COMMENTS

A Case for Judicial Balancing: Justice Stevens and the First Amendment

The Supreme Court's approach to first amendment adjudication is an amalgam of several distinct doctrinal developments.[1] Government may regulate "political speech" if it is inciteful;[2] commercial speech if the governmental interest outweighs the speaker's interest;[3] and obscenity, because it is not speech entitled to first amendment protection.[4] The Court's opinions, however, fail to enunciate a comprehensive theory of first amendment analysis,[5] thus obscuring the underlying issues and producing inconsistent results.[6] In obscenity cases the Court uses the non-speech concept, or categorization technique, to avoid first amendment analysis by placing the speech wholly outside of constitutional protection.[7]

Justice John Stevens, the newest member of the Court,[8] has attempted to reconcile emerging doctrines in several first amendment areas and develop a more consistent approach to first amendment issues. This comment discusses four of Justice Stevens's opinions that analyze first amendment issues. Two dissenting opinions in *Splawn v. California*[9] and *Smith v. United*

1. "At various times the Court has employed the bad tendency test, the clear and present danger test, an incitement test, and different forms of the ad hoc balancing test." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970). *See also* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Fuchs, *Further Steps Toward a General Theory of Freedom of Expression*, 18 WM. & MARY L. REV. 347 (1976); Shaman, *Revitalizing the Clear-and-Present-Danger Test: Toward a Principled Interpretation of the First Amendment*, 22 VILL. L. REV. 60 (1976).

2. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

3. Bates v. State Bar, 433 U.S. 350, 381-82 (1977).

4. Roth v. United States, 354 U.S. 476, 485 (1957).

5. The Court has preferred to deal with the issues in specific contexts. *Compare* Cohen v. California, 403 U.S. 15 (1971) (symbolic speech) *and* Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring) (political speech) *with* Bigelow v. Virginia, 421 U.S. 809 (1975) (commercial speech) *and* Roth v. United States, 354 U.S. 476 (1957) (obscenity).

6. *See* text accompanying note 42 *infra*.

7. *See, e.g.*, Miller v. California, 413 U.S. 75 (1973); Roth v. United States, 354 U.S. 476 (1957). In both cases the major concern is the definition of obscenity.

8. Justice Stevens, appointed by President Gerald Ford, joined the Court December 15, 1975.

9. 431 U.S. 595 (1977).

States[10] deal expressly with obscenity, and reject the Court's present method of analysis. *Young v. American Mini Theatres, Inc.*[11] and *Federal Communications Commission v. Pacifica Foundation*[12] both develop a balancing approach to ascertain the constitutionality of government regulation of nonobscene offensive speech. The comment concludes that Justice Stevens correctly identifies the factors necessary to insure proper Court protection of speech interests.

Under the Federal Constitution, the first amendment provides the fundamental guarantee for freedom of expression.[13] Although the Court has rarely articulated the values underlying freedom of expression,[14] many commentators have attempted to provide clear statements of these values.[15] Alexander Meiklejohn, one of the most articulate, states that the first amendment

> protects the freedom of those activities of thought and communication by which we "govern." It is concerned, not with a pri-

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10. 431 U.S. 291 (1977).

11. 427 U.S. 50 (1976).

12. 98 S. Ct. 3026 (1978). Although this comment limits its discussion to the listed cases, Justice Stevens has written other opinions in first amendment cases. *See* Houchins v. KQED, Inc., 98 S. Ct. 2588, 2599 (1978) (dissenting opinion); Zurcher v. Stanford Daily, 98 S. Ct. 1970, 1987 (1978) (dissenting opinion); Pinkus v. United States, 98 S. Ct. 1808, 1816 (1978) (concurring opinion); National Soc'y of Professional Engineers v. United States, 98 S. Ct. 1355 (1978) (majority opinion); Ward v. Illinois, 431 U.S. 767, 777 (1977) (dissenting opinion); Carey v. Population Services Int'l, 431 U.S. 678, 712 (1977) (concurring opinion); Marks v. United States, 430 U.S. 188, 198 (1977) (concurring and dissenting opinion); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 617 (1976) (concurring opinion).

13. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. 1.

14. The most widely known judicial articulation is in Justice Brandeis's concurring opinion in Whitney v. California, 274 U.S. 357, 375-76 (1927):

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that this should be a fundamental principle of the American government . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. See also New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (Brennan, J.); Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

15. *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); T. EMERSON, *supra* note 1; L. LEVY, LEGACY OF SUPPRESSION (1960); A. MEIKLEJOHN, POLITICAL FREEDOM (1960). For a philosophical discusson of free speech values see J.S. MILL, ON LIBERTY (1859).

