The Burger Court Opinion Writing Database

Schad v. Mount Ephraim

452 U.S. 61 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 31, 1981

RE: 79-1640 - James F. Schad et al. v. Borough of Mount Ephraim

MEMORANDUM TO THE CONFERENCE:

I will have a dissent around - soon, I hope.

Regards,

WEB

Brennan 80

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: APR 2 1981

Recirculated: _____

Borough of Mount Ephraim v Schad

#79-1640

CHIEF JUSTICE BURGER, dissenting: The residents of Mount Ephraim chose to maintain their town as a placid, "bedroom" community of a few thousand people. To that end, they passed an admittedly broad regulation prohibiting certain forms of entertainment. Because I believe that a community of people are -- within limits -- masters of their own environment, I would hold that, as applied, the ordinance is valid.

At issue here is the right of a small community to ban an activity incompatible with a quiet, residential atmosphere. The Borough of Mount Ephraim did nothing more than employ traditional police power to provide a setting of tranquility. This Court has often upheld the power of a community "to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled" Berman v Parker, 348 U.S. 26, 32-33 (1954). Justice Douglas, speaking for the Court, sustained the power to zone as "ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean

Brennan 80

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1640

James F. Schad et al., Appellants, v. Borough of Mount Ephraim. On Appeal from the Superior Court of New Jersey for the Appellate Division.

[April —, 1981]

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

The Borough of Mount Ephraim is a small borough in Camden County, New Jersey. It is located on the Black Horse Turnpike, the main artery connecting Atlantic City with two major cities, Camden and Philadelphia. Mount Ephraim is about 17 miles from the city of Camden and about the same distance from the river that separates New Jersey from the State of Pennsylvania.

The Black Horse Turnpike cuts through the center of Mount Ephraim. For 250 feet on either side of the turnpike, the Borough has established a commercial zone. The rest of the community is zoned for residential use, with either single or multi-family units permitted. Most of the inhabitants of Mount Ephraim commute to either Camden or Philadelphia for work.

The residents of this small enclave chose to maintain their town as a placid, "bedroom" community of a few thousand people. To that end, they passed an admittedly broad regulation prohibiting certain forms of entertainment. Because I believe that a community of people are—within limits—masters of their own environment, I would hold that, as applied, the ordinance is valid.

At issue here is the right of a small community to ban an activity incompatible with a quiet, residential atmosphere. The Borough of Mount Ephraim did nothing more than

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 20, 1981

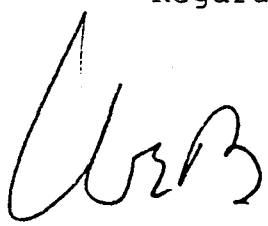
MEMORANDUM TO THE CONFERENCE

RE: #79-1640 - Schad v Mount Ephraim

Just after the first full paragraph on page 2 of my dissent opinion in this case, I will be adding the following.

> An overconcern about draftsmanship and overbreadt should not be allowed to obscure the question before u It is clear that, in passing the statute challenged he the citizens of the Borough of Mount Ephraim meant onl to preserve the basic character of their community. I is just as clear that, by thrusting its live nude danc upon the scene, the appellant will change the characte of the community. Therefore, as applied in this case, the statute speaks directly and unequivocably. It may that, as applied in some other case, this statute would violate the First Amendment. But, since such a case is not before us, we should not decide it.

Regards,



2

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

2nd DRAFT

Recirculated: MAY 22 1981

SUPREME COURT OF THE UNITED STATES

No. 79-1640

James F. Schad et al., Appellants, v. Borough of Mount Ephraim. | On Appeal from the Superior Court of New Jersey for the Appellate Division.

[April —, 1981]

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

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At issue here is the right of a small community to ban an activity incompatible with a quiet, residential atmosphere. The Borough of Mount Ephraim did nothing more than

2, 3, 4

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

3rd DRAFT

Recirculated: MAY 28 1981

SUPREME COURT OF THE UNITED STATES

No. 79-1640

James F. Schad et al., Appellants, v. Borough of Mount Ephraim. | On Appeal from the Superior Court of New Jersey for the Appellate Division.

[April —, 1981]

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

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The residents of this small enclave chose to maintain their town as a placid, "bedroom" community of a few thousand people. To that end, they passed an admittedly broad regulation prohibiting certain forms of entertainment. Because I believe that a community of people are—within limits—masters of their own environment, I would hold that, as applied, the ordinance is valid.

