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Second Class Speech: The Court's Refinement of Content Regulation: *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981)

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Note

Second Class Speech: The Court's Refinement of Content Regulation

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

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought free from government censorship. The essence of this forbidden censorship is content control.[1]

I. INTRODUCTION

There are two fundamental principles of the first amendment of the United States Constitution.[2] First, government cannot regulate protected speech on the basis of content;[3] second, nonobscene expression is protected.[4] Both of these principles were disregarded by the United States Supreme Court in 1976 when it decided *Young v. American Mini Theatres, Inc.*,[5] and upheld a zoning ordinance which made concentrations of adult theaters unlawful. *Young* thus became the first Supreme Court decision to squarely sanction regulation of protected speech on the basis of content.[6] Until *Young*, the Court had consistently refused to allow

1. Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972).
2. U.S. CONST. amend I. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*
3. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).
4. Cohen v. California, 403 U.S. 15, 19-20 (1971).
5. 427 U.S. 50 (1976). For a discussion of the *Young* decision, see notes 33-39 & accompanying text *infra*.
6. Perhaps United States v. O'Brien, 391 U.S. 367 (1968), in which the Court upheld O'Brien's conviction for burning a draft card in public, can be viewed as Court-sanctioned regulation of speech based on content. *See* note 121 *infra*. This Warren Court decision has since been interpreted as involving a regulation which only incidentally infringed on speech. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 79 (1976) (Powell, J., concurring); *cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-6, at 594-98 (1978) (*O'Brien* was wrongly decided because the Court refused to look at Congressional motive).

   Much of the *O'Brien* rationale was undermined in Spence v. Washington, 418 U.S. 405 (1974), where the Court upheld a defendant's right to display the American flag upside down with a peace symbol on it. In *Spence* the Court

regulation of protected speech based on content.[7] Since *Young*, the Court has become increasingly tolerant of content-based regulations; however, it has never formulated an adequate model with which to apply its content-based doctrine.

Recently, the Supreme Court limited the extent to which states may regulate speech on the basis of content in *Schad v. Borough of Mount Ephraim*,[8] a case which is factually quite similar to *Young* but reaches a contrary result.[9] In *Schad*, the Court attempted to harmonize its new content-based doctrine with traditional first amendment analysis and thereby develop a workable model. However, the model set forth in *Schad* is difficult to apply in view of prior Supreme Court decisions, and an examination of those decisions is necessary to provide a perspective from which to view *Schad* and posit its impact on first amendment adjudication.

This Note will examine the Court's prior decisions regarding the doctrine of content regulation and the insights into that doctrine provided by *Schad*. This analysis will reveal the difficulty in developing a workable first amendment model for permissible content regulation. While the relationship of first amendment rights

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recognized the communicative nature of the defendant's conduct, something it refused to do in *O'Brien*.

7. Speech classified as "unprotected" may be regulated. Such speech includes: "obscenity," Miller v. California, 413 U.S. 15 (1973), and "fighting words," Chaplinksy v. New Hampshire, 315 U.S. 568 (1942). *See* Comment, *Fighting Words Doctrine—Is There a Clear and Present Danger to the Standard?*, 84 DICK. L. REV. 75 (1979) (questions whether "fighting words" remains a viable doctrine). While commercial speech is protected, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the Court has indicated that commercial speech has a subordinate position under the first amendment guarantees. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *See* Roberts, *Toward a General Theory of Commercial Speech and the First Amendment*, 40 OHIO STATE L.J. 115 (1979) (commercial speech is protected in a modified Court doctrine that gives it less protection than noncommercial speech). Commercial speech may be regulated on the basis of content. In Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981), the Court set forth a four-part test to determine the validity of a restriction on commercial speech. It stated:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Id. at 2892.

8. 452 U.S. 61 (1981).

9. Both cases involved zoning ordinances which restricted some types of speech. In *Schad* the zoning ordinance prohibited live entertainment while in *Young* the zoning ordinance required a dispersal of adult theaters. For a discussion of the distinctions made by the *Schad* Court between the case before it and *Young*, see notes 105-17 & accompanying text *infra*.

to local zoning power is beyond the scope of this Note,[10] an understanding of the Court's theoretical first amendment framework can be particularly relevant to zoning in view of the posture of the *Schad* and *Young* cases, which both involved constitutional attacks on city zoning ordinances.

II. CONTENT REGULATION IN PERSPECTIVE

The Supreme Court's development of a doctrine regarding the extent to which states may regulate speech on the basis of content pervaded the 1970s.[11] However, the roots of permissible content regulation can be traced to the 1942 case of *Chaplinsky v. New Hampshire*[12] in which the Court upheld Chaplinsky's conviction under a statute which prohibited addressing "any offensive, derisive or annoying word" to persons in any street or other public place.[13] The Court found that Chaplinsky's statements to a city marshall[14] were "fighting words,"[15] unprotected by the first amendment, and in now famous dictum,[16] stated: "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."[17] The *Chaplinsky* dictum led to a categorization test, under which speech is classified as protected or unprotected based on its content.[18] Under this test, if the content of the speech is protected, the state can only impose reasonable restrictions on the time, place, and manner of speech.[19]

10. The constitutional issues of local zoning power and the first amendment doctrines of overbreadth and time, place, and manner restrictions will not be addressed in this Note. For a good discussion of the overbreadth doctrine, see Note, *First Amendment Vagueness and Overbreadth: Theoretical Revision by the Burger Court*, 31 VAND. L. REV. 609 (1978). For a discussion of zoning and association rights, see L. TRIBE, *supra* note 6, § 15-18, at 974-80.
11. L. TRIBE, *supra* note 6, § 12-18, at 672-74.
12. 315 U.S. 568 (1942).
13. *Id.* at 569.
14. On a city street Chaplinsky had called a city marshall a "God damned racketeer and a damned fascist." *Id.*
15. *Id.* at 573. *See* Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 577 (1980).
16. Cases in which the dictum was cited include: Miller v. California, 413 U.S. 15, 20 (1973); Memoirs v. Massachusetts, 383 U.S. 413, 461 (1966) (White, J., dissenting); Kunz v. New York, 340 U.S. 290, 298 (1951) (Jackson, J., dissenting); Terminiello v. Chicago, 337 U.S. 1, 26 (1949) (Jackson, J., dissenting).
17. 315 U.S. at 571-72.
18. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Terminiello v. Chicago, 337 U.S. 1 (1949). *See also* Goldman, *A Doctrine of Worthier Speech: Young v. American Mini Theatres, Inc.*, 21 ST. LOUIS U. L.J. 281, 282 (1977) (Goldman found the categories of unprotected speech to be "narrowly limited" but not "well defined").
19. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); Kovacs v. Cooper, 336