> vate right, but with a governmental responsibility.
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> . . . But in the deeper meaning of the Constitution, voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them. . . . Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare, that in theory, casting a ballot is assumed to express.[16]

Under this formulation the first amendment mandates almost absolute protection for speech directly related to the political process. As the degree of attenuation between the speech and the political process increases, the constitution allows a greater level of governmental regulation. All expression, however, contributes incrementally to the cultural development of the nation and should be entitled to some, if not total, first amendment protection.[17]

The Court's interpretation of the first amendment developed during the last sixty years[18] against a strongly asserted societal interest in controlling those types of speech enunciating unorthodox, harmful, or immoral views.[19] The first amendment thus guarantees individual liberties despite society's interest in controlling speech. The Court, however, has held that the first amendment does not protect all forms of speech. For certain classes of speech the Court achieves this result by declaring that the form of expression is not speech. Thus, the Court's unarticulated judicial premise that the speech does not further the political process permits government suppression of certain speech,

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16. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255. *See also* T. EMERSON, *supra* note 1, at 6-7.

17. The Court has implicitly recognized this principle in commercial speech cases. *See* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 765 (1976). *See also* text accompanying notes 38-40 *infra*.

18. Modern first amendment history begins with the Espionage Act Cases, Schenck v. United States, 249 U.S. 47 (1919) and Abrams v. United States, 250 U.S. 616 (1919). Although the Court's first treatment of the issues involved political speech, since that time it has confronted speech issues in a much wider range of situations.

19. *Cf.* Spence v. Washington, 418 U.S. 405 (1974) (prosecution for affixing peace symbol to flag); United States v. O'Brien, 391 U.S. 367 (1968) (prosecution for draft card burning); Roth v. United States, 354 U.S. 467 (1957) (obscenity prosecution); Dennis v. United States, 341 U.S. 494 (1951) (prosecution for Communist Party organizing); Schneck v. United States, 249 U.S. 27 (1919) (prosecution for protesting draft). Indeed, because our political system rests on majority rule, any regulation of speech enforces a majority position. Thus, when the Court affords first amendment protection to a type of speech it invariably upholds a minority position. *See generally* T. EMERSON, *supra* note 1. *See also* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 160-73 (2d ed. 1970); E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE 2-5 (1960).

even though it does serve first amendment values.

The first use of the categorization analysis occurred in *Chaplinsky v. New Hampshire,*[20] which held that "fighting words" were not entitled to constitutional protection.[21] In subsequent cases the Court expanded on *Chaplinsky*'s dicta and excluded other types of speech from first amendment protection.[22] In other classes of speech the Court permits government regulation based upon judicial balancing of competing values. Political speech, for example, enjoys more protection than commercial speech because it more clearly serves first amendment values and government has a lesser interest in controlling it.[23] Once the Court classifies the speech, however, it applies the doctrines of that particular area of speech, often failing to consider decisions from other contexts.[24]

The Court's failure to develop a comprehensive approach to first amendment adjudication is most obvious in the obscenity area.[25] Here the Court relies exclusively on a categorization analysis. *Roth v. United States,*[26] the Court's landmark obscenity opinion, marks the beginning of a line of cases that attempt to define obscenity. *Roth* necessitated a constitutional definition of obscenity because, in addition to holding obscenity to be nonspeech and not entitled to first amendment protection, the Court held nonobscene material was speech protected by the first amendment.[27] Although the Court has abandoned this speech/nonspeech distinction in other areas,[28] it refuses to do so in the obscenity context. This refusal prevents comprehensive first amendment adjudication and preserves the artificial categorization analysis. Justice Stevens's initial obscenity opinions, however, point the way toward a more comprehensive first amendment analysis.

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20. 315 U.S. 568 (1942).

21. *Id.* at 571-73.

22. *See, e.g.,* Roth v. United States, 354 U.S. 476 (1957). *See also* Ely, *supra* note 1; Shaman, *supra* note 1.

23. *Compare* Bond v. Floyd, 385 U.S. 116 (1966) (political speech) *with* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) (truthful advertising) *and* E.F. Drew & Co. v. FTC, 235 F.2d 735 (2d Cir. 1956) (false or misleading advertising).

24. The Court does not consider political speech cases if it finds the speech commercial. Similarly, the Court considers obscenity cases within a narrow set of precedents. *See* Shaman, *supra* note 1; note 5 *supra.*

25. *See generally* F. SCHAUER, THE LAW OF OBSCENITY (1976). *See also* Kalven, *The Metaphysics of the Law of Obscenity,* 1960 SUP. CT. REV. 1.

26. 354 U.S. 476 (1957).

27. *Id.* at 484-85.

28. *Compare* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) *and* Bigelow v. Virginia, 421 U.S. 809 (1975) (protecting commercial speech) *with* Valentine v. Chrestensen, 316 U.S. 52 (1942) (commercial speech unprotected).

