie theaters were not prohibited by the Detroit ordinance; instead, these theaters were merely dispersed throughout an area.[55] In *Schad*, however, all live entertainment was prohibited in the commercial district.[56] Second, the ordinance presented in *Young* was upheld because reasonable time, place, and manner restrictions were established,[57] but the *Young* Court never suggested that a local government could prohibit all live entertainment in a municipality.[58] Justice White stated that any restrictions on protected first amendment rights must not prohibit all mediums of communication;[59] therefore, Mount Ephraim's contention that its ordinance was a legitimate "time, place and manner" restriction was not upheld.[60] The appellants' convictions were reversed because the municipality had failed to adequately justify the ordinance,[61] and the prohibition had gone far beyond *Young*'s allowable restrictions.

Justice Blackmun concurred in the plurality's opinion, emphasizing two points. His first argument was that if zoning ordinances were challenged on first amendment grounds, a municipality would have

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[50] The contention that such activity would create of traffic and litter problems was not supported by the record. *Id.* at 2185-86. It is interesting to note that the traffic problem has been unconvincingly presented to the Court as justification for an ordinance which infringed upon a petitioner's first amendment rights. *See Erzonznik*, 422 U.S. 205 (1975). Usually, the Court will invalidate an ordinance which has been justified by the state because of potential litter problems. *See* Schneider v. State, 308 U.S. 147, 162 (1939).

[51] 101 S. Ct. at 2186.

[52] *Id.* at 2186-87.

[53] *Id.* at 2186.

[54] *See* text accompanying notes 36-41 *supra.*

[55] 101 S. Ct. at 2184.

[56] *Id.* at 2181.

[57] *Id.* at 2184 n.10. *See also id.* at 2187 (Blackmun, J., concurring); *Young*, 427 U.S. at 54-55.

[58] 101 S. Ct. at 2184, 2186.

[59] *Id.*

[60] *Id.* at 2186.

[61] *Id.* at 2186-87. The case was remanded for further proceedings consistent with the Court's opinion. *Id.* at 2187.

to reasonably justify the basis for the ordinance.[62] The constitutional test to be utilized by the Court in evaluating the validity of a regulation would not be the "minimal scrutiny of a rational relationship test," but would require a more exacting balancing test[63] between the first amendment and the legitimate municipal interests. A municipality would have to support the validity of its ordinance with evidence showing the purpose behind its enactment.[64]

Justice Blackmun rejected the borough's argument that the ordinance was justified because nude dancing was available in nearby areas.[65] Mount Ephraim relied upon this regional-availability argument to support its desire to preserve its own character.[66] But the importance of first amendment guarantees, according to Justice Blackmun, supersedes this community objective.[67]

In a concurring opinion, Justice Powell[68] agreed that the borough did not justify its ban on live entertainment.[69] If all commercial activity had been banned, the borough could have prohibited live entertainment without violating first amendment rights.[70] Further, if the ordinance had stopped all commercial activity except services for the immediate needs of the residents, that regulation would have been upheld against a constitutional challenge "in a narrowly zoned area."[71] In this case, however, the borough had neither excluded all commercial activity nor narrowly defined the zone. Justice Powell therefore concluded that Mount Ephraim had failed to justify the ordinance.[72]

In a separate concurring opinion, Justice Stevens contended that an important question had not been answered in the record.[73]

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[62] *Id.* at 2187 (Blackmun, J., concurring). Justice Blackmun stated that the municipality "must be prepared to articulate, and support, a reasoned and significant basis for its decision." *Id.*

[63] *Id.* Such a balancing test would presumably require close scrutiny. *Id.*

[64] *Id; see* note 62 *supra.*

[65] 101 S. Ct. at 2188 (Blackmun, J., concurring).

[66] *Id.*

[67] *Id.*

[68] *Id.* (Powell, J., concurring).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 2189 (Stevens, J., concurring). Justice Stevens viewed the case in two distinct ways. First, if the case were seen as a community's desire to prohibit nude dancing, the burden of proof would be on the appellants to show that the municipality's ordinance was unconstitutional. *Id.* at 2183 (Stevens, J., concurring). But, if the case involved a first amendment challenge, the municipality would have to show that its ordinance was valid. *Id.* Justice Stevens was not satisfied with either of the two approaches because the borough had not adequately defined the commercial uses permitted in the district. *Id.* at 2188 (Stevens, J., concurring).