While the categorization test was frequently replaced in the 1970s with an equal protection analysis,[20] it was recently used in the symbolic speech case of *Cohen v. California*.[21] In *Cohen*, the Court found that a profane slogan on a jacket worn by Cohen in a courtroom was a protected form of communication for content regulation purposes.[22] The Court, therefore, overturned Cohen's conviction under a breach of the peace statute,[23] finding that the statute violated his first amendment free speech rights.[24]

However, the Court ignored the categorization test one year later in the content regulation case of *Police Department v. Mosley*[25] where the Court struck down an ordinance which prohibited all nonlabor picketing within 150 feet of a school. Mosley, a nonlabor picketer who was protesting a school's racial policies, was arrested for violating the ordinance.[26] The Court used an equal protection test[27] to resolve the first amendment issue, concluding that the regulation was not "tailored to a substantial government interest" and "[t]herefore, under the Equal Protection Clause,

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U.S. 77 (1949); Note, *Constitutional Law—First Amendment—Content Neutrality*, 28 CASE W. RES. L. REV. 456 (1978).

20. *See* notes 25-43 & accompanying text *infra*.
21. 403 U.S. 15 (1971).
22. *Id.* at 19. The *Cohen* decision is also important in its recognition of symbolic speech as protected speech. *See* Note, *Cohen v. California: A New Approach to an Old Problem?*, 9 CAL. W.L. REV. 171 (1972). Additionally, it set a precedent for one's right of privacy while in public. *See* Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken to?*, 67 NW. U. L. REV. 153 (1972). *Cohen* has been interpreted as overturning the *Chaplinsky* sensibilities test which protected a person's sensibilities while in public. *See* Goldman, *supra* note 18, at 283-84. *But see* Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L. REV. 283 (*Cohen v. California* shows government cannot be the moral director of public discourse but it does little else).
23. CAL. PENAL CODE § 415 (West 1970) prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."
24. 403 U.S. at 16. The Court set forth the first amendment test, stating: "[I]n our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one of the various well established exceptions . . . to the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Id.* at 24. Since Cohen's speech was protected, the Court used strict scrutiny to conclude that "absent a more particularized and compelling reason" the state could not make the speech a criminal offense. *Id.* at 26.
25. 408 U.S. 92 (1972).
26. *Id.* at 92-93. For a recent application of *Mosley*, see Carey v. Brown, 447 U.S. 455 (1980) (Court found that a statute which prohibited only nonlabor picketing violated 1st and 14th amendments).
27. 408 U.S. at 95. The Court stated that the "crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment," *id.*, of labor and nonlabor picketers.

[would] not stand."[28]

An equal protection analysis was again used a few years later in *Erznoznik v. City of Jacksonville*.[29] Citing to *Mosley* as the proper precedent,[30] the *Erznoznik* Court invalidated a city ordinance which prohibited outdoor movies involving nudity.[31] However, the Court's use of equal protection analysis suggested that the ordinance would have been upheld had the city more narrowly tailored its statute and presented some rationale for distinguishing movies containing nudity from those without nudity.[32] This opened a door to allowing content regulation under a narrowly drawn statute if supported by sufficient justification.

After *Erznoznik* the Court soon found such a regulation in *Young v. American Mini Theatres, Inc.*,[33] where a Detroit zoning ordinance which prohibited concentrations of adult theatres was attacked. In *Young*, a plurality of the Court explicitly rejected the proposition that some protected speech could not be singled out and regulated on the basis of its content.[34] Justice Stevens, writing for the plurality, stated: "[A] line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication."[35] Justice Stevens, departing from prior cases,[36] rationalized such line-drawing by focusing on the social value of the speech, stating:

> [W]hether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve a citizen's right to see "Specified Sexual Activities" exhibited in theatres of our choice.[37]

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28. *Id.* at 102.
29. 422 U.S. 205 (1975). The *Erznoznik* Court did not mention the use of a categorization test but simply stated: "[E]ven a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinction." *Id.* at 215.
30. *Id.*
31. The Jacksonville ordinance prohibited the showing of films containing nudity in a drive-in theater only when the screen was visible from a public street or place. *Id.* at 206-07. Jacksonville contended that the ordinance was designed to protect captive audiences, to protect youths, and for traffic safety. The Court questioned the city's justification for "distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic," *id.* at 215, and found the statute to be overbroad in meeting the city's interests. *Id.* at 208-15.
32. *Id.* at 215 n.13.
33. 427 U.S. 50 (1976).
34. *Id.* at 70.
35. *Id.*
36. The prior cases included: Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Police Dep't v. Mosley, 408 U.S. 92 (1972); Cohen v. California, 403 U.S. 15 (1971).
37. 427 U.S. at 70. For criticisms of this rationale, see Goldman, *supra* note 18, at

Such a formulation placed the speech in *Young* at a lower level than political or philosophical discussion. Justice Stevens also found that the burden on the "second class" speech was minimal by using an alternative means analysis and reasoning that there were alternative theatre sites available.[38] He then upheld the zoning ordinance using equal protection analysis.[39]

Armed with the *Young* opinion, the Supreme Court in *FCC v. Pacifica Foundation*[40] found that the FCC could validly prohibit "indecent" language.[41] A plurality of the Court in *Pacifica* affirmed the *Young* proposition that speech could be regulated based upon its content. It again employed an alternative means test[42] to show the incidental effect on first amendment rights.[43] Together *Pacifica* and *Young* established the Court's recognition of levels of protected speech and the propriety of using an alternative means test to determine the burden on protected speech. Thus, under these cases, if there are alternative means available by which to exercise first amendment rights, the burden on the "second-class" speech is minimal, and it may be subjected to content-based regulation. However, because this view was explicitly embraced by only a plurality of the Court in both decisions, the decisions were of uncertain precedential value.