In *Splawn v. California*[29] the Court reviewed a prosecution for the sale of an obscene film.[30] The trial court instructed the jurors that they could consider evidence concerning the film's sale and distribution in determining obscenity.[31] Justice Rehnquist, writing for the majority, relied exclusively on two obscenity cases, *Hamling v. United States*,[32] and *Ginzburg v. United States*,[33] in rejecting the first amendment challenge. Identifying a distinct area of first amendment jurisprudence he wrote: "There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether material is obscene."[34] The majority did not consider any commercial speech cases in framing its opinion.

In *Ginzburg* the court held that evidence of advertising or pandering of otherwise nonobscene material could justify finding the material involved obscene. The trial court had considered evidence of pandering and convicted the defendant under a federal obscenity statute.[35] The Court held "[w]here the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity."[36] The opinion's rationale rested not on the offensive character of the advertising involved, but on the possibility the public would misuse the information.[37] Thus, *Ginsburg* employed a paternalistic approach resting on the Justices' beliefs of how the information would affect the public.

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29. 431 U.S. 595 (1977).

30. Splawn had been convicted of a misdemeanor violation of California Penal Code § 311.4 (West 1970). He challenged his conviction contending the jury instructions violated his first and fourteenth amendment liberties. Splawn v. California, 431 U.S. 595, 596-97 (1977).

31. The instruction in relevant part was:

> In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. . . .
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> . . . If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance.

Id. at 597-98.

32. 418 U.S. 87 (1974).

33. 383 U.S. 463 (1966).

34. 431 U.S. at 598 (citations omitted).

35. 18 U.S.C. § 1461 (1976).

36. 383 U.S. at 470.

37. *See id.* at 475-76.

In *Virginia Pharmacy Board v. Virginia Consumer Council*,[38] however, the Court rejected the premises of the paternalistic approach. In *Virginia Pharmacy*, the Court held a state ban on advertisng prescription drug prices unconstitutional. Justice Blackmun's majority opinion recognized that the public needs free access to information to make informed decisions.[39] The state's interest in maintaining pharmacists' professional standards was insufficient to justify closing the channels of communication, and the ban ultimately protected pharmacists' economic interests by keeping the public ignorant. The Court, focusing on the public's right to receive information, concluded:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communications rather than close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.[40]

Justice Stevens dissented in *Splawn* because he thought commercial speech cases should determine the decision. He noted that in *Virginia Pharmacy* the Court held truthful advertising protected notwithstanding its commercial character. This principle, he felt, precluded the majority's limited analysis in *Splawn* because the trial court's instructions[41] allowed the jury to find the material obscene solely on the basis of truthful, nonoffensive advertising, which in effect bans such advertising.[42] Allowing evidence of advertising in obscenity prosecutions has a chilling effect because sellers of nonobscene material may forego advertising to avoid criminal prosecution even though *Virginia Pharmacy* protects such advertising. Justice Stevens concluded that *Virginia Pharmacy* implicitly overruled *Ginzburg*.[43]

Justice Stevens correctly recognizes that the majority's paternalistic approach in *Splawn* undermines first amendment val-

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38. 425 U.S. 748 (1976).

39. *Id.* at 764-65.

40. *Id.* at 770.

41. Justice Stevens emphasized the sentence: "If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance." 431 U.S. at 602 n.1 (Stevens, J., dissenting).

42. *Id.* at 603.

43. *Id.* at n.2.

ues by keeping the public ignorant. In *Splawn* he stated that "[u]nder any sensible regulatory scheme, truthful description of subject matter that is pleasing to some and offensive to others ought to be encouraged, not punished."[44] Indeed, nonoffensive advertising actually furthers asserted state interests in prohibiting obscenity. Because advertising informs the public of the material's explicit character, it decreases the possibility both of the material offending the public and of juveniles obtaining the material.[45] In contrast to the majority's myopic reliance on obscenity law, Justice Stevens applied principles from other first amendment cases in his analysis.

Justice Stevens fully articulated his disaffection with the Court's categorization approach to obscenity in *Smith v. United States*.[46] The Court in *Smith* considered the effect of a state statute on a jury determination of contemporary community standards in a federal obscenity prosecution.[47] Although under Iowa law disseminating sexually explicit material to adults was legal,[48] the Court held Iowa law did not preclude a federal obscenity prosecution. Rather, the Court tested the conviction against the constitutional test of obscenity enunciated in *Miller v. California*.[49] In *Miller*, the Court retained the speech/nonspeech distinction developed in prior obscenity cases, but held sexually explicit works should be judged on a local standard instead of a national one.[50] Expanding on this determination the Court in *Smith* held that contemporary community standards are a jury question, and state regulations, although admissible into evidence, do not bind the jury.[51] Thus, the Court upheld Smith's conviction for solely *intrastate* mailing of material he was entitled to sell under state law.

Justice Stevens dissented and urged the Court to prohibit

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44. *Id.* at 604.

45. *See id.* n.3.

46. 431 U.S. 291 (1977).