At issue here is the right of a small community to ban an activity incompatible with a quiet, residential atmosphere. The Borough of Mount Ephraim did nothing more than

2, 3, 4

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

4th DRAFT

Recirculated: MAY 29 1981

SUPREME COURT OF THE UNITED STATES

No. 79-1640

James F. Schad et al., Appellants,
v.
Borough of Mount Ephraim.

On Appeal from the Superior Court of New Jersey for the Appellate Division.

[April —, 1981]

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

The Borough of Mount Ephraim is a small borough in Camden County, New Jersey. It is located on the Black Horse Turnpike, the main artery connecting Atlantic City with two major cities, Camden and Philadelphia. Mount Ephraim is about 17 miles from the city of Camden and about the same distance from the river that separates New Jersey from the State of Pennsylvania.

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At issue here is the right of a small community to ban an activity incompatible with a quiet, residential atmosphere. The Borough of Mount Ephraim did nothing more than

2, 3

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

5th DRAFT

Circulated: MAY 29 1981

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 79-1640

James F. Schad et al., Appellants, v. Borough of Mount Ephraim. } On Appeal from the Superior Court of New Jersey for the Appellate Division.

[April —, 1981]

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

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At issue here is the right of a small community to ban an activity incompatible with a quiet, residential atmosphere. The Borough of Mount Ephraim did nothing more than

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 8, 1980

RE: No. 79-1640 Schad v. Borough of Mount Ephraim

Dear Byron:

Please join me.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 6, 1981

RE: No. 79-1640 Schad v. Borough of Mt. Ephraim

Dear Byron:

I agree.

Sincerely,

Bill

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

My ~~present~~ present vote is to DFWSFG — But I'll vote to Note rather than decide it summarily.

October 7, 1980

Re: No. 79-1640 - Schad v.
Borough of Mount Ephraim

Dear Byron,

If you would be willing to eliminate the last clause of the final sentence (beginning with "or"), I would be glad to join your dissenting opinion. This does not mean, of course, that I would, in fact, not be willing to consider joining 4 others to reverse summarily.

I'll probably dissent if decided summarily 10/8

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

Zoning ordinance in town of 5000 forbids all live entertainment

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 1, 1981

Re: No. 79-1640, Schad v. Mount Ephraim

Dear Byron,

In all likelihood I shall end up joining your opinion for the Court in this case. My doubt is sufficient, however, to cause me to await the dissenting opinion and whatever separate writing there may be.

Sincerely yours,

P.S.

Justice White

Copies to the Conference

Brennan 80

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 26, 1981

Re: No. 79-1640, Schad v. Mt. Ephraim

Dear Lewis,

Please add my name to your concurring opinion.

Sincerely yours,

P.S.

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 26, 1981

Re: No. 79-1640, Schad v. Mt. Ephraim

Dear Byron,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Justice White

Copies to the Conference

I would dismiss
Mun Case (DFWSFQ)
There was talk at
Sept 29 Conference about
Summary Reversal.

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 7 OCT 1980

Recirculated: _____

Re: No. 79-1640 - Schad v. Borough of Mount Ephraim

9 2 vote to Note taken Mun see Reversal w/o argument 10/7

MR. JUSTICE WHITE, dissenting.

Appellants, operators of an adult bookstore in Borough of Mount Ephraim, New Jersey, offered as a form of adult entertainment a peep show featuring live performances by nude dancers. Based on these presentations, appellants were convicted in municipal court of violating Borough of Mount Ephraim zoning ordinances §99-15B, which prohibits the exhibition of live entertainment in any commercial establishment throughout the Borough. Their convictions were affirmed in the Camden County Court and the Superior Court, Appellate Division, these courts rejecting appellants' claims that prohibiting all live entertainment in commercial establishments was unconstitutional under the First and Fourteenth Amendments. The Court now dismisses the appeal to this Court for want of a substantial federal question, a summary action on the merits which approves the

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Printed

Circulated: _____

1st DRAFT

Recirculated: 7 OCT 1980

SUPREME COURT OF THE UNITED STATES

JAMES F. SCHAD ET AL. *v.* BOROUGH OF MOUNT EPHRAIM

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

No. 79-1640. Decided October —, 1980

MR. JUSTICE WHITE, dissenting.