300-01; Note, *Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech*, 4 HASTINGS CONST. L.Q. 321, 358-59 (1977).

38. 427 U.S. at 71-72 n.35. Justice Stevens referred to the district court finding that " '[t]here are myriad locations in the City of Detroit which must be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights is slight.' " *Id.* (quoting Nortown Theatres, Inc. v. Gribbs, 373 F. Supp. 363, 370 (E.D. Mich. 1974)). *Cf.* Note, *Zoning Content Classifications for Adult Movie Theatres*, 22 LOY. L. REV. 1079 (1976) (questioning whether the Court will adopt an alternative means test as to time and manner).

39. Justice Stevens found that the distinction the ordinance made between adult theaters and other theaters was "justified by the city's interest in preserving the character of its neighborhoods." 427 U.S. at 71.

40. 438 U.S. 726 (1978). In *Pacifica*, a George Carlin monologue tape entitled "Filthy Words" was played on a radio station during an afternoon broadcast.

41. 18 U.S.C. § 1464 (1976) forbids the use of "any obscene, indecent, or profane language by means of radio communications." This statute is part of a federal criminal code covering obscenity.

42. The Court stated: "Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words." 438 U.S. at 750 n.28. The portion of the opinion relating to the alternative means test was joined by a majority of the Court.

43. *Id.* A case decided after *Young*, Linmark Assocs. v. Willingsboro, 431 U.S. 85 (1977), involved a challenge to an ordinance which prohibited the use of "For Sale" signs in order to prevent white flight. The Court struck down the ordinance, distinguishing *Young* as involving a detrimental "secondary effect" on speech while in the case before it the effect was "primary." *Id.* at 94. This distinction was not used in *Pacifica*.

While these cases do not present an analytically clear model, there are at least four principles relevant to content regulation which can be extracted from the Court's opinions: (1) different classes of speech can be regulated based on content,[44] (2) the content regulation issue may be analyzed in terms of the differential treatment between classes of speech[45] using an equal protection analysis which focuses on the relationship of the regulation to the state's legislative goal,[46] (3) an alternative means test may be used to examine the extent of the burden on first amendment rights imposed by the regulation,[47] and (4) the level of judicial scrutiny of the state's justification[48] for the regulation depends on the social value of the speech[49] and the importance of the state's interests.[50]

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44. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976).
45. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (adult movies with specified sexual acts versus movies without specified sexual acts); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (outdoor movies containing nudity versus movies without nudity); Police Dep't v. Mosley, 408 U.S. 92 (1972) (labor versus nonlabor picketing). *See* notes 25-43 & accompanying text *supra*.
46. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976) ("The remaining question is whether a line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods."). *See also* notes 27, 32 & accompanying text *supra*.
47. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 750 n.28 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50, 71-72 n.35 (1976).
48. The level of scrutiny is unsettled. While in Erznoznik v. City of Jacksonville the Court scrutinized each justification forwarded by the City of Jacksonville for its ordinance, 422 U.S. 205, 208-17 (1975), in Young v. American Mini Theatres, Inc., the Court stated: "It is not our function to appraise the wisdom of [the city's] decision to require adult theatres to be separated rather than concentrated in some areas." 427 U.S. 50, 71 (1976).
49. The social value of speech was examined in FCC v. Pacifica Foundation where the Court stated:

> These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[S]uch 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 that may be derived from them is clearly outweighed by the social interest in order and morality."

438 U.S. 726, 746 (1978) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (footnotes omitted). *See also* note 37 & accompanying text *supra*.
50. In Young v. American Mini Theatres, Inc., the Court stated: "[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 427 U.S. 50, 71 (1976). The *Young* Court also made a distinction between viewpoint and subject-based regulations. The Court stated:

> [T]he regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion

Although these principles were affirmed in *Schad*, the Court changed the focus from the social value of the speech to the drafting of acceptable statutes.

III. ANALYSIS

A. The *Schad* Decision

In *Schad*, the defendants operated an adult bookstore in Mount Ephraim, New Jersey, where they installed coin operated mechanisms through which a customer could view a live nude dancer behind a glass panel. The defendants were convicted and fined for violating a city zoning ordinance which did not list their activity as a permitted use.[51] The New Jersey Superior Court affirmed and the New Jersey Supreme Court denied review.[52] The United States Supreme Court overturned their convictions, finding the ordinance an overbroad infringement of first amendment rights.[53]

Justice White, writing for the majority,[54] began his opinion by accepting the New Jersey courts' determination that the Mount

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picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.

Id. at 70. *Cf.* Goldman, *supra* note 18, at 293 (an ordinance cannot "discriminate between adult films which praise Communism and those which ridicule it").

Professor Geoffrey Stone in his article *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978), defined subject-based regulations as "content based restrictions defined in terms of expression about an entire subject, rather than in terms of a particular viewpoint, idea, or item of information." *Id.* at 83. He contended, however, that the Court has failed to recognize such restraints "as a separate class of restraints on speech." *Id.* at 115.

51. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 64 (1981). MOUNT EPHRAIM, N.J., OFFICIAL ZONING ORDINANCE § 99-15B provided:

> B. Principal permitted uses on the land and in buildings.
> (1) 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
> . . . .
> (2) Motels.

Section 99-4 provided: "All uses not expressly permitted in this chapter are prohibited." *Id.* § 99-4. Contrary to the lower court's interpretation in *Schad*, *see* 452 U.S. at 64-65, the Mount Ephraim ordinance could also prohibit nonlive entertainment, *e.g.*, movies.

52. 452 U.S. at 65.

53. *See id.* at 74-77.

54. Justice White was joined in his opinion by Justices Marshall, Brennan, Powell, Stewart, and Blackmun. Justice Stevens filed a separate opinion concur-

Ephraim ordinance excluded all "live entertainment" in the Borough.[55] With this premise in hand, Justice White approached the case by focusing on the right infringed rather than the zoning power exercised. This approach placed *Schad* in the first amendment sphere involving a regulation based on content.[56]

Given this first amendment posture, Justice White identified the speech infringed as live entertainment, including nude dancing.[57] With the infringement identified, he set up a middle tier equal protection test,[58] stating: "[W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest."[59] Mount Ephraim asserted that the ordinance served its interests in helping create a commercial area "cater[ing] only to the 'immediate needs' of its residents" and in avoiding problems "such as parking, trash, police protection, and medical facilities."[60] Justice White found

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ring in the judgment. Justice Burger, joined by Justice Rehnquist, dissented. *See* note 63 *infra*.