47. Smith was prosecuted under 18 U.S.C. § 1461 (1976).

48. 1974 Iowa Acts, chs. 1267-68 (repealed 1976 Iowa Acts, ch. 1245).

49. 413 U.S. 15 (1973).

50. The three substantive parts of the *Miller* test are:

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

Id. at 24. For a discussion of the changes brought about by the *Miller* standards see F. SCHAURER, *supra* note 25.

51. 431 U.S. at 308.

criminal prosecutions for obscenity because they are unworkable and unconstitutional. First, his dissent rejected the Court's definition of obscenity.[52] Second, he argued that, although the government cannot totally suppress sexually explicit material through criminal prosecutions, it may still regulate the offensive effects of such material in other ways.[53]

Because *Smith* involved a criminal prosecution, Justice Stevens stated *Miller*'s community standard concept is inappropriate for determining guilt or for providing sufficient warning of proscribed conduct.[54] He felt the underlying rationale of the *Miller* concept—the difficulty of proof of a national standard—applied equally to any standard. Indeed, he observed that under any standard, a jury's subjective reaction to the material in question, rather than rules of law, determines a defendant's guilt or innocence. He concluded, "the line between communications which 'offend' and those which do not is too blurred to delimit the protections of the First Amendment."[55] Thus, all sexually explicit material should be entitled to that quantum of first amendment protection sufficient to preclude criminal prosecution.[56]

Justice Stevens, however, would allow reasonable time, place, and manner regulations of offensive material. Such regulations are permissible to control any detrimental effects the material has on society.[57] Citing his own opinion in *Young v. American Mini Theatres, Inc.*,[58] he observed that protected nonobscene speech is not wholly immune from state regulations.[59] He concluded "[a]s long as the government does not totally suppress protected speech and is faithful to its paramount obligation of complete neutrality with respect to the point of view expressed in a protected communication, . . . regulation of certain types of communication may . . . take into account obvious differences in subject matter."[60] Courts, however, must judge the validity of such regulations not only against the speaker's right to air his

52. *Id.* at 312-16 (Stevens, J., dissenting).

53. *Id.* at 317-21. Justice Stevens cites cases involving commercial speech, Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976); access claims to public forums, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Saia v. New York, 334 U.S. 558 (1948); and zoning, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

54. 431 U.S. at 312-13 (Stevens, J., dissenting).

55. *Id.* at 316.

56. *Id.*

57. *Id.* at 317-18.

58. 427 U.S. 50 (1976).

59. 431 U.S. at 318.

60. *Id.*

views, but also against the public's right of access to material, utilizing the doctrines already developed in other first amendment contexts.[61]

In *Young v. American Mini Theatres, Inc.*,[62] Justice Stevens, writing for the Court,[63] upheld government regulation of nonobscene sexually explicit speech. When read in conjunction with his opinions in other obscenity cases, *Young* illustrates his analysis and the limitations he feels the first amendment and the Constitution place on governmental regulation of speech. In *Young* the Court upheld Detroit zoning ordinances requiring dispersal of adult theaters.[64] Theater owners, who had been denied a license under the ordinances, challenged the measures as (1) violating the due process clause on vagueness grounds;[65] (2) imposing a prior restraint on protected expression; and (3) violating the equal protection clause.[66]

In disposing of the prior restraint challenge, Justice Stevens focused on the scope of the city's zoning powers and the ordinances' effects on the availability of adult films. Noting that the zoning power clearly extended to theaters in general,[67] and that

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61. *Id.* at 319 n.18.

62. 427 U.S. 50 (1976).

63. Justice Stevens delivered the opinion of the Court. The Chief Justice, Justice White, and Justice Rehnquist joined in the entire opinion. Justice Powell joined in the disposition of the vagueness and prior restraint challenges, but submitted a separate opinion rejecting the equal protection challenge. Justices Brennan, Stewart, Marshall and Blackmun all joined in dissenting opinions by Justice Stewart and Justice Blackmun.

64. The ordinances prohibited any new regulated uses, including adult theaters, within 1,000 feet of any two existing regulated uses. The City Council originally passed the ordinance in 1962. They added adult theaters to the list of regulated uses in 1972, justifying the ordinances as an attempt to protect the quality of city neighborhoods. 427 U.S. at 52-55.

65. Justice Stevens disposed of the vagueness challenge by denying petitioners standing. He noted that the ordinances clearly applied to the theater owners and any facial vagueness had not affected them. Then he considered the owners' right to assert vagueness under the overbreadth doctrine. He set forth the following test: if a statute clearly applies to a litigant, then "if the statute's deterrent effect on legitimate expression is not 'both real and substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts,' . . . the litigant is not permitted to assert the rights of third parties." 427 U.S. at 60 (citations omitted). He concluded that under this test respondents lacked standing. 427 U.S. at 60-61.

