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Equal Protection and the First Amendment: Zoning Away Skid Row

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A recent United States Supreme Court decision upheld a Detroit zoning ordinance on equal protection grounds even though the ordinance regulated free speech. The article examines the traditional equal protection analyses and the relationship between the first amendment and equal protection clause. Although he agrees with the Court's decision, the author is critical of the Court's failure to explicitly delineate its standards of review in equal protection cases.

Operators of two "adult" motion picture theatres sued in federal district court[1] for enforcement of their right to establish "adult" theatres in certain areas of Detroit where a zoning ordinance barred their location.[2] Designed to preserve neighborhoods, the ordinance prohibited the establishment of "adult" theatres and bookstores within 1000 feet of any other "regulated use." The district court held the ordinance valid as advancing Detroit's expressed compelling interest in preserving neighborhoods and as imposing only a slight incidental burden on first amendment conduct.[3] The Court of Appeals for the Sixth Circuit reversed, holding that the ordinance, because it classified the affected businesses solely on the basis of the content of the materials which they purveyed, was invalid under the equal protection clause of the fourteenth amendment despite the city's having established that concentrations of such businesses tended to have deleterious effects on surrounding neighborhoods.[4] On certiorari, the United States Supreme Court *held*, reversed: A

1. Nortown Theatre, Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974). Nortown Theatre, Inc., American Mini Theatres, and Variety Books, Inc. filed separate civil actions which were consolidated for decision at both the district and circuit court levels.

2. DETROIT, MICH., OFFICIAL ZONING ORDINANCES art. 743-46 (1972). This ordinance was passed as an amendment to a 1962 enactment designed to control the location of certain types of "skid row" businesses. The Common Council of Detroit had determined that concentration of such "uses" had a deleterious effect on surrounding neighborhoods. Until 1972, regulated uses included Group "D" cabarets, establishments for the sale of beer or intoxicating liquor for consumption on the premises, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. In 1972 the Council amended the list of regulated uses to include adult bookstores, adult motion picture theatres, and adult mini motion picture theatres. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1015-17 (6th Cir. 1975).

3. Nortown Theatre, Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974).

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

zoning ordinance employing a content distinction that incidentally affects free speech does not violate the equal protection clause of the fourteenth amendment. *Young v. American Mini Theatres, Inc.*, 96 S. Ct. 2440 (1976).

The overlap between the first amendment and the equal protection clause is an area of much uncertainty. In recent years the Supreme Court has applied a balancing test in free speech[5] and other first amendment cases.[6] The importance of the first amendment interests affected is weighed against the government's interests in regulation.[7] Equal protection challenges arise whenever a legislature attempts to classify certain persons in a different manner from others similarly situated. Equal protection challenges require a determination of whether differential treatment offered groups or classes of individuals furthers an appropriate governmental interest.[8] Because it has never been faced with a situation in which both interests were present, the Supreme Court has not explicitly delineated its standard of review where an equal protection challenge is based on a classification which results in abridgment of the first amendment guaranty of free expession.[9]

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5. *E.g.*, NAACP v. Button, 371 U.S. 415 (1963); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Kovacs v. Cooper, 336 U.S. 77 (1949).

6. *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

7. When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of the two conflicting interests demands the greatest protection under the particular circumstances presented. American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950).

8. Articles which explore the Supreme Court's use of the equal protection clause and its implications include Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Gunther, *The Supreme Court, 1971—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39; Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*]; Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807 (1973).

9. In deciding both zoning and first amendment cases, the Supreme Court has usually rested its decision on grounds other than equal protection. Therefore, the question of the appropriate standard of review in these cases was undecided. As to first amendment cases, see Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); *Developments*, *supra* note 8, at 1128.

The Supreme Court has established specific constitutional guidelines to regulate governmental action undertaken in furtherance of substantial governmental interests that indirectly restricts first amendment rights.[10] The Court has employed a "balancing" principle to uphold reasonable time, place, and manner regulations of protected speech where the regulations have been the incidental result of the government's attempt to further significant governmental interests.[11]

Although these Supreme Court precedents regarding regulations of expression authorize the incidental infringement of first amendment rights,[12] the equal protection clause requires that similarly situated individuals receive similar treatment. Traditionally, the Court has applied a two-tiered analysis in determining the outcome of equal protection challenges.[13] Under the rational basis or minimum scrutiny test of equal protection, no legislative classification differentiating similarly situated indiviudals is to be set aside "if any state of facts reasonably [might] be conceived to justify it."[14] The compelling state interest or strict scrutiny test of equal protection is invoked if the challenger demonstrates that the legislative scheme in question either utilizes a suspect classification[15] or

10. The test for an ordinance which affects first amendment rights was succinctly stated in United States v. O'Brien, 391 U.S. 367, 377 (1968):

> [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.

11. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session); Cox v. Louisiana, 379 U.S. 559 (1965) (ban on demonstrations in or near a courthouse with the intent to obstruct justice); Kovacs v. Cooper, 336 U.S. 77 (1949) (limitation on use of sound trucks).

12. United States v. O'Brien, 391 U.S. 367 (1968); *see* cases cited in note 11 *supra*.

13. *See* sources cited in note 8 *supra*.

14. McGowan v. Maryland, 366 U.S. 420, 426 (1961). Earlier equal protection cases had articulated the rational basis test in somewhat stricter terms. *See, e.g.*, Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) where the Court said that discriminatory legislation is constitutional as long as "the classification . . . be reasonable, not arbitrary, and . . . rest(s) upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

15. Suspect classifications include those based on aliénage, Graham v. Richardson, 403 U.S. 365 (1971); race, Loving v. Virginia, 388 U.S. 1 (1967); and ancestry, Oyama v. California, 332 U.S. 633 (1948).

impings upon a fundamental right.[16] Judicial scrutiny is more rigorous in this second tier, and the burden rests on the state to demonstrate that the legislative classification promotes a compelling governmental interest by the least restrictive legislation alternative.[17] In practice, almost all legislation subjected to minimum scrutiny has been upheld, and legislation subjected to strict scrutiny has been struck down.[18]

Commentators have noted that the rigid two-tiered approach to equal protection challenges has apparently been supplanted by a three-tiered approach in which an intermediate standard is utilized.[19] Some formulations of this standard include a "sliding-scale" model under which the intensity of judicial scrutiny varies with the importance of the interest which is being infringed,[20] and a "substantial relationship in fact" test which involves a factual inquiry into whether the legislative classification is substantially related to the objective of the statute.[21]

Although the Justices of the Supreme Court have been unable to agree as yet on any one test as a rationale for their decisions,[22]

16. Fundamental rights include the right to privacy, Roe v. Wade, 410 U.S. 113 (1973); the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972); the right of interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to adequate appellate review of a criminal conviction, Griffin v. Illinois, 351 U.S. 12 (1956); the right to marry and procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942); and any other right "explicitly or implicitly guaranteed by the Constitution," San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

17. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

18. *See Developments*, *supra* note 8, at 1077-91.

19. *See, e.g.*, Gunther, *supra* note 8; Comment, *A Question of Balance: Statutory Classification under the Equal Protection Clause*, 26 STAN. L. REV. 15 (1973).

20. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); 81 YALE L.J. 61, 71, 81-82 (1971).

21. *See* Gunther, *supra* note 8, at 20-21; 53 NEB. L. REV. 312, 317-18 (1974).

22. The Court is obviously divided regarding proper guidelines under equal protection scrutiny. This diversity is illustrated by the five separate opinions handed down in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Justice Powell, writing the majority opinion, supported by Chief Justice Burger and Justices Blackmun, Rehnquist, and Stewart, held that "[t]he constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest." 411 U.S. at 55. Justice Stewart, concurring in the opinion and judgment of the Court, argued that the McGowan v. Maryand, 366 U.S. 420, 426 (1961), test was still the applicable standard. 411 U.S. at 60. Justice Brennan, dissenting, argued that a stricter test of equal protection should have been utilized since "'fundamentality' is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed." 411 U.S. at 62. Justice White, dissenting in an opinion which was supported by Justices Douglas and Brennan apparently accepted Justice Powell's standard but felt that

the Court has recognized that in equal protection scrutiny, it is appropriate to consider whether a legislative distinction is based upon the selective restriction of certain content of expression, rather than on a particular kind of expression irrespective of content.[23] In *Police Department of Chicago v. Mosley*[24] an ordinance prohibited any picketing, with the exception of peaceful labor picketing, within a set distance from any school. The ordinance was struck down because the Court found that it regulated first amendment rights through content distinctions.[25] The Court, however, specifically recognized that sufficient regulatory interests may exist to justify selective exclusions or distinctions among types of picketing, but noted that such content distinctions must be "carefully scrutinized" because first amendment rights are involved.[26] Decided on the same day as *Mosley* was *Grayned v. City of Rockford*[27] in which an anti-noise ordinance was upheld because it was "narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and [did] not unnecessarily interfere with first amendment rights."[28] As in *Mosley*, the Court failed to elaborate on the test of equal protection scrutiny appropriate to content distinctions.[29]

In *Lehman v. City of Shaker Heights*[30] the Supreme Court considered the refusal of a city transit system to allow a candidate for

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its application should have produced the opposite result, that is, that the classification in *Rodriguez* was not rationally related to the end sought to be achieved. 411 U.S. at 67. Finally, Justice Marshall, dissenting in an opinion supported by Justice Douglas, argued for the abolition of the two-tiered test altogether: that is, Court decisions do not fall into one of the two neat categories—strict scrutiny or mere rationality—and that the Court has applied a "spectrum of standards" in equal protection review. 411 U.S. at 98-99.