55. 452 U.S. at 65. The Court indicated that the ordinance might exclude only live entertainment in commercial establishments, *id.* at 66 n.5, but that its decision would be similar if the ordinance excluded only the nude dancing involved in the case. *See id.* at 73-74 n.15. Some live entertainment was permitted under the ordinance as a nonconforming use, *id.* at 64 n.3; the Court indicated that this undermined Mount Ephraim's case. *Id.* at 73 n.14.

Various interpretations of what the ordinance banned seemed to bother the Court. *Id.* at 67 n.6. The Court indicated that it would have reached the same result if the ordinance were interpreted to ban all entertainment. *Id.* at 72 n.12. Given this ambiguity, the Court was probably more likely to use the overbreadth doctrine. *See* note 56 & accompanying text *infra*.

56. The first amendment focus of the case is also demonstrated by Justice White's application of the traditional first amendment overbreadth doctrine. 452 U.S. at 66. This doctrine provides that a party may challenge the validity of a law on overbreadth and vagueness grounds as the law applies to others. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); Gooding v. Wilson, 405 U.S. 518 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971). In *Schad*, Justice White stated: "Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own." 452 U.S. at 66. This is commonly called the *Thornhill* doctrine from Thornhill v. Alabama, 310 U.S. 88 (1940). Justice White did not mention the possible use of Broadrick v. Oklahoma, 413 U.S. 601 (1973), to prevent the application of the overbreadth doctrine. *Broadrick* does not allow overbreadth challenges to statutes on the basis of how the statute affects third parties, particularly where conduct is involved, unless the overbreadth is "real" and "substantial" and the statute is not subject to a narrowing construction. *Id.* at 615-16. *See* Note, *supra* note 10.

57. 452 U.S. at 65-66.

58. This middle tier test has been used to review classifications based on gender, Reed v. Reed, 404 U.S. 71 (1971), and illegitimacy, Lalli v. Lalli, 439 U.S. 259 (1978).

59. 452 U.S. at 68.

60. *Id.* at 72-73.

the ordinance to be overbroad in relation to the governmental interests it purportedly served.[61] He reversed the New Jersey courts,[62] thereby overturning the appellants' convictions.[63]

B. Why Protect the Speech?

The initial questions in analyzing first amendment cases are: (1) what is the expression being protected, and (2) why should it be protected? The *Schad* holding was based on the ordinance's exclusion of live entertainment. However, the Court, in dictum, indicated that it could have ranged from "all entertainment"[64] to only "nude dancing."[65] The question thus raised is why these forms of speech should be included under a first amendment umbrella.

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61. *Id.* at 72-76. Justice White found that the Borough's justifications were not supported by evidence showing how they were furthered by excluding only live entertainment. *Id.* at 73-74.

62. *Id.* at 77. The Camden County Court refused to view *Schad* as a first amendment case. The county court contended that the case involved only a zoning ordinance. *Id.* at 64.

63. *Id.* at 77. Justice Blackmun concurred with Justice White's opinion, but separately emphasized that the appropriate test, while more than rational basis, should not be unsurmountable when zoning infringes on the first amendment. He added that *Schad* should not be viewed as espousing a "reasonable access" doctrine to be used in reviewing regulations. *Id.* at 78-79.

Justices Powell and Stewart also concurred with Justice White's opinion, but felt that the focus of *Schad* should be on drafting. They contended that in some instances zoning can be used legitimately to exclude all commercial establishments or limit commercial establishments to essential services. *Id.* at 79.

Justice Stevens did not join Justice White's opinion but concurred in the judgment. He believed that the whole case turned on how the burden of persuasion was allocated because he stated: "[T]he record is opaque . . . ." *Id.* at 83. He faulted Mount Ephraim for this and therefore believed that it should shoulder the burden of showing an adverse impact. Had Mount Ephraim showed that this use introduced a "cacophony into a tranquil setting," *id.*, he would have upheld the ordinance "even if the live nude dancing is a form of expressive activity protected by the First Amendment." *Id.*

Chief Justice Burger, joined by Justice Rehnquist, dissented. They framed the issue in terms of "the right of a small community to ban an activity incompatible with a quiet, residential atmosphere." *Id.* at 85. They contended that the overbreadth doctrine was misused by the majority in finding that the right asserted encompassed "live entertainment" when the real right asserted was "nude dancing." *Id.* at 86. They believed that protecting such expression "trivializes and demeans" the first amendment. *Id.* at 88. Even accepting the proposition that the expression was protected, they could not ascertain how *Schad* could be distinguished from *Young*. They therefore would have found the ordinance to be constitutional on its face and as applied. *Id.* at 86-88.

64. *Id.* at 72 n.12. *See* note 55 *supra*.

65. 452 U.S. at 73-74 n.15. The Court stated: "Even if Mount Ephraim might validly place restrictions on certain forms of live nude dancing under a narrowly drawn ordinance, this would not justify the exclusion of all live entertain-

The reasons advanced by first amendment theorists for protecting various forms of speech range from protecting speech as an end-in-itself[66] to protecting only speech necessary for self-government.[67] One popular theory is a "general" theory under which the value of freedom of expression is viewed from the standpoint of its potential to advance individual self-fulfillment.[68] This value is integrated with other first amendment values, such as advancement of knowledge, discovery of truth, participation in decision-making by all members of society, and maintenance of a proper balance between stability and change.[69]

On the other hand, under a strict political value theory, the value of freedom of expression is viewed as limited to expression necessary for self-government.[70] At first glance, live entertainment and nude dancing may not be protected under the political value theory, however, they could easily be viewed as a means toward individual self-fulfillment as a sought-after form of entertainment for some people. Nevertheless, there is language in *Schad* which supports both the general and political value theories as the rationale for protecting the speech involved. The Court grouped the activity regulated in *Schad* with political and ideological speech stating that all were protected.[71] Arguably, the Court rec-

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ment or, insofar as this record reveals, even the nude dancing involved in this case." *Id.* at 73-74 n.15. *See* note 55 *supra*.