Specifically, he noted that what the ordinance purported to prohibit, and what in fact was banned were two separate things.[74] The restriction forbade all commercial uses except those specifically listed;[75] yet, many commercial uses which were permitted were not listed.[76] Justice Stevens also noted that the appellants had been granted an amusement license to show films;[77] it was not until the store permitted live nude dancing that complaints were filed and the municipality took action.[78] The distinction between the adult films and the live nude dancing was not intelligible to Justice Stevens.[79]

The standard to be applied when an ordinance is challenged on first amendment grounds, according to Justice Stevens, is content-neutrality.[80] Application of this standard requires a court to first examine the subject matter of the contested activity.[81] If the first amendment protects the activity or expression, then the state may impose only reasonable restrictions.[82] The inadequacy of the record and the fact that the ordinance was not narrowly defined by Mount Ephraim led Justice Stevens to conclude that the standard of content-neutrality had not been met, and he therefore concurred in the judgment.[83]

The dissenting opinion, written by Chief Justice Burger, emphasized that the lower courts had adopted the correct formulation of the issue.[84] That is, the case involved a zoning question concerning the right of a borough to prohibit nude dancing, not a first amendment right question concerning whether or not live entertainment could be banned.[85] The Chief Justice considered the suburban character of Mount Ephraim itself.[86] He concluded that even if the regulation

[74] *Id.* at 2189-90 (Stevens, J., concurring).

[75] *Id.* at 2189 (Stevens, J., concurring).

[76] *Id.* at 2189-90 (Stevens, J., concurring). For example, a movie theater was located in the commercial district, as well as local bars. *Id.* Apparently, the bars which had live entertainment were permitted to operate because their uses were classified as "nonconforming." *Id.* at 2189 n.4 (Stevens, J., concurring).

[77] *Id.* at 2190 (Stevens, J., concurring). It was never determined whether films were a permitted use. *Id.* But, the adult films shown at Schad's bookstore were permitted. *See* note 6 *supra* and accompanying text.

[78] *See* note 8 *supra* and accompanying text.

[79] 101 S. Ct. at 2190-91 (Stevens, J., concurring).

[80] *Id.* at 2188-91 (Stevens, J., concurring); *see* Police Dep't v. Mosely, 408 U.S. 92 (1972). *See also* note 113 *infra* and accompanying text.

[81] Police Dep't v. Mosely, 408 U.S. 92, 95-96 (1972).

[82] *See* Note, *Content Neutrality*, 28 CASE W. L. REV. 456, 458 (1978).

[83] 101 S. Ct. at 2191 (Stevens, J., concurring). Justice Stevens, though, did not join in the plurality's overbreadth analysis. *Id.*

[84] 101 S. Ct. at 2191 (Burger, C.J., dissenting); *see* text accompanying notes 10-13 *supra.*

[85] 101 S. Ct. at 2191 (Burger, C.J., dissenting).

[86] *Id.* at 2192 (Burger, C.J., dissenting). The Chief Justice described the borough as a "bedroom community." *Id.* at 2191 (Burger, C.J., dissenting).

restricted alleged first amendment guarantees, such a prohibition imposed only a slight infringement on those rights.[87] For that reason, he believed that Mount Ephraim had validly exercised its police powers.[88]

A basic difference between the Court's analysis and that of the dissent was the manner in which each identified the issue. The plurality and those concurring with the holding of *Schad* asserted that first amendment rights were involved.[89] Thus, the borough had the burden of justifying the ordinance by demonstrating that it bore a substantial relationship to the legitimate needs of the community.[90] The dissent viewed the case as one pertaining to the right of a municipality to enact a zoning ordinance.[91] As such, the burden would have been on Schad to prove that the ordinance was constitutionally infirm.[92] The distinction between the two was due in large part to the absence of evidence in the record.[93]

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[87] *Id.* at 2192-93 (Burger, C.J., dissenting). Chief Justice Burger believed that not every form of expression could fall within the ambit of first amendment protection, and that the intrusion here could be upheld if Mount Ephraim or any other municipality had enacted a law prohibiting live nude dancing. *Id.*

[88] *Id.* at 2193 (Burger, C.J., dissenting).

[89] *Id.* at 2179; *id.* at 2187 (Blackmun, J., concurring); *id.* at 2188 (Powell, J., concurring); *id.* (Stevens, J., concurring). Justice Stevens, though, expressed dissatisfaction with viewing the case as one challenging first amendment guarantees. *Id.* at 2188-89 (Stevens, J., concurring). His displeasure was premised on his belief that the record was inadequate and that Mount Ephraim had not applied content-neutral standards to the adult bookstore. *Id.* at 2189 (Stevens, J., concurring).