Appellants, operators of an adult bookstore in the Borough of Mount Ephraim, N. J., offered as a form of adult entertainment a peep show featuring live performances by nude dancers. Based on these presentations, appellants were convicted in municipal court of violating Borough of Mount Ephraim zoning ordinances § 99-15B, which prohibits the exhibition of live entertainment in any commercial establishment throughout the Borough. Their convictions were affirmed in the Camden County Court and the Superior Court, Appellate Division, these courts rejecting appellants' claims that prohibiting all live entertainment in commercial establishments was unconstitutional under the First and Fourteenth Amendments. The Court now dismisses the appeal to this Court for want of a substantial federal question, a summary action on the merits which approves the decision below, *Hicks* v. *Miranda,* 422 U. S. 332, 334 (1975), and from which I dissent.

Nonobscene live entertainment is a form of expression protected by the First Amendment. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 557-558 (1975), and dancing as a form of expression does not lose its protection simply because it is performed in the nude. *Doran* v. *Salem Inn, Inc.,* 422 U. S. 922, 932-934 (1975); *California* v. *LaRue,* 409 U. S. 109, 116-118 (1972). In *LaRue,* we upheld a state proscription of nude dancing in bars where liquor was sold; but in *Doran,* we invalidated a local ordinance that forbade

I'll vote to Note rather than Review Summarily 10/9

1, 2, 3

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 9 OCT 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

JAMES F. SCHAD ET AL. *v.* BOROUGH OF MOUNT EPHRAIM

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

No. 79–1640. Decided October —, 1980

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART and TM join, dissenting.

Appellants, operators of an adult bookstore in the Borough of Mount Ephraim, N. J., offered as a form of adult entertainment a peep show featuring live performances by nude dancers. Based on these presentations, appellants were convicted in municipal court of violating Borough of Mount Ephraim zoning ordinances § 99–15B, which prohibits the exhibition of live entertainment in any commercial establishment throughout the Borough. Their convictions were affirmed in the Camden County Court and the Superior Court, Appellate Division, these courts rejecting appellants' claims that prohibiting all live entertainment in commercial establishments was unconstitutional under the First and Fourteenth Amendments. The Court now dismisses the appeal to this Court for want of a substantial federal question, a summary action on the merits which approves the decision below, *Hicks* v. *Miranda,* 422 U. S. 332, 334 (1975), and from which I dissent.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 31 MAR 1981

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-1640

James F. Schad et al., Appellants, *v.* Borough of Mount Ephraim. | On Appeal from the Superior Court of New Jersey, ~~for the~~ Appellate Division.

[April —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

In 1973, appellants began operating an adult bookstore in the commercial zone in the Borough of Mount Ephraim in Camden County, N. J. The store sold adult books, magazines and films. Amusement licenses shortly issued permitting the store to install coin-operated devices by virtue of which a customer could sit in a booth, insert a coin and watch an adult film. In 1976, the store introduced an additional coin-operated mechanism permitting the customer to watch a live dancer, usually nude, performing behind a glass panel. Complaints were soon filed against appellants charging that the bookstore's exhibition of live dancing violated § 99–15B of Mount Ephraim's zoning ordinance, which described the permitted uses in a commercial zone,[1] in which the store was located, as follows:

"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

[1] The zoning ordinance establishes three types of zones. The "R–1" residential district is zoned for single-family dwellings. The "R–2" residential district is zoned for single-family dwellings, townhouses, and garden apartments. The "C" district is zoned for commercial use, as specified in § 99–15 of the Mount Ephraim Code. See Mount Ephraim Code, § 99–7.

Brennan 80

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 6, 1981

Re: 79-1640 - Schad v. Borough of Mt. Ephraim

Dear John,

I shall have the San Diego opinion around in due course. The view to be expressed in that draft is that under our cases there is a distinction between commercial and non-commercial speech and that to the extent the San Diego ordinance bans non-commercial signs, on-site or off-site, it is invalid.

This is wholly consistent with the view expressed in Schad that banning an entire category of non-commercial speech in a commercial zone is unconstitutional absent some showing that has not been made. Of course, if it is your position that anything that is sold or offered for profit is commercial speech or that non-commercial speech is entitled to no more protection than commercial speech, it is understandable that you would disagree with the draft in Schad.

Of course, what will command a Court in either Schad or San Diego remains to be seen.