This test applies the "substantial overbreadth" doctrine first enunciated in Broadrick v. Oklahoma, 413 U.S. 601, 611-16 (1973). This represents a shift in the traditional Court stance of freely allowing vagueness challenges. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). This test does not, however, eliminate standing to assert vagueness claims. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 60 (1976); Erzonznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). For a general discussion of the overbreadth doctrine see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1969).

66. 427 U.S. at 58.

Detroit's ordinances did not limit the total market in sexually explicit films,[68] he concluded, "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances. . . . [T]he regulation of the place where such films may be exhibited does not offend the First Amendment."[69]

Then, writing for only a plurality,[70] Justice Stevens considered the equal protection challenge. His analysis, however, eschewed traditional equal protection doctrines and focused on first amendment principles.[71] He viewed the ordinance as a time, place, manner restriction,[72] furthering a strong city interest in the character and quality of its neighborhoods.[73] Further, the individual right asserted was wholly commercial in nature, and, therefore, not fundamental, although couched in first amendment terms.[74] He noted that although the Court has spoken in broad terms regarding content based distinctions, the content of speech often detemines first amendment questions.[75] Relying on cases involving libel,[76] commercial speech,[77] and obscenity,[78] he stated,

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67. 427 U.S. at 62.

68. *Id.*

69. *Id.* at 62-63.

70. *See* note 63 *supra.* In his disposition of the equal protection challenge Justice Powell utilized the four part test of United States v. O'Brien, 391 U.S. 367 (1968). That test approved a government regulation having incidental impact on symbolic speech:

> 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 . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377, *quoted in* Young v. American Mini Theatres, Inc., 427 U.S. 50, 79-80 (1976) (Powell, J., concurring). Applying this test he found no denial of equal protection.

Justice Blackmun, however, thought the ordinance was unconstitutional on vagueness grounds, *id.* at 88, and Justice Stewart's dissent relied on substantive first amendment doctrine. *Id.* at 84.

71. *See* 427 U.S. at 65-66. Indeed, most first amendment cases necessarily contain an equal protection claim. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972); Cox v. Louisiana, 379 U.S. 536 (1965). *See generally* Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 SUP. CT. REV. 1. One commentator has stated that the first amendment implicitly requires equal protection. Karst, *Equality as a Central Principle in First Amendment,* 43 U. CHI. L. REV. 20, 65-68 (1975).

72. 427 U.S. at 71-73.

73. *Id.*

74. *See id.*

75. *Id.* at 65-66.

76. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

77. *E.g.*, Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Markham Advertising Co. v.

"[e]ven within the area of protected speech, a difference in content may require a different governmental response."[79] These differing responses, however, are justified not only because of the content, but also because society has a legitimate interest in controlling the time, place, or manner of speech.[80]

The Court has previously allowed reasonable time, place, manner restrictions that further legitimate government interests.[81] Such regulations do not offend the first amendment either because they control access to public forums thus preserving an ordered society,[82] or because they protect an unwilling listener's right of privacy.[83] Prior to *Young*, however, the Court permitted only content neutral regulations.[84] Justice Stevens gave two reasons why this principle was inapplicable to Detroit's ordinances. First, regulating the place of exhibition was in fact content neutral because "whether the motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same."[85] Second, sexually explicit speech, like commercial speech and libel, is subject to regulation but not suppression.[86]

Although the Detroit zoning ordinances distinguished between theaters because of their films' content, the city did not attempt to suppress sexually explicit material. Rather the ordinances furthered the strong city interest in reducing detrimental effects—reduction of property values, deterioration of neighborhoods, and higher crime rates—caused by de facto blue zones.[87] Accordingly, the city had not violated its obligation of neutrality[88] and its interest in controlling the place and manner of the material's presentation outweighed the theater owners' commercial interests.[89]

Justice Stevens continued his assault on the Court's tradi-

State, 73 Wash. 2d 405, 439 P.2d 248 (1968).

78. *E.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Ginsberg v. New York, 390 U.S. 629 (1968).

79. 427 U.S. at 66.

80. *See, e.g., id.*; United States v. O'Brien, 391 U.S. 367 (1968); Kovacs v. Cooper, 336 U.S. 77 (1949).

81. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948).

82. *E.g.*, Cox v. New Hampshire, 312 U.S. 569, 580 (1941).

83. *E.g.*, Kovacs v. Cooper, 336 U.S. 77, 86 (1949).

84. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

85. 427 U.S. at 70.

86. *Id.*

87. *Id.* at 55.

88. *Id.* at 70.