23. *E.g.*, Erznoznik v. Jacksonville, 422 U.S. 205 (1975); Lehman v. Shaker Heights, 418 U.S. 298 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

24. 408 U.S. 92 (1972).

25. In holding that the ordinance was inconsistent with the requirements of the equal protection clause, the Court stated that the ordinance "slip[ped] from the neutrality of time, place, and circumstance into a concern about content." 408 U.S. at 99, *quoting* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29.

26. 408 U.S. at 98-99. Whether careful scrutiny in such a context entails strict scrutiny is unclear because the specific terminology is not used. However, the overall effect of the opinion seems to imply that strict scrutiny was applied.

27. 408 U.S. 104 (1972).

28. *Id.* at 119.

29. The Court described the anti-noise ordinance as a "reasonable regulation." *Id.* at 121.

30. 418 U.S. 298 (1974).

public office to advertise, while it permitted commercial and service-oriented advertising. In apparently applying the rational basis or minimum scrutiny analysis,[31] the Court concluded that the distinction between types of advertising was within the city's discretion and only incidentally affected free expression.[32] In *Erznoznik v. City of Jacksonville*[33] the Court held invalid on equal protection grounds a municipal ordinance which declared that any movie containing nudity which was visible from a public street was a public nuisance. Justice Powell, speaking for the majority, concluded that "the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content."[34] The Court implied that some judicial examination beyond "rational basis" deference was approriate for constitutional appraisal of content distinctions but did not elaborate further.[35]

The factual setting of the *Mini Theatres* case presented the Court with the opportunity to clarify and develop its standards of review with respect to equal protection challenges based on classifications which allegedly abridge a citizen's first amendment right to free expression. Writing for the majority, Justice Stevens first determined that the regulation of the place where "adult" films could be exhibited did not offend the first amendment.[36] The Court found the city's interest in planning and regulating the use of property for commercial purposes to be "clearly adequate" to support the locational restriction.[37] To support this conclusion, the opinion noted that Supreme Court precedent authorized reasonable time, place,

31. The Court found that the rationales for the selective exclusion constituted "reasonable" legislative objectives. *Id.* at 304. The strict scrutiny test was not applied because the limitation of advertising space to commercial and service-oriented advertising did not "rise to the dignity" of a first amendment infringement. *Id.*

32. The court held that because the city possessed only limited advertising space on the transit system, it could restrict such advertising "in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." *Id.*

33. 422 U.S. 205 (1975).

34. *Id.* at 212. In his dissent, Chief Justice Burger found the first amendment interests involved to be "trivial at best" since there was only a requirement that the screen be shielded from public view, and thus, no restriction on any "message." *Id.* at 223.

35. The Court specifically stated that under equal protection and the first amendment even traffic regulations cannot discriminate on the basis of content "unless there are clear reasons for the distinctions." 422 U.S. at 215. The ordinance was not rationally tailored to support its asserted purpose as a traffic regultion because movies containing nudity posed no greater threat to traffic safety than did all other movies. *Id.* at 214-15.

36. 96 S. Ct. at 2448 (1976).

37. *Id.*

and manner regulations of protected speech where those regulations are necessary to further significant governmental interests.[38]

The Court then addressed the question of whether the alleged infringement upon first amendment rights of adult theatre owners resulting from the classification was justified by the substantial governmental interest served by the regulation. The Court concluded that even though the zoning regulation was based on content distinctions, the city's interest in the preservation of its neighborhoods was sufficient justification for the incidental infringement on the theatre owners' first amendment rights:

> Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures.[39]

The majority opinion in *Mini Theatres* does not discuss at any length the appropriate test of equal protection. The Court did not find an infringement of a fundamental right which would automatically trigger strict scrutiny[40] nor did it employ the rational basis test under which judicial deference to legislation is almost always automatic.[41] Unlike the Court of Appeals for the Sixth Circuit, which

38. *Id.* at 2448 and n.18. The opinion emphasized that the ordinances in no way limit the content of material that may be shown or sold in the City of Detroit, but merely regulate the place where adult material may be offered. Thus, the Court reasoned that the ordinances simply regulate speech related conduct—the operation of adult bookstores and theatres—and are not exacting a penalty based on a determination of obscenity. Viewed in this light, the Court found the instant case squarely in line with the speech and conduct cases cited in note 11 *supra*. In these cases, the Supreme Court enunciated the principle that upon a showing of a strong governmental interest in regulating the non-speech aspect of first amendment conduct, some incidental burden on the first amendment is permissible.

39. 96 S. Ct. at 2453 (1976) (footnote omitted).