Sincerely yours,

Mr. Justice Stevens
Copies to the Conference

pp. 5,7,9,11,13 & stylistic

2nd DRAFT

14 MAY

SUPREME COURT OF THE UNITED STATES

No. 79-1640

James F. Schad et al., Appellants, *v.* Borough of Mount Ephraim. | On Appeal from the Superior Court of New Jersey, Appellate Division.

[April —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

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"(1) Offices and banks; taverns; restaurants and luncheonettes for sit-down dinners only and with no

[1] The zoning ordinance establishes three types of zones. The "R-1" residential district is zoned for single-family dwellings. The "R-2" residential district is zoned for single-family dwellings, townhouses, and garden apartments. The "C" district is zoned for commercial use, as specified in § 99–15 of the Mount Ephraim Code. See Mount Ephraim Code, § 99–7.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–1640

James F. Schad et al., Appellants, v. Borough of Mount Ephraim. | On Appeal from the Superior Court of New Jersey, Appellate Division.

[April —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

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[1] The zoning ordinance establishes three types of zones. The "R-1" residential district is zoned for single-family dwellings. The "R-2" residential district is zoned for single-family dwellings, townhouses, and garden apartments. The "C" district is zoned for commercial use, as specified in § 99–15 of the Mount Ephraim Code. See Mount Ephraim Code, § 99–7.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 3, 1981

MEMORANDUM TO THE CONFERENCE

Cases held for No. 79-1640 -

Schad v. Borough of Mount Ephraim

No. 80-336 - Brubeck, et al. v. Florida

This is an appeal from a decision of the Circuit Court for Lee County, Florida,[1] rejecting a challenge to the constitutionality, on its face and as applied, of a county ordinance that prohibits nudity and semi-nudity in bars. The pertinent sections of the ordinance provide:

> "2.1 It shall be unlawful for any person owning or operating a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises:
>
> . . .
>
> (c) To suffer or permit any person, while on the premises of said commercial establishment, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage.
>
> . . .
>
> 2.2 It shall be unlawful for any person, while on

[1] The jurisdictional statement is styled "Appeal from the District Court of Appeal of the State of Florida." Appts argue that the Dist. Ct. of App. ruled on the merits of their claim, since it called for a response before denying cert. I believe this case should be considered an appeal from the Circuit Court for Lee County.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 9, 1980

Re: No. 79-1640 - Schad v. Borough of Mount Ephraim

Dear Byron:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 6, 1981

Re: No. 79-1640 - Schad v. Borough of Mount Ephraim

Dear Byron:

Please join me.

Sincerely,

T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 7, 1981

Re: No. 79-1640 - Schad v. Borough of Mount Ephraim

Dear Byron:

I may eventually join your opinion. For now, however, I shall await your forthcoming writing in Metromedia. I also would like to see what John may have to say.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 22, 1981

Re: No. 79-1640, Schad v. Borough of Mount Ephraim

Dear Byron:

Please join me.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Black

Circulated: MAY 28 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1640

James F. Schad et al., Appellants, *v.* Borough of Mount Ephraim. | On Appeal from the Superior Court of New Jersey for the Appellate Division.

[June — , 1981]

JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but write separately to address two points that I believe are sources of some ambiguity in this still emerging area of the law.

First, I would emphasize that the presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment. In order for a reviewing court to determine whether a zoning restriction that impinges on free speech is "narrowly drawn [to] further a sufficiently substantial governmental interest," *ante,* at 7, the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as *de minimis.* In this case, Mount Ephraim evidently assumed that because the challenged ordinance was intended as a land-use regulation, it need survive only the minimal scrutiny of a rational relationship test, and that once rationality was established, appellants then carried the burden of proving the regulation invalid on First Amendment grounds. Brief for Appellee 11-12. After today's decision, it should be clear that where protected First Amendment interests are at stake, zoning regulations have no such "talismanic immunity from constitutional challenge." *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50, 75 (1976) (concurring opinion).

May 29, 1981

Re: No. 79-1640 - Schad v. Borough of Mount Ephraim

Dear Byron:

The Chief's revision of today in his dissent seems to me to cure his overbroad statements in his draft of May 28. I therefore am content, if you are, to have the case come down Monday.