89. *Id.* at 72.

tional modes of first amendment adjudication in *Federal Communications Commission v. Pacifica Foundation.*[90] In *Pacifica* the Court upheld the validity of a Federal Communications Commission declaratory order regulating radio broadcasts of "indecent" speech.[91] The F.C.C. issued the order after receiving a complaint about the early afternoon broadcast of a monologue by comedian George Carlin titled "Filthy Words."[92] Justice Stevens wrote a four part majority/plurality opinion that eschewed a simplistic analysis and applied the balancing approach he first enunciated in *Young.*

Before reaching the first amendment issues, Justice Stevens limited the scope of the opinion. Noting that the F.C.C.'s order was not an attempt to promulgate regulations but was issued in response to a specific complaint,[93] he stated, "the focus of our review must be on the Commission's determination that the Carlin monologue was indecent as broadcast."[94] Thus, the opinion only suggests future Court responses to indecent broadcast determinations. Indeed, considering Justice Stevens's admonition in *Young* that reasonable regulations may not substantially limit an entire market,[95] clearly the Court did not grant the F.C.C. carte blanche authority over program content.

Justice Stevens then considered whether the first amendment precluded the F.C.C. order. Pacifica argued alternatively that the order was overbroad or that the Constitution forbids regulation of nonobscene material.[96] In rejecting both arguments Justice Stevens utilized concepts developed in other first amendment contexts.[97]

Focusing primarily on the scope of the F.C.C. order and the

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90. 98 S. Ct. 3026 (1978).

91. *Id.* at 3041.

92. The passage broadcast is cut five of side two on the album "George Carlin, Occupation: FOOLE" (Little David Records, LD 1005). A transcript of "Filthy Words" appears as an appendix to Justice Stevens's opinion. 98 S. Ct. at 3041 app.

93. 98 S. Ct. at 3032.

94. *Id.* at 3033.

95. *See* text accompanying notes 86-87 *supra.*

96. 98 S. Ct. at 3036. Prior to reaching the first amendment issues Justice Stevens considered the effect of the statutory anticensorship provision, 47 U.S.C. § 326 (1970). He concluded that the provision prohibited editing in advance of broadcasts, but did not preclude the Commission from adopting an appropriate response to completed broadcasts. 98 S. Ct. at 3033. *See also* Note, *Regulation of Program Content By the F.C.C.*, 77 HARV. L. REV. 701, 715 (1964). For a contrary interpretation see Judge Tamm's opinion for the court of appeals, Pacifica Foundation v. F.C.C., 556 F.2d 9 (D.C. Cir. 1977).

Justice Stevens also refused to require as a matter of statutory construction that the F.C.C. find a broadcast obscene before imposing civil sanctions. 98 S. Ct. at 3036.

97. He cites cases involving political speech, libel, commercial speech, and obscenity. See 98 S. Ct. at 3037-39.

specific context of the broadcast, Justice Stevens refused to apply an overbreadth analysis.[98] He noted that the Court's opinion and the F.C.C. order were specifically limited to the Carlin monologue as broadcast. He concluded that because indecency is tied so closely to context, and because the order would not substantially affect the content of serious communication, application of overbreadth principles would be inappropriate.[99] This view carries forward the Court's dissatisfaction with the overbreadth doctrine in general and focuses instead on the litigants' first amendment claim.[100]

Pacifica's substantive first amendment argument urged the Court to adhere to the timeworn categorization approach. They stressed that fighting words and obscenity are the only remaining forms of constitutional nonspeech. Therefore, because the broadcast fell in neither category absolute first amendment protection was appropriate.[101] The simplicity of the argument highlights the inadequacies of the Court's categorization technique. The all or nothing approach precludes proper judicial concern for first amendment values. But in contrast to the rigid categorization analysis, Justice Stevens insisted that both content and context affect first amendment analysis.[102]

To Justice Stevens, however, content has two distinct meanings.[103] The first refers to the form of the expression, the second to an analysis of the substance of the expression. Although the former is entitled to less judicial protection, both meanings must be considered because the first amendment's primary goal is to insure protection of diverse points of view.[104] Indeed, form and substance often coalesce when individuals enunciate offensive ideas.[105] Additionally, when government jeopardizes the pub-

98. 98 S. Ct. at 3037.

99. *Id.*

100. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973). *See also* note 65 *supra* and authorities cited.

101. 98 S. Ct. at 3036.

102. *Id.* at 3038.

103. *See id.*

104. *See* text accompanying note 17 *supra.*

105. The classic exposition of this concept is in Cohen v. California, 403 U.S. 15 (1971). Justice Harlan wrote:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message to be communicated.

Id. at 26.

lic's first amendment right of access, the paramount judicial concern is preservation of the form of expression.[106] In *Pacifica,* however, neither of these factors was present[107] because the F.C.C. order regulated only the form of the expression. Therefore, the broadcaster's first amendment claim was entitled to less weight in the judicial balance.

The context of the speech also affects first amendment analysis because it determines the weight of the asserted government interest.[108] In *Pacifica,* Justice Stevens noted that government has a more profound interest in the broadcast context than in other areas.[109] This greater interest arises primarily because without government intervention the public has no direct influence on radio or television program content.[110] Conversely, government control of the dissemination of material in a discrete context, like the sale of literature, cannot be justified because members of the public exercise direct control over their purchasing decisions.[111] Thus, in *Pacifica,* Justice Stevens isolated the factors necessary to insure a principled judicial analysis of the first amendment.