40. Had the Court subjected the ordinance to strict scrutiny, in all likelihood the ordinance would have been struck down. For a discussion of the rarity of finding a compelling state interest under strict scrutiny, see Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489, 1495 (1972); Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 808 (1973). A point emphasized by these discussions is that since a compelling interest is so rarely found, the general rule is that determining strict scrutiny to be the proper test is the same as finding the legislation to be unconstitutional.

41. Since 1926, the guidelines for reviewing the constitutionality of zoning regulations have remained the same: such legislation is presumed valid unless it is shown to be arbitrary,

applied the compelling state interest test,[42] the Supreme Court apparently employed an intermediate analysis in *Mini Theatres*. Without reference to any one of the usual tests, the Court carefully balanced the competing concerns of the city and the interests protected by the first amendment and found that the distinction between "adult" and "non-adult" theatres in the Detroit zoning ordinance furthered a substantial governmental interest while only incidentally infringing on first amendment rights.[43]

The decision in *Mini Theatres* carries a significant message to local zoning authorities: that is, disseminators of adult material can be regulated by the zoning power without resort to the convoluted law of obscenity cases. It seems fair to say that the "adult" and "non-adult" classification drawn by the zoning ordinance in *Mini Theatres* represents justifiable distinctions. The city of Detroit determined that only "adult," rather than "non-adult," theatres adversely affected neighborhoods when concentrated in limited areas.[44] The city did not impose an outright ban on adult establishments. As the district court found, adult establishments may locate in "myriad locations in the City of Detroit" under the 1000 foot provision.[45] The ordinance therefore exemplifies constitutional "tailoring" to achieve a substantial governmental interest.[46]

It is disappointing that the Supreme Court did not take advantage of the opportunity in *Mini Theatres* to clarify and explicitly delineate its standards of review in equal protection cases.[47] While

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capricious, or lacking a substantial relationship to the public health, morals, safety, or welfare of the individual community. City of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). Rational basis analysis requires very little of zoning ordinances to maintain their validity under equal protection analysis. Had the Court followed the traditional two-tiered approach, subjecting the ordinance to minimum scrutiny, it would merely have had to reaffirm the *Euclid* presumption of legislative validity to uphold the ordinance. *See Developments*, *supra* note 8, at 1077-91.

42. The Sixth Circuit found the ordinance affected the theatre owners' fundamental right of free expression. It held that although the classification promoted a compelling governmental interest, it did not do so by the least restrictive legislative alternative. American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1020-21 (6th Cir. 1975).

43. 96 S. Ct. at 2453.

44. *Id.* at 2444-45.

45. 373 F. Supp. at 370.

46. *See* note 35 *supra*.

47. *Mini Theatres* emphasizes the need for a method of equal protection analysis that can be sensitive to, and treat fairly, important competing interests. The case brings into sharp focus the inherent weakness of the rigid two-tiered approach. On the one hand, although first amendment rights are burdened, albeit slightly, an application of the rational basis test

the opinion provides some clues that a more flexible three-tiered analysis will be employed in the future,[48] it also indicates that the court prefers to continue its case-by-case analysis of equal protection challenges, thereby preserving an uncertain status quo.

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Exclusionary Rule Does Not Extend to State Seized Evidence Used in Federal Civil Tax Proceedings

In a recent decision the United States Supreme Court refused to exclude from admission in a federal civil tax proceeding evidence seized illegally, but in good faith, by state law enforcement officers. This note indicates that this decision reflects the Court's growing disillusionment with the fourth amendment exclusionary rule. It is argued that the opinion fails to recognize potential law enforcement abuses which may flow from such a limitation of the rule, and that the Court did not expound upon the relevance of the good faith character of the seizures to the holding.

In 1968, pursuant to a search warrant based partly on their observations of alleged gambling activity, Los Angeles police seized certain wagering records and $4,940.00 in cash from Max Janis and arrested him for illegal gambling. As was customary in such cases, the police informed the Internal Revenue Service (IRS) of their observations, the seizures, and the arrest. On the basis of this infor-

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would allow the ordinance to pass constitutional muster in furtherance of any arguably valid state objective. Such a standard seems to afford too little protection when one considers the treatment historically afforded first amendment freedoms. On the other hand, a classical application of the strict scrutiny test, which would almost surely result in declaring the ordinance unconstitutional, gives too little deference to the traditionally and necessarily broad zoning power.

48. The analysis employed in *Mini Theatres* requires minimum governmental concern for individual rights and a substantial basis, rather than a compelling state interest, to justify their restriction. Thus the flexible intermediate tier analysis is arguably a mere rational basis test with "bite." *See* Gunther, *supra* note 8, at 21. However, the Supreme Court did not formally introduce the test. The Court must decide if the flexible test will be added to create a tertiary formula of equal protection or whether the two-tiered formula will remain intact.