66. *See* Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978). Baker used a liberty model of the first amendment and found: "Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual. The liberty theory justifies protection because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with legitimate claims of others." *Id.* at 966.

Similarly, Professor Tribe questioned whether freedom of speech is "in part also an end in itself, an expression of the sort of society we wish to become and the sort of persons we wish to be." TRIBE, *supra* note 6, § 12-1, at 576.

67. *See* A. MEIKLEJOHN, POLITICAL FREEDOM (1965); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (only explicit and predominantly political speech should have preference to other freedoms).

68. T. EMERSON, THE SYSTEM OF FREE EXPRESSION (1970); Karst, *Equality as a Central Principle of the First Amendment*, 43 U. CHI. L. REV. 20, 23 (1975) (one purpose of the first amendment is to promote a sense of individual self-worth).

69. T. EMERSON, *supra* note 68, at 6-7 (values are integrated set of independent values).

70. A. MEIKLEJOHN, *supra* note 67. Meiklejohn's model expanded as he included within it communication necessary for voter objective judgment. He therefore found that writings ranging from documents to works of art, discussion of opposing ideas, and the sovereignty of the individual in voting were necessary for voter objective judgment. *Id.* at 117-18.

71. 452 U.S. at 65-66.

ognized that live entertainment, while not directly political, often carries political views. Although this suggests a political value analysis, the Court's premise that the ordinance was suspect because it broadly limited communicative activity[72] supports a general theory self-fulfillment approach.

Perhaps the most compelling and relevant theory in the context of content regulation is the negative value theory.[73] Under this theory, the value of freedom of speech is viewed as a restriction on government suppression. Thus, expression such as "live entertainment" would be protected because

> once we allow the government any power to restrict the freedom of speech, we may have taken a path which is a 'slippery slope.' Line-drawing in such an abstract area is always difficult and especially so when a government's natural inclination is moving the line towards more suppression of criticism and unpopular ideas. If one could distinguish between illegitimate and legitimate speech, it may still be necessary to protect all speech in order to afford real protection for legitimate speech.[74]

The Court found this view particularly important in *Cohen v. California*.[75] In *Cohen*, the Court, focusing on the bounds of the California statute,[76] stated: "[I]t is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[77] Similarly, the *Schad* Court, fearing the boundless nature of the Mount Ephraim ordinance, used the first amendment overbreadth doctrine to prevent deterrence of protected activities.[78]

While there is support in the *Schad* opinion for each of the three theories, the Court did not expressly endorse any one. Whichever view the Court embraced, it did not use the *Chaplinsky* approach,[79] used in *FCC v. Pacifica Foundation*,[80] that expression only has "social value as a step to truth."[81] Such a theoretical base would have the unfortunate effect of greatly increasing the Court's scope of permissible content regulation because most speech is

72. *Id.* at 71.
73. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 718 (1978).
74. *Id.* *See* Stone, *supra* note 50, at 101-04. (content-based restrictions distort the workings of the "marketplace of ideas" and violate the principle of government impartiality).
75. 403 U.S. 15 (1971). *See* notes 21-24 & accompanying text *supra*.
76. *See* note 23 & accompanying text *supra*.
77. 403 U.S. at 25.
78. 452 U.S. at 66.
79. *See* notes 12-17, 49 & accompanying text *supra*.
80. 438 U.S. 726 (1978).
81. *Id.* at 746. *See* note 49 *supra*.

not intent on finding "truth."[82]

Nor did *Schad* carry the same tenor as *Young v. American Mini Theatres, Inc.*,[83] which used a political type model for finding value in speech for which we would "march our sons and daughters off to war."[84] The Court in *Schad* found value in preserving live entertainment and thereby recognized that speech has value as expressed through different mediums whether the medium is oratory, *e.g.*, traditional political speech, or nude dancing.

C. What Level of Protection for the Speech?

After the Court decided that the speech involved in *Schad* was "worthy" of first amendment protection, it determined the level of protection by applying a middle tier equal protection test.[85] This raises the question of how the Court applied the model it explicitly set forth.

A traditional first amendment analysis advocated by Professor Tribe would require the Court to divide speech regulations into two categories: (1) those aimed at communicative impact, *i.e.*, regulation of the viewpoint expressed; and (2) those aimed at noncommunicative impact, *i.e.*, regulation for a government interest distinct from the viewpoint.[86] Professor Tribe believes that the type of speech involved in the first category should be given full traditional first amendment protection based on the rationale that government should not restrict expression because of the ideas expressed.[87] With respect to speech involved in the second category, he believes that the Court should apply a balancing model on a

82. *Cf.* Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 443-45 (1980) (*Chaplinsky* exclusion approach is incompatible with modern first amendment doctrine); Gard, *supra* note 15, at 577. (*Chaplinsky* rationale should not be used to justify censorship of offensive words).

83. 427 U.S. 50 (1976). *See* notes 33-39 & accompanying text *supra*.

84. Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976).

85. *See* notes 58-59 & accompanying text *supra*.

86. L. TRIBE, *supra* note 6, § 12.2, at 580-82. Tribe defined communicative impact regulations as those by which the government seeks to control expression because of the viewpoint that is expressed. Noncommunicative impact regulations encompass government control of actions "because of the effect produced by awareness of the information such actions impart." *Id.* at 580. For communicative impact cases, see: Cohen v. California, 403 U.S. 15 (1971) (defendant arrested for the statement on his jacket); Street v. New York, 394 U.S. 576 (1969) (defendant arrested for burning an American flag); DeJonge v. Oregon, 299 U.S. 353 (1937) (defendant arrested for attending a meeting). For noncommunicative impact cases, see: Grayned v. City of Rockford, 408 U.S. 104 (1972) (ordinance banning noisy demonstrations upheld); Kovacs v. Cooper, 336 U.S. 77 (1949) (ordinance banning loudspeakers upheld).