Justice Stevens's opinions, then, attempt to achieve a more comprehensive first amendment analysis, especially in the offensive speech area. His analysis rejects the Court's traditional treatment of offensive speech[112] and instead focuses on three essential premises of first amendment analysis. First, the first amendment protects two distinct interests: the speaker's right to air his views and the public's right of access to information.[113] Second, both the

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106. *See* text accompanying note 61 *supra.*

107. 98 S. Ct. at 3038 n.22, 3040 n.28.

108. *Compare* Stanley v. Georgia 394 U.S. 557 (1969) (obscenity prosecution banned when materials seized in private home) *with* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (right of privacy rationale not extended to adults-only theater).

109. 98 S. Ct. at 3040-41.

110. Indeed many commentators have suggested the F.C.C. has not exercised enough control over program content. *See* Barron, *Access to the Press—A New First Amendment Right,* 80 HARV. L. REV. 1641, 1664 (1967); Note, *The Listener's Right to Hear in Broadcasting,* 22 STAN. L. REV. 863, 902 (1970); Note, *First Amendment Rights of the Broadcast Licensee and the Public Interest in Entertainment Programming,* 17 WASHBURN L. REV. 262, 288 (1978).

111. *See* text accompanying note 61 *supra.*

112. *See* text accompanying notes 25-29 and 52 *supra.*

113. By focusing on each "right" separately the Court would insure that it protects first amendment values. *See* text accompanying notes 15-17 *supra.* This method also insures that the Court would be able to isolate "sham" invocations of the first amendment. Thus, the theater owner in *Young* was not attempting to enforce his "own" right to speak, but rather his right to engage in a commercial venture. *But see* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). The result would no doubt have been different if he had been attempting to convey a message that involved use of sexually explicit material. *See, e.g.,* Papish v. Board of Curators, 410 U.S. 667 (1973); Kois v. Wisconsin, 408 U.S. 229 (1972); Cohen v. California, 403 U.S. 15 (1971). In *Cohen,* the Court upheld the

form and the substance of expression should affect the Court's first amendment analysis.[114] Finally, the first amendment permits reasonable time, place, and manner regulations of communication.[115] These considerations lead to the conclusion that total suppression of obscene communication is unconstitutional.[116]

In contrast to Justice Stevens's position, the Court's traditional approach permits government to completely suppress certain offensive speech.[117] The Court allows criminal prosecution of obscenity based on legislative determinations that obscenity *may* lead to anti-social behavior or impair the moral tone of society.[118] To Justice Stevens, total suppression is impermissible. In his view, however, government is not powerless to protect its legitimate interests. Regulations such as Detroit's zoning ordinances are available to control the demonstrable detrimental effects of pornographic establishments. Nevertheless, the individual's right of expression and the public's right of access to information limit the state's regulatory power.[119]

These limitations preclude total government suppression of obscene material. Justice Stevens considers the Court's present refusal to regard obscenity as protected speech a violation not only of the first amendment's ban on total suppression but of additional constitutional prohibitions as well.[120] In his view the line between obscene and nonobscene material is impossible to draw. Thus, any definition of obscenity, whether legislative or judicial, violates *a priori* the fourteenth amendment's guarantee of due process.[121] Indeed, because criminal prosecutions are involved this inherent vagueness violates the notion of fair warning fundamental to our concept of ordered liberty.[122]

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individual's right to convey a message even though the form was offensive. *See generally* Miller, *Obscenity and The Law of Reflection*, 51 KY. L.J. 577 (1963). Similarly, by focusing on the public's right of access the Court would insure that the "market place" remains secure. Young v. American Mini Theatres, Inc., 427 U.S. 50, 70-71 (1976).

114. *See* Pacifica Foundation v. F.C.C., 98 S. Ct. 3026 (1978).

115. Such regulations, however, must not affect the availability of offensive material. *See* Smith v. United States, 431 U.S. 291 (1977) (Stevens, J., dissenting); Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976). *See generally* J. MILL, *supra* note 8; Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960) Kalven, *supra* note 67. *See also* text accompanying notes 16 *supra*.

116. Smith v. United States, 431 U.S. 291, 318 (1977) (Stevens, J., dissenting).

117. *E.g.*, Miller v. California, 413 U.S. 15 (1973). *See also* notes 25-27 and accompanying text *supra*.

118. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973).

119. *E.g.*, Smith v. United States, 431 U.S. 291, 319 n.18 (1977) (Stevens, J., dissenting).

120. *See id.* at 315-16 (1977) (Stevens, J., dissenting).