Sincerely,

HAB

Mr. Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 6, 1981

No. 79-1640 Schad v. Borough of Mt. Ephraim

Dear Byron:

I will await your circulation in Metromedia before coming to rest in these two cases.

Both of them present difficult questions for me, as my tentative votes indicated. I may well join your opinion in this case, although I would be more comfortable if it were somewhat clearer that depending upon the circumstances (size, character, etc.) a community may ban all public entertainment. I have no doubt, also, that some communities validly may allow only light, neighborhood type commercial activity and limit this to a small zoned area.

It would have been helpful in this case to have had, in addition to a more carefully drawn ordinance, a record that described the characteristics as a community of the Borough.

Sincerely,

L. Lewis

Mr. Justice White

LFP/lab

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 8, 1981

79-1640 Schad v. Borough of Mt. Ephraim

Dear Byron:

Please join me.

Sincerely,

L. Lewis

Mr. Justice White

lfp/ss

cc: The Conference

May 8, 1981

79-1640 Schad v. Borough of Mt. Ephraim

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

Byron: Here is the little concurring opinion that I mentioned. If you are disposed to incorporate the substance of this in a footnote in your opinion, I would prefer this to circulating myself.

L.F.P., Jr.

05/12/81

79-1640 Schad v. Borough of Mt. Ephraim

JUSTICE POWELL, concurring.

I join the Court's opinion as I agree that Mt. Ephraim has failed altogether to justify its broad restriction of protected expression. This is not to say, however, that some communities are not free - by a more carefully drawn ordinance - to regulate or ban all commercial public entertainment. In my opinion, such an ordinance could be appropriate and valid in a residential community where all commercial activity is excluded. Similarly, a residential community should be able to limit commercial establishments to essential "neighborhood" services permitted in a narrowly zoned area.

But the Borough of Mt. Ephraim failed to follow these paths. The ordinance before us was not carefully drawn and, as the Court points out, it is sufficiently over- and under-inclusive that any argument about the need to maintain the residential nature of this community fails as a justification.

Brennan 10

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

9$1640 12-MAY-81 DRB

From: Mr. Justice Powell

Circulated: MAY 12 1981

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–1640

JAMES F. SCHAD, ET AL., APPELLANTS *v.* BOROUGH OF MOUNT EPHRAIM

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELATE DIVISION

[May ——, 1981]

JUSTICE POWELL, concurring.

I join the Court's opinion as I agree that Mt. Ephraim has failed altogether to justify its broad restriction of protected expression. This is not to say, however, that some communities are not free—by a more carefully drawn ordinance—to regulate or ban all commercial public entertainment. In my opinion, such an ordinance could be appropriate and valid in a residential community where all commercial activity is excluded. Similarly, a residential community should be able to limit commercial establishments to essential "neighborhood" services permitted in a narrowly zoned area.

But the Borough of Mount Ephraim failed to follow these paths. The ordinance before us was not carefully drawn and, as the Court points out, it is sufficiently over- and under-inclusive that any argument about the need to maintain the residential nature of this community fails as a justification.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

5-27-81

Circulated: _____

2nd DRAFT

Recirculated: MAY 27 1981

SUPREME COURT OF THE UNITED STATES

No. 79-1640

James F. Schad et al., Appellants, v. Borough of Mount Ephraim. | On Appeal from the Superior Court of New Jersey for the Appellate Division.

[May —, 1981]

JUSTICE POWELL, with whom JUSTICE STEWART joins, concurring.

I join the Court's opinion as I agree that Mt. Ephraim has failed altogether to justify its broad restriction of protected expression. This is not to say, however, that some communities are not free—by a more carefully drawn ordinance—to regulate or ban all commercial public entertainment. In my opinion, such an ordinance could be appropriate and valid in a residential community where all commercial activity is excluded. Similarly, a residential community should be able to limit commercial establishments to essential "neighborhood" services permitted in a narrowly zoned area.

But the Borough of Mt. Ephraim failed to follow these paths. The ordinance before us was not carefully drawn and, as the Court points out, it is sufficiently over- and under-inclusive that any argument about the need to maintain the residential nature of this community fails as a justification.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 2, 1981

Re: No. 79-1640 Borough of Mt. Ephraim v. Schad

Dear Chief:

Please join me in your dissenting opinion in this case.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 1, 1981

Re: 79-1640 - Schad v. Borough of Mt. Ephraim

Dear Byron:

Your opinion is much more persuasive than I had thought possible in this case. You apparently leave open the possibility that a small community could entirely prohibit some constitutionally protected commercial expression such as motion pictures or live entertainment, provided that the ordinance is narrowly drawn and adequately justified. Nevertheless, I am still troubled by the question of where the burden of demonstrating either justification, or the lack thereof, should be placed. Arguably, because First Amendment concerns are implicated, the burden should always be placed on the municipality. I wonder, however, if that is a correct analysis.