87. L. TRIBE, *supra* note 6, § 12.2, at 582. The regulation is unconstitutional unless the government shows a clear and present danger or the speech falls within an unprotected category. This is based on the negative value concept. *See*

case-by-case basis using unifying principles from past decisions because the restriction is not for the ideas expressed but for another government interest.[88] The *Schad* Court did not explicitly apply this traditional analysis; instead it recognized that a protected liberty was infringed[89] without sufficient justification.[90] However, it can be argued that the Court implicitly used the traditional analysis. When the Court examined Mount Ephraim's justifications for the ordinance it looked at what the ordinance was designed to prevent. After finding no sufficient justification for the ordinance, the Court implicitly determined that the ordinance was aimed at communicative impact. Thus, the Court may have believed that the ordinance was really aimed at stopping the expression itself and not devised for the interests asserted.

A self-proclaimed revisionist has criticized the traditional analysis,[91] believing that a middle tier equal protection test should be used in reviewing regulations that discriminate on the basis of content.[92] If a regulation survives that test it then should be subject to a balancing test based on the *Cohen* principles.[93] This is very close to the test the Court set forth in *Schad* when it articulated a middle tier test and then claimed that the substantiality of the state's

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Brandenburg v. Ohio, 395 U.S. 444 (1969) (current clear and present danger doctrine).

88. L. TRIBE, *supra* note 6, § 12.2, at 582. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Grayned v. City of Rockford, 408 U.S. 104 (1972); Schneider v. State, 308 U.S. 147 (1939).

89. 452 U.S. 61, 68 (1981).

90. *Id.* at 72.

91. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 747 (1980). Farber contended: "[O]ne flaw in the communicative impact approach is its broad definition of content regulation. Under that definition, a regulation that affects all speech equally can still be considered a form of content regulation if the justification for the regulation relates to communicative impact." *Id.*

92. *Id.* at 737-38, 747-48. Farber believes that the equal protection tests used in illegitimacy and gender classification are appropriate to scrutinize regulations that discriminate on the basis of content. He gave four reasons to use this analysis: (1) it is less restrictive on future legislative efforts; (2) it serves to protect speech by making regulations take a broader form which the public will be unwilling to tolerate; (3) it is easier to apply than a balancing test; (4) it can reduce "chill" effects because it could invalidate an ordinance on its face. *Id.* at 748 n.100.

93. *Id.* at 748. Farber set forth three principles to use in balancing: (1) a consideration of only those justifications upon which the statute clearly focuses; (2) a reluctance to add to the list of acceptable justifications for content regulation; and (3) balancing with an awareness and sensitivity to first amendment values and precedent. *Id.*

Professor Farber ignored the Court's ability to make the necessary distinctions in first amendment areas. He also ignored the chilling effect on first amendment rights caused by the use of a loose equal protection test because of its lack of guidance to courts and legislators.

interest should be judged by the *Schneider v. State*[94] analysis, under which the infringement of first amendment rights is balanced against reasons supporting the infringement.[95] From this premise the Court proceeded to analyze the relationship of Mount Ephraim's justifications to the ordinance. However, because the ordinance was not drawn narrowly enough to meet Mount Ephraim's interests, the Court did not have to balance the competing interests. Thus, it did not develop the contours of the balancing test beyond citing *Schneider*.[96]

To support its use of the middle tier test the Court cited two zoning cases[97] and one first amendment case.[98] Relying on these cases, the Court indicated that *Schad* involved more than zoning and that more than a minimal burden was placed on first amendment rights by the Mount Ephraim ordinance.

The Court applied the middle tier test by scrutinizing the distinction the Mount Ephraim ordinance made between the classes of commercial uses which were expressly permitted and live entertainment which was not.[99] The Court determined that although some forms of live entertainment could create problems not asso-

94. 308 U.S. 147 (1939). In *Schneider*, the Court used a balancing test to hold invalid an ordinance which required a permit to canvas a public street with leaflets. The Court stated: "[T]he delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the [first amendment] rights." *Id.* at 161.

95. 452 U.S. at 68-70.

96. *Id.*

97. *Id.* at 68-69 n.7. In the first cited zoning case, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the Court, using a rational basis test, upheld a zoning ordinance which restricted land use to one-family dwellings and defined family to include related individuals or two unrelated individuals. In his dissent, Justice Marshall called for applying a strict scrutiny test because the ordinance restricted the rights of association and privacy. *Id.* at 13 (Marshall, J., dissenting). The *Belle Terre* dissent became relevant in the second-cited case, Moore v. City of East Cleveland, 431 U.S. 444 (1977), in which the Court struck down an ordinance which limited occupancy of dwellings to a single family which was defined so as to restrict even some related individuals from living with each other. The *Moore* case indicates that when a protected liberty (the institution of the family) is involved, more than a rational basis test is applied.

98. 452 U.S. at 68-69 n.7. The first amendment case cited, United States v. O'Brien, 391 U.S. 367 (1968), provides a test to be used when freedom of speech is only incidentally affected. *See* note 121 & accompanying text *infra*. In *O'Brien*, the Court upheld a statute forbidding the burning of one's draft card. *See* note 6 *supra*. The defendant in *Schad* cited *O'Brien* as supplying the appropriate test. Brief of Appellant at 18-23, Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

99. 452 U.S. at 73-74. *See generally* Karst, *supra* note 68, at 20 (equality of liberty is at the heart of the first amendment when content regulation is involved); note 45 & accompanying text *supra*.

ciated with commercial uses permitted under the ordinance, the ordinance was not narrowly drawn to respond to whatever those problems might be.[100] By focusing the middle tier test on the tailoring of the statute to the Borough's interests, the Court never had to judge "the substantiality of the governmental interests."[101]

The Court's use of the middle tier test and its focus on the ordinance's breadth present problems for legislators and courts in determining the scope of permissible content regulation and the protection which must be accorded to first amendment rights. The main problem is in determining the degree of scrutiny a court must apply to government justifications for regulations of different types of speech. In *Schad*, the Court did not blindly accept the Borough's justifications for the ordinance but instead questioned their applicability. This suggests that a greater level of scrutiny is required than the minimal level of scrutiny in *Young* where the Court accepted without question the city's justification for dispersing adult theatres.[102]

A second problem arises in determining how substantial the government interest must be to uphold a regulation which is narrowly tailored to serve the government interest. This apparently may vary depending on the content of the speech.[103]

Finally, the Court's focusing of a middle tier test on the tailoring of a regulation to the state's interests may jeopardize first amendment rights. Under such an approach, resolution of first amendment issues will depend upon how statutes or ordinances are drafted instead of the importance of freedom of speech itself. Hopefully, such an approach will not lead lawmakers to draft more comprehensive statutes or ordinances which might avoid the problem of unjustifiable distinctions between classes of regulated

100. 452 U.S. at 73-74.