121. *Id.*

122. *See* United States v. Harris, 347 U.S. 612 (1954); Lanzetta v. New Jersey, 306

The Court's present approach also fails to protect adequately the first amendment values involved in obscenity cases.[123] By removing certain material from the public domain, government forces conformity to the social norm, to the exclusion of minority views. Indeed, history has shown concepts condemned as heretical in one age form the basis of thought in a later age.[124] Similarly, full participation in the decision-making process cannot be achieved without free access to all forms of expression because, in forming opinions and making decisions, each individual draws on the whole of his cultural heritage.[125] Finally, total suppression of obscenity retards social change by maintaining majority attitudes toward sex to the exclusion of minority views. Thus, totally suppressing obscenity stifles individual self-fulfillment, impedes the advancement of knowledge, and hinders the discovery of truth.

Justice Stevens's approach, however, suffers from none of the above infirmities. Limiting regulation of obscenity to time, place, and manner restrictions allows government to protect against ascertainable deleterious effects.[126] At the same time individuals remain free to determine the social value of the material's content. Similarly, by focusing on the two distinct first amendment interests of expression and access,[127] his approach more effectively protects first amendment values. Justice Stevens's approach thus guards against total government interference with individual self-fulfillment and insures protection of minority viewpoints. Accordingly, this comprehensive balancing approach furthers the first amendment's ultimate goal: allowing cultural development through the free exchange of ideas.[128]

Arguably Justice Stevens's balancing approach is less protective of first amendment values than the present categorization technique. The major criticism attacks his frank recognition that offensive forms of expression are entitled to some, but not abso-

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U.S. 451 (1939). Indeed, this fundamental notion supported the Court's ruling in Marks v. United States, 430 U.S. 188, 198 (1977). In *Marks*, the petitioner was indicted prior to the *Miller* decision. His trial, however, occurred after *Miller* and the trial court instructed the jury according to the *Miller* standards. The Court ruled that *Miller* had substantially altered the law of obscenity and Marks was impermissibly convicted. The specific issue was the social value test. Justice Stevens wrote a brief concurrence outlining his view that criminal prosecutions for obscenity are unconstitutional. *Id.* at 198.

123. *See* text accompanying note 17 *supra*.

124. *See generally* T. KUHN, *supra* note 19.

125. *See* A. MEILKEJOHN, *supra* note 15; T. KUHN, *supra* note 19.

126. Young v. American Mini Theaters, Inc., 427 U.S. 50, 71-73 (1976).

127. *Id.*

128. *See* T. EMERSON, *supra* note 1; J. MILL, *supra* note 15.

lute, first amendment protection.[129] This criticism, however, implicitly adopts categorization analysis because it presupposes that absent a finding of obscenity, speech should receive absolute protection. Indeed, the Court has rejected this approach in commercial speech, libel, and fighting words cases.[130] In those decisions, the Court protected previously unrecognized first amendment interests after principled analysis of the asserted governmental interests.[131] Ultimately, Justice Stevens's balancing approach is analytically sounder and more protective of speech values than the rigid categorization technique.

Although critics of balancing assert it provides insufficient protection for civil liberties,[132] Justice Stevens's opinions show a profound concern for the preeminence of first amendment values. In each case he clearly articulates the distinct speech interests, then critically examines each asserted government justification for regulating the speech as well as the effects of the regulation. This thoughtful analysis of the competing interests actually provides a more principled decision-making process than application of rigid doctrines.[133]

Justice Stevens's analysis of first amendment issues, then, represents a principled effort to provide a comprehensive system of first amendment adjudication. This effort involves an extension of recent court developments in commercial speech, libel, and access cases. He urges that the Court completely abandon its categorization approach to obscenity.[134] By adopting his approach the Court would more fully protect first amendment values. Ultimately, Justice Stevens's approach holds promise of realizing

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129. *See* Friedman, *Zoning "Adult" Movies: The Potential Impact of Young v. American Mini Theaters*, 28 HASTINGS L.Q. 1293 (1977); Schauer, *The Return of Variable Obscenity*, 28 HASTINGS L.Q. 1275 (1977); Note, *Zoning, Adult Movie Theatres and the First Amendment: An Approach to Young v. American Mini Theatres, Inc.*, 5 HOFSTRA L. REV. 379 (1977).

130. *See, e.g.*, Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) (commercial speech); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel); Hess v. Indiana, 414 U.S. 105 (1973) (fighting words).

131. *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding fighting words outside protection of first amendment).

132. *See, e.g.*, Schauer, *supra* note 129; Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

133. *Cf.* Dennis v. United States, 341 U.S. 494 (1958) (political speech). Indeed, in *Dennis* Justice Frankfurter advocates a balancing approach stating "[t]he demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved." *Id.* at 524-25. *See also* Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1006 (1972).

134. Smith v. United States, 431 U.S. 291 (1977).

Justice Black's hope "that in calmer times, when present pressures, passions and fears subside, this or some other Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[135]

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135. Dennis v. United States, 341 U.S. 494, 581 (1951) (Black, J., dissenting).