[90] *Id.* at 2183. A municipality, or the state, can justify the ordinance by demonstrating that it relates to the police powers of the state. Kovacs v. Cooper, 336 U.S. 77, 83 (1949); Schneider v. State, 308 U.S. 147, 160 (1939). To this end, in Village of Belle Terre v. Boraas, 416 U.S. 1, 12 (1974), Justice Marshall in his dissent stated:

> [Where a] zoning ordinance creates a classification which impinges upon fundamental personal rights it can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest. . . . And, once it can be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden.

Id. at 18 (Marshall, J., dissenting).

[91] 101 S. Ct. at 2191 (Burger, C.J., dissenting).

[92] *Id.*; *see, e.g.*, *Euclid*, 272 U.S. at 388, 395; Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962).

[93] The separate opinions evidence the Court's apparent displeasure with the sparcity of information. Chief Justice Burger noted that the concurring opinions "exhibit an understandable discomfort with the idea of denying this small residential enclave the power to keep this kind of show business from its very doorsteps." 101 S. Ct. at 2192 (Burger, C.J., dissenting). Justice Stevens supported the Chief Justice's observation when he stated that if the evidence on the record had been as the Chief Justice perceived it to be, he would have supported the dissenting opinion. *Id.* at 2190 (Stevens, J., concurring).

The overbreadth doctrine which the plurality employed in reversing the convictions is derived from the first amendment[94] and may be used if the activity proscribed could be reached by a more narrowly drawn ordinance.[95] It is traditionally applied if a law extends to an otherwise protected expression.[96] The overbreadth doctrine may be put into practice in two ways—one invalidates a local law on its face,[97] while the other, the "as applied" technique, serves to aid only the party who has challenged the ordinance.[98] The *Schad* Court

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[94] It has been stated that the overbreadth doctrine derives as much from the due process concept as it does from the first amendment. CONSTITUTIONAL LAW, CASES AND MATERIALS 1192 (5th ed. P. Kauper & F. Beytagh, eds. 1980). As previously noted, the overbreadth doctrine is applied when laws extend to otherwise protected activity and when the behavior could be controlled by a more specifically drawn provision. In this case, it is not easy to imagine what type of ordinance could ban live entertainment in a commercial zone.

Regulations banning topless dancing in bars were upheld in California v. La Rue, 409 U.S. 109 (1972). The Supreme Court, however, rested its decision on the fact that the state had the power under the twenty-first amendment to regulate the time, place, and manner in which liquor is sold, *a fortiori* a state could ban the sale of liquor where topless dancing occurred. *Id.* at 117-18. But the *La Rue* Court was careful to point out that California had not prohibited the activity across the board. *Id.* at 118. Recently the Supreme Court upheld a New York ordinance which banned topless entertainment in bars licensed by the state. New York State Liquor Auth. v. Bellanca, 101 S. Ct. 2599 (1981). Thus, it seems clear that ordinances which prohibit topless dancing can withstand scrutiny.

Schad, though, did not involve a liquor establishment; therefore, *La Rue* would not be controlling. Arguably, a *Young*-type locational restriction on live entertainment would be permissible. Additionally, if a municipal ordinance banned all commercial activity, it would probably be upheld on reasoning similar to that of *Euclid*. *See* note 25 *supra* and accompanying text. *See also* 101 S. Ct. at 2188 (Powell, J., concurring). It is also clear that any ordinance which prohibits protected expression must be narrowly drawn. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 932-33 (1975).

[95] *See* note 94 *supra*.

[96] *See* notes 97-98 *infra*.

[97] *See* Note, *supra* note 31, at 852-58. In *Erznoznik*, the Court examined an overbreadth challenge to an ordinance which prohibited, under criminal sanctions, the showing of any films which contained nudity in a drive-in theater. 422 U.S. at 206-07. The Court overturned the convictions, reasoning that as applied to the appellants the ordinance was overbroad. *Id.* at 215. The Court also addressed an "invalid on its face" argument. *Id.* at 215-17. There the Court exercised caution and restraint. If an ordinance could be subjected to a narrowing construction by state courts, then the Court would not invalidate the ordinance on its face. *Id.* *See* notes 27-32 *supra* and accompanying text.