In a rather petty zoning violation case involving a relatively small fine, it seems somewhat unrealistic to require a municipality to make elaborate proof concerning the constitutionality of its zoning ordinance. I am inclined to believe that even though the defendant relies on the First Amendment, he should bear the burden of establishing the unconstitutionality of the law. If you start with a presumption that it is permissible for a small community to exclude live entertainment or motion pictures, I am still inclined to the view that nothing in this record is sufficient to overcome such a presumption.

In all events, I shall await the dissenting opinion before coming to rest and may write briefly in this case myself.

Respectfully,

John

Justice White
Copies to the Conference

O/B. Brennan 80

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 6, 1981

Re: 79-1640, Schad v. Mount Ephraim

Dear Byron:

This is a much more important case than I originally realized. I believe it is the first case in which the Court has considered the constitutionality of a content-neutral ban on any form of commercial speech. It also, I believe, is the first time the Court has applied overbreadth analysis in a commercial speech context. Therefore, while I agree with the views expressed by the Chief Justice, I intend to write separately challenging the assumption that overbreadth analysis is appropriate in every zoning case imposing any content-neutral restriction on any form of commercial expression. Because the principle presumably would apply equally to commercial billboards, nude dancing, and various other kinds of commercial expression, what I have to say may also apply to a certain extent to the San Diego case.

Respectfully,

JPS

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: MAY 26 81

Recirculated: _____

79-1640 - Schad v. Borough of Mount Ephraim

JUSTICE STEVENS, concurring in the judgment.

The record in this case leaves so many relevant questions unanswered that the outcome, in my judgment, depends on the allocation of the burden of persuasion. If the case is viewed as a simple attempt by a small residential community to exclude the commercial exploitation of nude dancing from a "setting of tranquility," post, at 2 (BURGER, C.J., dissenting), it would seem reasonable to require appellants to overcome the usual presumption that a municipality's zoning enactments are constitutionally valid. To prevail in this case, appellants at least would be required to show that the exclusion was applied selectively, or perhaps that comparable expressive activity is not "amply available in close-by areas outside the limits of the Borough." Ante, at 15 (opinion of the Court). On the other hand, if one starts, as the Court does, from the premise that "appellants' claims are rooted in the First Amendment," ante, at 5, it would seem reasonable to require the Borough to overcome a presumption of invalidity. The Borough could carry this burden by showing that its ordinances were narrowly drawn and furthered

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SUPREME COURT OF THE UNITED STATES

No. 79-1640

James F. Schad et al., Appellants, v. Borough of Mount Ephraim. | On Appeal from the Superior Court of New Jersey for the Appellate Division.

[June —, 1981]

JUSTICE STEVENS, concurring in the judgment.

The record in this case leaves so many relevant questions unanswered that the outcome, in my judgment, depends on the allocation of the burden of persuasion. If the case is viewed as a simple attempt by a small residential community to exclude the commercial exploitation of nude dancing from a "setting of tranquility," *post*, at 2 (BURGER, C. J., dissenting), it would seem reasonable to require appellants to overcome the usual presumption that a municipality's zoning enactments are constitutionally valid. To prevail in this case, appellants at least would be required to show that the exclusion was applied selectively, or perhaps that comparable expressive activity is not "amply available in close-by areas outside the limits of the Borough." *Ante*, at 15 (opinion of the Court). On the other hand, if one starts, as the Court does, from the premise that "appellants' claims are rooted in the First Amendment," *ante*, at 5, it would seem reasonable to require the Borough to overcome a presumption of invalidity. The Borough could carry this burden by showing that its ordinances were narrowly drawn and furthered "a sufficiently substantial government interest." *Ante*, at 7 (opinion of the Court) (footnote omitted).

Neither of these characterizations provides me with a satisfactory approach to this case. For appellants' business is located in a commercial zone, and the character of that zone is not unequivocally identified either by the text of the Bor-