101. *Id.* at 70.

102. *See* notes 113-17 & accompanying text *infra*; note 48 *supra*.

103. *See* notes 48-50 & accompanying text *supra*; Goldman, *supra* note 18, at 301-07. Professor Goldman saw problems ahead for the Court if it adhered to the middle tier equal protection test used in *Young* and in other content-based regulation cases. He questioned how the Court would rank levels of speech, the state's interests, and "the cause and effect relationship between the speech regulated and the asserted evil the state is seeking to avoid." *Id.* at 301. He acknowledged that while there were problems with the categorical approach, at least it provided ease of application and guidance to legislators. *Id.* at 306. *But see* Karst, *supra* note 68, at 66-67. Professor Karst cited four benefits of equal protection analysis: (1) it protects first amendment values without attacking state interests; (2) a state can re-tailor its statute to meet its interests; (3) it encourages an interventionist Court; and (4) equal treatment has emotional appeal to both justices and to the public. *See also* note 92 *supra*.

speech.[104]

D. Distinguishing *Young*

To determine what *Schad* portends for the future, one must examine the Court's reasoning in distinguishing *Young v. American Mini Theatres, Inc.*[105] from *Schad*. The Court found *Young* distinguishable because: (1) the *Young* ordinance placed a minimal burden on first amendment rights, and (2) the City of Detroit in *Young* presented evidence which justified the regulation's burden on first amendment interests.[106] These distinctions, however, appear to be more of an implicit ranking of speech content than real distinctions, since each distinction is either irrelevant or superficial.

1. Burden on First Amendment Rights

The Court contended that *Young* placed only a minimal burden on first amendment rights as compared to *Schad* because in *Young* the ordinance merely dispersed adult entertainment, while in *Schad*, the ordinance totally prohibited all live entertainment. Phrasing the distinction in this fashion makes the controlling factor the scope of the ordinance and not its real effect on first amendment rights.[107] Seemingly, this distinction would allow a governmental body to burden first amendment rights if its jurisdiction were broad enough. As the majority in *Schad* noted:

> [The Borough's] position suggests the argument that if there were county-wide zoning, it would be quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential

104. This is illustrated in *Schad* where the Court stated: "Mount Ephraim asserts that it could have chosen to eliminate all commercial uses within its boundaries. Yet we must assess the exclusion of live entertainment in light of the commercial uses Mount Ephraim allows, not in light of what the Borough might have done." 452 U.S. at 75.

105. 427 U.S. 50 (1976). *See* notes 7-9 & accompanying text *supra*.

106. 452 U.S. at 71-72. The Court stated:

> [I]t was emphasized in that case [*Young*] that the evidence presented to the Detroit Common Council indicated that the concentration of adult movie theatres in limited areas led to deterioration of surrounding neighborhoods, and it was concluded that the city had justified the *incidental burden* on First Amendment interests resulting from merely dispersing, but not excluding, adult theaters.
>
> In this case, however, Mount Ephraim has not adequately justified its *substantial restriction* of protected activity.

Id. (footnotes omitted) (emphasis added).

107. For example, while the Detroit ordinance dispersed adult theaters, in a city the size of Detroit this could have practically eliminated adult theaters which would not have a feasible place to relocate. In Mount Ephraim, where potential live entertainment was totally excluded, the ordinance might have only eliminated very few prospective business ventures.

> communities, such as the Borough of Mount Ephraim. This may very well be true, but the Borough cannot avail itself of that argument in this case.[108]

This apparently permissible distinction based on the type of zoning involved has no substantive relation to first amendment rights. In reality it is a mere factual distinction which the Court should not rely upon in the future.[109]

It could be argued that a more severe burden on first amendment rights was effected in *Schad* because the ordinance prohibited all live entertainment while the *Young* ordinance was restricted to nonobscene adult entertainment with specified sexual acts.[110] However this is a questionable distinction in view of the Court's dictum that it would have decided similarly had the Mount Ephraim ordinance only prohibited the nude dancing involved in the case.[111] Additionally, this distinction limits the *Young* decision to statutes which specify sexual acts for adult entertainment.[112] Such dividing of nonobscene nudity into grades would seem to be a task the Court would not wisely accept because of the burden it would place on the Court's time and the impossibility of making relevant distinctions in this area.

2. *Supporting Evidence*

The Court also distinguished *Young* from *Schad* because, in *Young*, there were findings by the Detroit Common Council[113] which supported Detroit's justification for the ordinance. The *Young* Court did not scrutinize these findings but accepted them at face value.[114] In contrast, in *Schad*, the Borough of Mount Ephraim did not have evidence to support its justifications for the

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108. 452 U.S. at 76.

109. This factual distinction has its roots in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), where the Court used an alternative means test with respect to the place of exercising freedom of expression to show the limited burden on first amendment rights. *See* notes 38, 43 & accompanying text *supra*.

110. This distinction can be seen as implicit in the *Schad* opinion given the emphasis on the breadth of the Mount Ephraim ordinance. The Detroit ordinance in *Young* enumerated the sexual acts that would classify a theatre as "adult." 427 U.S. at 53 n.4.

111. 452 U.S. at 73-74 n.15. *See* note 65 & accompanying text *supra*.

112. In *Young*, Justice Powell distinguished the *Erznoznik* majority opinion (which he authored) by saying that the Jacksonville ordinance was not an incidental restriction on the first amendment, as it was overbroad in prohibiting the "showing of any nudity, however innocent or educational." 427 U.S. at 83 (Powell, J., concurring).

113. 427 U.S. at 54-55. Detroit's reason for the ordinance was to "preserve the quality of urban life"; the Court felt this was entitled to great respect. *Id.* at 71. *See* note 50 & accompanying text *supra*.