[98] The "as applied" version of the overbreadth doctrine requires a balancing of the governmental interests involved against first amendment rights. Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972). In *Grayned*, the Court examined an anti-picketing ordinance as it had been applied to convict the appellant. *Id.* at 106. The Court reversed the appellant's conviction not on the ground that the ordinance was overbroad but, rather, on the ground that the local law violated the equal protection clause of the fourteenth amendment. *Id.* at 107, 121. Justice Douglas, though, stated that the ordinance was clearly overbroad and unconstitutional. *Id.* at 124 n. * (Douglas, J., dissenting in part). Although the majority did not invalidate the ordinance on first amendment grounds, its explanation of the "as applied" analysis is functionally correct. *Id.* at 114-21. For an excellent and detailed analysis of this doctrine, see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 847-52 (1970).

utilized the "as applied" doctrine in its analysis and was arguably correct.[99] The lack of specificity and clear guidelines in the ordinance enabled Justice White to conclude that the convictions in this case should be reversed.[100]

The failure on the part of the borough to justify the ordinance was noted throughout the plurality opinion.[101] When that opinion is read in conjunction with the concurring opinions, it becomes obvious that Mount Ephraim did not practice what it preached. While one ordinance listed permitted uses in the commercial zones, and another ordinance prohibited all uses not specifically enumerated,[102] many examples of nonpermitted uses were found to exist.[103] It was virtually impossible to determine the reason for this contradiction on the basis of the record.[104]

The borough's rationale for enforcing the ordinance is likewise difficult to ascertain.[105] On the one hand, the municipality allowed Schad to show adult films to his patrons even though films were not on the list of permitted activities and were therefore banned.[106] On the other hand, when live dancers were introduced, another activity not specifically permitted, the borough determined that Schad had violated the ordinance.[107]

Schad challenged the ordinance both as it applied to him and as it applied to others similarly situated.[108] He could also have

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The "as applied" finding does not cause the ordinance to be declared unconstitutional; it invalidates the particular situation presented to the Court. United States v. Raines, 362 U.S. 17, 20-24 (1960). At least one commentator has explored the ramifications of the "as applied" analysis and concluded that this analysis will more likely be applied in expressive conduct cases. Note, *Narrowing the Overbreadth Doctrine?* 45 UNIV. COLO. L. REV. 361, 367 (1974).

[99] *See* Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973). *Cf.* Stromberg v. California, 283 U.S. 359, 369-70 (1931) (statutory provision proscribing display of red flags was invalid because, though not labelled by Court as such, it was overbroad).

[100] 101 S. Ct. at 2187.

[101] *Id.* at 2185, 2186, 2187.

[102] *See* note 8 *supra* and accompanying text.

[103] 101 S. Ct. at 2185 (Stevens, J., concurring). Counsel for the municipality urged that the borough's zoning ordinance was enacted to provide for the "immediate needs" of Mount Ephraim's residents. *Id.* Yet, the Court noted that many commercial enterprises, and indeed the ordinance itself, were for the purpose of supplying residents with regional commercial establishments. *Id.*

[104] It was argued that the municipality permitted a movie theater to conduct business as a nonconforming use. *Id.* at 2188 n.7 (Stevens, J., concurring).

[105] *Id.* at 2189 (Stevens, J., concurring).

[106] *Id.*

[107] *Id.*

[108] The appellants had also alleged that this ordinance violated the due process and equal protection clauses of the fourteenth amendment. Brief for Appellants at 30-31, Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176 (1981). The appellants felt that the distinction drawn by the

challenged the ordinance under the void-for-vagueness doctrine.[109] That doctrine nullifies laws which fail to give adequate notice of the conduct they encompass to people of normal intelligence.[110] The Supreme Court has frequently stated that people are entitled to be informed of what the state commands or forbids.[111] If there is no fair warning, then an ordinance or statute can be held void for vagueness. It may certainly be argued that the facts of *Schad* fall within the ambit of this doctrine. It is not difficult to conjure a host of situations which, if the ordinance were read literally, would be prohibited. For instance, is a theatrical production of *Hamlet* a permitted use? One would have to say "no" if the ordinance prohibits all that it does not specifically permit. Yet it would be difficult to find a justifiable and substantial reason to ban that play. Although this doctrine could have

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municipality between the permissible showing of adult films and the impermissive live nude dancing was arbitrary and unreasonable. *Id.* at 31. Justice White did not address this argument because the first amendment challenge was sufficient to overturn the convictions. 101 S. Ct. at 2181 n.4.

Additionally, the appellants challenged the ordinance as a prior restraint on their first amendment guarantee of free expression. Brief for Appellants, *supra*, at 23-28. The Court did not even address this argument. This allegation was based upon the appellants' contention that in order for them to have live entertainment in their establishment they would have to apply for a variance from Mount Ephraim. *Id.* at 23-24. A brief examination of decisions dealing with prior restraint will demonstrate that the variance requirement here did not constitute a prior restraint.