114. 427 U.S. at 71. *See* note 48 *supra*; *cf.* Goldman, *supra* note 18, at 286 (lack of

ordinance; the Court did not accept the Borough's justifications for its regulation but closely scrutinized them.[115] Thus perhaps the real distinction between *Young* and *Schad* was not the evidence but the degree of scrutiny the Court applied.[116] This difference in scrutiny could be related to the distinction the Court made between the extent each ordinance burdened first amendment rights. As discussed above, this distinction has little substance.[117] In using such surface distinctions, however, the Court must have implicitly ranked the speech in *Young* at a lower level than the speech in *Schad*, thereby according each a different level of judicial scrutiny.

IV. *SCHAD*'S CONTRIBUTION TO THE DOCTRINE OF CONTENT REGULATION

The *Schad* Court refined the developing content regulation doctrine by: (1) articulating a middle tier equal protection test to be employed in analyzing regulations of speech based on content,[118] and (2) changing the focus from the social value of speech to the drafting of acceptable statutes.[119] However, the extent to which the latter effects a genuine refinement is clouded by the Court's implicit changing of the level of scrutiny given to a regulation based on its view of the value of the speech involved.[120]

Additionally, *Schad* reaffirmed the Court's use of an alternative means test to judge the impact of a regulation on first amendment rights. Further *Schad* is important because the Court did not use the *O'Brien* test[121] used in *Young* by Justice Powell[122] and subse-

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scrutiny typifies open balancing when the government-stated objectives are accepted at face value).

115. *See* 452 U.S. at 72-74; notes 60-61 & accompanying text *supra*.
116. *See generally* note 103 & accompanying text *supra*.
117. This relates to the distinction between nudity and adult entertainment with specified sexual acts in ranking the importance of the speech affected. It also relates to the distinction between total exclusion zoning and dispersal zoning. *See* notes 107-12 & accompanying text *supra*.
118. *See* notes 58-59 & accompanying text *supra*.
119. *See* notes 99-101 & accompanying text *supra*.
120. This was demonstrated by the Court's distinguishing *Young* from *Schad*. *See* notes 113-17 & accompanying text *supra*.
121. United States v. O'Brien, 391 U.S. 367 (1968). *O'Brien* set forth four requirements to be met to uphold a regulation that burdened first amendment rights:

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

Id. at 377. *See* notes 6, 98 *supra*.
122. Young v. American Mini Theatres, Inc., 427 U.S. 50, 79-82 (1976) (Powell, J., concurring).

quently used by other courts as the proper test for cases of content regulation.[123]

Schad will thus have an impact on judicial review of regulations based on the content of speech. It provides the courts with a more certain test to apply. Instead of questioning whether to apply the *Young* plurality opinion[124] or the *O'Brien* test, *Schad* sets forth a majority decision which clearly calls for a middle tier equal protection test.[125] Nevertheless, *Schad* does little to clarify the permissible scope of regulations based on the content of speech.

Schad will also have an impact on judicial review of zoning regulations, particularly those used to eliminate adult entertainment establishments. If courts follow the distinctions made by the *Schad* Court between the *Young* ordinance and that in *Schad*, they will examine the burden an ordinance places on first amendment rights by focusing on the scope of the ordinance.[126] This may lead zoning board authorities to encompass larger areas thus enabling them to exclude adult entertainment in certain areas under the *Young* dispersal standard. In the areas of both speech regulation standards and zoning, legislators will be forced to sharpen their skills in drafting regulations, while courts will have to sharpen their skills in scrutinizing them.

V. CONCLUSION

Court acceptance of a doctrine which allows regulation of protected speech based on its content is troubling for persons concerned with the degradation of first amendment rights. Justices Stevens, Rehnquist, Burger, and White explicitly have accepted the content regulation concept,[127] while Justices Brennan, Mar-

123. *E.g.*, Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) (licensing adult entertainment); Marco Lounge, Inc. v. City of Federal Heights, — Colo. —, 625 P.2d 982 (1981) (zoning live nude entertainment).

124. The *Young* standard, speech for which we "would march our sons and daughters off to war." 427 U.S. at 70 (Stevens, J., plurality opinion), is a difficult one to apply. *See* note 37 & accompanying text *supra*.

125. The proper application of the test, however, is unclear. *See* notes 102-03 & accompanying text *supra*.

126. *See* Kacar, Inc. v. Zoning Hearing Bd., 432 A.2d 310 (Pa. Commw. Ct. 1981). The Pennsylvania Court in *Kacar* indicated that *Schad* was distinguished from *Young* based on the burden on first amendment rights effected by a total exclusion of the use involved. *Id.* at 316 n.8.

Schad also could increase the amount of evidence necessary to sustain a content-based regulation. *See* notes 113-17 & accompanying text *supra*.

127. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (Stevens, J., plurality opinion). *See* notes 33-39 & accompanying text *supra*.

shall, Stewart, and Blackmun explicitly have rejected it.[128] Justice Powell has been the fragile swing vote on content regulation issues. Justice Powell has accepted the concept of content regulation only if the impact on first amendment rights is incidental,[129] otherwise he has explicitly rejected it.[130] This balance in the Supreme Court can now be subject to change with the retirement of Justice Stewart and his replacement by Justice O'Connor. Depending on Justice O'Connor's view of content regulation, the balance in the Supreme Court can either be restored, or, in the alternative, content regulation can become an acceptable doctrine for a majority of the Court.[131]

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128. Carey v. Brown, 447 U.S. 455, 471-72 (1980) (Stewart, J., concurring); FCC v. Pacifica Foundation, 438 U.S. 726, 762-77 (1978) (Brennan, J., dissenting). Young v. American Mini Theatres, Inc., 427 U.S. 50, 88-96 (Blackmun, J., dissenting); *id.* at 84-88 (Stewart, J., dissenting).

129. Young v. American Mini Theatres, Inc., 427 U.S. 50, 79-82 (1976) (Powell, J., concurring).

130. FCC v. Pacifica Foundation, 438 U.S. 726, 761-62 (Powell, J., concurring).

131. In Widmar v. Vincent, 102 S. Ct. 296 (1981), a university regulation prohibiting use of university facilities for religious groups was found to be an unconstitutional content-based regulation. The Court struck down the ordinance using a strict scrutiny equal protection test. Interests in religious freedom and association may have been the reason for the increased scrutiny. All the Justices joined the majority opinion except Justice Stevens who concurred in the judgment and Justice White who dissented.