In Thomas v. Collins, 323 U.S. 516 (1945), the Court held that no one may be forced to obtain a license from the Secretary of State before they are permitted to speak. *Id.* at 542. In *Thomas*, the appellant was required by a Texas statute to apply for this license before he could solicit members for labor unions. *Id.* at 518. Since the state could not justify such a restriction on first amendment rights, the Court concluded that the requirement was a prior restraint and thus the statute was held unconstitutional. *Id.* at 541-42.

Other cases have held that statutes or ordinances imposed a previous restraint upon first amendment freedoms. *See* note 39 *supra*. The assertion that a requisite variance imposes a prior restraint simply lacks any support in precedent. Accordingly, the fact that the Supreme Court did not address this issue was valid.

[109] For a detailed analysis of this doctrine, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[110] The doctrine has also been explained in terms of an ordinance or law which forbids an act in terms so unascertainable that ordinary people may differ as to its application. *See generally* Fiske v. Kansas, 274 U.S. 380 (1927).

[111] In Hynes v. Mayor of Oradell, 432 U.S. 610 (1976), the Court held two ordinances, which together would regulate most door-to-door solicitation, void for vagueness. *Id.* at 611, 620-22. The Court held that the character of the ordinance was not clear and that it did not specify the procedure to be followed by those wishing to comply with its terms. *Id.* at 621-22.

Another application of this doctrine can be found in NAACP v. Button, 371 U.S. 415 (1963). In *Button*, the appellants challenged a Virginia statute which regulated attorneys' conduct. *Id.* at 424. The Court invalidated the statute, holding that strict standards were to be applied when statutory vagueness was found in the area of free expression. *Id.* at 432. Since no compelling state interest could be shown, the statute was deemed to infringe upon the appellant's freedom of expression. *Id.* at 437-38.

been applied, perhaps the Justices chose not to employ it to invalidate the ordinance since the record here was so inadequate.[112]

Another traditional first amendment justification, content-neutrality,[113] was discussed only by Justice Stevens. Even he expressed concern about applying such a test here.[114] This analysis was not applicable in *Schad* for a variety of reasons. Content-neutrality by its very nature suggests that states may impose time, place, and manner restrictions on protected expression based upon legitimate interests.[115] But in the *Schad* case, the content of the statute was not ascertainable because of the inadequate record. Thus, the first step of a "content-neutrality" analysis—whether or not the content of the expression was protected—could not be taken and, therefore, the borough could not justify the local law.[116] There was simply not enough evidence to indicate that the borough had not prohibited protected first amendment activity under the guise of content-neutrality, nor did it appear from the language of the ordinances that such justification existed.[117]

The inadequate factual record thus precluded the *Schad* Court from using any remedy other than an "as applied" analysis. Arguably, since the lower courts had determined that *Schad* was a zoning case, and therefore the burden of proof would have been on those attacking the zoning ordinance, the municipality was not prepared to justify the ordinance. The *Schad* holding, then, alerts other similarly situated municipalities that they will be required to to sustain their burden of proof under a first amendment challenge to their local laws. It is not enough to say that reasons exist for an ordinance which infringes upon a protected freedom. A borough must factually support its interest.

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[112] Both Herndon v. Lowry, 301 U.S. 242, 263 (1937), and Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 532 (1952) (Frankfurter, J., concurring), discuss the Court's role when the record before it is factually insufficient.

[113] *See* notes 80-83 *supra* and accompanying text. In *Young*, 427 U.S. at 69-70, the plurality examined the content of the speech therein and concluded that as applied to the adult movie theaters:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment.

Id. at 70 ("I disapprove of what you say, but I will defend to the death your right to say it." *Id.* at 63 (quoting S. TALLENTYRE, THE FRIENDS OF VOLTAIRE 199 (1907))). Thus it was shown that erotic materials were the subject of less rigorous standards because of their content.

[114] 101 S. Ct. at 2190 (Stevens, J., concurring).

[115] *See Young*, 427 U.S. at 70-73.

[116] Note, *Content Neutrality*, 28 CASE W. L. REV. 456, 458 (1978).

[117] 101 S. Ct. at 2189-91 (Stevens, J., concurring).

In the wake of *Schad*, the power of a municipality to zone remains a vital tool of local government. It is clear now that a borough may not impose substantial restrictions on first amendment activity without fully justifying the restraint. The precedential value of this decision may therefore be limited to the need for a municipality to adequately document its reasons for proscribing otherwise protected activity.

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